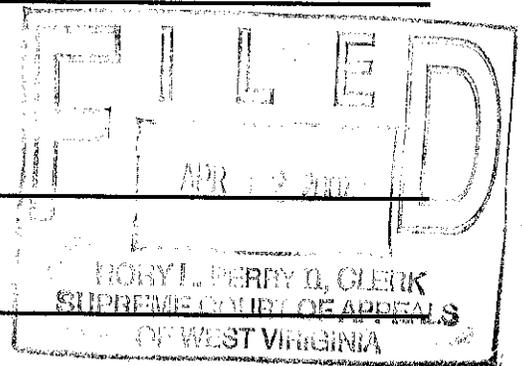


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

CASE NO. ~~071050~~  
**33383**



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

v.

GEORGE P. NAUM  
and JOAN NAUM,  
RESPONDENTS.

**RESPONDENTS' OPPOSITION TO  
PETITION FOR WRIT OF PROHIBITION**

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**I. FACTS AND PROCEDURAL BACKGROUND**

**A. Procedural Status**

This matter is scheduled for trial to commence in the Circuit Court of Ohio County, West Virginia, on April 25, 2007. It concerns a motor vehicle collision which occurred on April 30, 2003.

This matter was originally scheduled for trial on August 23, 2006. The parties represented to the court in a joint motion that they had been engaged in settlement negotiations and in an effort to contain litigation expenses had foregone the requisite discovery. (Exhibit A, Joint Motion to Vacate the Trial Date). The parties again attempted an effort at settlement by agreeing to participate in mediation which occurred on March 17, 2007. (Exhibit B, Letter of Elba Gillenwater (Mediator) dated February 16, 2007 scheduling mediation). When the mediation proved fruitless the parties were forced to engage in last minute discovery. The petitioners' expert, Peter Sheptak, M.D., was deposed on March 29, 2007 (Transcript (Tr.) Sheptak). The respondents' medical experts, Ronald Hargraves, M.D. and Henry Kettler, M.D., were deposed on March 30, 2007 and April 3, 2007, respectively. (Exhibit C, Notice of Deposition of Ronald Hargraves, M.D. and Exhibit D, Notice of Deposition of Henry Kettler, M.D.). The court's Scheduling Conference Order provided, as is customary with the court, that motions in limine were due on or before the date of the Pretrial Conference and to be included in the parties' Pretrial Memorandums. (Exhibit E, Scheduling Conference Order). The order of the court vacating the prior trial date also vacated the prior pretrial date and rescheduled this matter for pretrial on April 6, 2007. (Exhibit F, Order to Vacate the Pretrial and Trial Date and Order of Amended Trial Date). That order also extended the discovery cutoff date to April 1, 2007.

As directed in the court's Scheduling Conference Order, the respondents filed and served their Pretrial Memorandum with accompanying Motions in Limine on the day before the Pretrial Conference. The petitioners, likewise, filed their Pretrial Memorandum and Motions in Limine the day before the Pretrial Conference. The respondents filed 15 Motions in Limine and the petitioners filed eight Motions in Limine. All the motions were heard at the Pretrial Conference without objection by either party as to the timeliness of the same.

The respondents filed Motion in Limine (No. 1) to Preclude Testimony of Defense Medical Expert, Peter Sheptak, M.D. (Exhibit G, Motion in Limine (No. 1) to Preclude Testimony of Defense Medical Expert, Peter Sheptak, M.D.). Respondents argued that Dr. Sheptak was not qualified to render the opinions that he sought to offer in this matter and that his conclusions, drawn as they were from his own reconstruction of the circumstances of the collision based on his review and consideration of the accident report without methodology and/or calculation, amounted to nothing more than speculation, supposition and conjecture. The court agreed with the respondents' characterization of Dr. Sheptak's testimony and sustained the motion and excluded it in its entirety. The court found that Dr. Sheptak had ranged far beyond his field of expertise in analyzing the nature of the impact to conclude that the mechanism of injury, *i.e.* that the respondent had struck his head on the roof, did not occur. The court further concluded that Dr. Sheptak's conclusions about the force of the impact and speed of the vehicles were foundational to his ultimate opinions and so enmeshed and intertwined therein that his testimony could not be parsed.

