VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court building in the City of Richmond on Thursday the 11th day of April, 2019.

Present: All the Justices

Sharon Blevins Coates, Appellant,

against Record No. 180266
Circuit Court No. CL14-2866

Mark M. Jones, et al., Appellees.

Upon an appeal from a judgment rendered by the Circuit Court of the City of Richmond.

Upon consideration of the record, briefs, and arguments of counsel, the Court is of opinion that the judgment below should be affirmed. Sharon Blevins Coates filed a medical malpractice action against Mark M. Jones and OrthoVirginia, Inc. The jury returned a verdict for the defendants. Coates challenges the trial court's refusal to strike two members of the venire for cause.

"Civil litigants are entitled to a fair and impartial trial by jury consisting of people who stand indifferent in the cause." *Hawthorne v. VanMarter*, 279 Va. 566, 583 (2010) (internal quotation marks and citation omitted). Under Code § 8.01-358, "[a] trial court must excuse for cause a potential juror who 'has any interest in the cause, or is related to either party, or has expressed or formed any opinion, or is sensible of any bias or prejudice' regarding the action." *Roberts v. CSX Transp., Inc.*, 279 Va. 111, 116 (2010) (quoting *Spangler v. Ashwell*, 116 Va. 992, 996-97 (1914)). Once a member of the venire has responded in such a way as to raise reasonable doubt about his or her impartiality, that individual cannot later be rehabilitated by offering "expected answers to leading questions." *Martin v. Commonwealth*, 221 Va. 436, 444 (1980). Proof of impartiality "should come from [the venireman] and not be based on his mere assent to persuasive suggestions." *Breeden v. Commonwealth*, 217 Va. 297, 300 (1976). However, "[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Briley v. Commonwealth*, 222 Va. 180, 186

(1981) (quoting *Irvin v. Dowd*, 366 U.S. 717, 722-23 (1961)). Thus, a reviewing court must engage in a largely fact-dependent inquiry to "determine . . . the nature and strength of the opinion formed." *Id.* at 185.

In evaluating the trial court's decision to deny a motion to strike a juror for cause, we are mindful that "a trial court's denial of a motion to strike a juror for cause 'will not be disturbed on appeal unless there has been manifest error amounting to an abuse of discretion.'" *Roberts*, 279 Va. at 116 (quoting *Townsend v. Commonwealth*, 270 Va. 325, 329 (2005) and *Barrett v. Commonwealth*, 262 Va. 823, 826 (2001)). "The circuit court is in a superior position to determine whether a prospective juror's responses during voir dire indicate that the juror would be prevented from or impaired in performing the duties of a juror as required by the court's instructions and the juror's oath." *Green v. Commonwealth*, 262 Va. 105, 115 (2001) (collecting cases). "[T]he trial judge has the opportunity, which we lack, to observe and evaluate the apparent sincerity, conscientiousness, intelligence, and demeanor of prospective jurors first hand." *Roberts*, 279 Va. at 115 (internal quotation marks and citation omitted). Moreover, this Court considers the voir dire of a prospective "juror as a whole, and [does] not consider the juror's isolated statements." *Hawthorne*, 279 Va. at 583 (collecting cases).

In the present case, responses from two members of the venire are at issue. The first was Carrie Leone. She had a nursing license but was not working in the field of medicine at the time of trial. Leone did not volunteer a response when members of the venire were questioned about whether they held a bias that would prevent them from being able to listen to the evidence. Leone later stated that, in her own experience as a nurse, she encountered patients who "manipulated sometimes." When asked if these specific experiences with manipulative patients would "start [her] out more in favor of the healthcare provider," Leone responded "[m]aybe a little bit." Jones' counsel then asked whether anyone in the venire had "worked in a physician's office or at a hospital" and whether that experience would cause bias in favor of one side or the other. Leone specifically responded "[n]o." She expressed no reservations about being able to listen to the evidence from both sides and the instructions of law from the judge and rendering a decision based on that information. She also did not state a concern about being able to withhold any decision in the case until she heard from both sides.

Responding to the motion to strike Leone, the court observed:

> She did express that she may be a little bit -- she was wavering on that, so . . . I think her responses to the voir dire by defense clarified her position so she could be fair and impartial.

