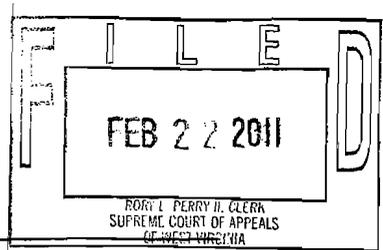


No. 11-0469



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BOBBY J. MESSER, and
His wife, AMANDA MESSER,

Petitioners, Plaintiffs Below,

v.

Civil Action No.: 06-C-182
(Wyoming County)

HAMPDEN COAL COMPANY, LLC,

Respondents, Defendant Below.

**RESPONDENT, HAMPDEN COAL COMPANY, LLC'S RESPONSE IN OPPOSITION TO
PETITION FOR APPEAL FILED BY PETITIONERS, BOBBY J. MESSER, AND HIS
WIFE, AMANDA MESSER**

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II. RESPONSE TO PETITIONER'S ASSIGNMENT OF ERROR

This Court must decide whether the trial court properly refused to dismiss Prospective Juror Robert Helmandollar for cause where: (1) Juror Helmandollar made no "clear statement" of bias or prejudice, and unequivocally stated that he could listen to the evidence and apply the law, disregarding any prior training or background; (2) Juror Helmandollar made no statements that were contradictory to the opinions expressed by Plaintiff's expert; and (3) West Virginia law provides no special rule or procedure for examining the qualification of jurors who have relevant professional backgrounds, and no special procedure is warranted, as the framework announced by this Court in *O'Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002), is sufficient to ensure that a fair and impartial jury is empanelled as required by W. Va. Code §56-6-12.

III. STATEMENT OF THE CASE

Petitioner's description of the proceedings below omitted facts that are crucial to this Court's analysis of the issue presented on appeal. An examination of these facts should lead this Honorable Court to affirm the trial court's decision with respect to the qualifications of Prospective Juror Robert Helmandollar.

A. Background

As discussed in Petitioner's Brief, the claims of Plaintiffs Bobby J. Messer and Amanda Messer's arose from injuries sustained by Plaintiff Bobby J. Messer ("Plaintiff") during the course and scope of Bobby Messer's employment with Rectron, Inc., ("Rectron"), as a lineman. *Plaintiffs' Amended Complaint*, ¶¶14-15. Rectron employs individuals to work on behalf of its affiliate, Electric Line. Rectron and Electric Line were hired by Defendant Hampden Coal Company as independent contractors to install an electrical power line to the location of a new pump at Browning Fork, Mingo County. *Id.* at ¶16. At issue in the case was whether any acts or

omissions by Defendant Hampden proximately caused the injuries of Mr. Messer, who at all times worked under the supervision and at the direction of Rectron and Electric Line. *Id.* at ¶¶28, 43-46.

B. Voir Dire Statements By Prospective Juror Robert Helmandollar

Plaintiff's sole assignment of error on appeal relates to the trial court's refusal to dismiss Prospective Juror Helmandollar for cause. As demonstrated by the *voir dire* transcript attached to Petitioner's Brief, Juror Robert Helmandollar possessed a degree in electrical engineering, and had worked on high voltage transmission lines. *Transcript of Proceedings (Jury Voir Dire), September 9, 2009*, 43:15-22.¹ Mr. Helmandollar stated that the company he worked for used contractors to climb up poles to work on lines. *Id.* at 44:4-19. While expressing no opinion as to the benefits or prevalence in the industry of that arrangement, he stated simply that "...if our company couldn't handle the job, we'd bring contractors in." *Id.* at 44:20 to 45:1.

He had on occasion watched contractors do their work. *Id.* at 45:17-20. The contractors he watched were responsible for "locking and tagging out the power source." *Id.* at 46:7-11. He described how the lock-out/tag-out procedures were performed, and further described how the contractors he observed tested the lines after cutting the power. *Id.* at 46:12 to 47:22. Further, relevant to the arguments contained in the Petition for Appeal, Prospective Juror Helmandollar explained why insulated gloves are used in this line of work. First, he said, "it's the law." *Id.* at 48:13-19. Second, "it can protect you against voltage, if you do get struck by it." *Id.*

Mr. Helmandollar was never asked, and never cast any judgment on individuals who do not use insulated gloves. He simply stated his understanding of why insulated gloves are used.

¹ Relevant portions of the *Transcript of Proceedings (Jury Voir Dire), September 9, 2009*, designated by Petitioner as part of the record on appeal, were attached as Exhibit A to the Petitioner's Brief.

Moreover, Mr. Helmandollar was never asked, and never stated any opinion, regarding the duties owed by a coal company to its independent contractors.

Later that day, Prospective Juror Helmandollar was called back by Plaintiff's counsel for further questioning. Mr. Helmandollar stated in response to questioning that having to put aside his professional training and listen to the testimony of experts would not make him uncomfortable. *Id.* at 161:10 to 162:11. Furthermore, he stated he would be able to be fair, limit his decisions to the evidence and instructions given, and would have "no problem" setting aside his personal experiences in deciding the case. *Id.* at 163:22 to 164:14.

