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

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Benjamin, Justice, dissenting:

Where, exactly, did Judge Recht go wrong? Apparently, according to the Majority, Judge Recht committed an error worthy of reversal and the awarding of a new trial because he refused to strike for cause a physician from the jury pool when the physician testified that he would decide the case based upon the facts and law, as instructed by the trial court, and not upon emotion. Judge Recht committed this grave error because, based upon everything before him, he believed the physician – something the Majority of this Court sitting on high without the benefit of having sat where Judge Recht sits, apparently is unwilling to do. How dispiriting to our system of justice that a citizen who will decide a case upon the law, as instructed by the trial court, and the facts, without regard for emotion, should be deemed by this Court to be unfit to serve as a juror in this State. Sensibility and reason require that such qualities should be the gold standard for juror qualification. The Majority of this Court apparently disagrees.

The Majority cites ample authority in its opinion to support the proposition that a trial judge's decision to disqualify a juror for bias or prejudice is committed to the trial

court's sound discretion and will not be reversed absent manifest error. *See*, Majority Slip Opinion, pp. 6-7. As stated by the Majority, "[w]e will defer to a trial judge's ruling regarding the qualifications of jurors because the trial judge is able to personally observe the juror's demeanor, assess his/her credibility and inquire further to determine the juror's bias and/or prejudice." Majority Slip Opinion, p. 6. The Majority, however, ignores its own directive to defer to Judge Recht's reasoned determination[1] and substitutes its judgment for his, without the corresponding benefit of having observed Dr. Polack as he responded to the trial court's and counsels' inquiries during the voir dire process. Thus, the importance of the actual demeanor of the potential juror and a learned judge's considered determination of the same falls victim to this Court's long-standing penchant for redefining standards of review when the allure of authoritative appellate second-guessing beckons.

Although the Majority cites a number of passages from the voir dire of Dr. Polack in its opinion, it omitted several that are significant – significant not only for their presence in the record, but also for their absence from the Majority opinion. In the first, Dr. Polack rejects the notion that he would allow his understanding of science, rather than the law as instructed by the trial court, to guide his decision. In response to questioning by Appellee's counsel, Dr. Polack testified:

[1]A determination, I note, borne of Judge Recht's long-standing, dedicated service to the justice system in this State both as a distinguished trial judge and a member of this Court.

Mr. Lafferre: Do you think that what you think about sound science as being the basis for decision-making – I don't want to put words in your mouth, but that's my understanding of what you said just a moment ago– are you say that that would be your guide in this case, as opposed to the judge's instructions of law?

Dr. Polack: *My guide must be the judge's instructions in law.*

(Emphasis added). This exchange was in follow-up to the initial questioning by Appellant's counsel set forth on pages 2-3 of the Majority slip opinion. The Majority also neglected to include Judge's Recht's stated reasons for denying the Appellant's motion to strike Dr. Polack for cause, the reasoning implicitly rejected by the Majority herein. After the initial voir dire of Dr. Polack in chambers, Judge Recht explained his reasons for denying Appellant's motion stating:

The Court: Dr. Polack probably is a poster child for the reason we have voir dire and still accommodate the teachings of O'Dell. He has been rather forthright, exactly how he feels.

But in the ultimate question, he will be able to be a fair juror; but you certainly have enough information in order to – if you feel so inclined, to exercise your peremptory challenge; that's why we have voir dire. But I don't think any of his answers would disqualify him for cause.

> I thought they might. And if you just look at the questionnaire itself, it came perilously close, but I just don't think it's enough. So your objection will be overruled, and your objection saved.

Later in the voir dire process, Appellant renewed her motion to strike Dr. Polack for cause. Prior to the questioning cited by the Majority on pages 4-5 of its opinion, the trial court made the following significant statements, which, like the above passage, were not acknowledged by the Majority:

> The Court: Certainly, the first response that he has a bias against personal injury lawyers is a strong statement, extremely strong statement. The question is: What would it take to overcome that bias?
>
> Mr. Lafferre: I'll observe, he didn't say he was biased against plaintiffs themselves—
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> The Court: – appreciate that. But that's my point, is what it would take to overcome the bias as against plaintiffs' lawyers? We don't know that. And I don't think that question was asked.
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> Mr. Daley: I don't believe, under O'Dell, it needs to be. It's quite clear; it's a clear statement, and that further questioning is not going to help.
>
> The Court: If it stopped there, I'd definitely agree with you, definitely agree with you. He then went on to modify it, where basically he's saying that he is a man of science and

> will not be swayed by emotion. It's that Jeffersonian argument of head versus heart that we all learned while we were in grade school.
>
> Dr. Polack is more head than heart, but I'm going to ask him that question. I really need to know it. It wasn't asked. I think its because of it's – potential impact, I think its only fair, so . . .

Thereafter, in responding to Judge Recht's questioning, Dr. Polack testified that credibility on the part of the lawyer would overcome this perceived bias and that he would decide the case upon the law and evidence. After considering Dr. Polack's response, Judge Recht denied Appellant's renewed motion to strike Dr. Polack stating "I still think he's not excusable for cause, notwithstanding the responses he gave in the questionnaire, because I think his verbal responses transcend that."

The record before this Court simply does not support the Majority's conclusion that Judge Recht abused his considered discretion in refusing to strike Dr. Polack for cause. Of even more concern, I fear that the Majority's opinion in this matter may be viewed in the future as establishing a standard in West Virginia that a juror who states he or she will rely upon the facts and the law to decide a case – and not upon emotion – should be, or even may be, subject to being excused for cause.

Finally, I must additionally take issue with the Majority's finding of prejudice arising from Judge Recht's failure to strike Dr. Polack for cause. As recognized by the Majority, actual prejudice must be demonstrated before a trial court's ruling on a motion to strike a juror for cause may be reversed. *State v. Miller*, 197 W. Va. 588, 605, 476 S.E.2d 535, 669 (1996). What then did the Majority deem sufficient to demonstrate the prejudice necessary to reverse Judge Recht's decision not to strike Dr. Polack for cause? The jury's adverse verdict? What the Majority fails to admit is that Dr. Polack ultimately did not sit on the jury as Appellant utilized a preemptory strike to remove him. Thus, he could not have influence the jury's deliberations. Notwithstanding his absence, the jury that heard the evidence still found no causation whatsoever to support Appellant's claim. It is pure speculation by the majority that the juror who would have replaced Dr. Polack in the jury pool had he been struck for cause may have impacted the ultimate verdict. By simply presuming prejudice and equating that prejudice to an adverse jury verdict, the majority has effectively removed from our jurisprudence the appealing party's burden to show prejudice.

Judge Recht did not abuse his discretion in refusing to strike Dr. Polack for cause. I furthermore disagree with the Majority that the mere fact of an adverse jury verdict is sufficient evidence of prejudice to reverse a trial court's discretionary ruling upon a juror's qualification where there is no objective evidence of conflict, such as a significant relationship to a party or a party's employee or relative, but only speculation as to that

juror's beliefs. Accordingly, I dissent.