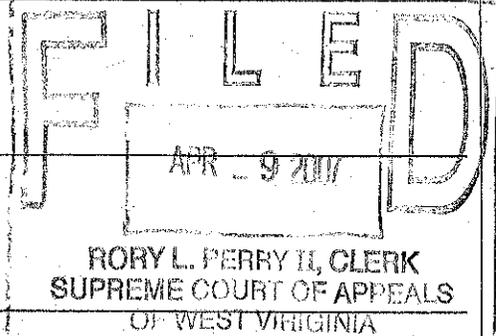


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

CASE NO.



LAMBERT TURNER JONES, II and
RED JONES AUTO MART, INCORPORATED, a corporation,
PETITIONER,

v.

GEORGE P. NAUM
and JOAN NAUM
RESPONDENTS.

PETITION FOR WRIT OF PROHIBITION

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I. FACTS AND PROCEDURAL BACKGROUND

The present case arises out of a very low speed motor vehicle accident that occurred on April 30, 2003, in Ohio County, Wheeling, West Virginia. At the time of the accident, traffic was moving slowly. The plaintiff brought his 2000 Lincoln Continental to a stop. The defendant attempted to stop his 1995 Probe, but was unsuccessful. The vehicles came into contact with minimal damage resulting. Neither the plaintiff nor the defendant reported any injuries at the scene. More than a year and a half later, plaintiff underwent a micro-surgical anterior cervical discectomy at the C5-6 level with allograft fusion of the C5-6. Plaintiff filed the underlying case asserting that this neurosurgical procedure, as well as other neurological problems, such as a concussion, traumatic headaches, dizziness, confusion, memory problems, and the inability to concentrate, were all caused by the subject motor vehicle accident. The primary issue is whether these problems were caused or contributed to by the subject accident or whether the claimed conditions were caused by other accidents, falls, degenerative conditions, medications, or other health problems.¹

In support of plaintiff's neurological claims, plaintiffs disclosed numerous experts, including a neurosurgeon, Dr. Hargraves, and a neurologist, Dr. Kettler, as expert witnesses.

To address the neurological issues raised by plaintiff and to respond to the neurological

¹ Discovery has revealed that the plaintiff had multiple prior motor vehicle accidents, wherein, he complained of cervical problems and was diagnosed with a herniation of the C5-6 level. At least one physician claims the plaintiff had a 15% permanent partial disability rating prior to the subject accident as a result of the pre-existing problems that plaintiff now claims are causally related to the subject motor vehicle accident. Medical records also show he had significant degenerative changes to his cervical spine prior to and after the subject motor vehicle accident. Further, it has been learned that the plaintiff underwent triple bypass surgery less than three months prior to the subject motor vehicle accident. Further, evidence has shown that the plaintiff has been taking Oxycotin and other medications for an extended period of time. The expert would indicate cognitive problems are common complications with bypass procedures and prolonged use of some medications. Discovery further revealed plaintiff fell on at least two occasions and on at least one of these occasions rolled down a hill as a result of that fall.

experts disclosed by plaintiff, the defendant timely disclosed a Board Certified Neurological Surgeon, Dr. Peter E. Sheptak, M.D.²

In the evening hours before the Pre-Trial, plaintiff served a Motion to Exclude the testimony of defendant's neurosurgeon. The following morning at the Pre-Trial, the Court below categorically excluded defendant's neurological expert from testifying in any manner in this case. The Court below, however, held it would allow the plaintiff's neurological experts to testify.³

This Pre-Trial hearing occurred on Friday, April 6, 2007. As of the date of the filing of this Petition for Writ of Prohibition, April 9th, 2007, the Court had not yet prepared a written Order reflecting its verbal rulings. A formal request was made for a transcript of the hearing by writing on April 6, 2007. As of the date of this Petition, the transcript was not yet produced.

The Trial in this matter is scheduled to commence in twelve (12) business days, on April 25, 2007. In response to the surprise exclusion of the defendant's only medical expert witness, a Motion to Continue the Trial date was made. The Court below denied the Motion to continue the Trial set for later this month. The defendant below is now being forced to Trial without his neurological expert to respond to plaintiff's neurological experts.

II. RELIEF REQUESTED

The Petitioner respectfully requests the West Virginia Supreme Court of Appeals issue a Writ of Prohibition precluding the Court below from enforcing its Order excluding the expert's testimony. Further, the Petitioner requests this Court protect the defendant from the inherent injustice that will result if the defendant is forced to Trial in twelve days without any medical expert.