Following this questioning, Plaintiff moved to excuse Mr. Helmandollar for cause, due to his "education, training and experience." *Id.* at 165:23 to 166:5. The trial court denied this Motion. Plaintiff then exercised a peremptory challenge to dismiss Mr. Helmandollar. *Id.* at 168:3 to 169:3.

C. Trial Testimony By Plaintiff's Expert Roger Bybee, P.E.

Petitioner contends in the Petition for Appeal that Prospective Juror Robert Helmandollar should have been excused for cause because he expressed opinions that potentially conflicted with the expert testimony to be offered by Plaintiff's electrical expert, Roger Bybee, P.E. Thus, an examination of Mr. Bybee's testimony is necessary in order to evaluate Petitioner's claim.

Mr. Bybee's testimony primarily concerned the duties allegedly owed by Hampden Coal Company to Electric Line. Mr. Bybee stated that he believed Hampden Coal had a duty to inform outside contractors like Electric Line of any changes in hazards:

Q: Do you have an opinion within reasonable degree of electrical engineering certainty as to whether Hampden Coal Company breached its duty and responsibility to meet and inform outside contractor Electric Line of the changes in the hazards since Electric Line had last worked at Hampden Coal Company?

A: Yes, I do.

Q: And what is that opinion?

A: They did not meet their responsibilities.

*Trial Transcript, September 10, 2009, at 197-198.*²

In another portion of his testimony, Mr. Bybee offered an opinion on the use of safety gloves, agreeing that Hampden had no duty to ensure that contractors were provided with and used insulated gloves:

Q: And I'm not trying to say that. What I'm trying to say is: Hampden wasn't supposed to give Tad Gilliam insulated gloves, were they?

A: No.

Q: Unless he asked if he didn't have his.

A: I think Hampden has the right to rely on the contractors that they hire, that they are properly qualified to do the work that they've been hired to do.

Trial Transcript, September 10, 2009, Page 271.

Additionally, Mr. Bybee testified that the contractor, Rectron, had a non-delegable duty to check the lines before employees such as Plaintiff worked on them:

Q: ..I'm asking you about whether you said –

A: Yes.

Q: -- when Tad Gilliam and his company were still defendants in this case that they had the responsibility - regardless of what Hampden Coal did or didn't tell them - to check the line.

A: That's correct, that Tad Gilliam had. And I maintain that today. They're not in the case.

² Relevant portions of the *Trial Transcript, September 10, 2009*, designated by Petitioner as part of the record on appeal, are attached hereto as Exhibit "A".

Q: That's because they should have been aware of the -- or at least Tad Gilliam should have been aware of the dangers of his employees working on energized lines, right?

A: That's why he's a qualified person. He has the training -- the education, training and experience to be aware of the hazards, and he has a duty to provide a safe work space for his employees.

Id. at 281:11-24.

Thus, while Mr. Bybee's main criticism of Defendant was that Hampden Coal should have informed outside contractors of changes in the hazards in the lines since those outside contractors had last worked at Hampden Coal Company, Plaintiff's own expert knew that Defendant had the right to rely on its contractors to be able to perform their jobs safely and to check the lines prior to working on energized lines. The jury ultimately returned a unanimous verdict for Defendant.

D. Plaintiff's Motion For New Trial

Plaintiff immediately sought to overturn the verdict, filing a Motion for a New Trial and raising the argument for the first time that Prospective Juror Helmandollar had expressed the opinion that "based upon his training and experience as an electrical engineer, any person who is injured by electricity must himself be at fault for causing such accident." *Plaintiff's Mtn for New Trial, September 28, 2009*, ¶3. Plaintiff argued that this constituted a "clear statement" reflecting "the presence of disqualifying prejudice or bias." *Id.* at ¶5. Plaintiff then filed an Amended Motion for New Trial on or around October 15, 2009, asserting the additional argument that Prospective Juror Helmandollar's education and experience on a central issue in the case should have led the trial court to disqualify him for cause. *Plaintiff's Amended Mtn for New Trial, October 15, 2009*, ¶5.

Defendant opposed the Plaintiff's Motion for New Trial on or around October 13, 2009, pointing out to the Court that the Plaintiff had mischaracterized comments made by Juror Helmandollar during *voir dire*, and that Plaintiff failed to raise any objection regarding prejudicial or biased statements at the time of its motion to excuse Juror Helmandollar for cause, and thus had waived this argument. *Brief In Opp to Pltf Mtn for New Trial*, October 13, 2009, ¶¶3-4, 7. Moreover, Defendant pointed out that Juror Helmandollar had unequivocally stated that he could set his personal experiences aside, and would listen to the evidence and the instructions given by the Court. *Id.* at ¶6. Thus, Mr. Helmandollar was qualified to sit on the jury and the court's refusal to excuse him for cause did not justify the grant of a new trial.

Judge Rudolph J. Murensky of the Wyoming County Circuit Court denied Plaintiff's Motion for New Trial by Order dated September 22, 2010, on the basis that Mr. Helmandollar had stated "[w]ithout hesitation or qualification" that he could serve on the jury without bias or prejudice. *Order*, September 22, 2010. The present Petition for Appeal was filed on or around January 20, 2011 and received by Respondent on or around January 24, 2011.

