

No. 33218 – *Sally Black, Executrix of Estate of Charles A. Black, et al., v. CSX Transportation, Inc.*

FILED

August 8, 2007

released at 10:00 a.m.

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., concurring:

From the very beginning of the jury selection process, the potential juror at issue in this case, Dr. Polack, demonstrated clear bias and prejudice in his statements. In *O'Dell v. Miller*, 211 W.Va. 285, 565 S.E.2d 407 (2002), this Court made a firm rule about prospective jurors who exhibit prejudice or bias about a case: the juror is, as a matter of law, disqualified. As we said in Syllabus Point 5 of *O'Dell*:

Once a prospective juror has made a clear statement during *voir dire* reflecting or indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair.

This is not a discretionary test which requires subtle balancing by a trial judge, as the dissenting opinion might suggest. It is an absolute, mandatory, black-letter, and therefore easy-to-apply rule.

The dissenting opinion opens with a question asking plaintively, where did the trial judge go wrong? The answer is that the trial judge – with some help from counsel for the defendant – forgot that Syllabus Point 5 of *O'Dell* is a mandatory rule. Dr. Polack gave statements evidencing a clear, but general, dislike of litigating plaintiffs and their attorneys, and a clear distrust of information about the dangers of exposure to asbestos. In other words, Dr. Polack indicated a prejudice against one of the litigants, and a bias to reject that side's