² The defendant's disclosure was not only timely filed in advance of the disclosure date set by the Court, it was filed on April 12, 2006, almost a full year prior to the Pre-Trial hearing.

³ The defendant's expert was designated to address the same medical issues as the plaintiff's experts.

III. STANDARD OF REVIEW

A. STANDARD OF REVIEW CONCERNING PROHIBITION

“In determining whether to entertain an issue the Writ of Prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal’s order is clearly erroneous as a matter of law; (4) whether the lower tribunal’s order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal’s order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary Writ of Prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. Pt. 1 State ex rel. Weirton Medical Center v. Mazzone, 213 W.Va. 750, 584 S.E.2d 606 (2003); Syl. Pt. 4 State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1996). State ex rel. Johnson v. Reed, 219 W.Va. 289, 633 S.E.2d 234, (2006).

This Court has held that a Writ of Prohibition is appropriate when a lower Court has categorically excluded testimony from a well-credentialed medical expert. State ex rel. Weirton Medical Center v. Mazzone, 213 W.Va. 750, 754, 584 S.E.2d 606, 610 (2003). A party’s experts this Court stated as follows:

“In the instant case, if we were to allow the trial court’s ruling to stand, both parties would be compelled to go through an expensive, complex, trial, and appeal from the final judgment - an appeal that would likely address this issue. Based on our review of the record before us, we determined there is a likelihood of reversal on appeal based on the Circuit Court’s exclusionary ruling; we further find that the Petitioner has no plain, speedy, and adequate remedy in the ordinary course of the law.”

Id., citing with approval, State ex rel. Wiseman v. Henning, 212 W.Va. 128, 132, 569 S.E.2d 204, 208 (2002).

B. STANDARD OF REVIEW CONCERNING EXCLUSION OF AN EXPERT

West Virginia Rule of Evidence 702, provides “if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

“In determining who is an expert, a Circuit Court should conduct a two-step inquiry. First, a Circuit Court must determine whether the proposed expert (a) meets the minimal education or experiential qualifications (b) in a field that is relevant to the subject under investigation (c) which will assist the trier of fact. Second, a Circuit Court must determine that the expert’s area of expertise covers the particular opinion as to which the expert seeks to testify. Syl. Pt. 6, Jones v. Patterson Contracting, 206 W.Va. 399, 524 S.E.2d 915 (1999); Syl. Pt. 5, Gentry v. Mangum, 195 W.Va. 512, 466 S.E.2d 171 (1995).

This Court has repeatedly that “because of the ‘liberal thrust’ of the rules pertaining to experts, Circuit Courts should err on the side of admissibility.” Jones v. Patterson Contracting, 206 W.Va. 399, 404, 524 S.E.2d 915, 920 (1999) (Emphasis Added) citing with approval, Gentry v. Mangum, 195 W.Va. 512 at 525, 466 S.E.2d 171 at 184. Citing II Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers, Section 7-2 (A) at 24.

This Court has further explained “conventional devices like rigorous cross-examination, careful instructions on the burden of proof, and rebuttal evidence, may be more appropriate instead of the wholesale exclusion of expert testimony under Rule 702.” Jones v. Patterson Contracting, 206 W.Va. 399, 405, 524 S.E.2d 915, 921 (1999); Gentry v. Mangum, 195 W.Va. 512, 526, 466 S.E.2d 171, 185 (1995) quoting Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 596, 113 S.Ct. 2786, 2798, 125 L.Ed.2d 469, 484 (1993).

This Court has acknowledged that “testimony from an expert is presumed to be helpful. Watson v. Inco Alloys International, 209 W.Va. 234, 243, 545 S.E.2d 294, 303 quoting citing II

Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers, Section 7-2 (A)(2), at 32 (3d Ed. 1994). Citing Kopf v. Skyrn, 993 F.2d 374, 377 (4th Cir. 1993). "Basically, the helpfulness requirement simply means that the testimony does not concern something that is within the common knowledge and experience of a lay juror." Id. Beyond that, the question of whether expert testimony will assist the trier of fact goes primarily to the relevance of the evidence. Id. And the authorities cited therein.