IV. SUMMARY OF THE ARGUMENT

The Honorable Rudolph J. Murensky's Order dated September 22, 2010 denying Plaintiff's Amended Motion for a New Trial should be affirmed by this Court. Prospective Juror Helmandollar made no statements during *voir dire* reflecting prejudice or bias. Moreover, Mr. Helmandollar clearly and unequivocally stated that he could listen to the evidence and follow the instructions of the Court. Furthermore, while Petitioner claims that the prospective juror offered opinions contradictory to Plaintiff's expert's opinions on a central issue of the case, Petitioner's characterization of the prospective juror's statements as "opinions" is an exaggeration that is easily uncovered through a reading of the *voir dire* transcript. Additionally, the statements made

by Mr. Helmandollar did not contradict the opinions offered by Plaintiff's expert, and were not brought to the attention of the trial court at the time Plaintiff made its motion to excuse Mr. Helmandollar for cause.

Petitioner's Brief requests a drastic departure from West Virginia law with respect to when a juror must be disqualified from sitting on a jury for cause. Petitioner contends that Prospective Juror Robert Helmandollar should have been excluded for cause due mainly to his professional background and expertise. Petitioner's argument is based entirely on a position taken by the author of a law review article, and does not address the current state of the law in West Virginia, or the current state of the law in any other jurisdiction. Contrary to Petitioner's contention, professional expertise is not enough to disqualify a juror for cause. To so rule would be to reverse the direction of modern jurisprudence, which has allowed for more professionals to sit on juries in order to balance out the jury pool and to avoid the disproportionate impact of jury service on non-professionals. In fact, the weight of authority demonstrates that when confronted with a juror with professional expertise, courts employ the normal analytical framework for determining when a juror must be dismissed due to impartiality, by first examining whether the juror made any statements revealing the existence of bias or prejudice toward one side or the other. As Mr. Helmandollar made no such statements, the trial court's determination that he was qualified to serve on the jury should be affirmed.

Moreover, Petitioner's approach is entirely unworkable. Courts cannot be required to investigate a prospective juror's professional background beyond the point of confirming that the juror has no bias or prejudice affecting the ability of the juror to listen to the evidence and apply the law. This Honorable Court has already developed a framework by which a prospective juror's bias and/or prejudice can be evaluated, regardless of how those prejudices or biases were

formed. As Judge Murensky properly followed that framework, his determination that Mr. Helmandollar was qualified to serve as a juror should not be reversed.

V. **ARGUMENT**

A. **Juror Helmandollar Made No “Clear Statement” Of Bias Or Prejudice, And Unequivocally Stated That He Could Listen To The Evidence And Apply The Law, Disregarding Any Prior Training Or Background.**

Under West Virginia law, and under case law in other jurisdictions, it is indisputable that a potential juror must first express some bias and/or prejudice prior to being excused for cause. An examination of the trial transcripts clearly demonstrates that Mr. Helmandollar never expressed the bias and/or prejudice that Petitioner alleges. Even if Mr. Helmandollar’s responses to *voir dire* questioning *had* revealed the existence of potential bias and/or prejudice, which Respondent expressly denies, Mr. Helmandollar’s later unequivocal statement that he could listen to the evidence and properly apply the law, qualified him to fulfill his duty as a member of the community to sit on a jury. Thus, the trial court committed no error in refusing Plaintiff’s motion to strike Mr. Helmandollar for cause.

West Virginia Code §56-6-12 entitles parties to a civil action to impartial jurors, specifically providing as follows:

Either party in any action or suit may, and the court shall on motion of such party, examine on oath any person who is called as a juror therein, to know whether he is a qualified juror, or is related to either party, or has any interest in the cause, or is sensible of any bias or prejudice therein; and the party objecting to the juror may introduce any other competent evidence in support of the objection; and if it shall appear to the court that such person is not a qualified juror or does not stand indifferent in the cause, another shall be called and placed in his stead for the trial of that cause.

W. Va. Code §56-6-12

This Court has consistently explained that it “defer[s] to a trial judge’s ruling regarding the qualifications of jurors because the trial judge is able to personally observe the juror’s

demeanor, assess his/her credibility, and inquire further to determine the juror's bias and/or prejudice." *Black v. CSX Transp. Inc.*, 220 W. Va. 623, 627, 648 S.E.2d 610, 614 (2007). An appellate court should interfere with a trial court's discretionary ruling on this issue "**only when it is left with a clear and definite impression that a prospective juror would be unable faithfully and impartially to apply the law.**" (emphasis added) *State v. Miller*, 197 W. Va. 588, 476 S.E.2d 535 (1996). A reversal is only warranted "where actual prejudice is demonstrated." *Id.* at 605.

