



"Good lawyers are safer Post Mortem."

Spring 2006

Letter from the Editor

Some of our Charter members have recalled fondly the newsletter the Club published for a short period of time in the nineties, before our news offices were shut down by authority of The Patriot Act. (JK¹, as my daughter would say.)

Well, we're back, to provide notice of upcoming events, and to bring you our featured columns of "The state of Justice in West Virginia," our "Tullamore Dew Profiles," and "Ask Bartleby" our own "scrivener" who promises to attempt to answer questions of members touching on the history and heritage of the practice of law in our area.

If you would wish to offer a contribution to "Commentaries," send any articles, no more than 500 words, to our Executive Director, Barbara Knutsen,

who will pass them on to the editor. We reserve the right to reject any contributions offered, and of course, in keeping with our parsimonious reputation, we are unable to pay for publication rights, but then again, if we choose to publish it, we will give you a free lunch at Lemuel's.

We appreciate feedback on the newsletter, and feel free to contact us by email, letter or phone at 232-2576.

Your editor,

Ⓞ'Ⓒ of Ⓓ

P. S. - Every issue will contain a profile of one of our members, presented in alphabetical order, so fellow members can learn about each member's interests and accomplishments in and OUT of the profession. This month, it's ... Landers P. Bonenberger.

Tullamore Dew Profiles

Landers P. Bonenberger

At first, I felt deeply honored. The first to be profiled in the newly resurrected Blackstone Newsletter!

And then Barbara Knutsen brought me back down to earth. I was selected because I am first in the alphabetical roster of members.

Oh, well, never mind. Let's get on with it.

I have been a practicing attorney in Wheeling, my home town, since 1968 when I graduated from the University of Notre Dame. Since I received both my bachelor

and law degrees from that esteemed institution, I am deemed a "Double Domer!"

My practice is exclusively litigation and I have the scars to prove it. While at the advanced age of 63, I have been looking for an escape hatch from this profession (one that doesn't entail my demise), I have so far been markedly unsuccessful. To echo

Michael Corleone - "Just when I thought that I was out, they pull me back in!"

My wife of 33 years, Barbara, and I live in Springdale, a modest middle-class neighborhood much like Dimmeydale

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Bonenberger - con'd from p. 1

where I was raised. We have one child, Hilary, who followed me to Notre Dame, graduated from WVU Law School and practices in Pittsburgh with Swartz-Campbell.

My wife, Barbara, is extremely active in the community, especially with the YWCA.

I am extremely proud of both of "my girls" - I hope this doesn't sound sexist but I am a hopeless throw-back!

In addition to my practice at McDermott & Bonenberger, P.L.L.C., I have been solicitor for the Ohio County Commission

for over 25 years (perhaps the longest consecutive political appointment in the history of the County.)

Thanks to the generosity of Ogden Nutting, I also write a quarterly guest column for the Wheeling News-Register.

Except for a brief hiatus, I have been a member of Blackstone since its inception and a finer cadre of gregarious professionals you could not find. I am



Remember...

as a dues-paying Blackstone Club member, you may bring a different non-member lawyer to any meeting as your guest, to introduce him or her to the club.

Commentaries

is the official newsletter of the Blackstone Club, and is published by the Wheeling Academy of Law and Science. For more information, contact Barb Knutsen, Executive Director - 304.232.2576 barbaraknutsen@firststatecapitol.com

The State of Justice

Decision of the Hon. Robert E. Wilson in re: Mary A. Rose, Executrix of Estate of Richard L. Rose vs. Henry L. Kettler, M.D., et al Civil Action No. 99-C-394, Ohio County December 6, 2005
Reprinted with permission from the Judge.

LETTER OPINION

This Letter opinion addresses the interesting and important issue of whether an Ohio County resident can obtain a fair and impartial jury when the defendants are Ohio County health care providers and the claim is that the death of an Ohio county resident, Richard Rose, was a result of the medical negligence of the Ohio County health care providers, Dr. Henry L. Kettler, and Valley Radiologists, Inc. The plaintiff is Mary Rose, wife of Richard L. Rose and Executrix of the Estate of Richard L. Rose.

