

No. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

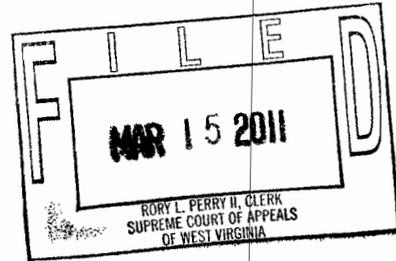
**BOBBY J. MESSER, and
his wife, AMANDA MESSER,**

Petitioners, Plaintiffs Below,

v.

HAMPDEN COAL COMPANY, LLC,

Respondent, Defendant Below.



PETITION FOR APPEAL

Appeal from the Circuit Court of Wyoming County
Honorable Rudolph J. Murensky, II, Judge
Civil Action No. 06-C-182

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Petitioners Bobby and Amanda Messer, plaintiffs below (“Plaintiffs”), appeal from an *Order Denying Amended Motion for New Trial* entered by the Circuit Court of Wyoming County on September 29, 2010¹ (the “Order”), which denied Plaintiffs’ motion for a new trial under West Virginia Rule of Civil Procedure 59 with regard to alleged error concerning the trial court’s failure to strike a prospective juror for cause. As set forth below, Plaintiffs should have been granted a new trial based upon the trial court’s reversible error in refusing to strike a prospective juror for cause, where such individual (1) stated opinions during voir dire that potentially conflicted with those of Plaintiffs’ electrical engineering expert; and (2)

¹The Order is dated September 22, 2010, but the circuit court’s docket reflects that such order was not entered until September 29, 2010.

possessed such professional education, training and experience in the field of electrical engineering that his presence upon the jury would have caused his opinions to unduly influence the jury's deliberations on the central issue in the case.

I. BACKGROUND

Plaintiffs filed their initial Complaint in this matter on October 11, 2006, alleging, *inter alia*, deliberate intent under W. Va. Code § 23-4-2 against defendants Rectron, Inc. ("Rectron") and Electric Line Company, Inc. ("Electric Line") in connection with an incident where Plaintiff Bobby Messer lost his left arm and right leg after coming into contact with an energized 7200-volt electric transmission line. The initial Complaint also alleged common-law negligence and trespass against Alltel Communications of Ohio No. 3, Inc. ("Alltel"). The complaint was twice amended, first to add negligence claims against defendants Hampden Coal Company, LLC ("Hampden"), Rockhouse Creek Development, LLC, and Morlan Enterprises, Inc., and subsequently to assert a negligence claim against Paul Kerns. Plaintiffs settled with or voluntarily dismissed all parties prior to trial with the exception of Hampden.

At the time of the subject incident, Plaintiff Bobby Messer was employed by Rectron as a lineman. Rectron employs persons to work on behalf of its affiliate, Electric Line, which contracts with coal companies to perform electrical services.

In September 2005, Hampden contracted with Rectron and/or Electric Line to install an electrical power line to the location of a new pump at Browning Fork, Mingo County,

West Virginia, which pump was intended to draw water from an abandoned underground coal mine. The work entailed extending an existing three-phase electrical power line that had previously serviced a belt-line running from a mine to Hampden's processing facilities, which electrical line originated from a substation located at Hampden's main Donaldson Branch facility on the other side of the mountain.

The initial work done on the project was performed at the far end of the circuit, where new lines were constructed leading to the site of the new pump. On the morning of September 15, 2005, all three phases of the subject power line were tested and grounded at this location, which confirmed that the line was de-energized. The fact that no electricity was found on the far end of the line apparently caused the crew to believe that the line was de-energized. Plaintiff was subsequently instructed by his supervisor, Jimmy Clay, to remove certain transformers and cut-out switches from a pole located between where the line had earlier been tested and grounded and the Donaldson Branch substation. The power line was neither tested to determine whether it was energized, nor grounded at the location where the transformers were to be removed.

After disconnecting and removing three transformers from the pole, Plaintiff began to remove, as instructed by his supervisor, the disconnects or cut-out switches from the pole and, after cutting one of the three phases of the line without incident, made contact with a second phase of the line that was energized with 7,200-volts AC. As a result of making contact with the energized power line, Plaintiff suffered severe electrical burns that subsequently resulted in, among other injuries, the necessary amputation of his left arm and

right leg.