The trial court could consider "the nature and strength of the opinion [Leone] formed." *Briley*, 222 Va. at 185. Her initial response – that she "maybe" started out more in favor of the health provider "a little bit" – was tepid and followed by the unequivocal clarification that she would not be biased in favor of one side or another. This was sufficient, when combined with the trial judge's unique opportunity to observe the prospective juror and evaluate her demeanor, sincerity, and conviction, for the trial court to conclude that she need not be stricken for cause. On the record before us, we are unable to conclude that the trial court abused its discretion with respect to juror Leone.

The second prospective juror, Kyle McLean, did not say anything in response to the question about whether members of the venire held a bias that would prevent them from being able to listen to the evidence. He expressed no concern about applying the law to the facts of the case without resorting to sympathy. Although other jurors voiced some concerns, McLean did not worry that there were too may lawsuits "hurting the healthcare community." He also was not concerned about participating in the case and finding against a physician. He expressed no reservations about being able to listen to the evidence from both sides and the instructions of law from the judge and render a decision based on that information. He also did not voice any concerns about being able to withhold a decision in the case until he heard from both sides. The venire was asked the following:

> The law in a civil case like this the plaintiff has to prove the case by a preponderance, which is more likely than not, by the greater weight of the evidence. If you're in a criminal case, you have this beyond a reasonable doubt standard, which many of you are familiar with. Anyone concerned about the fact that the law only requires that the plaintiff prove their case by a tipping of the scales, by a preponderance of the evidence? Anyone concerned about that? Anyone who would want to have a higher burden?

McLean answered as follows:

> Well, for these kind of cases, I believe there are large amounts of money involved with punishment, so I feel like that could be

> potentially life ruining or extremely problematic if one would lose a case, so I think it should be a higher standard than just preponderance of the evidence.

In addition, plaintiff's counsel asked:

> Some people have trouble with the kind of harm that the law requires to make up for if you find your verdict in favor of the patient. The jury instruction that will be read says you have to, you shall award damages for any of these things that you find by the greater weight of the evidence are proven in the case, but some jurors right at the beginning say, I wouldn't want to give money for that. One is mental anguish. Anybody have any problem putting a dollar amount to balance out mental anguish from a medical injury?

McLean responded "I just don't know how you quantify something like that or put a dollar amount on something like that."

Plaintiff's counsel asked McLean why he thought a judge rather than a jury should decide money damages.

> JUROR MCLEAN: I've never sat on a malpractice case before. I don't have any domain knowledge on how much would be an adequate amount to charge for any kind of recovery. I feel like we would be coming up with a random number.
>
> MR. LIVINGSTON: Okay. If the court gave you instructions that were – that you were to make that decision and you were to follow the instructions and base it on what you heard in the courtroom, is that something that you feel comfortable you could do notwithstanding that or do you think you would have trouble doing that?
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> JUROR MCLEAN: Would there be a range or something like that or given instructions you come up with an amount?
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> THE COURT: If the evidence – the question raised, sir, is whether or not if the evidence supports a finding of damages, would you be able to render based on the instructions that the court gives you a figure for damages.

McLean responded "[y]es."

The court recalled McLean for clarification of some of his answers. The following exchange took place between McLean and counsel for the plaintiff, Mr. Livingston, and counsel for the defendant, Ms. Pilcher:

> MR. LIVINGSTON: There was some disagreement just about what you actually just said in there. When we asked you about preponderance of proof, whether you could apply the more likely than not, preponderance of proof, is that your answer, that you had a concern about that, you didn't think you could apply that?
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> JUROR MCLEAN: Yeah, I feel like that there's a reputation at stake, there's significant money damages at stake, I feel like that's something that could be potentially career ruining for somebody, and I feel like there should be an overwhelming standard of evidence against that.
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> MR. LIVINGSTON: Okay. And this overwhelming standard, is that an opinion that you hold pretty strongly?
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> JUROR MCLEAN: Yes.
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> MR. LIVINGSTON: And you're not going to change that because, hey, the judge instructed you to apply a lower standard; is that fair?
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> JUROR MCLEAN: That's fair.
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> MR. LIVINGSTON: Did you also make a comment about how you thought the judge should decide and announce and not the jury?
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> JUROR MCLEAN: I expressed reservation about the jury determining the amount of damages. I don't know how to determine something like that. I'm not a doctor, I'm not a medical professional. I don't know who should do that, but I don't think that a jury, especially one that doesn't have any experience, should be able to determine that.
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> MR. LIVINGSTON: Okay. Thanks for your answers.
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> THE COURT: Defense?
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> MS. PILCHER: Sir, good afternoon. So what the jury is being asked to do is to make decisions not within a vacuum but after you've heard all of the evidence and received the instruction from the court. So would you be able to hear all of the evidence, listen

