

No. 29291 -- Laurel Proudfoot v. Dan's Marine Service, Inc., a West Virginia corporation, and Shore-Masters, Inc., a Minnesota corporation

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Starcher, J., concurring:

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OF WEST VIRGINIA

I concur with the majority opinion in the instant case -- if a juror has a prior felony conviction and conceals that conviction from the parties during *voir dire*, the jury's subsequent verdict is suspect and must be set aside.

I am troubled, however, by fact that this case does not comport with our recent case law regarding flaws in the composition of a jury. The result is that money and property are receiving more protection than the right of a citizen to liberty and freedom.

In *State v. Lightner*, 205 W.Va. 657, 520 S.E.2d 654 (1999), we held that it was *not* reversible error for a circuit court to allow an alternate, thirteenth juror to participate and vote with the regular jury panel in a criminal case. We specifically rejected a *per se* rule, one that would require automatic reversal, and adopted a discretionary rule for the following reason: "Each case must be decided on its own unique set of facts." 205 W.Va. at 660, 520 S.E.2d at 657.

The instant case adopts, for purposes of civil cases, a *per se* rule and rejects any consideration of a case's unique set of facts.

As I read the majority's opinion, we have created competing rules for juries in criminal and civil cases which are backwards. In civil cases, such as the one at bar, we should require a party to demonstrate that a problem with a juror caused prejudice before a verdict will be set aside -- and not have

a *per se* rule as adopted by the majority opinion. Conversely, in criminal cases, where the liberty interests of people are at stake, a *per se* rule for addressing problems with jurors should be adopted.

Reading the majority's opinion together with *State v. Lightner*, the average citizen can only conclude that this Court is willing to protect, through absolute rules, the pocketbooks of defendants from injured plaintiffs, but is not willing to protect a criminal defendant's right to be considered innocent until found guilty by an impartial jury of his peers. I do not believe this is the message this Court should be sending to the public.

I also believe that the majority's opinion may lead to substantial, post-trial litigation over juror qualifications. Another message that can be divined from the majority opinion is that, if a defendant is hit with a major monetary verdict, every aspect of every juror's life should be scrutinized. Under the majority's opinion, any misstep in a juror's past could become fodder to reverse a hard-fought jury verdict. I do not believe the majority intended this outcome.

I agree with the majority's opinion with some trepidation. However, while the majority's opinion is a sound interpretation of our statutes, I believe that this Court's pronouncements, regarding how courts should address flaws in the composition of a jury, should be readdressed and clarified.

I therefore respectfully concur. I am authorized to state that Justice Albright joins in this concurrence.