

IN THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

NUMBER 061878

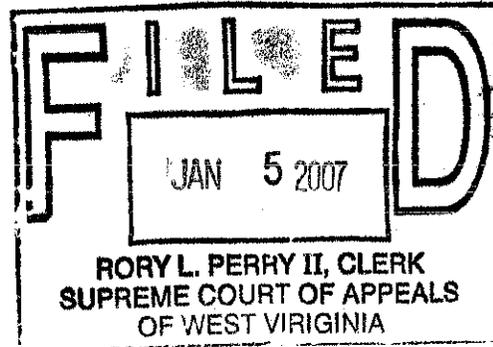
ERIC JASON BROOKS,

Plaintiff below, Appellant

v.

GALEN OF WEST VIRGINIA, INC.,
d/b/a GREENBRIER VALLEY MEDICAL
CENTER and GREENBRIER VALLEY
MEDICAL CENTER, LLC, d/b/a
GREENBRIER VALLEY MEDICAL
CENTER.

Defendants below, Appellee



BRIEF OF APPELLEE

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I. INTRODUCTION

Comes now, Appellee, Greenbrier Valley Medical Center, (hereinafter "GVMC") by counsel William F. Foster, II and Tammy Bowles Raines of *The Foster Law Firm, PLLC*, and files it's Brief on behalf of Appellee.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

While Appellant was a patient at GVMC, an intravenous catheter (hereinafter "IV") was inserted into a vein in his left hand for the purpose of administering fluids and medications. The Appellant subsequently filed a civil action in the Circuit Court of Greenbrier County alleging that he was permanently disabled as a result of the care he received during said admission to GVMC, specifically in relation to the above-stated IV site.

Appellant presented to the Emergency Department at GVMC on February 21, 2000, complaining of acute abdominal pain. He was evaluated and subsequently admitted to GVMC for testing and observation relating to this same complaint.

During the course of said admission, Appellant received intravenous fluids, narcotic analgesics, antibiotics and other medications through the IV site in his left hand. The Appellant's medical records from GVMC clearly indicate that said IV remained patent, open, unblocked and functional throughout the Appellant's hospital course. Specifically, following IV administration of narcotic pain medication through this IV, the Appellant sustained documented pain relief, which could not occur if said IV was

nonfunctional. Additionally, the Appellant's IV medication flow sheets also indicate that all IV fluids and medications, which infused through the subject IV site, were administered as scheduled and without complication, which again could not occur if said IV site was not properly functioning. Moreover, Appellant received IV radiographic dye while undergoing a radiological study known as a "Meckle's Scan," which was performed to assess the presence of a possibly ruptured appendix. The Appellant's "Meckle's Scan" was found to be readable by Appellant's treating physicians and contained no evidence that the Appellant suffered a ruptured appendix. The successful completion and interpretation of this radiological study could again only be accomplished if the subject IV was properly functioning.

Appellant's abdominal pain subsided and, following a three (3) day hospitalization, he was discharged from GVMC. Although multiple tests were performed, Appellant's treating physicians found no objective evidence supporting a cause for Appellant's subjective complaints of abdominal pain.

During the entirety of his admission at GVMC, Appellant never expressed any complaints of pain, discomfort, irritation or swelling at the subject IV site. At the time of his discharge, GVMC staff noted some minor irritation to be present on the left hand of Appellant at the location of his IV site. Appellant's health care providers considered the IV site irritation to be minor and merely to the degree expected following three (3) days of IV therapy. Furthermore, said IV site irritation was not of significant importance to extend Appellant's hospital stay at GVMC.

Appellant subsequently returned to the Emergency Department at GVMC the evening following his morning discharge with complaints of pain at and around the

former IV site in his left hand. At that time, Appellant was diagnosed with "phlebitis", which is defined as an inflammation of a vein, commonly caused by chemical or mechanical irritation of veins by intravenous fluids or indwelling catheters. F. A. Davis Company Taber's Cyclopedic Medical Dictionary (2005). Appellant subsequently sought treatment for this condition from his family physician, Dr. Ladier Thurman Canterbury. By April, 4, 2000, Dr. Canterbury determined and specifically documented in his records that Appellant's phlebitis had "*resolved.*"