This Court has cited to *Compton v. Henrie*, 364 S.W.2d 179, 182 (Tex. 1963), to define the terms "bias" and "prejudice" in the context of empanelling a jury:

Bias, in its usual meaning, is an inclination toward one side of an issue rather than to the other, but to disqualify, it must appear that the state of mind of the juror leads to the natural inference that he will not or did not act with impartiality. Prejudice is more easily defined, for it means prejudgment and consequently embraces bias; the converse is not true. *Macek v. Jones*, 222 W. Va. 702, f.n. 4, citing *Compton*, supra.

"Actual bias" of a juror can be shown by a juror's own admission of bias, or by proof of specific facts which show the juror has such prejudice or connection with the parties at trial that bias is presumed. *State v. Miller*, 197 W. Va. 588, syl. pt. 5, 476 S.E.2d 535 (1996).

This Court has set forth a well-defined methodology that trial courts must use to determine whether removal of a juror is necessary, stating that a trial court "must find from all of the facts that the juror will be impartial and fair and not be biased consciously or subconsciously." *Macek v. Jones*, 222 W. Va. 702, 706 (2008), quoting *West Virginia Dept. of Highways v. Fisher*, 170 W. Va. 7, 289 S.E.2d 213 (1982) cert. denied, *Fisher v. West Virginia Dep't. of Highways*, 459 U.S. 944, 103 S. Ct. 257, 74 L.Ed. 2d 201 (1982).

While this Honorable Court has warned against trial court's relying on "rehabilitation" as a method of qualifying prospective jurors who have already made biased or prejudicial

statements, this Honorable Court has expressly characterized the procedure described in *O'Dell v. Miller*, 211 W. Va. 285, 565 S.E.2d 407 (2002), as embodying the “better view” relating to the rehabilitation of jurors. See *Macek*, 222 W. Va. at 707. Under *O'Dell*, supra, it is only when the prospective juror has made a “**clear statement**” reflecting prejudice or bias that the juror must be removed without opportunity for rehabilitation. *Macek*, 22 W. Va. at 707. However, if a prospective juror makes only “an inconclusive or vague statement” that indicates the mere *possibility* of a disqualifying bias or prejudice, “further probing into the facts and background related to such bias or prejudice is required.” *Id.*

This method has been applied in several different scenarios that demonstrate that the trial court in the case *sub judice* properly followed the law, and that the judgment of the trial court in the case *sub judice* must be affirmed.

In *Macek v. Jones*, 222 W. Va. 702, 671 S.E.2d 707 (2008), the jury had returned a verdict in favor of a physician, Dr. Jones, in a medical malpractice action. *Id.* at 705. Appellants contended that the trial court erred in failing to strike prospective jurors David Andrew George and Glen Stolburg for cause. *Id.* at 704. Mr. George had explained during *voir dire* that he personally knew a physician who had lost a million dollar negligence suit, and felt sorry for him. *Id.* at 704. He acknowledged that while he would try to be fair, he “couldn’t just wipe it clean from [his] memory.” *Id.* at 705. He also expressed the opinion that “some lawyers take advantage of what become frivolous cases and the premiums doctors have to pay skyrocket and it drives some of them out of the state***” *Id.* at 710. He expressed sympathy for his own physician due to this difficulty. *Id.* Potential juror Glen Stolburg worked as a district sales manager for a newspaper that had extensively covered the issue of the state’s medical malpractice “crisis.” *Id.* at 705. *Voir dire* revealed that Mr. Stolburg was aware of the

newspaper's extensive coverage, aware of a strike by area physicians, aware of physician discontent with insurance premiums, and aware of the desire by physicians to seek a cap on damages. *Id.*

However, upon examination of the *voir dire* transcripts, the Court found that neither juror had made "clear statements" of bias and prejudice. Thus, the trial court was correct in allowing further questioning of the prospective juror relating to the juror's ability to lay aside any personal feelings and fairly apply the law. Mr. George then "specifically indicated that he would be persuaded by the evidence itself and the manner in which it was presented." *Id.* at 708. Mr. George also stated "unequivocally that he would follow the trial court's instructions." *Id.* Thus, Mr. George was "an unprejudiced potential juror willing to follow the trial court's directives." *Id.* Similarly, further questioning revealed that Mr. Stolburg's employment did not preclude him from serving impartially and fairly as a juror in the case. *Id.* at 708.

Like the prospective jurors in *Macek*, Mr. Helmandollar did not make any "clear statements" reflecting bias or prejudice on his part. He did not state in any way, shape or form, that he would favor one side or another. He did not state any opinion as to whether the job procedures and protocols he had witnessed during his professional experiences constituted "best practices" or "industry standards." In fact, what Petitioner characterizes as "opinions" expressed by Mr. Helmandollar, are more accurately characterized as mere descriptions of Mr. Helmandollar's job experiences. Not once did Mr. Helmandollar state that he would favor one side or the other. Not once did Mr. Helmandollar indicate that the failure of Plaintiff to use safety gloves led Mr. Helmandollar to conclude that Plaintiff was to blame for his injuries. Mr. Helmandollar's statements did not reveal any relationships with any of the parties to the litigation that would have given rise to an appearance of bias. Mr. Helmandollar's statements

did not reveal any tendency by Mr. Helmandollar to discount any particular expert's opinions relating to any pertinent issue in the litigation. Mr. Helmandollar's only "flaw" as a juror, according to Petitioner, appears to be his professional and educational background. Petitioner has failed to point to any case law in any jurisdiction that has held that a prospective juror's professional and educational background alone can disqualify him from the jury.