As it turned out, Alltel had been using one phase of the circuit to power a cellular phone tower on a nearby ridge, which energized phase branched off from the main line at a point between the location of the earlier testing and grounding and the location of the accident. It is undisputed that Alltel had Hampden's permission to use of the power line, and that Hampden's employees had knowledge of such use.

Following the accident, Electric Line was cited by the federal Mine Safety and Health Administration ("MSHA") under 30 C.F.R. §§ 77.501 ("No electrical work shall be performed on electric distribution circuits or equipment, except by a qualified person or by a person trained to perform electrical work and to maintain electrical equipment under the direct supervision of a qualified person. . . .") and 77.704 ("High-voltage lines shall be deenergized and grounded before work is performed on them. . . .") (2005). These citations were later vacated when MSHA determined that it had no jurisdiction because the accident occurred on an abandoned mine site.

Plaintiffs' case was centered on allegations that Hampden was negligent in failing to disclose the active status of the electrical line prior to the commencement of work on the same. Plaintiffs relied heavily upon their electrical expert, Roger Bybee, P.E., who testified, *inter alia*, that Hampden had failed to discharge their duty under National Fire Protection Association ("NFPA") Standard 70E, Article 110.4(B) (2004 ed.)² to meet with personnel

²The applicable 2004 version of NFPA Article 110.4(B) provided as follows:

(B) Outside Personnel (Contractors, etc.). Whenever outside

from Electric Line and/or Rectron prior to any work being performed on the subject electrical lines and inform them of changes in hazards since Electric Line last worked on the line, which meeting would have disclosed the fact that the subject power line was partially energized. (*See, e.g.*, Trial Transcript, Sept. 10, 2009 at 197-98.)

The jury returned its verdict on September 15, 2009, finding for Hampden in this matter. The Court subsequently entered an order granting judgment to Hampden on October 1, 2009. Plaintiffs filed a motion for new trial under West Virginia Rule of Civil Procedure 59 on September 28, 2009, which motion was later amended on October 16, 2009 after the transcript of jury voir dire was obtained. The circuit court denied Plaintiffs' motion for a new trial by an Order entered on September 29, 2010, and this appeal follows.

II. ASSIGNMENT OF ERROR

The circuit court erred in failing to grant Plaintiffs' motion for a new trial, where the lower court committed reversible error by failing to strike a juror for cause who (1) stated opinions during voir dire that potentially conflicted with those of Plaintiffs' electrical engineering expert; and (2) possessed such professional education, training and experience

servicing personnel are to be engaged in activities covered by the scope and application of this standard, the on-site employer and the outside employer(s) shall inform each other of the existing hazards, personal protective equipment/clothing requirements, safe work practice procedures, and emergency/evacuation procedures applicable to the work to be performed. This coordination shall include a meeting and documentation.

The applicable OSHA Standards, set forth at 29 C.F.R. Part 1910, incorporate NFPA-70E by reference.

in the field of electrical engineering that his presence upon the jury would have caused his opinions to unduly influence the jury's deliberations on the central issue in the case.

III. STANDARD OF REVIEW

When reviewing a trial court's rulings, this Court normally applies a two-prong deferential standard of review to the trial court's findings and conclusions. *See O'Dell v. Miller*, 211 W. Va. 285, 288, 565 S.E.2d 407, 410 (2002); *Doe v. Wal-Mart Stores, Inc.*, 210 W. Va. 664, 558 S.E.2d 663 (2001). "We review the final order and the ultimate disposition under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review." Syl. pt. 2, in part, *Walker v. West Virginia Ethics Commission*, 201 W. Va. 108, 492 S.E.2d 167 (1997).

"The determination of whether a prospective juror should be excused to avoid bias or prejudice in the jury panel is a matter within the sound discretion of the trial judge." *O'Dell*, 211 W. Va. at 288, 565 S.E.2d at 410 (citing *West Virginia Dept. of Highways v. Fisher*, 170 W. Va. 7, 289 S.E.2d 213 (1982), *cert. denied*, *Fisher v. West Virginia Dept. of Highways*, 459 U.S. 944, 103 S.Ct. 257, 74 L.Ed.2d 201 (1982)).