Nevertheless, On May 26, 2000, Appellant applied to the Social Security Administration (hereinafter "SSA") for disability insurance and childhood disability benefits for a condition which Appellant alleged began on February 21, 2000, the date of his initial treatment at GVMC. *See* Notice of Decision and Decision, dated Oct. 23, 2002, Social Security Administration, Office of Hearings and Appeals (hereinafter "SSA Decision") attached to Appellee's previously filed "Response to Petition for a Writ of Error" as Exhibit 1. By administrative decision dated December 4, 2000, the SSA initially denied the Appellant's claim for disability insurance and childhood disability benefits. *Id.* Appellant appealed this initial administrative decision and a hearing was held before John L. Melanson, U.S. Administrative Law Judge on October 17, 2002. At this hearing, the ALJ Melanson heard testimony of and considered various expert opinions. ALJ Melanson rendered a decision following said hearing and made several findings, including the following:

3. The medical evidence establishes that the claimant has the following severe impairments: reflex sympathetic dystrophy of the left arm and somatoform disorder.
4. The severity of the claimant's somatoform impairment meets the requirements [for a disability]...and is expected

to preclude him from working for at least 12 continuous months.

5. The claimant has been under a disability, as defined by the Social Security Act, since February 21, 2000 (20 CFR § 404.1520 (d)).

Id. At 3. Thus, the SSA linked Appellant's claim of permanent disability to his "somatoform disorder" and specifically found that said disability was not solely the result of his claimed diagnosis of reflex sympathetic dystrophy, but rather was due to his somatoform impairment.

"Somatoform Disorder" is defined as a "psychological disorder" in which physical symptoms are present which suggest a medical condition, but no medical condition, medication or any additional mental disorder is found to be present...a variety of conditions are included in this classification including somatization disorder, conversion disorder, pain disorder, and hypochondriasis." F. A. Davis Company Taber's Cyclopedic Medical Dictionary (2005). Thus, by definition, somatoform disorder is a psychological condition in which the Appellant in the matter at hand *subjectively* perceives a disability due to his mental disorder, but no impairment is present which is due to an organic, objective or detectable condition. Appellant did not object nor file an appeal to this final SSA ruling, thereby acquiescing to the findings of ALJ Melanson and the SSA in relation to his diagnosis of somatoform disorder and it being the cause of the Appellant's alleged disability.

Appellant filed a civil action in the Circuit Court of Greenbrier County on February 14, 2002, alleging that he was permanently disabled as a result of the care he received while a patient at GVMC in February 2000. Contrary to the later findings of the SSA, again to which Appellant neither objected nor appealed, Appellant's expert

witnesses in the civil action at hand asserted Appellant's permanent injury was solely the result of Chronic Regional Pain Syndrome (CRPS), a physical and objectively-proven syndrome, with no mention of his somatoform impairment. *See* August 21, 2003 Report from Dr. Thomas Furlow attached to Appellee's previously filed "Response to Petition for a Writ of Error" as Exhibit 2.

This significant discrepancy in the Appellant's diagnoses led to GVMC's filing of its Motion for Judicial Notice (attached to Appellee's previously filed "Response to Petition for a Writ of Error" Exhibit 3). Wherein, GVMC argued that Appellant should be estopped from refuting that a judicial body had previously found that Appellant's disability and condition was the result somatoform disorder, and not solely due to his alleged CRPS, as Appellant alleged in his Greenbrier County Circuit Court filing. At a Pre-Trial Conference in the underlying matter, held on April 4, 2005, Judge James J. Rowe granted GVMC's Motion for Judicial Notice.

At a July 7, 2005, hearing Appellant's counsel orally advised the Court that Appellant would be pursuing a medical negligence claim against the Emergency Department physicians at GVMC at the upcoming August 22, 2005 trial. Appellant further advised that such negligence claims would be pursued through the testimony his neurology expert witness, Dr. Thomas Furlow. On July 13, 2005, in response to Appellant's assertion, GVMC filed a Motion in Limine, to exclude Appellant's expert witness from opining such criticisms as to the Emergency Department physicians at GVMC. *See* Motion attached to Appellee's previously filed "Response to Petition for a Writ of Error" as Exhibit 4. In this Motion in Limine, GVMC asserted that Appellant lacked the necessary expert testimony to pursue negligence claims, pursuant to the

requirements of West Virginia Code Section 55-7B-4, through criticisms of the GVMC Emergency Room physicians based upon the following: (1) Dr. Furlow, despite being deposed, never voiced Emergency Room physician criticisms; and (2) Dr. Furlow in his discovery deposition went as far as to absolve GVMC's Emergency Department physicians from liability. *See* transcript excerpts from Dr. Furlow's October 6, 2004, discovery deposition attached to Appellee's previously filed "Response to Petition for a Writ of Error" as Exhibit 5.