IV. ARGUMENT

A. A WRIT OF PROHIBITION IS APPROPRIATE WHEN THE COURT BELOW CATEGORICALLY EXCLUDES TESTIMONY FROM A WELL-CREDENTIALLED MEDICAL EXPERT

This Court has clearly held that a Writ of Prohibition is the proper tool for addressing a lower Court's categorical exclusion of an expert witness. State ex rel. Weirton Medical Center v. Mazzone, 213 W.Va. 750, 754, 584 S.E.2d 602, 610 (2003). In the present case, just like the Weirton Medical Center case, if the Trial Court's ruling is allowed to stand, both parties will be compelled to go through an expensive, complex, Trial. Id. This problem is even more acute in the present case, as the Trial is scheduled to commence in less than twelve business days, and the untimely Motion and surprise Order by the Court, has left the defendant with no possibility of a fair Trial. Just like the Weirton Medical Center case, the defendant below has no plain, speedy and adequate remedy in the ordinary course of law. Id.

The defendant below contends that the lower Court's Order is clearly erroneous as a matter of law. The Court is allowing the plaintiff's neurological experts to testify while it is refusing to allow an equally, if not better qualified neurological expert to testify on behalf of the defendants. The defendant contends this double standard is not only clearly erroneous as a matter of law, but a violation of due process, in that the defendant's right to a fair Trial has been denied. Therefore, Prohibition is appropriate in this case, as it was in the Weirton Medical

Center case. Id.

B. THE CATEGORICAL EXCLUSION OF DR. SHEPTAK IS AN ABUSE OF DISCRETION

It has long been held that the standard for admissibility of expert testimony is to applied liberally in favor of allowing the experts to testify. This Court has pointed out “specifically, the liberality in the admission of expert testimony is retained. Rule 702 permits the admission of expert testimony if the witness qualifies as an expert upon the subject in which he or she is called to testify, and the testimony can assist the trier of fact. As under our prior law, the standard for qualifying as an expert is a permissive one in that a witness may be qualified as an expert by knowledge, skill, experience, training, or education. If a witness qualifies on any of the grounds listed in Rule 702 [he or she] should be allowed to testify as an expert.” West Virginia Division of Highways v. Butler, 205 W.Va. 146, 151, 516 S.E.2d 769, 774 (1999). Citing with approval, Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers, Vol. II, Section 7-2(A)(1), P.28 (3rd Edition 1994).

This Court has held “in general, an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the Court makes a serious mistake in weighing them. Jones v. Patterson Contracting, 206 W.Va. 399, 405, 524 S.E.2d 915, 921 (1999); Gentry v. Mangum, 195 W.Va. 512, 520, 466 S.E.2d 171, 179 (1995). The proper factors to apply are as follows:

“First a Circuit Court must determine whether the proposed expert (a) meets the minimal education or experiential qualifications (b) in a field that is relevant to the subject under investigation (c) which will assist the trier of fact. Second, a Circuit Court must determine that the expert’s area of expertise covers the particular opinion as to which the expert seeks to testify. Id. Jones v. Patterson Contracting at Syl. Pt. 6, Gentry v. Mangum at Syl. Pt. 5. Each factor will

be addressed in order.

1. **Dr. Sheptak is more than qualified to testify in his field and undisputably exceeds the minimal qualifications.**

Dr. Sheptak is a neurosurgeon who works with the University of Pittsburgh School of Medicine Department of Neurological Surgery. He attended the University of Notre Dame and the University of Pittsburgh, obtaining his B.S., graduating *Cum Laude*, as well as obtaining his M.D. He is certified by the American Board of Neurological Surgery. He is also Certified by the National Board of Medical Examiners. He is currently the Vice Chairman of Neurological Surgery for the University of Pittsburgh Medical Center. At this facility he also serves as the Director of Clinical Services and as a Clinical Professor. He has also served as the Chief of the Department of Neurosurgery for the St. Francis Medical Center. He also served as the Chief of Neurosurgery for the Oakland Veterans Administration Hospital. He has held attending or consulting privileges at more than a dozen hospitals and medical centers. He also served as the Neurosurgical Consultant for the University of Pittsburgh Athletic Teams, as well as the Pittsburgh Penguins Hockey Team. He has twenty publications to his name and has given more than a dozen presentations in his field. Dr. Sheptak further has over thirty years diagnosing and treating individuals with the type of injuries at issue in the present case.

Further, Dr. Sheptak has conducted a thorough review of the medical records in this case. He further has completed a medical examination of the plaintiff and obtained a medical history.