> to the court's instructions, and make all of your determinations on the issues you've been asked to decide on that alone? The standard that the court provides you, the rules that the court gives you.
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> JUROR MCLEAN: Yes.
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> MS. PILCHER: I want to make clear you've been asked what you think the standard should be, but there is a standard and it's in place and what you're telling me – I understand you're telling me that you would be able to follow the standard that is in place as it applies to this case.
>
> JUROR MCLEAN: Yes, with personal reservations, but yes.
> THE COURT: Thank you.

McLean's initial statement came in response to the following multi-part question:

> Anyone concerned about the fact that the law only requires that the plaintiff prove their case by a tipping of the scales, by a preponderance of the evidence? Anyone concerned about that? Anyone who would want to have a higher burden?

This multi-part question solicited McLean's personal policy views and "concerns." They did not address his ability and willingness to follow the court's instructions and provide the plaintiff with a fair trial. Jurors often approach their duty with some preconceived opinions. Rare is the juror who comes to the courthouse equipped with a full knowledge of what the law requires. Therefore, when McLean was asked about his personal views, his response was not, on its face, disqualifying. Additional questioning established that he would be willing to follow the court's instructions and follow the law.

He also expressed reservations about the ability to provide a specific dollar figure for amorphous damages like mental anguish. He candidly confessed that he had "never sat on a malpractice case before" and that he did not "have any domain knowledge on how much would be an adequate amount to charge for any kind of recovery." However, he answered "yes" to the question of whether, if "the evidence supports a finding of damages, would you [he] be able to render based on the instructions that the court gives you."

Prospective jurors can and often do hold personal opinions on a wide range of subjects like capital punishment, tort reform, or the health care system, and nevertheless be willing and able to set aside their personal opinions to follow the instructions of the court and fulfill their responsibilities as jurors. As Chief Justice Marshall observed, requiring that members of the

venire have no opinions "would exclude intelligent and observing men, whose minds were really in a situation to decide upon the whole case according to the testimony." *United States v. Burr*, 25 F. Cas. 49, 51 (C.C.D. Va. 1807). Although McLean forthrightly and repeatedly indicated his personal views, he stated on multiple occasions that he was willing to follow the instructions of the court. As the Supreme Court has noted, "[i]t is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin*, 366 U.S. at 723. McLean repeatedly stated that he could.

There is also a difference between this case and *Breeden*. There, a member of the venire expressed a bias at the outset of voir dire – she stated that "the fact that [the defendant] is here is strong indication that he is guilty" and stated that the defense would have to prove that he is innocent. 217 Va. at 298, n.*. We concluded that the potential juror was not rehabilitated through leading questions. *Id.* at 300. Here, in response to general questions, McLean offered no indication of bias against the plaintiff and expressed no reservation about applying the law as instructed by the court. He did offer his personal opinion about what he would prefer the law to be, and he acknowledged his ignorance about how to affix certain categories of damages. His responses were not disqualifying in the overall context of voir dire because he indicated his willingness to follow the instructions of the court and set to the side his personal opinions.

Plaintiff's counsel vigorously presses a reading of McLean's responses as indicative of strong convictions that disqualified him from providing the plaintiff with a fair trial. While that is a plausible characterization of the record, a no less plausible reading of his responses, on the cold record before us, is that while McLean firmly held certain personal views on what the law ought to be with respect to the preponderance of the evidence and the ability of a citizen juror to fix damages for amorphous harms like mental anguish, the questions posed and his responses to those questions establish that, his personal opinions and lack of experience notwithstanding, he harbored no bias and was willing to follow the instructions of the court. Given the deferential abuse of discretion standard, as well as the trial court's superior ability to assess the prospective juror and his responses, we are unable to conclude on this record that the trial court abused its discretion. *See Johnson v. New Britain General Hosp.*, 525 A.2d 1319, 1326-27 (Conn. 1987) (while acknowledging it was a "difficult case" the Court held that the juror's stated antipathy toward malpractice suits "was a generalized opinion held in the abstract and that it would not enter into his consideration of this specific case."); *Fazzolari v. City of West Palm Beach*, 608

So. 2d 927, 928 (Fla. Dist. Ct. App. 1992) ("A general, abstract bias about a particular class of litigation will not, in itself, disqualify a juror where it appears that the bias can be set aside.").