IV. ARGUMENT

The circuit court committed reversible error by failing to excuse a juror for cause based upon that person having (1) stated opinions during voir dire that potentially conflicted with those of Plaintiffs' electrical engineering expert; and (2) possessed such professional

education, training and experience in the field of electrical engineering that his presence upon the jury would have caused his opinions to unduly influence the jury's deliberations on the central issue in the case.

During *voir dire* conducted on September 9, 2009, one prospective juror, Robert Helmandollar, stated that he (a) had a bachelor of science degree in electrical engineering technology, (Trial Transcript, Jury Voir Dire [Sept. 9, 2009] ("Trial Tr.") at 43, 161)³; (b) was employed by a coal company as a general maintenance foreman, (*id.* at 162); (c) did "a lot of electrical work" for his employer, (*id.* at 43), including hiring and working with electrical contractors, (*id.* at 44-45); and (d) had hands-on experience working on power lines using equipment such as rubber gloves, insulated poles, and voltage detection instruments, (*id.* at 44-48). Most importantly, Mr. Helmandollar also stated his *opinion* that a contractor and its employees are responsible for de-energizing, locking-out and tagging an electrical circuit before undertaking work on the same. (*Id.* at 46, 47.) Moreover, this prospective juror also expressed an opinion to the effect that the wearing of insulated gloves was required by law and could protect a wearer from being injured by contact with electricity. (*Id.* at 47.)

Based upon these statements evidencing Mr. Helmandollar's "education, training and experience" in electrical matters, Plaintiffs moved to strike him for cause, which motion was denied by the trial court. (*Id.* at 166.) Plaintiffs were subsequently required to remove Mr. Helmandollar using one of their peremptory strikes. (*Id.* at 169.)

""The true test to be applied with regard to [the] qualifications of a juror is whether

³Relevant portion of the Trial Transcript are attached hereto as Exhibit A.

a juror can, without bias or prejudice, return a verdict based on the evidence and the court's instructions and disregard any prior opinions he may have had." Syl. pt. 1, *State v. Harshbarger*, [170 W. Va. 401, 294 S.E.2d 254 (1982)]' quoting *State v. Charlot*, 157 W. Va. 994, 1000, 206 S.E.2d 908, 912 (1974)." *State v. Finley*, 177 W. Va. 554, 556, 355 S.E.2d 47, 49 (1987).

During *voir dire* Mr. Helmandollar expressed opinions as to who, as between a coal operator and an electrical contractor, bears responsibility for taking steps to insure that a power line is de-energized—the central issue in the present case. He also attempted to speak to the law applicable to the use of certain personal protective equipment, namely insulated gloves. These expert opinions were stated without the aid of any evidence bearing upon matters relevant to this action, and demonstrated that Mr. Helmandollar had preconceived ideas concerning the proper outcome of this case. While Mr. Helmandollar stated that he could put aside his personal experiences and limit himself to the evidence and instructions presented at trial, (Trial Tr. at 163-64), his professional opinions on such crucial issues provided an ample basis for excusing him for cause.⁴ See syl. pt. 5, *O'Dell v. Miller*, 211

⁴In its Order denying Plaintiffs' motion for a new trial, the circuit court suggested that any claim of bias on the part of Mr. Helmandollar was waived by Plaintiffs having sought disqualification only on the basis of this prospective juror's "education, training and experience." Order at 2. While a party seeking the disqualification of juror has an obligation to speak clearly as to the grounds for such challenge, see, e.g., *State v. Hughes*, 225 W. Va. 218, 691 S.E.2d 813, 825 (2010), in this case the issues concerning Mr. Helmandollar's preconceived opinions and his "education, training and experience" are so closely intertwined that by alluding to the latter concern, Plaintiffs' challenge clearly put the trial court on notice regarding the grounds for the objection. See syl. pt. 3, *O'Dell v. Miller*, *supra* ("When considering whether to excuse a prospective juror for cause, a trial court is required to consider the *totality of the circumstances* and grounds relating to a potential request to

W. Va. 285, 565 S.E.2d 407 (2002) (“Once 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.”); *see also* syl. pt. 8, *State v. Newcomb*, 223 W. Va. 843, 679 S.E.2d 675 (2009).