Dr. Sheptak is preeminently qualified to address the issues in this case. Plaintiff's claimed injuries are precisely those which this expert has dealt with for his entire professional career. He has been provided the basis for evaluating the medical records in this case, and has had the opportunity to examine and diagnose the plaintiff.

Dr. Sheptak is the only physician in this case who has had the opportunity to review the majority of plaintiff's medical records. Dr. Sheptak has reviewed all of the radiology reports, CAT Scans and MRIs. He has reviewed the records of Dr. Henry Kettler, Dr. Ronald Hargraves,

Dr. Michael DeFranzen, Dr. Eric Fishman, Dr. D.K. Batra, Dr. George Naum, East Ohio Regional Hospital, Wheeling Hospital, West Penn Hospital, Ohio Valley Medical Center, and Dr. David Lindhert. Dr. Sheptak has also reviewed plaintiff's pharmacy records and medication history. He has evaluated the effect these medications would have on the plaintiff. No one can credibly dispute that the first element of the Gentry test is more than satisfied in favor of Dr. Sheptak being permitted to offer testimony in this case.

2. No one can credibly dispute Dr. Sheptak's neurological opinions are relevant to the subject matter under investigation

Plaintiff is alleging neurological injuries. He is claiming that he required neurosurgery at the C5-6 level as a result of the subject accident. Plaintiff is claiming neurological injuries, such as a concussion, traumatic headaches, cognitive dysfunction and dizziness. Plaintiff has placed a considerable number of neurological and neurosurgical matters at issue in this case. Indeed, the vast majority of plaintiff's claimed damages in this case are all neurological issues. Dr. Sheptak is unquestionably an expert in precisely the exact issues plaintiff has made the subject of this case.

Further, plaintiff has designated a neurologist, a neurosurgeon, and a neuropsychologist as experts in this case. These experts will all testify to neurological and neurosurgical issues. Plaintiff is using these experts to establish his neurological and neurosurgical problems and is attempting to recover damages against the defendant for these neurological and neurosurgical problems. Dr. Sheptak is an expert who squarely meets with the qualifications, as well as the precise field of expertise of plaintiff's disclosed experts. Therefore, no one can credibly dispute that Dr. Sheptak is being offered in a field that is relevant to the subject matter under investigation. Accordingly, element B of the Gentry test has been squarely met.

3. No one can dispute that a neurosurgeon's opinions would assist the trier of fact in evaluating the neurosurgical issues in this case.

It is quite normal and reasonable to rely upon a neurosurgical expert to respond to

neurosurgical claims. There is a perfect match between this expert and the issues. A fundamental issue in this case is whether the neurological injuries claimed by the plaintiff are actually caused by the accident. Dr. Sheptak was retained and disclosed as an expert to address the nature and extent of plaintiff's alleged injuries and the causation of those injuries. His assistance to the trier of fact is unquestionable. The jury in this case has to determine which of the plaintiff's numerous automobile accidents caused his cervical injuries. Plaintiff is suing the defendant in the present case claiming his injuries were caused by the present accident. Research and discovery has shown, however, that the plaintiff has been in prior accidents and on at least one occasion has sued another individual for the same injuries he is suing the defendant for in this case. In that prior lawsuit, plaintiff retained an expert witness that indicated he suffered from a herniation at the C5-6 level and would require surgery. Plaintiff sued for those injuries and settled that prior litigation. Now in the present case, plaintiff is once again suing for a herniation at the C5-6 level. Plaintiff once again is suing for surgery for that herniation at the C5-6 level. The trier of fact is going to need to determine whether plaintiff's injuries were pre-existing, the trier of fact is also going to need to evaluate the plaintiff's longstanding history of degenerative changes in his cervical spine. The medical records will show there was a significant amount of stenosis prior to the accident. The jury will also need to evaluate the more than a year and a half gap between the time of the subject accident and the surgery the plaintiff is now claiming is related to this accident. The trier of fact will also need to evaluate the fact that the plaintiff claims to have fallen on numerous occasions. On one of these occasions, the plaintiff admits that he rolled down a hill. The trier of fact is going to need to evaluate the impact of prior and subsequent injuries on plaintiff's neurological and neurosurgical claims. There is no question that the opinions of a neurosurgeon would assist the trier of fact. Indeed, the Court below has determined that it is appropriate for the plaintiff to rely upon a neurologist and a neurosurgeon. The Court below will allow the plaintiff to use experts in the exact same field as the defendant's expert. The only difference is the plaintiff is allowed to use their experts and the defendant is not

allowed to use his expert.

