The State of Justice

Decision of the Hon. Robert E. Wilson in re: Mary A. Rose, Executrix of Estate of Richard L. Rose vs. Henry L. Kettler, M.D., et al Civil Action No. 99-C-394, Ohio County December 6, 2005 Reprinted with permission from the Judge.

LETTER OPINION

This Letter opinion addresses the interesting and important issue of whether an Ohio County resident can obtain a fair and impartial jury when the defendants are Ohio County health care providers and the claim is that the death of an Ohio county resident, Richard Rose, was a result of the medical negligence of the Ohio County health care providers, Dr. Henry L. Kettler, and Valley Radiologists, Inc. The plaintiff is Mary Rose, wife of Richard L. Rose and Executrix of the Estate of Richard L. Rose.

After three false starts, I decided to rule on this issue by Letter Opinion rather than by a memorandum order. Justice William O. Douglas wrote, in a dissenting opinion, "The starting point of a decision usually indicates the result."[1][1] The problem I kept confronting as I drafted the order was not the starting point, but the length of the opinion. It was too long. The reason it was too long was that I wanted to include in the opinion, for appeal purposes, the outstanding work of Plaintiff's counsel's on this issue. When I embodied Plaintiff's proposed findings, Defendants' response, and my analysis in the order, I had an opinion that exceeded thirty pages. Thirty pages that probably no one would read, other than the three of us (my opinion). Therefore, knowing that a decision had to be made for this case to be tried in the foreseeable future, I decided to use this more informal and shorter Letter Opinion to give you my decision and the reasons for it. A separate Order denying plaintiff's motion is being entered on this same date. On appeal the record will provide the Court with your briefs and exhibits and the Court will have the benefit of your fine work and the extra work done by plaintiff's counsel.[2][2]

I agree with plaintiff's counsel that a campaign of advertising, media stories and public relations efforts in Ohio County over a period of several years have convinced a large majority of Ohio County residents that verdicts in favor of plaintiffs in medical malpractice cases have caused and will continue to cause doctors to leave Ohio County, thereby undermining the healthcare available to them, and that this campaign has tainted the jury pool to such an extent that it has become more difficult to seat a fair and impartial jury in a medical malpractice case in Ohio County. However, the Court is not going to grant Plaintiff's motion.

One of the main reasons plaintiff's argument didn't prevail is that even though it is more difficult to seat an unbiased jury, there is insufficient persuasive evidence that it is impossible to seat a fair and impartial jury in a medical malpractice case in Ohio County. It is for that reason that I also disagree with plaintiff's contention that "publicity about medical malpractice lawsuits has been so pervasive and continuous that plaintiffs in medical malpractice cases are unlikely to be able to empanel a fair and impartial jury in Ohio County."

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I do agree with Plaintiff's counsel that one of the most troubling aspects of this issue is that this problem has not occurred by accident:

" As early as 2001, Ohio County healthcare providers formed a coalition to '*influence public & potential jurors with a campaign to change opinion*.' The creation of CPR was the beginning of a long-term campaign to convince area residents that plaintiffs' verdicts in medical malpractice cases threatened the availability of healthcare for area residents. Potential jurors in Ohio County have been warned that 'Excessive Lawsuits Cost West Virginians Jobs and Money' and instructed that 'If you serve on a jury, remember that your decisions can affect jobs, employers, and shareholders in and outside West Virginia' by ads placed in the Wheeling newspapers by the West Virginia Chamber of Commerce."

"Faith in our system of justice is premised upon our belief that juries are fundamental to the protection of the rights of citizens. William Blackstone said it best in his Commentaries of 1768: 'The trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law...'"

I don't think our Supreme Court of Appeals, if it considers this issue, can ignore what the coalition to influence potential jurors intentionally did to the prospective jury pool in Ohio County by its successful campaign to cause prospective jurors to have fixed opinions in medical negligence lawsuits before hearing the facts. Faith in our system of justice is premised upon our belief that juries are fundamental to the protection of the rights of citizens. William Blackstone said it best in his Commentaries of 1768:

"The trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law…. It is the most transcendent privilege that any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals… [T]he most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed till the hour of trial; and that, when once the fact is ascertained, the law must of course redress it. This therefore preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful land wealthy citizens."

The coalition campaign was a direct affront to our Constitutional right to a fair trial. Their effort was not unique in the country. Many special interest groups in the United States (and even the President of the United States) are attacking the Constitutional right to a jury trial in a civil case today. A trial by a jury of fair and unbiased citizens is one of our society's most valued liberties. The United States Supreme Court has addressed the importance of the jury trial in several cases. In addressing the indispensable role of the jury, the Court said that the "maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with utmost care." Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501, 79 S. Ct. 948 (1959).

The issue before this Court is whether the

coalition campaign was so effective that all Ohio County medical negligence trials should, for the foreseeable future, be transferred to another West Virginia county. I cannot find that plaintiff's evidence compels that finding.

