No. 29776 -- Samuel R. O'Dell and Eva O'Dell v. Gary W. Miller, M.D., and First Settlement Orthopaedics, Inc., an Ohio corporation

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Maynard, Justice, dissenting:

I believe that the majority's flawed analysis in this case has resulted in an improper and unnecessary reversal of a perfectly valid jury verdict.

The majority incorrectly concludes that "Mr. O'Dell was denied his constitutional right not only to a fair and unbiased jury, but to a jury free from the suspicion of prejudice." There are several things wrong with this statement. First, Mr. O'Dell clearly was *not* denied his constitutional right to a fair and unbiased jury because the challenged juror was not a member of the jury which rendered the verdict. As noted in the majority opinion, Mr. O'Dell used a peremptory strike to remove the challenged juror.

Second, there is no constitutional right to exercise peremptory challenges in civil cases. *Riddle v. Bickford,* 785 So.2d 795, 799 (La. 2001).[1] Instead, in West Virginia, "[t]he right to peremptory challenges is conferred by statute[.]" (Citations omitted). *Tawney v. Kirkhart,* 130 W.Va. 550, 561, 44 S.E.2d 634, 641 (1947), *superseded by statute on other*

[1]Also, the right to exercise peremptory challenges in civil cases was unknown to the common law. *Morris v. Cartwright,* 57 N.M. 328, 331, 258 P.2d 719, 721 (1953).

grounds as stated in Bennett v. Buckner, 150 W.Va. 648, 149 S.E.2d 201 (1966). Interestingly, this statute is quoted by the majority *with the portion of the statute guaranteeing peremptory challenges omitted.* According to the last line of W.Va. Code § 56-6-12 (1923), "[a]nd in every case, unless it be otherwise specially provided by law, the plaintiff and defendant may each challenge four jurors peremptorily." *See also* West Virginia Rule of Civil Procedure 47(b). Therefore, at worst, Mr. O'Dell was denied his *statutory* right to exercise peremptory strikes from a jury panel free from bias and prejudice. However, for the reason stated below, I do not believe that this is true either.

The majority opinion simply presumes without discussion that the fact that Mr. O'Dell used a peremptory strike to remove the challenged juror is of no consequence to the Court's decision. This presumption apparently is based on dicta found in our case law. In the recent case of *Doe v. Wal-Mart Stores, Inc.*, 210 W.Va. 664, 671, 558 S.E.2d 663, 670 (2001), the Court opined, "The fact that Ms. Doe eventually struck the juror is of no consequence. Ms. Doe was entitled to exercise her peremptory strikes from a jury panel consisting of qualified, impartial and unbiased jurors." In support of this dubious proposition, the Court cited *Davis v. Wang,* 184 W.Va. 222, 226 n. 7, 400 S.E.2d 230, 234 n. 7 (1990), *overruled on other grounds by Pleasants v. Alliance Corp.,* 209 W.Va. 39, 543 S.E.2d 320 (2000). In footnote 7 of *Davis,* the Court asserted, "We have noted that the fact that the jurors in question were eventually removed from the jury panel by the use of peremptory strikes is not relevant to the decision." As its basis for this claim, the *Davis* Court cited *State v.*

Bennett, 181 W.Va. 269, 272, 382 S.E.2d 322, 325 (1989), and *State v. Wilcox,* 169 W.Va. 142, 286 S.E.2d 257, 258-59(1982).

The problem with the Court's reliance in *Davis* on *State v. Bennett* and *State v. Wilcox* is that *Bennett* and *Wilcox* are *criminal* cases specifically governed by W.Va. Code § 62-3-3 (1949) which provides in pertinent part:

> *In a case of felony,* twenty jurors shall be drawn from those in attendance for the trial of the accused. If a sufficient number of jurors for such panel cannot be procured in this way, the court shall order others to be forthwith summoned and selected, until a panel of twenty jurors, *free from exception,* be completed, from which panel the accused may strike off six jurors and the prosecuting attorney may strike off two jurors. (Emphasis added).

Because of the statute's specific mandate that peremptory strikes not occur until a panel of twenty jurors *free from exception* is completed, this Court has held:

> The language of W.Va. Code, 62-3-3 (1949), grants a defendant the specific right to reserve his or her peremptory challenges until an unbiased jury panel is assembled. Consequently, if a defendant validly challenges a prospective juror for cause and the trial court fails to remove the juror, reversible error results even if a defendant subsequently uses his peremptory challenge to correct the trial court's error.

Syllabus Point 8, *State v. Phillips,* 194 W.Va. 569, 461 S.E.2d 75 (1995). Therefore, this Court's rule in criminal cases that a peremptory strike does not cure the trial court's failure to remove an unqualified juror during voir dire is based on the specific language of W.Va. Code

§ 62-3-3 which is inapplicable to civil cases. In addition, there is no analogous statutory provision guaranteeing peremptory strikes from a panel free from exception in civil cases. Accordingly, there is no statutory basis for the assertion, first articulated in a footnote in *Davis,* repeated as law in *Doe,* and presumptuously used in the instant case to automatically reverse a verdict in a civil trial, that a party in a civil case is entitled to exercise his or her peremptory strikes from a jury panel consisting of only qualified, impartial and unbiased jurors.

However, even if the majority's legal analysis were correct, I do not believe that the trial court abused its discretion in failing to remove the challenged juror for cause. In criminal cases, this Court has not demanded the automatic disqualification of a prospective juror merely because of a consanguineal, marital or social relationship with an employee of a law enforcement agency who is actively involved in the prosecution of the case. For example, in *State v. Wade,* 174 W.Va. 381, 327 S.E.2d 142 (1985), this Court found no error where the circuit court refused to dismiss prospective jurors who knew the prosecuting attorney and a State witness. The facts of the instant case, where the juror at issue was a *former* patient of Dr. Miller and a client of the law firm representing Dr. Miller, mere business associations, raise much less concern of bias and prejudice than the facts in *Wade.*

In conclusion, I believe that the circuit court did not abuse its discretion in failing to strike the challenged juror for cause. However, for the reasons stated above, even

if the circuit court's failure to strike the juror constituted error, it was cured by Mr. O'Dell's use of a peremptory strike to remove the juror. Therefore, I would affirm the verdict below. Accordingly, I dissent.