The petitioner has filed this Petition for Writ of Prohibition seeking this court's review of the propriety of excluding the testimony.

## **B. Facts**

This is a personal injury action brought on behalf of George Naum, M.D. and his wife, Joan Naum, to recover for injuries and damages suffered as a result of a motor vehicle collision which occurred on April 30, 2003. Dr. Naum was stopped waiting for traffic to resume moving when he was struck from behind by the petitioner, Lambert Turner Jones, II. (Exhibit H, West Virginia Uniform Traffic Crash Report dated April 30, 2003). The collision was low impact. The amount of damage to the respective vehicles was minimal. Dr. Naum told his treating physicians, Henry Kettler, M.D. and Ronald Hargraves, M.D., that the collision caused him to hit his head on the roof of the car. (Exhibit I, treatment note of Henry Kettler, M.D. dated June 13, 2003 and Exhibit J, Wheeling Hospital history and physical examination of December 15, 2004). Dr. Naum described the mechanism as "the other car was lower and sort of went under the back bumper. This caused him to bounce upward off the front seat and hit his head on the roof." (Exhibit I).

Dr. Naum did not immediately seek medical attention. He is familiar with concussions and whiplash like injuries and believed the matter would resolve over a short period of time. Dr. Naum's son, George Naum, III or "Jeep," is also a physician. Dr. Jeep Naum ordered a CT scan for Dr. Naum that was done at Wheeling Hospital on May 9, 2003. The CT scan of Dr. Naum's brain, ordered because of evidence of concussion, was interpreted as normal. (Exhibit K, CT scan of May 9, 2003). Over the ensuing weeks as his symptoms of concussion did not clear and his headaches intensified, Dr. Naum sought a consult with a neurologist, Henry Kettler, M.D. Dr. Kettler diagnosed Dr. Naum with posttraumatic headaches. (Exhibit I). Dr. Kettler's office note of June 4, 2004, contains the opinion that Dr. Naum suffered from a closed head injury and persistent headaches. (Exhibit L, treatment note of Dr. Kettler dated June 4, 2004). On October 19, 2004, Dr.

Kettler discussed with Dr. Naum the results of an MRI he had ordered to investigate a cervical cause of the headaches which revealed a severe degree of central canal stenosis at C5-C6 and a protrusion of the disc at the same level. (Exhibit M, treatment note of Henry Kettler, M.D. dated October 19, 2004). Dr. Kettler referred Dr. Naum for a neurosurgical consult which was performed by Ronald W. Hargraves, M.D. Dr. Naum was admitted to Wheeling Hospital by Dr. Hargraves on December 15, 2004, for which he underwent an anterior cervical discectomy with fusion and plating at the C5-C6 level for the treatment, principally, of persistent headaches. (Exhibit J). It is Dr. Naum's claim that he suffered a mild concussion and an aggravation of a preexisting cervical condition. The symptoms associated with the aggravation of the preexisting cervical condition were lightheadedness, dizziness and, most significantly, persistent headaches for which he underwent a cervical surgery.

## **II. STANDARD OF REVIEW**

### **A. Standard of Review for the entertaining and issuing of a Writ of Prohibition**

In evaluating the merits of a Petition for a writ of prohibition, this Court has stated that

[i]n determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of the clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed fact and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

We continue to emphasize the extraordinary nature of a writ of prohibition. Because the remedy sought by prohibition is

extraordinary, we have limited the exercise of our original jurisdiction to circumstances of an extraordinary nature.

State ex rel. Ward v. Hill, 200 W.Va. 270, 274-5, 489 S.E.2d 24 (1997).

This Court outlined the criteria that must be met by a petitioner in order to entertain and issue a writ of prohibition.

In determining whether to entertain and 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 any 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. Further whether a witness is qualified to state an opinion is a matter which rests within the discretion of the trial court and its ruling on that point will not ordinarily be disturbed unless it clearly appears that its discretion has been abused.

State ex rel. Krivchenia v. Karl, 215 W. Va. 603, 606, 600 S.E. 2d 315, 318 (2004).

