No. 30846 *Jessie L. Graham v. David A. Wallace, D.D.S., M.S.*

Starcher, C. J., dissenting:

FILED
May 7, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

I dissent to the majority decision.

After the first trial of this case, a 3-2 majority of this Court reversed the first jury's verdict – which was for the patient, Mr. Graham.

The majority of this Court, in the first case, said that the oral surgeon, Dr. Wallace, did not get a fair chance to call rebuttal witnesses to counter a last-minute suggestion that Dr. Wallace had possibly manufactured documents. These documents related to when Dr. Wallace contacted Mr. Graham after the TMJ implants were recalled by the manufacturer. So the majority in the first case ordered a second trial.

I dissented to that decision, because Dr. Wallace explained the document issue to the jury, and I agreed with the trial judge that the jury had enough evidence to decide what did or did not happen about the documents.

I noted in my dissent in the first case that in trials, people are *always* claiming they need to put on rebuttal witnesses, basically so that they can get "the last word." But our law is that it is almost entirely up to a trial judge's discretion to deal with these rebuttal requests. In twenty years as a trial judge, I very rarely allowed rebuttal witnesses.

In other words, I thought the first trial was a fair trial, and the majority made a mistake to reverse a proper jury verdict.

Now, after a second trial, a second jury heard basically the same evidence – and ruled this

time for the oral surgeon, Dr. Wallace. And again, I find myself dissenting. This time I again dissent to a 3-2 majority decision to reverse the second jury's verdict, and to grant yet a *third* trial.

This time the majority wants to overturn the jury's verdict because an expert witness for Dr. Wallace testified about an X-ray dye test that was done by a radiologist.

Mr. Graham's lawyer argued that this testimony was a complete surprise, and also that it was irrelevant and misleading. However, Dr. Wallace's lawyer said in advance of trial that his expert would testify about "radiographic studies," and no one disputes that "radiographic studies" included the dye tests. Moreover, Mr. Graham's lawyer asked the expert about the dye tests in a deposition before trial.

Did the lawyer ask enough questions? Perhaps not. But that is not Dr. Wallace's fault, and there was no unfair surprise.

The majority opinion argues that the expert's dye test evidence was entirely irrelevant, but it is somewhat hard to follow this argument, which makes me think that – as in the first trial of this case – the majority is again straining to find a reason to reverse a jury verdict.

As I see it, the expert explained why he thought the dye test evidence, although "inconclusive," was marginally useful. Mr. Graham's lawyer tried to make the expert look foolish before the jury (and did a pretty good job, too) for saying that Dr. Wallace could rely in any fashion on an "inconclusive" dye test. I think the jury got the point and was not misled about the dye test.

When it comes to the relevance of evidence like the expert and the dye test, this evidence is just like the rebuttal evidence in the first trial. That is, our law says that we ordinarily leave whether evidence has any relevance to the call of the trial judge, unless the judge's ruling is blatantly wrong. The

trial court did not err, I think, in letting the expert say what he did.

Also, when Mr. Graham's lawyer raised this issue after trial, the judge decided that Mr. Graham had not made a persuasive case for a new trial based on this issue.

Our law again is that the trial judge ordinarily has the best opportunity to see and decide if these sorts of claimed errors about evidence are serious enough to require a new trial. Because the trial judge has the best opportunity, we give the judge's determination deference.

In this case, the judge decided that the jury had a good understanding of the evidence, and that Mr. Graham and Dr. Wallace had a fair chance to put on their cases. We should defer to the trial judge's opinion. Moreover, if we were to follow the position advocated by the majority, even though narrowly stated, it could be interpreted by some trial counsel as an opportunity to have a mini-trial each time an expert says something that is arguably outside of their Rule 26 disclosure statement. That is not a fair or sensible procedure, and it is certainly not the intent of the majority.

So – in the first case, I voted to uphold a jury's verdict *for the patient*, Mr. Graham. Then, in the second case, I voted to uphold a jury's verdict *for the oral surgeon*, Dr. Wallace.

The reader may ask, how could that be right? Which one should win? Who is right and who is wrong? It's a good question, and the answer is that our system *doesn't know who "should" win*.

Under our system, we have a *process* to handle these tough decisions, where people strongly disagree. We take these cases before a jury, and we have a fair trial, and then we live with the jury's verdict.

In very rare cases, where a jury's verdict is very clearly wrong, a judge has the power to

correct it, and order the case it to go before a new jury. But that is not what we have here. *Both of these juries were "right"* – because they both reached their verdicts after a fair trial.

However, in my judgment, the second trial never should have happened. (But my judgment was in the minority in the first case, which is also part of how our system works.)

Now, in the second case, my judgment is that the second jury verdict is the result with which we should live. (And again, my judgment is in the minority.)

At least I have been consistent – although I must say that fairness and compassion should always trump consistency.

For these reasons, I dissent. I would affirm the trial court's order refusing to grant a new trial. I am authorized to say that Judge Gary Johnson, sitting by temporary assignment, joins in this separate dissenting opinion.