At a July 14, 2005 hearing, Judge James J. Rowe granted GVMC's Motion in Limine Precluding Emergency Room Physician Criticisms. On August 18, 2005, four days before the trial in this matter was scheduled to commence, Appellant Petitioned this Court, via a Writ of Prohibition, to overturn Judge Rowe's ruling on this issue. This Court refused Appellant's Writ on August 18, 2005. *See* Order attached to Appellee's previously filed "Response to Petition for a Writ of Error" as Exhibit 6.

The trial of this matter commenced on August 22, 2005. The evidence presented during said trial was consistent with the above-described factual overview, namely that, Appellant and his experts asserted during direct examination that Appellant's current medical condition was solely the result of CRPS and avoided all references and mention of the Appellant's diagnosis of and the SSA decision findings of somatoform disorder. Consistent with the trial court's rulings on Appellee's Motion for Judicial Notice, Counsel for Appellee cross-examined Appellant and his expert witnesses, raising the findings of the SSA and the Appellant's diagnosis of somatoform disorder. Such cross-examination was offered for the purpose of preventing the jury from being misled as to the Appellant's medical condition and diagnoses, not for the purpose of advising the jury

of any potential or possible collateral source related to the SSA disability award. In point of fact, at no time during the trial of this matter was any reference to a dollar amount in regard to the SSA benefits awarded to the Appellant made before the jury.

On August 29, 2005, the jury returned a verdict in favor of Appellee, GVMC, by answering in the negative to the question: "Do you find that Greenbrier Valley Medical Center through its nursing staff deviated from the accepted standard of care in their care and treatment of Eric Brooks?" See Jury Verdict Form attached to Appellee's previously filed "Response to Petition for a Writ of Error" as Exhibit 7.

Appellant now appeals this Court to review the trial court's rulings on two issues: (1) the appropriateness of the trial court's ruling relative to GVMC's Motion for Judicial Notice and (2) again revisits the appropriateness of the trial court's rulings relative to GVMC's Motion in Limine, Precluding Emergency Room Physician Criticisms. Appellee GVMC asserts that the trial court did not err in regard to the rulings on these issues.

III. STANDARD OF REVIEW

Appellant incorrectly asserts that this appeal involves a question of law/interpretation of a statute and the accompanying de novo standard of review pursuant to Crystal R.M v. Charlie A.L., 194 W.Va. 119 (1995). However, Appellant takes this court's "question of law" phrasing out of context in applying that phrasing to an evidentiary ruling. In Crystal R.M. the court reviewed the trial court's interpretation of West Virginia's child support statute, not an evidentiary ruling which the instant appeal involves. De novo is not the appropriate standard of review for the two issues raised in this appeal.

Rather, in the instant appeal, Appellant questions two evidentiary rulings made by the trial court, one that admitted (SSA findings) evidence and one that excluded (emergency room physician criticisms) evidence. As such, Appellant's appeal clearly presents the Court with an evidentiary question and its accompanying abuse of discretion standard. This Court has long held that evidentiary rulings as well as the trial court's application of the Rules of Evidence are subject to review under an abuse of discretion standard. State Rodoussakis, 204 W.Va. 58 (1998) and State v. Larry M., 215 W.Va. 358 (2004). "The West Virginia Rules of Evidence...allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence...are committed to the discretion of the trial court." McDougal v. McCammon, 193, W.Va. 229 (1995).

IV. ARGUMENT

Taken in order as raised in Brief of Appellant;

Issue Raised: WHETHER THE TRIAL COURT ERRED BY TAKING JUDICIAL NOTICE OF THE FINDINGS OF THE SOCIAL SECURITY ADMINISTRATION AT APPELLANT'S DISABILITY HEARING ALLOWING THE JURY TO CONSIDER A MEDICAL CONDITION THAT DID NOT HAVE ANY INDEPENDENT MEDICAL BASIS

I. THE SOCIAL SECURITY ADMINISTRATION'S FINAL DECISION SPECIFICALLY REFERENCES MEDICAL TESTIMONY AND MEDICAL RECORDS ON WHICH APPELLANT'S FULLY FAVORABLE DECISION WAS BASED.

