

FILED

July 20, 2000

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., dissenting:

RELEASED

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I dissent to the majority opinion's refusal to allow the plaintiff to present to the jury evidence regarding defendant Linda Grim's morphine addiction, and evidence that she had been disciplined for her addiction, and was working pursuant to a consent agreement on the day that Ms. Taylor received her injuries in the hospital. The plaintiff presented evidence suggesting that Nurse Grim was acting unusual and confused when she gave Ms. Taylor a shot of Benadryl and Solu-Medrol. There was evidence that Nurse Grim even tried to give a person other than the plaintiff the shot. The nurse dropped the needle on the floor before giving the shot, and the plaintiff contends the needle was uncapped when this occurred. The nurse also wrote in the plaintiff's chart that she administered the shot to the left buttock -- the plaintiff contends that the drugs were injected in her right buttock. There was also controversy as to whether the nurse improperly mixed the two drugs.

Nurse Grim at some time during her career had abused morphine for 6 to 8 years, and did so around patients. An expert witness testified that her actions around the plaintiff at the time of the plaintiff's injury were consistent with someone who was actually using morphine. We know that there was some truth to Nurse Grim's habit because Nurse Grim, the West Virginia State Board of Examiners for Registered Professional Nurses, and Cabell Huntington Hospital had entered into a consent agreement such that the Hospital would not allow Nurse Grim to work in an "autonomous nursing position" and that she

would work “only under the direct supervision of a Registered Professional Nurse in a structured setting.” Nurse Grim was working alone at the time she injected the plaintiff.

If this had been a criminal case, the majority would have held the evidence of Nurse Grim’s past actions as admissible under *W.V.R.E.* Rule 404(b) faster than a New York minute. But since this is a civil case, where only compensation to an injured hospital patron and not the conviction of a criminal defendant is on the line, the majority opinion gives the evidence a protracted relevancy analysis. The majority concludes that past evidence of drug use by the defendant on the job is not indicative of current drug use.

I believe that the jury had the right to weigh *all* of the evidence, including whether the defendant was under the effect of drugs. Certainly, the jury was entitled to know that Nurse Grim was working under a disciplinary consent agreement, and that she was working unsupervised in violation of the agreement.

I therefore dissent.