After three false starts, I decided to rule on this issue by Letter Opinion rather than by a memorandum order. Justice William O. Douglas wrote, in a dissenting opinion, “The starting point of a decision usually indicates the result.”^[1] The problem I kept confronting as I drafted the order was not the start-

ing point, but the length of the opinion. It was too long. The reason it was too long was that I wanted to include in the opinion, for appeal purposes, the outstanding work of Plaintiff’s counsel’s on this issue. When I embodied Plaintiff’s proposed findings, Defendants’ response, and my analysis in the order, I had an opinion that exceeded thirty pages. Thirty pages that probably no one would read, other than the three of us (my opinion). Therefore, knowing that a decision had to be made for this case to be tried in the foreseeable future, I decided to use this more informal and shorter Letter Opinion to give you my decision and the reasons for it. A separate Order denying plaintiff’s motion is being entered on this same date. On appeal the record will provide the Court with your briefs and exhibits and the Court will have the benefit of your fine work and the extra work done by plaintiff’s counsel.^[2]

I agree with plaintiff’s counsel that a campaign of advertising, media stories and public relations efforts in Ohio County over a period of several years have convinced a large majority of Ohio County residents that verdicts in

favor of plaintiffs in medical malpractice cases have caused and will continue to cause doctors to leave Ohio County, thereby undermining the healthcare available to them, and that this campaign has tainted the jury pool to such an extent that it has become more difficult to seat a fair and impartial jury in a medical malpractice case in Ohio County. However, the Court is not going to grant Plaintiff’s motion.

One of the main reasons plaintiff’s argument didn’t prevail is that even though it is more difficult to seat an unbiased jury, there is insufficient persuasive evidence that it is impossible to seat a fair and impartial jury in a medical malpractice case in Ohio County. It is for that reason that I also disagree with plaintiff’s contention that “publicity about medical malpractice lawsuits has been so pervasive and continuous that plaintiffs in medical malpractice cases are unlikely to be able to empanel a fair and impartial jury in Ohio County.”

Con’d on P. 4

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State of Justice

continued from p.3

I do agree with Plaintiff's counsel that one of the most troubling aspects of this issue is that this problem has not occurred by accident:

"As early as 2001, Ohio County healthcare providers formed a coalition to

'influence public & potential jurors with a campaign to change opinion.'

The creation of CPR was the beginning of a long-term campaign to convince area residents that plaintiffs' verdicts in medical malpractice cases threatened the

availability of healthcare for area residents. Potential jurors in Ohio County have been warned that 'Excessive Lawsuits Cost West Virginians Jobs and Money' and instructed that 'If you serve on a jury, remember that your decisions can affect jobs, employers, and shareholders in and outside West Virginia' by ads placed in the Wheeling

newspapers by the West Virginia Chamber of Commerce."

I don't think our Supreme Court of Appeals, if it considers this issue, can ignore what the coalition to influence potential jurors intentionally did to the prospective jury pool in Ohio County by its successful campaign to cause prospective jurors to have fixed opinions in medical negligence lawsuits before hearing the facts. Faith in our system of justice is premised upon our belief that juries are fundamental to the protection of the rights of citizens. William Blackstone said it best in his Commentaries of 1768:

"The trial by jury ever has been, and I trust ever will be, looked upon as the glory of the English law... It is the most transcendent privilege that any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals... [T]he most powerful individual in the state will be cautious of committing any flagrant invasion of another's right, when he knows that the fact of his oppression must be examined and decided by twelve indifferent men, not appointed till the hour of

trial; and that, when once the fact is ascertained, the law must of course redress it. This therefore preserves in the hands of the people that share which they ought to have in the administration of public justice, and prevents the encroachments of the more powerful and wealthy citizens."

The coalition campaign was a direct affront to our Constitutional right to a fair trial. Their effort was not unique in the country. Many special interest groups in the United States (and even the President of the United States) are attacking the Constitutional right to a jury trial in a civil case today. A trial by a jury of fair and unbiased citizens is one of our society's most valued liberties. The United States Supreme Court has addressed the importance of the jury trial in several cases. In addressing the indispensable role of the jury, the Court said that the "maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with utmost care." Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 501, 79 S. Ct. 948 (1959).

The issue before this Court is whether the

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coalition campaign was so effective that all Ohio County medical negligence trials should, for the foreseeable future, be transferred to another West Virginia county. I cannot find that plaintiff's evidence compels that finding.

Counsel for the defendant is correct, in my opinion, with his argument that "[W]idespread publicity of itself does not require a change of venue and that proof that prejudice exists does not require a change of venue unless it appears that the prejudice is so great that he cannot get a fair trial." *State v. Beegle*, 188 W.Va. 681, 425 S.E.2d 823, 826 (1992) (criminal case where defendant showed extensive publicity of prior plea bargains). The key inquiry is not the number or ratio of jurors who know about a particular issue but the impartiality of the jurors chosen."