Moreover, even assuming that Mr. Helmandollar’s stated opinions alone do not demonstrate disqualifying bias or prejudice, such opinions, when coupled with his professional education, training and experience bearing on decisive issues in the case, would have unduly influenced the jury’s deliberations. While there do not appear to be any reported cases finding that expertise alone is sufficient grounds for striking a juror for cause,⁵ scholarly commentary has recently advocated an approach whereby “professional expertise *touching on an essential trial issue* would, in and of itself, be sufficient cause to strike a prospective juror.” Michael B. Mushlin, *Bound and Gagged: The Peculiar Predicament of Professional Jurors*, 25 *Yale L. & Policy Rev.* 239, 272 (2007) (emphasis added).

excuse a prospective juror, to make a full inquiry to examine those circumstances and to resolve any doubts in favor of excusing the juror.”) (emphasis added). Indeed, counsel for Plaintiffs made clear his concern that Mr. Helmandollar could use his education and training to essentially disregard the testimony of experts presented in this case. (*See* Trial Tr. at 161.)

⁵Courts have, however, attempted to “gag” jurors with professional training and/or experience, such that they are prohibited from interjecting their own opinions into the deliberative process. *See, e.g., People v. Maragh*, 94 N.Y.2d 569, 729 N.E.2d 701 (N.Y. 2000) (reversing murder conviction where two nurses on jury shared medical opinions with fellow jurors regarding victim’s cause of death, which opinions went against those of defendant’s expert witness). The obvious drawback of this approach is that it is difficult to police, and holds the potential for extensive post-verdict litigation. *See* Mushlin, *infra*, at 279.

Current law requires more than just the confluence of a prospective juror's professional expertise and the issues in the case at hand before a trial court generally will grant a challenge for cause. For the challenge to succeed, the professional must admit to, or be demonstrated to suffer from, a bias toward one side or the other, such that the juror could not be impartial. The case law and available data suggest that under this approach, professional jurors often find their way onto panels on which their status affords them undue influence over trial outcomes.

Id. (footnotes omitted).⁶ The basis for the view that a “professional juror” poses the threat of unduly impacting jury deliberations comes from survey research demonstrating that it is “hard for lay jurors not to ‘honor [the professional juror’s] opinion as the Gospel.’” *Id.* at 273. Importantly, such professional jurors have the ability to usurp the role of the parties’ expert witnesses without being subject to cross-examination. *Id.* at 275-76.

Plaintiffs need not, and do not, go so far as to advocate such a per se rule of juror disqualification based upon a prospective juror’s professional education, training and background.⁷ But in this case, the combination of Mr. Helmandollar professional

⁶See also Paul F. Kirgis, *The Problem of the Expert Juror*, 75 Temple L. Rev. 493, 537 (2002) (emphasizing potential for “expert juror” to interject opinions falling short of the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and concluding that “[i]n cases where a juror’s knowledge overlaps with central issues in the case, courts should be willing to strike the juror for cause.”).

⁷The circuit court, in its Order denying Plaintiffs’ motion for a new trial, stated that Plaintiffs’ position would be such that “there could never be coal miners sitting as jurors in deliberate intent cases relating to mining.” Order at 2. Under the approach advocated by Plaintiffs in this case, disqualification in such instances would not be necessary except in instances where the coal miner not only possesses education, knowledge and training bearing upon the precise issue in dispute in a particular case, but also stated definite opinions as to such issue linked to the same. Moreover, a distinction could easily be drawn between persons with general employment-related knowledge concerning a particular subject (e.g., mining), and those who possess advanced degrees in a pertinent field.

qualifications to speak authoritatively on matters of electrical engineering, when coupled with his statements expressing opinions concerning central issues in this case, necessitated excusing him for cause regardless of his statements that he could render an unbiased verdict. The trial court's failure to so disqualify this prospective juror for cause deprived Plaintiffs of a fair trial which can only be remedied by the granting of a new trial in this matter.

V. CONCLUSION

WHEREFORE, for the reasons stated above, Petitioners request that the instant appeal be granted, that the judgment of the circuit court be reversed, and that this case be remanded for a new trial of Petitioner's claims against defendant Hampden Coal Company, LLC.

Respectfully submitted,

**BOBBY J. MESSER, and his wife,
AMANDA MESSER,**

Petitioners, Plaintiffs Below,

By Counsel



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WEST VIRGINIA

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BOBBY J. MESSER and
his wife, AMANDA MESSER,

Plaintiffs,

vs.

CIVIL ACTION
NO. 06-C-182

ELECTRIC LINE COMPANY, INC.,
et al,

Defendants.