Appellant misleads the Court on the application of the trial court's granting of Appellee's Motion for Judicial Notice. Appellant also misleads this Court as to the basis of the SSA's fully favorable award to Appellant. As outlined in the above factual and procedural summary, prior to filing the underlying his civil action, Appellant filed for

SSA benefits alleging permanent injury from the care he received at GVMC in February 2000. After an initial denial and appeal, SSA determined that Appellant's Somatoform Disorder was significant enough to warrant a disability determination. Somatoform Disorder, as discussed above, is a *psychologically-based* disorder, and is not proximately-related to the alleged *physical* injury Appellant allegedly suffered from treatment received at GVMC. The SSA ruling was not based on Chronic Regional Pain Syndrome (CRPS), the alleged physical injury that Appellant alleges in the instant state court civil action caused by treatment received at GVMC. See SSA Decision previously attached to Appellee's previously filed "Response to Petition for a Writ of Error" as Exhibit 1. Appellant neither objected to nor appealed the SSA fully favorable award or the basis for that award. However, despite failing to object to or appeal the SSA Decision, Appellant filed a civil action in Greenbrier County Circuit Court asserting allegations completely contrary to the SSA findings.

To assume that the SSA issued a favorable ruling without medical evidence to support their decision is laughable at best. In fact, the ALJ who presided over the hearing wherein Appellant received a fully-favorable decision, references in his decision, medical experts from whom testimony was received and medical records which were relied upon. It is key to note that Appellant was fully advised in the Notice of Decision, that any and all portions of the decision were appealable. Appellant did not object to nor appeal any finding (including the finding of Somatoform Disorder). Since Appellant did not elect to appeal the ALJ's decision, that decision is final and not subject to appeal before this, or any other, Court. See 42 U.S.C. § 405(h); 20 C.F.R. § 404.955. The mere nature of Appellant's ludicrous assertion that the SSA randomly grants benefits without a medical

basis for the same cuts at the credibility of the SSA itself. If Appellant truly felt that the condition he was awarded a fully favorable disability award for was wrong or without merit and, nevertheless, accepted the award and the monthly checks that come with that award, is Appellant not committing fraud? Does he not continue to do so every month he receives and cashes his SSA benefit check?

Moreover, at this matter's trial, the SSA final decision was entered into evidence *without objection* from Appellant and the same was attached to Appellee's previously filed "Response to Petition for a Writ of Error" as Exhibit 1. Appellant presented no evidence at the trial of this matter to support his contention that the ALJ simply "threw in" Somatoform Disorder in order to grant Appellant benefits. There is no basis for appeal with respect to this issue raised.

II. THE TRIAL COURT CORRECTLY APPLIED THE DOCTRINE OF COLLATERAL ESTOPPEL.

In *Mellon-Stuart Co. v. Hall*, 178 W.VA. 291 (1987), the West Virginia Supreme Court described collateral estoppel as a doctrine which, "applies to issues that were actually litigated in an earlier suit even though the causes of action are different." *Id.* At 299-300. The doctrine may apply to decisions rendered by non-judicial bodies. *See id.* At 300. The *Mellon-Stuart* court utilized a three-part test to determine whether an adjudicative body's decision may be given collateral estoppel or res judicata effect: "(1) whether the body acts in a judicial capacity; (2) whether the parties were afforded a full and fair opportunity to litigate the matters in dispute; and (3) whether applying the doctrines is consistent with the express or implied policy in the legislation which created the body." *Id.*

Disability claims under the Social Security Act are governed by federal statutes and regulations. *See* 42 U.S.C. §405; 20 C.F.R. Pt. 404. Among other administrative procedures, claimants are entitled to an administrative hearing before an ALJ. 20 C.F.R. § 404.944. At the hearing, the claimant has the opportunity to present evidence, to use compulsory process to compel the attendance of witnesses, and to be represented by counsel. 20 C.F.R. § 404.950. If the ALJ decision regarding the claimant's alleged disability is not appealed within a prescribed time period, then it becomes final and binding on all parties. 20 C.F.R. § 404.955. Thus, an SSA hearing before an ALJ is the type of adjudication that may yield a final decision which may be given collateral estoppel effect. Indeed, the federal regulations warn claimants that administrative findings may give rise to a collateral estoppel defense. 20 C.F.R. § 404.950(f).