As Mr. Helmandollar made no "clear statement" of bias or prejudice, the trial court was correct not to dismiss Mr. Helmandollar for cause. However, even if Mr. Helmandollar's statements are characterized as "inconclusive or vague" statements indicating the *possibility* of prejudice or bias, which Respondent does not concede, the trial court properly applied the *O'Dell* framework by allowing further questioning of Mr. Helmandollar. The further questioning revealed that Mr. Helmandollar would not be made uncomfortable if asked to lay aside any aspect of his own training in order to listen only to the expert opinions presented at trial. It also revealed that Mr. Helmandollar did not work for any of the parties to the litigation. Further questioning by counsel also revealed that Mr. Helmandollar would not have any problem putting his personal experiences aside. Moreover, Mr. Helmandollar unequivocally affirmed that he would limit his decisions based on the evidence presented in the case and the instructions given by the Court.

In contrast, in *Black v. CSX Transportation, Inc.*, 220 W. Va. 623, 648 S.E. 2d 610 (2007), this Court demonstrated when a prospective juror must be dismissed for cause upon application of the *O'Dell* framework. The *Black* case involved an action filed by the estate of an employee exposed to asbestos, and who later died from colon cancer, against his employer, CSX. *Id.* at 623. After a defense verdict, the issue on appeal concerned whether a prospective juror had demonstrated enough bias/prejudice to justify removal for cause. Prospective juror Edward

Polack, M.D., stated that physicians generally do not like trial lawyers and that he had a “personal bias about asbestos.” *Id.* at 625-626. He explained that “a lot of the issues about asbestos are not science, and I’m perfectly willing to listen to the data, but I will have to be convinced predicated on scientific information, not emotional information.” *Id.* at 626. Upon further questioning, Dr. Polack did however state that he would be able to listen to the evidence from witnesses and to the law given at the close of the case. *Id.*

It was the type of “rehabilitation” illustrated in *Black* that was deemed ineffective by this Honorable Court. This Court reasoned that Dr. Polack had repeatedly made “clear statements” of bias against parties claiming to have been injured by exposure to asbestos, and “clear statements” of bias against personal injury lawyers. *Id.* at 629. Because Dr. Polack had made such “clear statements” of bias, the “magic questions” asked by the trial court, to which Dr. Polack responded that he could reach a verdict based upon the evidence from witnesses and the law from the Court, were ineffective. *Id.* This Court found that the trial court should have excused Dr. Polack as a juror for cause. *Id.*

The facts in *Murphy v. Miller*, 222 W. Va. 709 (2008) and *O’Dell*, *supra*, further illustrate just how far afield Mr. Helmandollar’s statements are from statements that have resulted in a required dismissal for cause. In *Murphy*, a medical malpractice action, the trial court erroneously failed to strike a dentist from the jury. The Court found that the dentist exhibited bias and prejudice because he stated (1) a distaste for medical malpractice action; (2) had an adversity toward pain and suffering damages; (3) prejudice based specifically upon his own experience as a defendant in a medical malpractice action brought against him in his capacity as a dentist; and (4) a belief that a medical malpractice action should be based only upon a deliberate act. *Murphy*, 222 W.Va. at 716-717.

Similarly, in *O'Dell*, supra, a prospective juror revealed that he had been treated by the orthopedic specialist who was being sued, was a client of the law firm representing the orthopedic specialist, and was aware of the possible impact which an adverse judgment could have on the orthopedic specialist's ability to practice medicine. *O'Dell*, 211 W.Va. at 287. The Court found that "[w]hile no per se rule bars the sitting of prospective jurors who are patients of a doctor who is a party to the litigation, strong reasons exist for disfavoring the practice of trial courts allowing jurors to remain when the physician-patient relationship exists between a party of the litigation and a prospective juror." *Id.* at 290.

Prospective Juror Helmandollar made no express statements and described no relationships with parties that even remotely resemble any of the statements made by jurors or relationships with parties that have justified dismissals for cause in West Virginia. Mr. Helmandollar made no statement in favor of, or against, individuals who sustained electricity related injuries. He offered no commentary on whether individuals who sustained these injuries were "to blame" for their injuries, or not. He did not make any statements suggesting a mistrust of any particular type of evidence relating to electricity related injuries. He did not make any statements revealing a bias or leaning in favor of Defendant. He did not work for any of the parties in the litigation, or express an opinion about the reputation of the parties to the litigation. In sum, a reading of the *voir dire* transcript demonstrates clearly that Prospective Juror Helmandollar's observations do not even come close to the type of statements that this Court has deemed sufficiently prejudicial and biased to overturn a trial court's determination of a juror's qualification.

B. Prospective Juror Helmandollar Made No Statements That Were Contradictory To The Opinions Expressed By Plaintiff's Expert.