* * * * *

JURY VOIR DIRE

Transcript of the proceedings had in the
above-entitled matter before the Honorable Rudolph
Murensky, and a jury, at the Wyoming County
Courthouse, Pineville, West Virginia, on the 9th
day of September, 2009.

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1 MR. AWADALLAH: This is an interesting
2 case because it has so many different people that
3 were at one point or another involved in it. Now,
4 you'll learn that Mr. Messer didn't work for
5 Hampden Coal. He worked for a company that
6 Hampden Coal hired to come out there. Mr. Messer
7 was working on the electrical lines at that time.

8 First, has anyone ever done any
9 electrical work in a professional capacity?

10 Mr. Helmandollar.

11 THE COURT: Juror No. 22,

12 Mr. Helmandollar.

13 MR. AWADALLAH: Go ahead and tell us what
14 you've done.

15 PROSPECTIVE JUROR HELMANDOLLAR: Well, I
16 have a degree in electrical engineering, and the
17 company I work for, I do a lot of electrical work
18 for them.

19 MR. AWADALLAH: Have you ever designed
20 and worked on high voltage transmission lines?

21 PROSPECTIVE JUROR HELMANDOLLAR: Worked
22 on, yes.

23 MR. AWADALLAH: What type of work did you
24 do?

1 PROSPECTIVE JUROR HELMANDOLLAR: Just
2 troubleshooting, trying to determine why we didn't
3 have electricity at that time.

4 MR. AWADALLAH: Okay. Now, when you were
5 working on the line, you weren't working by
6 yourself, were you?

7 PROSPECTIVE JUROR HELMANDOLLAR: No.

8 MR. AWADALLAH: How many people were with
9 you?

10 PROSPECTIVE JUROR HELMANDOLLAR: Usually
11 one to two.

12 MR. AWADALLAH: Did you ever climb the
13 pole, or go up in a bucket truck?

14 PROSPECTIVE JUROR HELMANDOLLAR: No.

15 MR. AWADALLAH: Who did?

16 PROSPECTIVE JUROR HELMANDOLLAR: We
17 always used the contractors to do that work.
18 Basically the extent of my work was replacing
19 fuses.

20 MR. AWADALLAH: Why do you use
21 contractors?

22 PROSPECTIVE JUROR HELMANDOLLAR: The
23 operations I've worked for have been union, and if
24 our company couldn't handle the job, we'd bring

1 contractors in.

2 MR. AWADALLAH: Generally, did you hire
3 contractors that you thought were specialists?

4 PROSPECTIVE JUROR HELMANDOLLAR: Yes.

5 MR. AWADALLAH: That knew how to work on
6 these electric lines, right?

7 PROSPECTIVE JUROR HELMANDOLLAR: Yes.

8 MR. AWADALLAH: Why is that important to
9 you? If it is.

10 PROSPECTIVE JUROR HELMANDOLLAR: Well,
11 you want someone that -- if you're going to
12 contract them out and pay them, you want them to
13 be able to do the job, to know what they're doing.

14 MR. AWADALLAH: Was it important to you
15 that they did the job safely?

16 PROSPECTIVE JUROR HELMANDOLLAR: Yes.

17 MR. AWADALLAH: Have you ever watched
18 them do the work?

19 PROSPECTIVE JUROR HELMANDOLLAR: Yes, on
20 the trucks, yes.

21 MR. AWADALLAH: Was any of the work that
22 you watched on energized lines?

23 PROSPECTIVE JUROR HELMANDOLLAR: No.

24 MR. AWADALLAH: Why not? Do you know?

1 PROSPECTIVE JUROR HELMANDOLLAR: It's not
2 safe.

3 MR. AWADALLAH: So these contractors that
4 you hired came out to work on de-energized lines,
5 right?

6 PROSPECTIVE JUROR HELMANDOLLAR: Yes.

7 MR. AWADALLAH: Who actually disconnected
8 the power?

9 PROSPECTIVE JUROR HELMANDOLLAR: They
10 were responsible for locking and tagging out the
11 power source.

12 MR. AWADALLAH: Tell me your
13 understanding of locking and tagging out the --
14 that's kind of a specialized term. I assume some
15 of these folks that may have heard it may not
16 understand it, but I'd like to hear your
17 perspective.

