IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
July 19, 2011 Session

MARSHA McDONALD
v.
PAUL F. SHEA M.D. AND SHEA EAR CLINIC

Appeal from the Shelby County Circuit Court
No. CT-003393-05 John R. McCarroll, Jr., Judge

No. W2010-02317-COA-R3-CV - Filed February 16, 2012

SEPARATE CONCURRENCE AND PARTIAL DISSENT

I agree with the result reached in this case, but I disagree with the majority's statement that "it is unclear whether Juror H was excluded based on a peremptory strike or for cause." The record is unequivocally plain in this case that the trial judge permitted the exercise of a peremptory challenge after the jury had been accepted and the trial was underway.

The trial judge stated to counsel "I think you have a right to do that now [exercise a peremptory challenge]." The court followed by saying, "Since I have ruled that way . . ." He used the past tense, indicating he had already ruled, even counting up the number of *peremptory* challenges which the plaintiff had remaining.

The language of the trial court stating it was "sufficient for a challenge" was not an excusal for cause because at that point the trial court had already ruled. His comments came as a part of a post-ruling discussion of his allowing the peremptory strike. The experienced trial judge, who knew the difference in a peremptory challenge and a challenge or excusal for cause, never used the language "for cause."

In this case, two alternate jurors were accepted. Therefore, I agree under the facts in this particular case that the "case was still tried before a panel of competent, impartial jurors." Dr. Shea had no right to have his case decided by any particular jurors. See *State v. Coleman*, No. M2000-01916-CCA-R3-CD, 2000 WL 125694, at *12 (Tenn. Crim. App. January 31, 2002), *perm. app. denied* (Tenn. June 3, 2002) (citing *State v. Smith*, 857 S.W.2d 1, 20 (Tenn. 1993).

ALAN E. HIGHERS, P.J., W.S.