

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

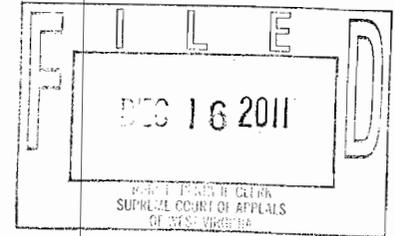
**BOBBY J. MESSER, and
his wife, AMANDA MESSER,**

Petitioners, Plaintiffs Below,

v.

**HAMPDEN COAL COMPANY, LLC,
a West Virginia limited liability company,**

Respondent, Defendant Below.



REPLY BRIEF OF PETITIONERS

The arguments made by Respondent Hampden Coal Company, LLC (“Hampden”) in favor of affirmance largely hinge upon a flawed understanding of the standard applicable matters involving juror qualification. Rather than requiring a “clear statement” of bias or prejudice as posited by Hampden,¹ this Court has made clear that any doubts regarding whether a prospective juror can be fair and impartial should be resolved in favor of excusing the juror. *See Black v. CXS Transp., Inc.*, 220 W. Va. 623, 628-29, 648 S.E.2d 610, 615-16 (2007) (“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 excuse a prospective juror, to make a full inquiry to examine those circumstances

¹Hampden Resp. at 13 (citing *Macek v. Jones*, 222 W. Va. 702, 707, 671 S.E.2d 707, 712 (2008) (per curiam)). While the Court in *Macek* stated that “it is imperative that a prospective juror who makes a clear statement indicating a prejudice or bias be removed from the jury without the necessity of further probing,” 222 W. Va. at 707, 671 S.E.2d at 712, it clearly did not impose a threshold requirement that a trial court ascertain such a “clear statement” prior to excusing any prospective juror for cause.

and to resolve any doubt in favor of excusing the juror.”) (emphasis in original) (quoting syl. pt. 3, *O'Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002)); see also *Rine v. Irisari*, 187 W. Va. 550, 556, 420 S.E.2d 541, 547 (1992) (holding that trial court's refusal to strike prospective jurors for cause based upon their relationships with defendant physicians was reversible error and that doubts concerning the impartiality of such prospective jurors should have been resolved in favor of the challenging party).

As the Court emphasized in *O'Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002), “as far as practicable in the selection of jurors, trial courts should endeavor to secure those jurors who are not only free from but *who are not even subject to any well-grounded suspicion of any bias or prejudice.*” *Id.* at 289, 565 S.E.2d at 411 (emphasis added) (citations omitted). In this case, although the prospective juror in question stated that he could put aside his personal experiences and limit himself to the evidence and instructions presented at trial, (Trial Transcript, Jury Voir Dire [Sept. 9, 2009] (“Trial Tr.”) at 163-64), the views he expressed concerning who, as between a coal operator and an electrical contractor, bears responsibility for taking steps to insure that a power line is de-energized, could reasonably have impaired his ability to be fair and impartial. Again, any doubt must be weighed in favor of disqualification.

Hampden also argues that Petitioners waived any argument as to a conflict between the opinions of their expert and those of the prospective juror in question by not proffering the expert's testimony at the time of voir dire. Even to the extent that such proffer was required, however, the fact remains that the prospective juror in this case expressed a view

regarding the central issue in the present case—whether Hampden, its electrical contractor, or both were responsible for taking the proper steps to de-energize the subject powerline—which the trial court was clearly cognizant of based upon the lower court’s prior consideration of various pre-trial motions.

Finally, as to Hampden’s assertion that Petitioners are seeking to have this Court “carve out a special rule effectively presuming bias on the part of professionals who have expertise related to the issue in the case,” Hampden Resp. at 20, such assertion is simply not true. While the prospective juror’s educational and professional background is clearly relevant to the analysis of this issue, Petitioner’s have made clear that it is only one part of the equation. An equally important factor is, as stated previously, the statement of the prospective juror in this case, elicited by defense counsel during voir dire, that his employment by a coal company involved the hiring and working with electrical contractors, (Trial Tr. at 44-45), and that such *contractors and their employees* are the parties responsible for de-energizing, locking-out and tagging an electrical circuit before undertaking their work. (*Id.* at 46, 47.) In sum, Petitioners are not asking for any new, groundbreaking rule to the effect that all prospective jurors with advanced education or professional credentials should automatically be disqualified from sitting on cases where such education or background may be implicated; rather, they are simply arguing that it should be among the “totality of circumstances” to be considered where a prospective juror has otherwise expressed pre-conceived opinions based upon such education or background evidencing bias or prejudice regarding a central issue in a case.

WHEREFORE, for the reasons stated above and in Petitioner's Petition for Appeal, Petitioners request that the Circuit Court's refusal to grant a new trial in this matter be reversed, and that this case be remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel for Petitioners hereby certifies that true and accurate copies of the *Reply Brief of Petitioners* were served upon the following counsel of record by United States Mail on this 14th day of December, 2011, addressed as follows:

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