18 PROSPECTIVE JUROR HELMANDOLLAR: Yes, it
19 means if you're going to de-energize a circuit,
20 you want to de-energize the breaker wherever the
21 source is coming from, de-energize it, lock it out
22 with a lock and a tag. The tag usually has the
23 date, the person that's responsible for locking it
24 out and why it's locked out.

1 MR. AWADALLAH: So when the power's
2 disconnected at a certain point in this line,
3 there's something put on the device to make sure
4 that people don't put it back in, right?

5 PROSPECTIVE JUROR HELMANDOLLAR: That's
6 correct.

7 MR. AWADALLAH: Who -- you said the
8 contractor and their employees were responsible
9 for doing that, right?

10 PROSPECTIVE JUROR HELMANDOLLAR: Yes.

11 MR. AWADALLAH: Because after all, they
12 were the electrical folks.

13 PROSPECTIVE JUROR HELMANDOLLAR: Yes.

14 MR. AWADALLAH: Have you ever seen them
15 test the lines after they pulled the disconnects
16 or cut the power?

17 PROSPECTIVE JUROR HELMANDOLLAR: Yes.

18 MR. AWADALLAH: How'd they do that?

19 PROSPECTIVE JUROR HELMANDOLLAR: Well,
20 the equipment, usually you have a Start/Stop
21 button. If it's a fuse or a transformer, there
22 are certain ways to do that also.

23 MR. AWADALLAH: Have you ever used any of
24 that equipment? Like insulated gloves?

1 PROSPECTIVE JUROR HELMANDOLLAR: Oh, yes.

2 MR. AWADALLAH: Have you ever used an
3 insulated stick?

4 PROSPECTIVE JUROR HELMANDOLLAR: Yes.

5 MR. AWADALLAH: Do you know what a tic
6 tracer is?

7 PROSPECTIVE JUROR HELMANDOLLAR: Yes.

8 MR. AWADALLAH: Or voltage detector.

9 PROSPECTIVE JUROR HELMANDOLLAR: Yes.

10 MR. AWADALLAH: Have you used all of
11 those?

12 PROSPECTIVE JUROR HELMANDOLLAR: Yes.

13 MR. AWADALLAH: Tell me what your
14 understanding of why you needed the gloves, the
15 insulated gloves.

16 PROSPECTIVE JUROR HELMANDOLLAR: Well,
17 number one, it's the law, and number two, it can
18 protect you against voltage, if you do get struck
19 by it.

20 MR. AWADALLAH: Has anyone else had
21 experience with electrical work similar to what
22 Mr. Helmandollar has described for us?

23 PROSPECTIVE JUROR LAXTON: I did, but not
24 high voltage.

1 today, do they not?

2 MR. MANNION: Yeah, I think they both
3 said it wasn't a problem.

4 THE COURT: I think that's what they
5 said. You might want to call them back here and
6 ask them about that, but I don't think it's going
7 to be a problem. If it is, they're just going to
8 have to miss it, as far as I'm concerned. I don't
9 think it was anything serious.

10 Is there anything you want to call any of
11 these back for?

12 MR. SEGAL: The only person I would want
13 to talk to is Mr. Helmandollar --

14 THE COURT: Okay, that's fine.
15 Mr. Helmandollar.

16 (Prospective Juror Helmandollar entered
17 the chambers.)

18 THE COURT: Mr. Helmandollar, if you'll
19 have a seat right there, please, and I will remind
20 you that you're still under oath.

21 Mr. Segal.

22 MR. SEGAL: Thanks, your Honor.

23 Mr. Helmandollar, because of where that TV is and
24 the way -- not that you weren't trying to speak

1 up, but I didn't hear a couple things. Did you
2 say that you had a degree of some type in
3 electrical engineering?

4 PROSPECTIVE JUROR HELMANDOLLAR: Yes, a
5 degree -- bachelor of science in electrical
6 engineering technology.

7 MR. SEGAL: Okay. And you have worked in
8 that field in the past, of course.

9 PROSPECTIVE JUROR HELMANDOLLAR: Yes.

10 MR. SEGAL: Okay. Here's the question:
11 There's going to be testimony in this case by
12 different experts, electrical experts with
13 different backgrounds and training and all that
14 stuff. What I'm concerned about is that we're
15 going to stick you in a situation where you're
16 essentially saying, "Well, I don't agree with that
17 expert because of my own training" or "I agree
18 with this expert because of my own training," and
19 at the same time, we're telling you you have to
20 sit there and put everything aside, you know, it's
21 almost like sticking a doctor in a medical case
22 and saying, "You have to put everything you
23 learned in medical school aside."