Petitioner argues that Mr. Helmandollar should have been disqualified for cause because Mr. Helmandollar expressed opinions potentially contradictory to Plaintiff's electrical expert. The transcript reveals that Mr. Helmandollar did not express any opinions at all, and certainly did not express any opinions contradictory to the eventual testimony of Plaintiff's electrical expert Roger Bybee. Petitioner fails to explain how any of the statements made by Mr. Helmandollar in *voir dire* contradicted any opinion offered by Mr. Bybee.

Petitioner claims that "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." *Petition for Appeal*, Page 4. However, Petitioner points to no statement by Mr. Helmandollar relating to whether a coal company must disclose the active status of an electrical line prior to independent contractors beginning work.

Additionally, the testimony offered by Mr. Bybee demonstrated that even Plaintiff's expert realized that a coal operator must rely upon its independent contractors to follow safety procedures and protocols, showing that, if anything, Mr. Bybee's opinions were entirely consistent with Mr. Helmandollar's observations relating to safety procedures followed by contractors. See *Trial Transcript, September 10, 2009*, Page 271, 281:11-24.

Moreover, the argument that Mr. Helmandollar expressed "opinions" that contradicted the opinions offered by Plaintiff's expert, Rober Bybee, P.E., was not raised at the time Plaintiff moved to exclude Mr. Helmandollar following *voir dire*. Plaintiff's failure to raise this at a time when the trial court could have cured it is fatal to this argument on appeal.

The transcript demonstrates that Plaintiff moved to excuse Juror Helmandollar for cause following *voir dire*. The relevant exchange clearly shows that Plaintiff only mentioned Mr.

Helmandollar's "education, training and experience" as the basis for Plaintiff's motion to excuse him for cause. *Transcript of Proceedings (Jury Voir Dire), September 9, 2009*, at 165:23 to 166:4. Petitioner now argues that the "education, training and experience" grounds asserted at trial are intertwined with any arguments relating to Mr. Helmandollar's expression of opinions as to an ultimate issue in the case. *Petition for Appeal*, page 8, footnote 4.

However, where a new trial is requested due to alleged disqualification or misconduct of a juror, it must appear that the party requesting the new trial called the attention of the court to the disqualification or misconduct. If the party fails to do so, he or she will be held to have waived all objections to such juror disqualification or misconduct. *Murphy v. Miller*, 222 W.Va. 709, 717 (2008); citing *Hanlon v. Logan Cty. Bd. of Educ.*, 201 W.Va. 305, 315 (1997); *McGlone v. Superior Trucking Co., Inc.*, 178 W.Va. 659 (1987); also see, Syl. Pt. 5 of *Murphy v. Miller*.

Contrary to Petitioner's contention, seeking to remove a prospective juror's stated opinions is very different from seeking to remove a prospective juror based solely upon education, training, and experience. Only Plaintiff could have known if statements made by Mr. Helmandollar would potentially conflict with the opinions of Plaintiff's own expert, and yet Plaintiff failed to alert the trial court to this alleged danger. If Plaintiff desired to point out to the trial court that Mr. Helmandollar had made statements that would potentially conflict with opinions to be offered by Plaintiff's expert, Plaintiff had every opportunity to point to specific statements made by Mr. Helmandollar that posed a problem. The trial court could then have evaluated those particular statements. The trial court could not have been expected to guess as to whether a prospective juror's *voir dire* statements would contradict the opinions of an expert

who had not yet testified, especially when Plaintiff brought only vague concepts such as the potential juror's "education, training, and experience" to the court's attention.

This Honorable Court's recent holding as exemplified in Syllabus Point 5 of *Murphy v. Miller*, supra, further supports the contention that Petitioner waived this issue by failing to call to the attention of the trial court any statements made by Mr. Helmandollar that would potentially contradict the opinions of Plaintiffs' expert. This Court should consistently apply its holding in *Murphy* to the facts of the case *sub judice*, and deny Petitioner's appeal.

Only Plaintiff could have alerted the trial court to this potential conflict, and Plaintiff failed to do so. Plaintiff waived this argument by not raising it at the appropriate time. This failure is fatal to the Petitioner's present appeal.

C. **West Virginia Law Does Not Provide For And Does Not Need A Special Method For Determining The Qualifications Of Prospective Jurors Who Have Professional Backgrounds Related To The Case, As The O'Dell v. Miller Framework Is Sufficient To Ensure A Fair And Impartial Jury.**

In essence, Petitioner would like this Court to carve out a special rule effectively presuming bias on the part of professionals who have expertise related to the issues in a case. Petitioner argues that a juror with relevant professional experience can exert more influence over other jurors and lead the other jurors to disregard the testimony of experts in the case.

