No. 27663 -- Pamela S. Pleasants as Administratrix of the Estate of Jennifer Lynn Pleasants, deceased v. Alliance Corporation, a West Virginia corporation

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Starcher, J., concurring in part and dissenting in part:

I concur with the majority's recognition, in Syllabus Point 5, that the giving of a "mistake of judgment" instruction in a medical malpractice case -- or any case -- is fertile ground for jury confusion. A juror's attention should be focused on the essential elements of the action: did the defendant doctor owe the plaintiff a duty of due care, and did the defendant breach that duty? The question "did the doctor make an honest mistake?" wrongly adds subjectivity to what is supposed to be an objective duty of care.

The instruction also suggests that a lesser duty of care exists for medical providers. While the average citizen can be held liable for not being careful under the given circumstances, a "mistake of judgment" instruction implies that a doctor's conduct could be excused if the doctor made an "honest mistake." A juror could infer from the instruction that a doctor can only be held liable for making a "dishonest" mistake -- which I guess would mean making a mistake and then lying about it -- or for intentionally harming the patient.

If a driver "honestly" just didn't see that a stoplight was red because he was adjusting the radio and drove through the light, hitting another car and injuring its occupants, and the driver admits that "whoops, I made a mistake," should we excuse the driver's carelessness? Should we excuse the driver's judgment call to adjust the radio knob rather than watch the road? Of course not. The driver's "mistake of judgment" in not paying attention to traffic signals cannot absolve the driver for any liability. This same

rule should apply to the medical profession. I therefore concur in the majority opinion's rejection of the "mistake of judgment" instruction in Syllabus Point 5.

That being said, I dissent to the remainder of the majority's opinion.

The jury panel in this case was composed of seven females and eight males. The circuit court removed one female for cause. The defendant in this case exercised his peremptory strikes to remove five of the remaining six women on the jury panel, thereby virtually guaranteeing an all-male jury. The plaintiff correctly characterized this situation as "fishy."

But the majority opinion focused on our holding in Syllabus Point 1 of *Parham v. Horace Mann Ins. Co.*, 200 W.Va. 609, 490 S.E.2d 696 (1997) where we stated that the reasons given by a party for exercising a peremptory strike must only be "facially valid" and "need not be persuasive or plausible." I believe that this statement of law is constitutionally incorrect. The United States Supreme Court has specifically held that, when examining gender-based juror challenges, a party's explanation of a juror challenge "must be based on a juror characteristic other than gender, and the proffered explanation may not be pretextual." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 145 (1994). In other words, the reasons given for a strike cannot be a pretext for discrimination, and must be plausible. If the reasons given by a party regarding a strike are a pretext for gender discrimination, then the trial judge should reject the party's explanation and go no further in determining whether "the opponent of the strike has carried his burden of proving purposeful discrimination."

"Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where . . . the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women." *J.E.B.*, 511 U.S. at

131. Dismissing a female juror because it is perceived that "she would not be a strong juror" or that she might not "gain an appreciation of some of the medical issues involved in this case" appears to ratify and perpetuate archaic, overbroad stereotypes about women. Such discrimination in jury selection "causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process." 511 U.S. at 127. I believe that the circuit court, by condoning the use of pretextual reasons for striking jurors, and this Court in sustaining that practice, has upheld discrimination harmful to the administration of justice in this State.

I also believe that the circuit court was wrong in refusing to hold a hearing to determine whether the jury foreman responded falsely to questions asked during *voir dire*. The jury panel was asked if any juror was involved in claims adjustment. The jury foreman had previously worked as an accident investigator and claims adjuster for UPS, but did not respond to the question.

We held in Syllabus Point 2 of *West Virginia Human Rights Comm'n v. Tenpin Lounge, Inc.*, 158 W.Va. 349, 211 S.E.2d 349 (1975) that when a party alleges that a juror falsely answered a material question on *voir dire*, and when a party requests a hearing to determine the truth or falsity of the allegation, "it is reversible error for the trial court to refuse such hearing." This holding is quite simple -- once a party makes an allegation and requests a hearing, all the circuit court needs to do is take 5 minutes, take the juror aside in chambers, and ask the juror a few questions to determine whether false statements were made.

The majority opinion takes this simple process and cobbles it up by apparently deciding that a juror's occupation, or former occupation in this case, is not a "material question" during *voir dire*. The majority opinion also reads into our holding in *Tenpin Lounge* a requirement of a "factual predicate

of a falsely answered material question" before a trial judge must hold a hearing on whether a juror falsely answered a material question. The circular impossibility of this requirement is obvious: a party often cannot absolutely show a question was falsely answered without a hearing, and under the majority's reasoning, cannot get a hearing without showing a question was falsely answered. (Which, of course, begs the next question: why is a hearing needed if a party can prove a question was falsely answered?)

Because the composition of the jury in this case was fundamentally unfair, I must dissent to the majority opinion. By allowing the jury foreman to apparently falsely answer questions regarding his occupation -- an occupation that would have likely caused the plaintiff to strike him from the jury -- while simultaneously allowing the defendant to strike women from the jury panel, the circuit court tarnished the jury's verdict in this case, and impaired the impartial appearance that the court system must project in our democratic system. This case should have been reversed and remanded for a new trial -- one with a fair, constitutionally sound jury.

In conclusion, I concur with the majority opinion's rejection of the special "mistake of judgment" instruction for the medical profession. I otherwise respectfully dissent, because the parties were deprived of a fair, impartial jury.