This Court has further noted "that in the past we have permitted the use of a writ of prohibition to correct a clear legal error from a trial court's substantial abuse of its discretion in regard to discovery orders." State Farm Mutual Automobile Insurance Company v. Stephens, 188 W. Va. 622, 626, 425 S.E.2d 577, 581 (1992).

**B. Standard of Review for the Exclusion of an Expert's Testimony**

Whether a witness is qualified to state an opinion is a matter which rests within the discretion of the trial court and its ruling on that point will not ordinarily be disturbed unless it clearly appears that its discretion has been abused. State ex rel. Krivchenia v. Karl, 215 W. Va. 603, 606, 600 S.E. 2d 315, 318 (2004). This Court has held that the propriety of a trial court's decision admitting the testimony of an expert witness will only be reversed for a clear abuse of discretion. Watson v. Inco Alloys International, Inc., 209 W. Va. 234, 238, 545 S.E. 2d 294, 298 (2001). The admissibility of testimony by an expert witness is a matter within the sound discretion of the trial court, and the trial court's decision will not be reversed unless it is clearly wrong. Id.

**III. ARGUMENT**

**A. The Petitioners requested relief must be denied because they have failed to demonstrate that the trial court's ruling constitutes a substantial, clear-cut, legal error which would warrant the issuing of a writ of prohibition.**

In order for the Petitioners to invoke a writ of prohibition, they must demonstrate that the trial court's ruling was a substantial, clear-cut, legal error. State ex rel. Ward v. Hill, 200 W.Va. 270, 274-5, 489 S.E.2d 24 (1997). Furthermore, because the error complained of involves the trial court's evidentiary ruling, the Petitioners must show that the trial court's ruling was a substantial abuse of discretion which resulted in a clear legal error. State Farm Mutual Automobile Insurance Company v. Stephens, 188 W. Va. 622, 626, 425 S.E.2d 577, 581 (1992).

Despite vague and generalized assertions of the trial court's abuse of discretion and its resulting unfairness, the petitioners' argument completely omits the legal basis for the trial court's ruling. Throughout their sixteen page brief the Petitioners never address or articulate the Respondent's objection to the testimony of their expert which is readily found in Respondent's

Motion in Limine and attached brief. Inexplicably, the Petitioners never address or refer to the legal basis for the trial court's exclusion of the same. The Petitioners' vague and generalized assertion that the trial court "categorically excluded testimony from a well-credentialed medical expert" accomplishes nothing except to characterize the trial court's ruling as unfounded, arbitrary and capricious. Without identifying the basis for the trial court's ruling, it is impossible for this Court to review the purported substantial, clear-cut, legal error justifying the Petitioners' request for a writ of prohibition. Moreover, it is not for this Court to conduct a de novo review of the materials produced by the Respondent and fashion or construct an argument on behalf of the Petitioners.

As the gatekeeper, it is undisputed that the trial court has the authority to determine the admissibility of expert testimony. The trial court's decision to exclude the testimony of an expert witness, does not, in and of itself, constitute an abuse of discretion. Merely asserting that the testimony of Dr. Sheptak was categorically excluded fails to establish that the trial court committed a substantial abuse of discretion. The Petitioners must demonstrate that the trial court's ruling was a substantial, clear-cut, legal error constituting a substantial abuse of discretion.

The Petitioners reliance on State ex rel Weirton Medical Center v. Mazzone, 213 W. Va. 750, 584 S.E.2d 606 (2003), can be distinguished. In Mazzone, the trial court excluded testimony from the Petitioners' expert finding that the methodology used by him as a basis for his conclusions lacked sufficient indicia of reliability. Id. at 753. Relying on its ruling in State ex rel. Wiseman v. Henning, 212 W. Va. 128, 569 S.E. 2d 204, (1996), and the application of the five criteria set out in State ex rel. Krivchenia v. Karl, 215 W. Va. 603, 600 S.E. 2d 315, (2004) this Court concluded that the invoking of prohibition was appropriate because

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 determine there is a likelihood of reversal on appeal based on the circuit's exclusionary ruling; we further find that the Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law.

State ex rel Weirton Medical Center v. Mazzone, 213 W. Va. 750, 754, 584 S.E.2d 606, 611 (2003)(citing State ex rel. Wiseman v. Henning, 212 W. Va. 128, 132, 569 S.E. 2d 204, 208 (1996)).