If the Court below determined that the plaintiff's neurological experts are sufficient to assist the trier of fact, then the Court below cannot conclude that the defendant's neurological expert will not assist the trier of fact. It is absolutely clear that the defendant's expert squarely meets element C under the Gentry test. Accordingly, Dr. Sheptak should be allowed to testify.

4. **No reasonable mind can dispute that this neurosurgeon's area of expertise covers the neurosurgical opinions to which the expert seeks to testify.**

In this final element of the Gentry test, the Court below is to determine whether there is a match between the expert's qualifications and the anticipated testimony of the expert. The match in the present case is perfect. The issues are neurological and neurosurgical issues. Dr. Sheptak is a neurological and neurosurgical expert. He is a preeminently qualified neurological and neurosurgical expert. There is a perfect 100% match between this expert's area of expertise and the area he seeks to testify.

The plaintiff has attempted to argue that Dr. Sheptak is not as qualified as a biomechanical expert and therefore should not be permitted to testify regarding the Delta V or change of velocity experienced by the plaintiff inside the vehicle at the time of the accident. Dr. Sheptak willingly admits that he is not a biomechanical expert. He is not intending to and has not been offered to testify as a biomechanical expert. Dr. Sheptak is simply a neurological and neurosurgical expert who has been offered to testify in the field of neurology and neurosurgery. The final prong of the Gentry test has been squarely met. Dr. Sheptak should be permitted to testify. It is error to prohibit Dr. Sheptak from testifying in his field of expertise.

C. **THE RULING OF THE COURT BELOW HAS DENIED THE DEFENDANT THE RIGHT TO A FAIR TRIAL**

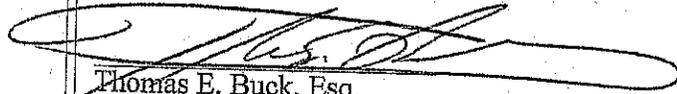
If the Court below had excluded all neurological and surgical experts regardless of whether they were plaintiff's experts or defendant's experts, then the ruling would be less

problematic. However, in the present case the Court has decided to allow the plaintiffs have neurological and neurosurgical experts but deny the defendant to have a properly disclosed and well-qualified neurological and neurosurgical expert. Applying this uneven standard giving special rights to the plaintiff and denying rights to the defendant, not only is inequitable, but has the effect of denying the defendant his Constitutional Right to a fair Trial. Essentially, the Court has issued an Order whereby the plaintiff can present neurological and neurosurgical experts and claim neurological and neurosurgical damages, while the defendant cannot respond or defend himself.

Further complicating this inequitable and unfair ruling, is the timing. The defendant disclosed his expert approximately a year ago. Both the Court and plaintiff's counsel were well aware of the identity of the expert, the qualifications of the expert, and the opinions of the expert, for a long time prior to Trial. For a year no objection was filed by plaintiff. However, plaintiff waited until the evening hours just before a morning Pre-Trial hearing to file a Motion to exclude the expert. Even with hand delivery, Rule of Civil Procedure 6(d)(1) requires at least seven days notice of such a Motion. No notice was given. The defendant was not even given an opportunity to brief the issues raised by plaintiff. At the 9:30 a.m. hearing, the Court entertained argument despite the lack of notice and despite the lack of opportunity for briefing. The Court then verbally ruled to exclude the defendant's expert. The lack of notice and the lack of time to brief the issues is further complicated by the pending Trial date. The Trial is to occur within twelve business days. Accordingly, this Court has allowed the plaintiff, without notice, to exclude the defendant's sole expert on this issue, mere days prior to the Trial. The Court then summarily denied defendant's Motion for a Continuance.

The ambush tactic excluding the defendant's lone witness on the essential issues in the case is shocking and inappropriate. The only way the defendant would have even a remote chance at a fair Trial is for the Writ of Prohibition to be granted.

LAMBERT TURNER JONES, II and
RED JONES AUTO MART, INC.
By Counsel



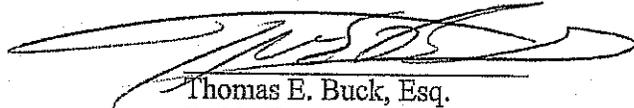
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CERTIFICATE OF SERVICE

Service of the foregoing **PETITION FOR WRIT OF PROHIBITION** was had upon the following by mailing a true and correct copy thereof by United States mail, postage prepaid, this 9th day of April, 2007:

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