Courts have consistently held that final administrative decisions of the SSA create a collateral estoppel effect. *See Pack v. Heckler*, 740 F.2d 292, 294 (4th Cir. 1984) (prior administrative determination that claimant was disabled bars government from relitigating issue of claimant's disability under doctrine of collateral estoppel); *Lively v. Secretary of Health and Human Services*, 820 F.2d 1391, 1392 (4th Cir. 1987) (prior administrative determination that claimant was disabled given res judicata effect).

[A]n ALJ hearing approximates a judicial trial in one important aspect: it serves as an adjudication of whether a claimant is entitled to social security benefits. The ALJ hearing resolves a disputed fact – whether a particular claimant is entitled to social security benefits. The claimant has the opportunity to present evidence in support of his or her claim that he or she deserves social security benefits.

Drummond v. Commissioner of Social Security, 126 F3d 837, 841 (6th Cir. 1997).

The Social Security Act renders the findings of an ALJ final and binding.

The findings and decision of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Commissioner of Social Security shall be reviewed by any person, tribunal, or governmental agency except as herein provided.

42 U.S.C. § 405(H). Any judicial review of a final SSA decision must be filed in federal court within sixty days after the administrative decision. 42 U.S.C. § 405(g). “Section 405(h) is intended to give finality to the decision of the Social Security Administration.” *Drummond*, 126 F.3d at 841.

Similarly applicable in this instance is Rule 201 of the West Virginia Rules of Evidence. Rule 201 deals with the formal judicial notice of facts that are “not subject to reasonable dispute in that it is...capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned.” WVRE 201(b). Clearly the findings made by the SSA reach the level of reliability worthy of judicial notice; the Circuit Court correctly recognized the same in granting GVMC’s Motion for Judicial Notice.

During this matter’s trial Appellant attempted to re-litigate the nature of his alleged medical disability, which already has been established in a final administrative decision of the SSA. At the SSA hearing, Appellant was represented by counsel and presented extensive medical evidence. Furthermore, the evidence was evaluated by an ALJ with expertise regarding medical issues. The SSA – after a hearing at which Appellant had a full opportunity to litigate his claims – determined that Appellant’s alleged disability was tied to a somatoform disorder *only*. The finding of Somatoform Disorder indicates that Appellant’s alleged disability was due to a subjective perception of pain created a psychological disorder, rather than an objectively detectable condition

attributable to the alleged malpractice of Appellee, GVMC. Appellant did not elect to appeal the ALJ's decision and, therefore, the decision is final. *See* 42 U.S.C. § 405(h); 20 C.F.R. § 404.955.

The SSA's final decision conclusively established the nature of Appellant's alleged disability following his treatment at Appellee, GVMC. That is the precise issue litigated in this malpractice action. Although Appellant asserted a new cause of action (medical malpractice) against an entity which was not a party to the SSA hearing (GVMC), the trial court correctly ruled that the doctrine of collateral estoppel precluded Appellant from re-litigating an *issue* which previously was litigated to a final conclusion. *See Pack v. Heckler*, 740 F.2d 292, 294 (4th Cir. 1984) (prior administrative determination that claimant was disabled bars government from re-litigating issue of claimant's disability under doctrine of collateral estoppel); *Lively v. Secretary of Health and Human Services*, 820 F.2d 1391, 1392 (4th Cir. 1987).

In sum, the trial court ruled correctly in granting Appellee, GVMC's Motion for Judicial Notice. In fact, as anticipated, during this matter's trial Appellant and his experts completely avoided all references and mention of Somatoform Disorder. Counsel for GVMC cross-examined Appellant and his experts with the findings of the SSA to prevent the jury from being misled about Appellant's medical condition, not for the purpose of advising the jury of any potential or possible collateral source. In fact, at no point did the jury ever hear any reference to any dollar amount of Appellant's SSA benefits.

As a matter of law, whether by collateral estoppel or WVRE 201, the trial court correctly prohibited Appellant from denying that he was found to be disabled due solely to the existence of a somatoform disorder, and not anything related to the medical

treatment that he received at GVMC in February 2000. There is no reversible error in the trial court's granting of Appellee's Motion for Judicial Notice with respect to Appellant's fully favorable SSA award. To rule otherwise would undermine the authority of the SSA and serve as a notice that state courts are a second, additional source of recovery for plaintiffs and claimants who have already litigated in the state and federal administrative systems.