In Mazzone, the Petitioners identified the clear-cut legal error committed by the trial court. This Court, relying upon Wiseman and examining the five criteria, especially numbers one and three, was able to determine that there was a likelihood of reversal on appeal and that the petitioners lacked an adequate remedy in the ordinary course of law. Clearly, this is not the case here. The Petitioners have not identified any clear-cut legal error or produced a record that would enable this Court to review the trial court's rulings for a substantial abuse of discretion or apply the five criteria set out in Krivchenia. It is for these reasons that the Petitioners' request for a writ of prohibition must be denied.

**B. The Petitioners have failed to establish that the trial court exceeded its legitimate powers which precludes this Court's issuing of a writ of prohibition.**

This Court has stated that "to justify the execution of a writ of prohibition, a petitioner has the burden of showing that the lower court's jurisdictional usurpation was clear and indisputable and, because there is no adequate relief at law, the extraordinary writ provides the only available and adequate remedy." State ex rel. Rose L. v. Pancake, 209 W.Va. 188, 191, 544 S.E.2d 403, 406 (2001):

In order to consider the issuing of a writ of prohibition, this Court will examine the following 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 any 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.

State ex rel. Krivchenia v. Karl, 215 W. Va. 603, 606, 600 S.E. 2d 315, 318 (2004).

The Petitioner has not meet its burden relative to all of the five criteria.

**1. The Petitioners has failed to establish that they have no other adequate means to obtain the desired relief.**

Petitioners' brief makes several overly broad and unsubstantiated claims that it is entitled to the relief requested. The Petitioners, however, fail to demonstrate that they do not have another adequate means of relief. The abundant case law on this issue clearly states a direct appeal is an adequate means of relief. The Petitioner has not demonstrated why direct appeal is not an adequate means to obtain relief except to say that the parties will be forced to go through an expensive, complex trial. This, in and of itself, is insufficient.

Petitioners also claim that they should be granted the relief requested because of the immediacy of the trial and the "untimely Motion and surprise Order by the Court." As detailed in Respondent's factual and procedural history, Petitioners' claims of untimeliness and surprise are not justified. Moreover, a review of the five criteria do not support the Petitioners claims that untimeliness and surprise are the basis for a writ of prohibition.

**2. The Petitioners have failed to establish that as a result of the trial court's ruling they will be damaged or prejudiced in a way that is not correctable on appeal.**

The Petitioners have not made any argument or produced any evidence to suggest that the trial court's ruling will damage or prejudice them in a way not correctable on appeal. Petitioners vague assertions of unfairness simply do not establish that they will be prejudiced or that these arguments, provided they have merit, cannot be corrected on appeal. The timeliness of these issues are of the parties making and it is inappropriate for the Petitioners to argue that they were surprised, ambushed or prejudiced. As evidenced by the submitted record, the Petitioners agreed and participated in the discovery schedule that they now regard as untimely. The Respondents have completely failed to establish that they have been unfairly prejudiced regarding the issues now before this Court.

**3. The Trial Court Correctly Excluded the Testimony of Dr. Sheptak and as Such the Petitioner Cannot Demonstrate the Trial Court's Ruling Was Clearly Erroneous as a Matter of Law.**

The defense of this case is based on the contention that the impact of the two vehicles lacked sufficient force as demonstrated by the minimal amount of damage sustained by each vehicle to have produced an injury in Dr. Naum. This is the central theme of the petitioner's case as evidenced by the first sentence of their Petition for Writ of Prohibition which sentence reads, "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." To make its claim even more abundantly clear the petitioners attached five pictures of the respondents' vehicle as exhibits to their Petition. The petitioners have not enlisted a biomechanical expert or an accident reconstructionist to present this contention.

(Exhibit N, Petitioners' Designation of Expert Witness). Instead the petitioners are seeking to introduce that evidence through the opinions of Dr. Sheptak.