24 And that's why I just wanted to ask you

1 about whether or not we're putting you in an
2 unfair position in this case, saying, "You have to
3 weigh all this testimony about electrical, and you
4 can't use what you learned or what you believe or
5 what you've studied, you've got to listen to the
6 witnesses."

7 And I didn't want to put you in that
8 situation if it was going to make you
9 uncomfortable.

10 PROSPECTIVE JUROR HELMANDOLLAR: No, it
11 shouldn't make me uncomfortable, no.

12 MR. SEGAL: Okay. Can you tell me what
13 you do at work?

14 PROSPECTIVE JUROR HELMANDOLLAR: I'm a
15 general maintenance foreman for a mining company,
16 and I basically just supervise the on-shift
17 foremen. I set up jobs, electrical and
18 maintenance-wise.

19 MR. SEGAL: Okay.

20 PROSPECTIVE JUROR HELMANDOLLAR: But
21 basically I'm the general maintenance foreman.

22 MR. SEGAL: All right. And who do you
23 work for?

24 PROSPECTIVE JUROR HELMANDOLLAR: Cliff's

1 Natural Resources, Pinnacle Mining Company.

2 MR. SEGAL: Okay. And what county is
3 your work in?

4 PROSPECTIVE JUROR HELMANDOLLAR: It's
5 here, it's just up the road.

6 MR. SEGAL: Good enough. Thank you for
7 answering my questions.

8 THE COURT: That used to be the old U.S.
9 Steel --

10 PROSPECTIVE JUROR HELMANDOLLAR: U.S.
11 Steel mine, yes.

12 THE COURT: Did you work for them when it
13 was U.S. Steel?

14 PROSPECTIVE JUROR HELMANDOLLAR: Yes.

15 THE COURT: And that's on -- where I
16 live, they call it the Welch/Pineville Road. I
17 guess maybe over here they call it the
18 Pineville/Welch Road. But that is where that
19 mines is located.

20 PROSPECTIVE JUROR HELMANDOLLAR: Yes, up
21 Pinnacle Creek Road just a few miles from here.

22 MR. AWADALLAH: Just a few, your Honor.

23 Mr. Helmandollar, do you think that
24 you'll be able to sit on this jury and be a fair

1 juror?

2 PROSPECTIVE JUROR HELMANDOLLAR: I think
3 so, yes.

4 MR. AWADALLAH: Do you think that you'll
5 be able to limit your decisions based on what you
6 hear as evidence and the instructions you're given
7 by the judge?

8 PROSPECTIVE JUROR HELMANDOLLAR: Yes.

9 MR. AWADALLAH: Will you have any problem
10 keeping your personal experiences aside from what
11 you're instructed to do and what the evidence
12 shows?

13 PROSPECTIVE JUROR HELMANDOLLAR: No, no
14 problem.

15 MR. AWADALLAH: That's all I have. Thank
16 you.

17 THE COURT: Would you please go back to
18 your seat?

19 PROSPECTIVE JUROR HELMANDOLLAR: Yes,
20 sir.

21 (Prospective Juror Helmandollar exited
22 the room.)

23 THE COURT: Okay. Are there any other
24 jurors that you would like to inquire from, the

1 ten that we have now?

2 MR. MANNION: Not from us, your Honor.

3 THE COURT: Mr. Segal?

4 MR. SEGAL: Sam, do I have any more?

5 MR. HRKO: She had some dealings with
6 Rockhouse, Melissa Haynes.

7 MR. SEGAL: That won't be a problem. I
8 don't think she indicated it would be any problem.
9 And they're not in it. Do you want to ask her if
10 it would play any role?

