

No. 31774 – *Ercelle E. Price v. Charleston Area Medical Center, Inc., a West Virginia corporation; University of West Virginia Board of Trustees; Associated Radiologists, Inc., a West Virginia Corporation; and Jose M. Serrato, M.D.*

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Starcher, J., dissenting:

I am in agreement with the majority’s holding that “to justify additional peremptory challenges, co-parties must ‘affirmatively show’ the presence of a serious dispute among them.” ___ W.Va. at ___, ___ S.E.2d at ___ (Slip. Op. at 12-13). Circuit judges should carefully assess a party’s motion for additional peremptory challenges, and ensure that there is a serious, honest dispute between the co-parties, not a tactical fake dispute merely so the parties can get more strikes.

I dissent from the majority’s opinion because the opinion avoided discussing multiple errors by the trial court that are likely to arise again on the retrial of this case. One error that is most egregious involves the defendants’ use of information obtained through *ex parte* violations of the physician-patient privilege. The defendants spoke with one of the plaintiff’s treating physicians, Dr. Glen A. Wright, several years before trial about a wholly unrelated problem – the plaintiff’s alcoholism – and had the doctor solicit the unauthorized release of the plaintiff’s medical records to himself, without the plaintiff’s knowledge or consent. Dr. Wright reviewed the records at the direction of defense counsel, and assisted the defendants in formulating a trial strategy. Dr. Wright then testified at trial, not as a fact witness, but as an expert for the defense.

These actions by defense counsel are so outrageous as to shock the conscience; that the circuit court did not intervene and prohibit Dr. Wright from testifying is even more amazing.

On remand, I would hold the defendants' feet to the fire and prevent the recurrence of such conduct, and prevent the defendants from profiting on retrial from their prior misconduct.

I respectfully dissent, and I am authorized to state that Chief Justice Albright joins in this separate opinion.