III. EVEN IF THIS COURT FINDS THAT THE CIRCUIT COURT'S GRANTING OF APPELLEE'S MOTION FOR JUDICIAL NOTICE WAS ERROR, THE RULING WAS HARMLESS SINCE THE JURY FOUND IN THE APPELLEE'S FAVOR BEFORE EVER ADDRESSING DAMAGES.

The collateral source rule as contemplated precludes inquiry as to whether a plaintiff has received monetary payments from a collateral source so as not to influence a jury determination in regard to damages. The general theory behind the collateral source rule is that a jury may well reduce a damage award based on the amounts that have been shown to have been received from such a collateral source. The collateral source rule is not applicable in this case, as discussed above however, because the SSA decision has no bearing on the jury's evaluation of liability.

In Keesee v. General Refuse Services, Inc., 216 W.Va. 199, 604 S.E.2d 449, the Plaintiff argued that introduction of collateral source evidence was prejudicial and, therefore, reversible error. The West Virginia Supreme Court of Appeals held in Keesee v. General Refuse Services, Inc. that the introduction of collateral source evidence would indeed have been prejudicial had the jury found in the Plaintiff's favor on the issue of liability. Nonetheless, by finding against the Plaintiff on the issue of the Defendant's liability, the jury never had an opportunity to contemplate the issue of damages.

Therefore, there was no reversible error based on the Plaintiff's argument of the collateral source rule in Keesee.

In the instant case, as in Keesee, the jury did not find in the Appellant's favor in regard to liability. See Jury Verdict Form attached to Appellee's previously filed "Response to Petition for a Writ of Error" as Exhibit 7. Accordingly, the jury never addressed the issue of damages. Because damages were never contemplated in this case, evidence of the Appellant's collateral income can in no way be found to be prejudicial. Appellant appropriately withdrew his first Issue Raised based on this court's rulings in Keesee; however, Appellant fails to realize that if the introduction of collateral source was harmless error¹, then so too would be the introduction of collateral source "without any independent medical basis."² Thus, in the instant case, as in Keesee, even if the trial court erred, there is no reversible error based on the collateral source rule.

Issued Raised : WHETHER THE TRIAL COURT ERRED BY IMPROPERLY EXCLUDING APPELLANT'S PLEADED THEORY OF LIABILITY WITH RESPECT TO DEVIATIONS OF THE EMERGENCY ROOM PHYSICIANS.

I. APPELLANT PRESENTED NO EVIDENCE PRE-TRIAL TO SUPPORT HIS EMERGENCY ROOM DEVIATIONS AS PLED AND THE TRIAL COURT, ACCORDINGLY, PROPERLY KEPT THOSE CRITICISMS FROM THE JURY.

While Appellant plead criticisms of the GVMC Emergency Room Physicians in his February 14, 2002, Complaint, Appellant failed to offer expert witness testimony to substantiate a deviation from the applicable standard of care by the Appellee's

¹ It is important to note that GVMC firmly stands by the trial court's decision to grant its Motion for Judicial Notice and that the trial court's granting of this motion in no way violates the collateral source rule.

² Appellee GVMC asserts that the SSSA had more than sufficient medical evidence in their granting Appellant's fully favorable award and that the SSA (nor any such administrative agency – for example Workers Compensation) would never issue a fully favorable and permanent award without sufficient medical basis.

Emergency Room Physicians within the multiple discovery deadlines set (and reset) by the trial court.

Throughout the over four year pendency of this litigation, Appellant disclosed only one expert witness, Dr. Thomas Furlow, a neurologist. Appellee deposed Dr. Furlow on October 6, 2004. At that deposition Dr. Furlow's testified in regard to Emergency Room physician criticisms as follows (attached to Appellee's previously filed "Response to Petition for a Writ of Error" as Exhibit 5):

Q. Exactly. So you will agree that he was timely back in the ER?

A. he came back pretty quickly, yes.

Q. So, I guess – what I'm saying is if he's timely back in the ER is his development of RSD in any way preventable?

A. I would say the average case is generally not preventable, probably not even diagnosable in the earliest phase; particularly if there's ongoing tissue injury.

Q. When would have been that first time, in your opinion, when Mr. Brooks's condition could have been diagnosed?

A. Well, if he failed to respond to antibiotics and moist heat an evaluation, probably would have been a week or two one could certainly suspect a diagnosis.