The petitioners had Dr. Naum undergo a Rule 35 examination which was performed by Peter Sheptak, M.D., a neurosurgeon. Dr. Sheptak was provided with a copy of the accident report in which the investigating officer, by checking a few boxes, gave some indication of the degree of damage sustained by each of the vehicles. (Exhibit H). The petitioners are seeking to offer Dr. Sheptak as a medical expert and to have him testify that, based upon his review of the accident report and the minimal amount of damage sustained by the vehicles as recorded therein, the accident was of insufficient impact or force to have produced the injuries of which Dr. Naum complains. Dr. Sheptak states in his report,

**Upon reviewing the police report and the other history concerning the April 2003 incident it becomes very obvious that this was an extremely low level impact with no significant discernable damage to either vehicle. Therefore, I find it highly unlikely that the patient suffered a concussion during the impact. I also feel it highly unlikely that he struck his head on the roof as he reported to several physicians. (Emphasis added.)**

(Exhibit O, Report of Peter Sheptak, M.D. dated 1/10/06). Dr. Sheptak testified,

- Q. Is it your opinion that the impact lacks sufficient force to have caused Dr. Naum to strike his head?
- A: Yes, that's my opinion at this time, that's correct.
- Q. So then you believe that supports your conclusion . . . that it's unlikely he suffered a concussion?
- A. Related to the impact, that's correct.
- Q. So you have reached conclusions regarding the potential of this collision to have caused Dr. Naum's complaints, correct?

A. Correct.

Q. In the conclusions you have reached regarding the potential of the collision, the speed and the impact to have caused Dr. Naum's complaints provides part of the basis for your opinions in this case?

A. Yes, that's correct.

Q. . . . It's my understanding that certain conclusions regarding the speed and impact of the vehicles has led you to draw certain conclusions about whether or not Dr. Naum suffered an injury as a result?

A. Yes, that's correct.

(Sheptak Tr., p. 28-30).

Dr. Sheptak further testified,

Q. . . . Would it be your opinion that because of the speed of the impact and the degree of damage suffered to the vehicles that it would be unlikely that he suffered such a concussion in this accident.

A. Yes, that's what I believe, that it would be highly unlikely.

(Sheptak Tr., p. 32).

Dr. Sheptak is being offered not simply to render a medical opinion, but to render opinions regarding the nature of the impact, the relative speed of the vehicles and the force of the collision as they relate to the potential for injury to be caused therefrom. The conclusions Dr. Sheptak reached regarding the nature of the collision based exclusively on his review of the accident report provides the foundation for the ultimate opinions he renders in the case.

Dr. Sheptak testified that his CV (Exhibit P, Curriculum Vitae of Peter Sheptak, M.D.) contained the total sum of all of his qualifications offered in support of the contention that he was

qualified to render the opinions offered in this case. (Sheptak Tr., p. 14). He agreed that he was a medical expert exclusively. (Sheptak Tr., p. 17). His training, education and experience was limited to the field of neurosurgery. (Sheptak Tr., p. 18). He has extensive clinical experience in the treatment of cervical injuries. (Sheptak Tr., p. 15).

Dr. Sheptak has ventured to offer an opinion far beyond his field of expertise when on the basis of a review of an accident report he renders conclusions regarding the potential force at impact and its potential to have caused a concussion or cervical injury. Dr. Sheptak testified,

Q. Do you know how much force would be required to be delivered by a bullet vehicle into a stationary vehicle to cause a disc injury in an individual like Dr. Naum who had the existing pathology that he already had? (Sheptak Tr., p. 54, lines 13-17).

(After a long colloquy the question was attempted to be re-asked. See p. 56, lines 18-20 at which time the witness abruptly answered as below.)

A. I don't know. I don't know the answer to that question in Delta V pounds per square inch or whatever you want to call it.

Q. You're not an expert in that?

A. I'm not an expert enough in that situation to determine what could cause it.

(Sheptak Tr., pp. 56-57).