I agree with the Defendants' argument that meaningful voir dire and peremptory challenges remain the solution to the very real problem in Ohio County of prospective jurors with preloaded perceptions. "The guiding star for a Court is not whether a juror has knowledge of a particular issue or even opinions about it but whether a juror can render an opinion based solely on the evidence and under

instruction by the Court, without bias or prejudice. *State v. Wade*, 200 W.Va. 637, 490 S.E.2d 724 (1997), cert. denied, 522 U.S. 1003, 118 S.Ct. 576, 139 L.Ed.2d 415.

"The fact that a substantial portion of the Ohio County jury pool consists of individuals who work, or have spouses who work, in the healthcare industry, does not mean that it is impossible to get an unbiased jury in a medical negligence case in Ohio County. An Ohio County potential jury panel is likely to include some members who are concerned about the fact that a substantial verdict in favor of a plaintiff in a medical malpractice case might negatively impact the availability of medical care in Ohio County. There are also potential jurors who are concerned that they might be soundly criticized by family, friends and neighbors by a substantial verdict. The use of full and effective voir dire of prospective jurors by the Court and counsel from a large jury pool will eliminate those prospective jurors who have these concerns. The experience of the Court is that it works and remains the key to an unbiased jury in all civil actions.

Defendants are right: "Effective voir dire screening allows inquiry

about life experiences, relevant attitudes, background, exposure, prejudices and case-related attitudes. The Court advocates and has participated in extensive voir dire of potential jurors to assure that the interests of both parties are protected. See transcript of voir dire proceeding, *Huff v. Latos*. Questioning is not superficially confined to basic demographics and general attitudes. A potential juror can also be questioned individually and privately, posturing a more conducive environment for candor and honesty as suggested by Dr. Penrod, away from other potential jurors whose presence may influence their answers."

Plaintiff argues:

"In recent years, social scientists have lent their expertise to the study of juries. While courts traditionally believe that jury questionnaires and/or voir dire can identify and exclude biased jurors, the scientific literature demonstrates that many of the traditional beliefs about the

Con'd on P. 6

"The use of full and effective voir dire of prospective jurors by the Court and counsel from a large jury pool will eliminate those prospective jurors who have these concerns. The experience of the Court is that it works and remains the key to an unbiased jury in all civil actions."

State of Justice

ability of *voir dire* to insure fair and unbiased jury panels is mistaken. This is particularly true where, as in the present case, the jury pool as a whole is so skewed toward a particular point of view.”

I do not accept plaintiff’s argument that the imbalance in the Ohio County jury pool cannot be solved by jury questionnaires and *voir dire*.

This argument by the Plaintiff that the jury pool as a whole in Ohio County is so skewed toward health care providers that it is impossible to obtain an

“We recognize that jurors enter the courtroom with biases and preloaded perceptions. An important job of the judge and the attorneys is to discover that bias and deal with it by using the tools the law provides us. And, to the extent that we can’t eliminate 100% of the bias, it is the responsibility of the bench and bar to confront and deal with bias as we try to do the best we can to achieve a fair trial for all litigants.

“

unbiased jury in a medical negligence case is the heart of Plaintiff’s argument.

But Plaintiff did not prove this theory of irreversibly tainted Ohio county jurors. However, that conclusion does not mean that this Court has failed to recognize the seriousness of the issue presented by the Plaintiff. In fact, just the opposite is true. A fair and unbiased jury is the concern of plaintiff’s counsel. That is the reason for this tremendous effort undertaken by Plaintiff’s counsel to challenge whether it is possible to have a fair jury trial in an Ohio County Malpractice case. Plaintiff’s counsel are to be commended for their efforts. Yet Plaintiff’s counsel does not acknowledge that the Judges in the First Judicial Circuit share plaintiff’s concern. We recognize that jurors enter the courtroom with biases and preloaded perceptions. An important job of the judge and the attorneys is to discover that bias and deal with it by using the tools the law provides us. And, to the extent that we can’t eliminate 100% of the bias, it is the responsibility of the bench and bar to confront and deal with bias as we try to do the best we can

to achieve a fair trial for all litigants. See *Overcoming Jury Bias*, 1 *Medical Malpractice: Law and Strategy*, Volume 11, number 10, August 1992.