Q. And, within a week or two he is no longer under the care of the folks at the Greenbrier Medical Center?

A. I gather so.

Q. Let's assume that a diagnosis is properly made one to two weeks after his Greenbrier Medical Center discharge on February 23, 2000; if a diagnosis is promptly made is there anything that could have been done that would have diminished the extend of his illness as it exists today?

A. Well, early intervention with physical therapy, some would try a stellate ganglion block, the use of Beta blockers or calcium channel blockers are often advocated to attempt to bring the disease to a halt. But this disease takes off some-times and cannot be stopped.

Q. Do you have an opinion, to a reasonable degree of medical certainty, if Mr. Brooks would have been timely diagnosed, been treated, whether or not RSD could have either, one, have been stopped or, two, slowed it to some degree that it would not be as severe as it is today?

A. I don't think I could prognosticate, no. It's inherently unpredictable.

See also August 21, 2003 Report from Dr. Thomas Furlow attached to Appellee's previously filed "Response to Petition for a Writ of Error" as Exhibit 2.

Despite this testimony from Appellant's only disclosed standard of care expert witness, at a July 7, 2005, hearing Appellant's counsel orally advised the trial court that Appellant, at the upcoming August 22, 2005, trial would be pursuing a medical negligence claim against Appellee, GVMC's Emergency Department physicians, and that Appellant would be doing so through, Dr. Furlow. In response, on July 13, 2005, Appellee filed a Motion in Limine asking the trial court to preclude the untimely disclosed Emergency Department criticisms.³ *See* Motion in Limine Precluding Emergency Room Criticisms attached to Appellee's previously filed "Response to Petition for a Writ of Error" as Exhibit 4.

At a July 14, 2005, hearing the trial court granted Appellee's Motion in Limine Precluding Emergency Room Physician Criticisms. On August 18, 2005, four days before trial was scheduled to begin, Appellant petitioned this Court, via a Writ of Prohibition, to overturn Judge Rowe's ruling on this matter. This Court denied Plaintiff's Writ on August 18, 2005. *See* Order attached to Appellee's previously filed "Response to

³ Other than pleading negligence of the emergency room physicians, Appellant never pursued this theory of negligence throughout discovery. The emergency room physicians were neither named as defendants nor were they ever even deposed. In fact there were never even any written discovery questions directed to Appellee GVMC on this issue.

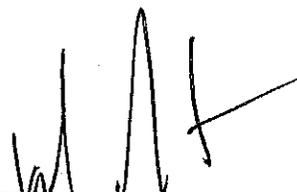
Petition for a Writ of Error” as Exhibit 6. Nothing has changed either factually or procedurally to warrant a second review of this issue by this Court.

V. CONCLUSION

The trial court committed no error below in either its granting of Appellee’s Motion for Judicial Notice or Appellee’s Motion in Limine to Preclude Emergency Room Physician Criticisms. The trial court’s rulings were based on sound legal doctrine and the sound public policy of precluding claimants in the state and federal administrative systems from both forum shopping and double dipping. Moreover, with respect to the Motion for Judicial Notice, even if this Court were to find that the trial court erred, such error is harmless such the jury never makes it to the issue of damages in its deliberations. Likewise, with the respect to the Motion in Limine to Preclude Emergency Room Physician Criticisms, this issue has already been submitted to this Court for review and the same was refused. The jury verdict should stand.

GREENBRIER VALLEY MEDICAL CENTER

By Counsel



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IN THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

NUMBER 061878

ERIC JASON BROOKS,

Plaintiff below, Appellant

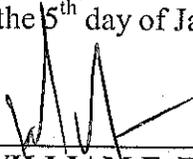
v.

**GALEN OF WEST VIRGINIA, INC.,
d/b/a GREENBRIER VALLEY MEDICAL
CENTER and GREENBRIER VALLEY
MEDICAL CENTER, LLC, d/b/a
GREENBRIER VALLEY MEDICAL
CENTER.**

Respondent, Appellee

CERTIFICATE OF SERVICE

I, William F. Foster, II, do hereby certify that the foregoing **BRIEF OF APPELLEE** was served upon the Appellant, by mailing a true copy thereof to Richard E. Hardison, Jr., Attorney at Law, 101 Main Street, P.O. Box 1700, Beckley, West Virginia, 25802-1700, by United States Mail, postage prepaid, on this the 5th day of January, 2007.



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