Affirmed.

CHIEF JUSTICE LEMONS, with whom JUSTICE MIMS and JUSTICE POWELL join, dissenting.

Although I agree with the majority that jurors can and often do hold personal opinions on a variety of subjects, when the personal opinions of a prospective juror are so pervasive as to prohibit impartiality, the prospective juror must be struck for cause. In the present case, because the trial court failed to strike prospective juror McLean for cause and thereby forced Coates to use a peremptory challenge to remove McLean from the jury panel, I respectfully dissent from the majority's decision to affirm the trial court's ruling with respect to McLean.

"Parties to litigation are entitled to a fair and impartial trial by a jury of persons who stand indifferent in the cause. The right to a fair and impartial trial in a civil case is as fundamental as it is in a criminal case." *Roberts v. CSX Transp., Inc.*, 279 Va. 111, 116 (2010) (quoting *Cantrell v. Crews*, 259 Va. 47, 50 (2000)) (internal quotation marks omitted). The General Assembly enacted Code § 8.01-358 to safeguard jury impartiality. Code § 8.01-358 provides, in relevant part, that:

> The court and counsel for either party shall have the right to examine under oath any person who is called as a juror therein and shall have the right to ask such person or juror directly any relevant question to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; and the party objecting to any juror may introduce any competent evidence in support of the objection; and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that case.

We have explained that "[i]t is the duty of the trial court, through the legal machinery provided for that purpose, to procure an impartial jury to try every case." *Roberts*, 279 Va. at 116 (quoting *Salina v. Commonwealth*, 217 Va. 92, 93 (1976)).

Generally, when a prospective juror expresses any bias toward one party or has formed an opinion about the nature of the case, the prospective juror must be struck for cause. *Id.* at

116. Providing expected answers to leading questions is insufficient to later rehabilitate a prospective juror. *Martin v. Commonwealth*, 221 Va. 436, 444, 448 (1980) (concluding that a prospective juror should have been struck for cause because "the efforts of the trial judge and the prosecutor to rehabilitate [the prospective juror] did not 'assauge our concern;' she merely gave expected answers to leading questions"); *Breeden v. Commonwealth*, 217 Va. 297, 300 (1976) (same). Rehabilitation, if at all, "should come from [the prospective juror] and not be based on his mere assent to persuasive suggestions." *Martin*, 221 Va. at 444 (quoting *Breeden*, 217 Va. at 300).

When a prospective juror should be struck for cause, it is insufficient to say the party can use a peremptory strike because it is "prejudicial error in the civil context when a trial court forces a party to use a peremptory strike afforded under Code § 8.01-359 to remove a venireperson who is not 'free from exception' and should have been struck for cause." *Roberts*, 279 Va. at 117 (discussing Code § 8.01-357). Each party is "entitled, as a matter of law, [to] have a panel free from exception upon which to exercise his peremptory strikes." *Id.* at 118; *see* Code §§ 8.01-357 and -359.

In this case, Coates' counsel told the prospective jurors that the standard of proof in a civil case is a preponderance of the evidence and explained how that standard is lower than a criminal case, which requires proof beyond a reasonable doubt. He then asked if anyone had a concern or would want a higher burden of proof. McLean responded:

> Well, for these kind of cases, I believe there are large amounts of money involved with punishment, so *I feel like that could be potentially life ruining or extremely problematic if one would lose a case*, so I think it should be a higher standard than just preponderance of the evidence.