In addition to the fact that Dr. Sheptak ranges far beyond his field of expertise to render opinions, he does so without any calculation, methodology or consideration of the multitude of factors that constitute the nature of an impact. Dr. Sheptak testified he did not know how fast the petitioners' vehicle was traveling at impact. (Sheptak Tr., p. 63). He was uncertain as to the energy

absorbing characteristics of the bumper of Dr. Naum's vehicle. (Sheptak Tr., pp. 63-64). He testified he does not know the standards as they apply to bumpers for energy absorption. (Sheptak Tr., p. 64). Dr. Sheptak also testified that in light of the fact that he was unfamiliar with the energy absorption characteristics of the bumper, he did not know how hard Dr. Naum's vehicle was hit or at what speed it was hit. (Sheptak Tr., p. 64). Dr. Sheptak acknowledged that his information concerning the degree of damage suffered by the petitioners' vehicle was limited. (Sheptak Tr., p. 65). Dr. Sheptak admitted that he was not an expert qualified to render an opinion as to the measure of Delta V required to produce injury. (Sheptak Tr., p. 50).

In Dr. Sheptak's deposition he acknowledged that it is not standard medical practice for a physician to review an accident report or photos of an accident when rendering medical judgments or offering medical care. (Sheptak Tr., p. 45-47).

The respondent sought in limine to exclude Dr. Sheptak's testimony and/or his opinions in their entirety pursuant to West Virginia Rule of Evidence 702 because Dr. Sheptak testified that,

Q. The conclusions you've drawn regarding the nature of the impact are relevant to the ultimate opinions you hold in this case?

A. Yes. The conclusions explain my ultimate opinion.

Q. Okay. And the conclusions are also material to your ultimate opinions that you hold in this case?

A. Yes.

Q. And they're germane, correct?

A. Yes.

(Sheptak Tr., p. 30). It is clear that the leap of faith that Dr. Sheptak has taken with respect to his supposition and speculation regarding the nature of the impact derived from the severity of the damage to the vehicles is the foundational basis of the ultimate opinions he is offering in this case.

“The admissibility of testimony by an expert witness is a matter within the sound discretion of the trial court, and the trial court’s decision will not be reversed unless it is clearly wrong.” Syl. pt. 6, Helmick v. Potomac Edison Company, 185 W. Va. 269, 406 S.E.2d 700 (1991), cert. denied 502 U.S. 908, 112 S. Ct. 301, 116 L. Ed.2d 244 (1991), Syl. pt. 1, West Virginia Division of Highways v. Butler, 205 W. Va. 146, 516 S.E.2d 769 (1999). See also, Syl. pt. 3 Wilt v. Buracker, 191 W. Va. 39, 443 S.E.2d 196 (1993). The question of whether a witness is qualified to state an opinion is a matter which rests within the discretion of the trial court and its ruling on that point will not ordinarily be disturbed unless it clearly appears that its discretion has been abused. Syl. pt. 12, Board of Education v. Zando, Martin & Millstead, 182 W. Va. 597, 390 S.E.2d 796 (1990), and Syl. pt. 2, Morris v. Boppana, 182 W. Va. 248, 387 S.E.2d 302 (1989). The court has further held under WVRE 702, a trial judge has broad discretion to decide whether expert testimony should be admitted and where the evidence is unnecessary, cumulative, confusing or misleading, the trial judge may properly refuse to admit it. Syl. pt. 4, Rozas v. Rozas, 176 W. Va. 235, 342 S.E.2d 201 (1986). It is against this backdrop and utilizing this standard that the merits of the trial court’s determination in this case to exclude the testimony of Dr. Sheptak needs to be considered. The petitioner has urged that the court leapfrog this standard and utilize the standards required to be used by the trial court as set out in Gentry v. Mangum, 195 W. Va. 512, 466 S.E.2d 171 (1995). That would constitute a de novo review.

The court needs to be satisfied that the ruling of the trial court was clearly wrong and that it clearly appears that its discretion was abused. A review of the application of the facts to the law as was undertaken by the trial court reveals that no such abuse of discretion occurred in this case inasmuch as a review of the record reveals that Dr. Sheptak was not qualified to offer the opinions sought to be offered in this case.