This is an assumption based purely on anecdote. In fact, most jurisdictions allow individuals with expert backgrounds to not only sit on juries, but also to use their knowledge when analyzing the evidence, and to discuss this with other jurors, as long as the juror does not inject extrinsic evidence into the jury deliberations. See *Erixson v. Ojeleye*, 35 Kan. App. 2d 72 (Kan. Ct. App. 2006); *Meyer v. State*, 119 Nev. 554, 571-572 (Nev. 2003); *Hard v. Burlington N.R. Co.*, 870 F.2d 1454, 1460-1462 (9th Cir. 1989); *State v. DeMers*, 234 Mont. 273, 762 P.2d 860, 863 (Mont. 1988); *State v. Mann*, 131 N.M. 459, 39 P.3d 124, 127, 132-135 (N.M. 2002);

State v. Heitkemper, 196 Wis. 2d 218, 538 N.W.2d 561, 563-564 (Wis. Ct. App. 1995); *Kendrick v. Pippin*, 222 P.3d 380, 388-389 (Colo. Ct. App. 2009) (“The question before us, therefore, is whether a juror’s pre-existing personal expertise or knowledge of a general nature – that is, not involving historical or otherwise substantive facts in the case – is extraneous information which the juror may not use or communicate to other jurors in the course of deliberations. We conclude, as have almost all courts which have considered the issue, that it is not.”).

Courts in other jurisdictions clearly follow an approach similar to the approach taken by West Virginia, only disqualifying prospective jurors with professional backgrounds and expertise when the juror makes statements reflecting bias and/or prejudice, or expressly states that his/her expertise prevents them from following the instructions given by the court. The comments made by jurors who have been excluded in these cases are illustrative of the burden that Petitioner has failed to meet in this case.

For instance, in *Hooks v. Workman*, 693 F. Supp. 2d 1280, 1301-1303 (D. Okla. 2010), the Court upheld a dismissal for cause when the potential juror expressly stated she would not be able to disregard a clinical definition that she had learned through her professional work and training. *Id.* at 1302. The exchange during *voir dire* revealed clearly and unequivocally that the juror would not be able to follow the law:

THE COURT: Okay. And do you understand there may be a clinical definition and there may be a legal definition and they may or may not conflict?

PROSPECTIVE JUROR: That is right.

THE COURT: But your duty, as a juror –

PROSPECTIVE JUROR: Yes.

THE COURT: -- would be to follow the legal definition in this case. If I give you that definition in the jury instructions, can you follow that definition?

PROSPECTIVE JUROR: If they're not the same, no.

Id. at 1301-1302.

Similarly, in *People v. Luman*, 994 P.2d 432, 435 (Colo. Ct. App. 1999), the appellate court held that a potential juror in a sexual assault criminal case who was an unlicensed psychotherapist specializing in treating victims of abuse was required to be dismissed for cause. The juror had stated that her opinions, formed through her professional and personal background, would prevent her from being impartial. The relevant exchange that led to the appellate court's decision was:

THE COURT: Do you think you could be fair? What were you thinking of?

JUROR: What I was thinking of was that in my family there is a history of sexual abuse in my family, and working a lot with people who have been sexually abused or assaulted, **I think I have opinions or thoughts that probably would keep me from being very unbiased.**

Id. at 435 (emphasis added).

Significantly, the appellate court did not focus on the extent of her professional background, but focused instead on her answers to *voir dire* that demonstrated that she remained unsure of her ability to remain impartial in light of her professional and personal experience. See *id.* at 436.

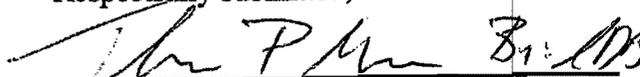
Petitioner argues that the professional juror poses a danger in civil cases as the juror with a professional background relevant to an issue in the case can exert undue influence on the other jurors. However, petitioner fails to explain why the current *O'Dell* framework is not sufficient to prevent the seating of jurors who are biased and/or prejudiced regardless of why or how those biases and prejudices formed. Under the *O'Dell* framework, all potential jurors, regardless of any personal experiences or professional experiences that touch and concern issues in the case, must demonstrate an ability to listen to the evidence and follow the law before being qualified to sit on a jury. Petitioner points to no rationale for modifying this framework.

Moreover, Petitioner's approach is entirely unworkable. Courts cannot be required to investigate a prospective juror's professional background beyond the point of confirming that the juror has no bias or prejudice affecting the ability of the juror to listen to the evidence and apply the law. The operative and relevant inquiry for determining whether a juror can be fair and impartial, is not *how* the juror's biases and prejudices were formed, but rather whether the biases and prejudices exist, and further whether they will prevent a juror from listening to evidence and following the court's instructions. The *O'Dell* framework is sufficient to prevent trial courts from seating jurors with prejudice and/or bias on civil juries. The trial court in the case *sub judice*, in fact, followed the *O'Dell* framework. Mr. Helmandollar demonstrated he could fairly and impartially listen to the evidence and apply the law. Thus, the decision of the trial court should be affirmed.

VI. CONCLUSION

Petitioner's attempt to overturn the jury verdict by arguing that Mr. Helmandollar might have exerted undue influence over a jury due to his bachelor's degree in electrical engineering must fail. Petitioner has not pointed to any statements by Mr. Helmandollar expressing any bias or prejudice against one side or the other. Moreover, Petitioner fails to point to any portion of the trial transcript whereby Plaintiff's expert expressed any opinions that were contradictory to the observations made by Mr. Helmandollar during *voir dire*. The transcripts demonstrate conclusively that Petitioner has not even come close to demonstrating any implied or actual bias or prejudice on the part of Mr. Helmandollar that required the trial court to dismiss him for cause. In light of the clear weight of authority contrary to Petitioner's position, in West Virginia and across the country, the Petition for Appeal should be denied.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BOBBY J. MESSER, and
His wife, AMANDA MESSER,

Petitioners, Plaintiffs Below,

v.