11 MR. HRKO: I don't think it would be a
12 big deal.

13 MR. SEGAL: All right. No, your Honor.

14 MR. HRKO: Just -- that's the property
15 where the accident happened.

16 THE COURT: Do you have any further that
17 you want to call?

18 MR. AWADALLAH: No, your Honor.

19 THE COURT: Okay. Are there any motions
20 to disqualify for cause?

21 MR. SEGAL: Yes, your Honor.

22 THE COURT: Okay.

23 MR. SEGAL: I would move for cause that
24 Robert Helmandollar be excused for cause.

1 THE COURT: And for what reason?

2 MR. SEGAL: His education, training and
3 experience. I don't -- it's a lot like I said,
4 it's like putting a doctor in a malpractice case.
5 It simply --

6 THE COURT: Do you have any objections?

7 MR. AWADALLAH: Yes, your Honor.
8 Mr. Helmandollar just sat here and told us that he
9 can be fair, he can be impartial and he can set
10 aside his personal experience and make a decision
11 based on the evidence and your instructions.

12 THE COURT: Okay. I will deny that
13 motion. He's qualified as a juror. And I'll note
14 your objection.

15 MR. MANNION: How many strikes do we each
16 get?

17 THE COURT: Two. Anything else?

18 MR. SEGAL: Did you --

19 THE COURT: I denied your motion.

20 MR. SEGAL: No, no, your Honor, I didn't
21 know if you wanted to revisit the issue of an
22 alternate.

23 THE COURT: We'll pick these and then
24 we'll discuss the alternate.

1 MR. SEGAL: Great.

2 THE COURT: Okay?

3 MR. HRKO: So of the first ten, we each
4 get two?

5 THE COURT: We have the first ten. The
6 panel is now qualified. You two -- I'm not going
7 to go out there and -- I'll let you two sit here,
8 you two go to the jury room. Wait a minute, you
9 want to go over it with your client, don't you?

10 MR. SEGAL: No, your Honor. We can do it
11 -- do you want to do it in the conference room?

12 THE COURT: You might want to go into the
13 jury room and discuss it. You all could discuss
14 it in here. You don't need Mr. Messer with you?

15 MR. HRKO: I don't think so.

16 THE COURT: Okay. Then you can just go
17 back into the jury room. Just go out this door
18 and to the left. Do you need anybody out there
19 with you?

20 MR. HRKO: Do we get a strike sheet?

21 THE COURT: I'll bring the clerk in here
22 and I'll get a strike sheet.

23 (The Court and court reporter returned to
24 the courtroom and counsel conferred in side

1 rooms. Upon their return to the courtroom, the
2 proceedings continued as follows:)

3 THE COURT: Is the plaintiff ready to
4 strike?

5 MR. SEGAL: We are, your Honor.

6 THE COURT: Okay. Mr. Bailiff, if you
7 would hand the strike sheet to him to strike.
8 That's a violent word. But if you would just hand
9 the sheet to them, they'll make their strike and
10 it will go back and forth.

11 (Counsel proceeded to exercise their
12 strikes.)

13 THE COURT: Okay, we're back on the
14 record. And while we were here playing with the
15 bingo balls in open court, I believe that the
16 plaintiff and the defense made their strikes
17 alternatively. The plaintiff made the first one,
18 the defense, the plaintiff and defense. Is that
19 right?

20 MR. SEGAL: That is correct, your Honor.

21 THE COURT: Mr. Awadallah?

22 MR. AWADALLAH: Yes, sir.

23 THE COURT: Now you'll listen to the boss
24 for a minute and she'll tell you what.

1 THE CLERK: The following jurors are
2 excused: Stephen Sizemore, Tony Cline, Robert
3 Helmandollar, Ashley Damron.

4 THE COURT: You may go sit in the back.

5 Okay. Wait a minute, we've got to go
6 over -- Ms. Goode, I would like you to come over
7 here in Seat No. 7. Ms. Banther, if you'll fill
8 Seat No. 9. That way all six jurors are very
9 close to the witness seat.

10 Now, what I'm going to do now is: I'm
11 going to ask the clerk to put bingo balls in for
12 Jurors 11, 12, 14, 16, 18, 20 and 21, and she'll
13 pull three of those out, okay?

14 We're picking an alternate. I'm going to
15 have you sit in Seats 4, 5 and 6.

16 THE CLERK: Lloyd Adams.

17 THE COURT: Mr. Adams, if you would have
18 a seat in Seat No. 4.

19 THE CLERK: Vickie Raye.

20 THE COURT: If you'll have a seat in Seat
21 No. 5.

22 THE CLERK: Linda Stewart.

23 THE COURT: Mr. Segal, are you all ready
24 to strike?