

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Appeal No. 32753

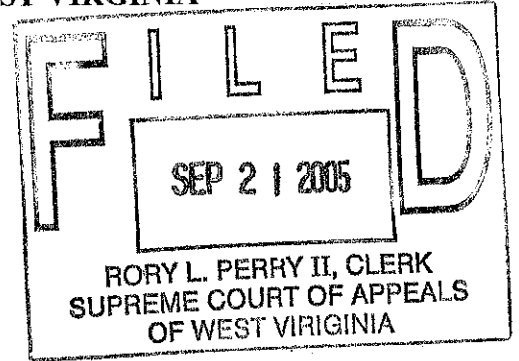
JENNIFER THOMAS,

Appellant – Plaintiff Below,

v.

ANIL K. MAKANI, M.D. and
SOUTH BRANCH SURGICAL ASSOCIATES, INC.,
a West Virginia corporation,

Appellees – Defendants Below.



APPELLANT'S REPLY BRIEF

On appeal from the Circuit Court of Grant County, West Virginia
Civil Action No. 02-C-12
The Honorable Phillip B. Jordan, Jr., Circuit Judge

Guy R. Bucci, Esquire (WV Bar No. 521)
Carrie L. Webster, Esquire (WV Bar No. 7524)
BUCCI, BAILEY & JAVINS, L.C.
213 Hale Street
Charleston, West Virginia 25301
(304) 345-0346

A. John Curry, II, Esquire (WV Bar No. 907)
CURRY & TOLLIVER
P.O. Box 11866
Charleston, WV 25338-1866
(304) 343-7200

Counsel for Appellant, Jennifer Thomas

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APPELLANT'S REPLY BRIEF

The Appellant has appealed from an Order wherein the circuit court refused to set aside an adverse jury verdict in a civil action for medical malpractice. The Appellees assert, in their response brief, that the Appellant received a fair trial because the three jurors whom the Appellant maintains were biased in the Appellees favor were in fact fair and unbiased and properly empaneled as jurors. The Appellees also maintain that "the Appellant waived her right to appeal any issue relating to those jurors sitting on the jury panel..." because counsel for Appellant failed to move to strike Jurors Gretchen Bruce and Linda Porter for cause and also failed to utilize a preemptory strike against any of them [including David Evans].

In response, it should first be emphasized that there is no rule or law that requires a party to utilize a preemptory strike before the party can raise issues on appeal regarding potential juror bias or prejudice resulting in an unfair trial. In fact, the purpose of voir dire is to "ferret[] out biases and prejudices to create a jury panel, before the exercise of preemptory strikes, free of the taint of reasonably suspected prejudice or bias. O'Dell v. Miller, 211 W.Va. 285, 288, 565 S.E.2d 407, 410 (2002). Thus, "(t)rial courts have an obligation to strike biased or prejudiced jurors for cause." Id. Therefore, the Appellees' suggestion that the Appellant somehow waived her rights or otherwise erred by failing to utilize preemptory strikes against these prospective jurors is without merit.

Furthermore, it is well-settled that "... parties to a lawsuit are entitled to impartial jurors. Id. The empaneling of even one otherwise disqualified juror denies a party her right to a fair trial. Thus, in the instant case, even though counsel for Appellant did not move to strike [for cause] prospective Jurors Bruce and Porter, David Evans was seated as a juror, over the specific objections of Appellant's counsel, thereby denying the Appellant a fair trial and constituting sufficient grounds

for this appeal. A thorough reading of David Evans testimony, summarized in Appellant's brief, demonstrates his strong preference for his former doctor. He expressed confidence in the Appellee, Dr. Makani's professional abilities and even agreed he could possibly "lean towards" him in assessing his liability because of his good work when treating him as a patient. (Trial R. pp. 66-67). *See also Appellant's Brief, pp. 5-6.* In short, David Evans made statements that clearly demonstrated bias in favor of the Appellees and suggested he may not act with impartiality.

This Court has held that "[o]nce a prospective juror has made a clear statement during *voir dire* reflecting or indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair." *Id.* at Syllabus Point 5. Thus, the Appellees' attempts, in their response brief, to extract other parts of Mr. Evans latter testimony to convince this Court that he was unbiased and unfair are inconsequential because Mr. Evans own admissions during the initial part of his *voir dire* disqualified him as a juror, and at a minimum raised doubts about his impartiality. This Court has held that "(a)ny doubt the court might have regarding the impartiality of a juror must be resolved in favor of the party seeking to strike the potential juror. *Id.* at 288 (other citations omitted). These doubts required the circuit court to strike him from the jury and by failing to do so abused its discretion by impaneling him.

The reason for this rule could not be clearer. When a juror demonstrates he has to work hard to be fair, the principle of a fair and open minded jury is terminally compromised. The plaintiff's burden of proof is enhanced when a juror is already leaning against her. The plaintiff here faced an increased burden, one that included convincing a juror who admittedly was not neutral.

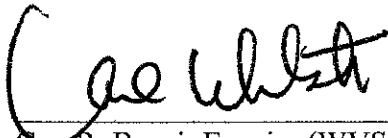
This requires a new trial and a strong statement that the Circuit Court erred in not striking this juror from this case.

As for the argument that other handicapped jurors were not so challenged, it is clear that the one biased juror is more than sufficient to taint the entire panel and any similar motion to strike would have met the same fate as the motion to strike juror Evans.

For the reasons stated above and previously set forth in Appellant's brief, this Court should find that the lower court abused its discretion by impaneling David Evans, Gretchen Bruce and Linda Porter and set aside the tainted jury verdict.

Respectfully Submitted,

JENNIFER THOMAS,
By Counsel



Gay R. Bucci, Esquire (WVSB 521)
Carrie L. Webster, Esquire (WVSB 7524)
BUCCI, BAILEY & JAVINS, L.C.
213 Hale Street
Charleston, West Virginia 25301
(304) 345-0346

A. John Curry, II, Esquire (WVSB 907)
CURRY & TOLLIVER
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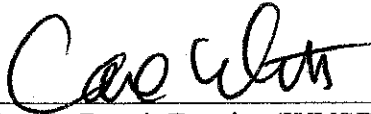
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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of September, 2005, I served the foregoing **Brief of Appellant** upon all counsel of record, by depositing a true copy thereof in the United States mail, postage prepaid, in an envelop addressed as follows:

Dino S. Columbo, Esquire
Timothy R. Linkous, Esquire
1054 Maple Drive
Morgantown, WV 26505
(304) 599-4229



Guy R. Bucci, Esquire (WVSB 521)
Carrie L. Webster, Esquire (WVSB 7524)
Peter G. Markham, Esquire (WVSB 9396)
BUCCI, BAILEY & JAVINS, L.C.
213 Hale Street
Charleston, West Virginia 25301
(304) 345-0346

A. John Curry, II, Esquire (WVSB 907)
CURRY & TOLLIVER
P.O. Box 11866
Charleston, WV 25338-1866
(304) 343-7200

Counsel for Appellant, Jennifer Thomas