Civil Action No.: 06-C-182
(Wyoming County)

HAMPDEN COAL COMPANY, LLC,

Respondents, Defendant Below.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February, 2011, true and accurate copies of the foregoing *Respondent, Hampden Coal Company, LLC'S Response In Opposition To Petition For Appeal Filed By Petitioners, Bobby J. Messer, And His Wife, Amanda Messer* were deposited in the U.S. Mail contained in postage-paid envelopes addressed to the following interested parties:

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EXHIBIT A

IN THE CIRCUIT COURT OF WYOMING COUNTY
WEST VIRGINIA

BOBBY J. MESSER and
his wife, AMANDA MESSER,

Plaintiffs,

vs.

CIVIL ACTION
NO. 06-C-182

ELECTRIC LINE COMPANY, INC.,
et al,

Defendants.

VOLUME II

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 10th day of September, 2009.

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I N D E X

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2				
3		Plaintiff's Witness	Direct Cross	Redirect Recross
4		Jimmy Clay	93 134	171 176
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A. Yes, I do.

Q. And what is that opinion?

A. They were not.

Q. Do you have an opinion within reasonable degree of electrical engineering certainty as to whether Hampden Coal Company breached its duty and responsibility to meet and inform outside contractor Electric Line of the change in the hazards since Electric Line last worked at Hampden Coal Company?

A. Yes, I do.

MR. AWADALLAH: Objection, your Honor.

He's asking the witness for an expert -- excuse me, for a legal conclusion here.

THE COURT: I'll overrule it.

Q. Do you want me to repeat the question?

A. Yes, sir.

Q. Do you have an opinion within reasonable degree of electrical engineering certainty as to whether Hampden Coal Company breached its duty and responsibility to meet and inform outside contractor Electric Line of the changes in the hazards since Electric Line had last worked at Hampden Coal Company?

A. Yes, I do.

1 Q. And what is that opinion?

2 A. They did not meet their responsibilities.

3 Q. The last opinion before we go back - I want
4 to cover this - do you have an opinion within a
5 reasonable degree of electrical engineering
6 certainty as to whether Hampden Coal Company could
7 delegate, transfer responsibility or contract out
8 their responsibility to comply with the minimum
9 acceptable good engineering standards and practices?

10 MR. AWADALLAH: Objection, your Honor, same
11 basis.

12 THE COURT: Overruled.

13 A. I have an opinion.

14 Q. And what is that opinion?

15 A. They could not transfer their
16 responsibilities.

17 Q. Okay. Now, you told us that you believed
18 Hampden Coal - and you had an opinion within
19 reasonable certainty - was the operator of the
20 electrical supply facilities which injured Bobby
21 Messer, and you said you do, and they did. Why?

22 A. The reason that they are the owner and
23 operator - because it's both things, operating in
24 this case - is that the owner/operator is the person

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that equipment.

A. Not to people who are not otherwise qualified to --

Q. I understand.

A. -- approach it. Rubber gloves and all the equipment and stuff like that do not make an unqualified person qualified.

Q. And I'm not trying to say that. What I'm trying to say is: Hampden wasn't supposed to give Tad Gilliam insulated gloves, were they?

A. No.

Q. Unless he asked if he didn't have his.

A. I think Hampden has the right to rely on the contractors that they hire, that they are properly qualified to do the work that they've been hired to do.

Q. Okay.

A. And I think that -- no, I'll just leave it at that.

Q. To bring back something we talked about earlier, there's no doubt that it was the responsibility of Tad Gilliam and Rectron to make sure that this line was de-energized at the Browning Fork branch.

1 **Q. Regardless of whether someone at Hampden**
2 **Coal says the line is energized or de-energized,**
3 **Mr. Gilliam has the duty and responsibility to check**
4 **the line.**

5 A. That's -- where we're talking about the
6 NFPA 70E, that's different than what we're talking
7 about.

8 **Q. I'm not asking you about NFPA 70E. I'm**
9 **asking you about whether you said --**

10 A. Yes.

11 **Q. -- when Tad Gilliam and his company were**
12 **still defendants in this case that they had the**
13 **responsibility - regardless of what Hampden Coal did**
14 **or didn't tell them - to check the line.**

15 A. That's correct, that Tad Gilliam had. And
16 I maintain that today. They're not in the case.

17 **Q. That's because they should have been aware**
18 **of the -- or at least Tad Gilliam should have been**
19 **aware of the dangers of his employees working on**
20 **energized lines, right?**

21 A. That's why he's a qualified person. He has
22 the training -- the education, training and
23 experience to be aware of the hazards, and he has a
24 duty to provide a safe work space for his employees.