Rule 702 of the WVRE, which governs the admissibility of expert and other scientific testimony, permits opinion testimony by experts, "qualified as an expert by knowledge, skill, experience, training, or education, and 'if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.'" The court determined that Dr. Sheptak should be precluded from offering causation opinions drawn from his interpretation of the significance of the impact because he is not qualified to render such a causation opinion by knowledge, experience, training or education. Opinions based on rank speculation and supposition do not assist the trier of fact to understand the evidence or to determine a fact in issue. Dr. Sheptak wholly failed to apply principles and methods of biomechanics reliably to the facts of the case. Dr. Sheptak admitted the basis for his supposition was the accident report. He also admitted that physicians do not customarily review accident reports in the formulation of medical opinions or to assist them in providing medical care to patients. (Sheptak Tr., pp. 45-47).

Dr. Sheptak is not a biomechanic. Biomechanics is three major components: (1) the application of physics to an understanding of the workings of the human body. This aspect of biomechanics is sometimes called biophysics; (2) the design and development of artificial joints and the effects of material incompatibility and the computation or measurement of forces within the body during its natural behavior. This aspect of biomechanics is sometimes called bioengineering; and

(3) the effects of rapid trauma to the body (as occurs for a vehicle accident) and computation or measurement of forces within the body, and motions by the body, during a response to this rapid trauma. Watts, A., Atkinson, D., & Hennesey, C. (1996, p. 5), Low Speed Automobile Accidents, Accident Reconstruction and Occupant Kinematics, Dynamics in Biomechanics. (Exhibit Q - excerpt of text attached). The authors further state that, "for rapid trauma, Physics (mechanics) involves the calculation and/or experimental measurement of forces, accelerations, stresses and strains in kinematic motion of the parts of the body. . ." (Exhibit Q - see excerpt). The authors further instruct that damage levels to a body are determined through a collaboration between engineers (applying physics) and physicians. The engineers set up the crash experiments, measure the accelerations and forces in body motions. The physicians then study the person to learn if a medical problem has been induced. It is in this manner that trauma levels that cause damage can be determined. (Exhibit I- excerpt p. 6). Dr. Sheptak testified that,

Q. Are you a biomechanical engineer?

A. No, I'm not.

Q. Have you received formal training in biomechanical engineering?

A. No, I haven't.

Q. Are you a member of any biomechanical engineering organization?

A. No.

Q. Do you subscribe to any other publications?

A. No.

(Sheptak Tr., p. 49). He also testified that,

Q. So the answer is no, you're not an expert in kinematics, correct?

A. Correct.

(Sheptak Tr., p. 61). Dr. Sheptak admitted that he was not an expert in vehicle and occupant kinematics and low speed override/under ride collisions. (Sheptak Tr., p. 59). The Society of Automotive Engineers (SAE) has published numerous articles on the subject of low speed vehicle collisions and their potential for causing injury. Some of the articles were reviewed with Dr. Sheptak. Dr. Sheptak stated, "I can say categorically I don't recall ever reading an SAE article on any of these issues." (Sheptak Tr., p. 58). The essence of what constitutes Dr. Sheptak's opinions bears repeating. Dr. Sheptak testified,

Q. Is it your opinion that the impact lacks sufficient force to have caused Dr. Naum to strike his head?

A: Yes, that's my opinion at this time, that's correct.

Q. So then you believe that supports your conclusion . . . that it's unlikely he suffered a concussion?

A. Related to the impact, that's correct.

Q. So you have reached conclusions regarding the potential of this collision to have caused Dr. Naum's complaints, correct?

A. Correct.

Q. In the conclusions you have reached regarding the potential of the collision, the speed and the impact to have caused Dr. Naum's complaints provides part of the basis for your opinions in this case?

A. Yes, that's correct.

Q. . . . It's my understanding that certain conclusions regarding the speed and impact of the vehicles has led you to draw

certain conclusions about whether or not Dr. Naum suffered an injury as a result?

A. Yes, that's correct.

(Sheptak Tr., p. 28-30).

Dr. Sheptak further testified,

Q. . . . Would it be your opinion that because of the speed of the impact and the degree of damage suffered to the vehicles that it would be unlikely that he suffered such a concussion in this accident.

A. Yes, that's what I believe, that it would be highly unlikely.

(Sheptak Tr., p. 32).

He unequivocally stated that the conclusions he reached as set forth above, "explain my ultimate opinion" (Sheptak Tr., p. 30).