In sum, I am led irresistibly by my own personal experience and the evidence presented on the issue before the court to the conclusion that the plaintiff can obtain a fair and unbiased Ohio County jury in a medical negligence trial. Plaintiff’s venue motion will be denied and this matter will be set for trial in Ohio County.

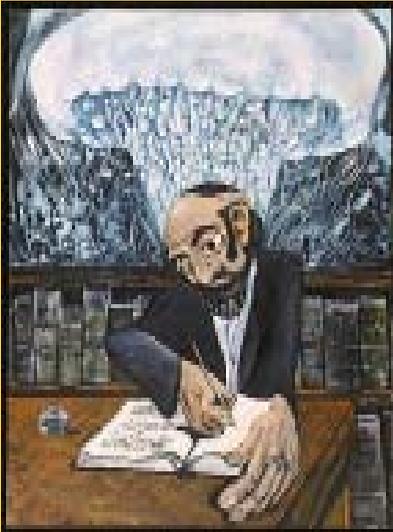
It is so ORDERED.

Ronald E. Wilson, Judge

(Footnotes)

1[1] *Environmental Protection Agency v. Mink*, 410 U.S. 73, 93 S.Ct. 827, 35 L.Ed. 2d 119 (1973).

2[2] Quotations from plaintiff’s counsel in this Letter Opinion are from plaintiff’s Proposed Findings of Fact and quotations from defendants’ counsel are from the Response of Defendants Henry Kettler, M.D., and Valley Radiology, Inc. to Plaintiff’s Proposed Findings of Fact.



Ask Bartleby

Dear Bartleby,

What kinds of questions can members ask you?

Sincerely,

O’C of D

Dear O’C of D,

I am interested in the history and heritage of the legal profession in the area, and how the profession has impacted the community over the years, in and out of the courtroom. If it’s not on “Google,” it may be something your local “scrivener” can research. Give me a try!

Yours Truly,

Bartleby, the Scrivener

Imprimis: I am a man who, from his youth upwards, has been filled with a profound conviction that the easiest way of life is the best. — *Bartleby, the Scrivener* Herman Melville



The Wheeling Academy of Law and Science (WALS) Foundation is completing its third year of presenting mock trials in the fourth and eighth grade classes in Ohio County. During the past year, more than 1,000 students (a few of whom are pictured at right) have participated in this wonderful educational project that brings to life the American Justice System. As we like to say, “If those who believe in the Civil Justice system don’t educate the public, those who don’t will.”

Thank you, lawyers, for your support! -- Barb

The Blackstone Club is not an official bar function, and has no ties to any city, state, federal, professional or political entity or organization; it is solely a project of the Wheeling Academy of Law and Science, Inc., a private corporation.



Upcoming Blackstone Club Meetings & CLEs

Tonight: April 20, 2006 Randy Gossett has asked the Hon. Martin J. Gaughan to make tonight's presentation. The topic is "An Update on the Alternative Sentencing in 1st Circuit Court." Cocktails and hors d'oeuvres from Lemuel's (our building's new tenant) will begin at 6 p.m. Our food and beverages will reflect this month's theme, "Spring HAS Sprung." Judge Gaughan's presentation will begin at 6:30 p.m. Now that the weather is warmer, it's a perfect time to bring a guest. Don't forget that we are going to announce our surprise perk that will continue throughout the year for Blackstone Club members.



June 15, 2006 Theme: "Summer and Strawberries," presentation (TBA) by Shari McPhail
Aug. 17, 2006 Gerald Duff **Oct. 19, 2006** Tom Myers **Dec. 14, 2006** Black Tie Event

Continuing Legal Education Seminars

Friday, May 19, 2006 - All-Day Seminar (Up to 7.2 credits available)

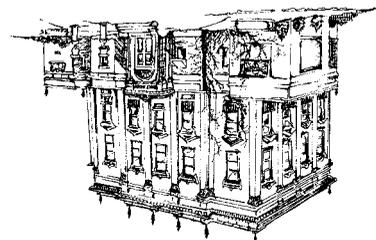
"Lingering Legal Issues in The Assassination of John F. Kennedy" - presented by Dr. Cyril H. Wecht and other experts

Friday, June 9, 2006 - Half-Day Seminar

"A Morning with the Judges VI" (Up to 3.6 credits available)

-The Hon. Edmund A. Sargus, Jr, U.S. District Judge, Southern District of Ohio

-The Hon. Thomas E. Johnston, U.S. District Judge, Southern District of West Virginia



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