Counsel for the defendant is correct, in my opinion, with his argument that "'[W]idespread publicity of itself does not require a change of venue and that proof that prejudice exists does not require a change of venue unless it appears that the prejudice is so great that he cannot get a fair trial.' State v. Beegle, 188 W.Va. 681, 425 S.E.2d 823, 826 (1992) (criminal case where defendant showed extensive publicity of prior plea bargains). The key inquiry is not the number or ratio of jurors who know about a particular issue but the impartiality of the jurors chosen."

I agree with the Defendants' argument that meaningful voir dire and peremptory challenges remain the solution to the very real problem in Ohio County of prospective jurors with preloaded perceptions. "The guiding star for a Court is not whether a juror has knowledge of a particular issue or even opinions about it but whether a juror can render an opinion based solely on the evidence and under instruction by the Court, without bias or prejudice. State v. Wade, 200 W.Va. 637, 490 S.E.2d 724 (1997), *cert. denied,* 522 U.S. 1003, 118 S.Ct. 576, 139 L.Ed.2d 415.

"The fact that a substantial portion of the Ohio County jury pool consists of individuals who work, or have spouses who work, in the healthcare industry, does not mean that it is impossible to get an unbiased jury in a medical negligence case in Ohio County. An Ohio County potential jury panel is likely to include some members who are concerned about the fact that a substantial verdict in favor of a plaintiff in a medical malpractice case might negatively impact the availability of medical care in Ohio County. There are also potential jurors who are concerned that they might be soundly criticized by family, friends and neighbors by a substantial verdict. The use of full and effective voir dire of prospective jurors by the Court and counsel from a large jury pool will eliminate those prospective jurors who have these concerns. The experience of the Court is that it works and remains the key to an unbiased jury in all civil actions.

Defendants are right:

"Effective *voir dire* screening allows inquiry about life experiences, relevant attitudes, background, exposure, prejudices and case-related attitudes. The Court advocates and has participated in extensive *voir dire* of potential jurors to assure that the interests of both parties are protected. *See* transcript of *voir dire* proceeding, *Huff v. Latos*. Questioning is not superficially confined to basic demographics and general attitudes. A potential juror can also be questioned individually and privately, posturing a more conducive environment for candor and honesty as suggested by Dr. Penrod, away from other potential jurors whose presence may influence their answers."

"The use of full and effective voir dire of prospective jurors by the Court and counsel from a large jury pool will eliminate those prospective jurors who have these concerns. The experience of the Court is that it works and remains the key to an unbiased jury in all civil actions."

Plaintiff argues:

"In recent years, social scientists have lent their expertise to the study of juries. While courts traditionally believe that jury questionnaires and/or *voir dire* can identify and exclude biased jurors, the scientific literature demonstrates that many of the traditional beliefs about the

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ability of *voir dire* to insure fair and unbiased jury panels is mistaken. This is particularly true where, as in the present case, the jury pool as a whole is so skewed toward a particular point of view."

I do not accept plaintiff's argument that the imbalance in the Ohio County jury pool cannot be solved by jury questionnaires and *voir dire*.

This argument by the Plaintiff that the jury pool as a whole in Ohio County is so skewed toward health care providers that it is impossible to obtain an unbiased jury in a medical negligence case is the heart of Plaintiff's argument. But Plaintiff did not prove this theory of irreversibly tainted Ohio county jurors. However, that conclusion does not mean that this Court has failed to recognize the seriousness of the issue presented by the Plaintiff. In fact, just the opposite is true. A fair and unbiased jury is the concern of plaintiff's counsel. That is the reason for this tremendous effort undertaken by Plaintiff's counsel to challenge whether it is possible to have a fair jury trial in an Ohio County Malpractice case. Plaintiff's counsel are to be commended for their efforts. Yet Plaintiff's counsel does not acknowledge that the Judges in the First Judicial Circuit share plaintiff's concern. We recognize that jurors enter the courtroom with biases and preloaded perceptions. An important job of the judge and the attorneys is to discover that bias and deal with it by using the tools the law provides us. And, to the extent that we can't eliminate 100% of the bias, it is the responsibility of the bench and bar to confront and deal with bias as we try to do the best we can to achieve a fair trial for all litigants. See Overcoming Jury Bias, 1 Medical Malpractice: Law and Strategy, Volume 11, number 10, August 1992.

In sum, I am led irresistibly by my own personal experience and the evidence presented on the issue before the court to the conclusion that the plaintiff can obtain a fair and unbiased Ohio County jury in a medical negligence trial. Plaintiff's venue motion will be denied and this matter will be set for trial in Ohio County.

It is so ORDERED.
Ronald E. Wilson, Judge

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(Footnotes)
1[1] Environmental Protection Agency v. Mink, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed. 2d 119 (1973).

2[2] Quotations from plaintiff's counsel in this Letter Opinion are from plaintiff's Proposed Findings of Fact and quotations from defendants' counsel are from the Response of Defendants Henry Kettler, M.D., and Valley Radiology, Inc. to Plaintiff's Proposed Findings of Fact.