(Emphasis added.) Coates' counsel also asked, "if the facts and the evidence supported an award of damages, does anyone have a philosophical belief that it shouldn't be a jury, that a judge should decide . . . a dollar amount." McLean expressed reservations. Coates' counsel then followed up and asked McLean, "why [do] you think a judge should decide money damages instead of a jury[?]" McLean replied, "I've never sat on a malpractice case before. I don't have any domain knowledge on how much would be an adequate amount to charge for any kind of recovery. I feel like we would be coming up with a random number." When asked if the trial court instructed him to assign damages based on the evidence, rather than respond in the

affirmative, McLean proceeded to ask "[w]ould there be a range or something like that or given instructions you come up with an amount?" At that point, the trial court asked McLean if the evidence supported an award of damages, would he be able to assign damages based on the instructions provided by the court. Only then did McLean respond "[y]es."

When determining whether to strike McLean for cause, the trial court called McLean back for additional questioning based on his earlier responses. Coates' counsel noted there was "some disagreement" about what McLean had previously said. Coates' counsel then asked McLean to confirm that, when he was asked "whether [he] could apply the more likely than not, preponderance of proof" standard, McLean had indicated that he "had a concern about that" and he "didn't think [he] could apply" that standard of proof. McLean replied:

> Yeah, I feel like that there's a reputation at stake, there's significant money damages at stake, *I feel like that's something that could be potentially career ruining for somebody*, and I feel like there should be an overwhelming standard of evidence against that.

(Emphasis added.) When asked if he felt "pretty strongly" about the "overwhelming standard," McLean answered "[y]es." When asked, "[a]nd you're not going to change that because, hey, the judge instructed you to apply a lower standard; is that fair?," McLean responded, "[t]hat's fair."

Jones' counsel then asked leading questions in an attempt to rehabilitate McLean. When asked if, after listening to all of the evidence and the jury instructions, would he be able to apply the standard of proof provided by the trial court after listening to all of the evidence and the court's instructions, McLean responded "[y]es." Jones' counsel then asked:

> I want to make clear you've been asked what you think the standard should be, but there is a standard and it's in place and what you're telling me -- I understand you're telling me that you would be able to follow the standard that is in place as it applies to this case.

Even with counsel's leading question, McLean responded, "[y]es, with personal reservations, but yes."

In *Roberts*, we held that "[a] trial court must excuse for cause a potential juror who 'has *any* interest in the cause, or is related to either party, or has expressed or formed *any* opinion, or is sensible of *any* bias or prejudice' regarding the action. 279 Va. at 116 (quoting *Spangler v.*

Ashwell, 116 Va. 992, 996-97 (1914) (emphases added)). Here, McLean's responses demonstrated an obvious bias in favor of health care providers. McLean was of the opinion that a verdict for Coates "could be potentially life ruining" and "potentially career ruining" for Jones. Further, McLean indicated that he understood the standard of proof required by the law and he disagreed with it, preferring instead a standard of proof that was clearly at odds with the law. In other words, he clearly provided a "candid reflection of [his] state of . . . mind" concerning the applicable standard of proof and assigning damages. *Breeden*, 217 Va. at 300. His statements demonstrate "substantial doubt as to [his] impartiality," and therefore, McLean should have been struck from the venire. *Briley v. Commonwealth*, 222 Va. 180, 187 (1981). *See also Wright v. Commonwealth*, 73 Va. 941, 943 (1879) ("If there be a reasonable doubt whether the juror possesses these qualifications, that doubt is sufficient to insure his exclusion.").

Even though McLean provided expected answers to Jones' counsel's leading questions about the appropriate burden of proof and the trial court's question about assigning damages, those responses were insufficient to rehabilitate McLean. As we explained in *Martin*, providing "expected answers to leading questions" is insufficient to rehabilitate a prospective juror. 221 Va. at 444. McLean's responses were, at most, "'mere assent to persuasive suggestions,'" which we have held is insufficient to rehabilitate a prospective juror. *Breeden*, 217 Va. at 300 (quoting *Parsons v. Commonwealth*, 138 Va. 764, 773 (1924)). Indeed, it is telling that McLean qualified his assent, stating that he could apply the applicable standard of proof "with personal reservations." Given his apparent bias and opinions, the trial court should have struck McLean for cause.

Accordingly, I dissent from the majority's decision to affirm the holding of the trial court with respect to McLean. I would reverse the judgment of the trial court and remand for a new trial.

This order shall be certified to the Circuit Court of the City of Richmond.

A Copy,

Teste:

Clerk