The ultimate opinions of Dr. Sheptak having as they do a foundational basis on the conclusions he has reached regarding the nature and severity of the impact are not admissible because he lacks the education, training and experience to render such opinions. Under Gentry v. Mangum, 195 W. Va. 512, 466 S.E.2d 171 (1995), the court held that pursuant to Rule 702 an expert may testify if he or she is "qualified as an expert by knowledge, skill, experience, training or education." Id. at W. Va. 520 and/or S.E.2d at 179. In Syl. pt. 5 of Gentry, the court held,

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 educational 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.

The record is clear that Dr. Sheptak has strayed far from his field. He is not even familiar with the terms of art in the industry let alone capable of undertaking an investigation consistent with the methodology utilized to determine the potential of an impact to have caused injury.

Gentry has as its counterpart in the federal system Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993). Daubert interpreted Rule 702 of the FRE. Federal courts applying Daubert and interpreting FRE 702 have held that, “a blanket qualification for all physicians to testify as to anything medically related would be contra to the court’s gatekeeping responsibilities.” Alexander v. Smith & Nephew, P.L.C., 90 F. Supp.2d 1225, 1230 (ND OK 2000). “Just as a lawyer is not by general education and experience qualified to give an expert opinion on every subject of the law, so to a scientist or medical doctor is not presumed to have expert knowledge about every conceivable scientific principle or disease.” Whiting v. Boston Edison Company, 891 F. Supp. 12, 24 (DC MA 1995). The petitioners cannot establish that Dr. Sheptak is qualified under the second prong of the Gentry standard which requires that his area of expertise cover the particular opinion to which he is seeking to testify.

The question of admissibility under Wilt v. Buracker, 191 W. Va. 39, 443 S.E.2d 196 (1993), arises if it is first established that the testimony deals with “scientific knowledge.” In Syl. pt. 6 of Gentry, the court stated that the Wilt gatekeeper function “only arises if it is first established that the testimony deals with “scientific knowledge.” Biomechanics and biomechanical engineering apply the laws of mechanics and physics to explain human function and movement through modeling, simulation and measurement. Biomechanics is the research and analysis of the mechanics of living organisms or the application and derivation of engineering principles to and from biological systems. (Exhibit J- BIOMECHANICS, Article from Wikipedia). The plaintiffs submit that the Wilt/Gentry

gatekeeper function required by Rule 702 of the WVRE is applicable to the testimony sought to be offered by Dr. Sheptak. Engineers utilize their scientific knowledge to design. Engineers are not scientists. The response of an occupant in a vehicle to the force of an impact is not design but science. It assists an expert in understanding the response of an occupant to the force of an impact to understand the manner in which vehicles have been designed to translate and/or to absorb energy. The principles utilized in the calculations performed are a function of physics as incorporated into the design by engineers. The ultimate opinion as to what force an occupant is experiencing as a function of an impact is science. "Scientific" implies a grounding in the methods and procedures of science while "knowledge" connotes more than subjective belief or unsupported speculation. In order to qualify as "scientific knowledge" an inference or assertion must be derived by the scientific method. Wilt v. Buracker, 191 W. Va. 39, 443 S.E.2d 196 (1993).

Gentry, requires that a circuit court perform the role of "gatekeeper" once it has been determined that the proper evidence can be considered "scientific" in nature. The gatekeeper's role requires the court to engage in a two-part analysis in regard to the expert testimony. The circuit court must determine whether the expert testimony reflects scientific knowledge, whether the findings are derived by scientific method, and whether the work product amounts to good science. The court must also ensure that the scientific testimony is relevant to the task at hand. Syl. pt. 4, Gentry.

The instant case is remarkable for the total lack of any methodology. The work product utilized to reach conclusions regarding force of the impact as it related to its ability to cause injury in a patient with Dr. Naum's known pathology consisted of a review of the accident report. An accident report that Dr. Sheptak admitted was not something that he customarily reviewed in conjunction with rendering medical opinions or offering medical care. There is a complete lack of

analysis or calculation or investigation. Dr. Sheptak performed no research or study and demonstrated total ignorance with respect to relative speed of the vehicles, the force of the impact, the measurement of the Delta V, the placement of a headrest, etc. Dr. Sheptak admitted that whether or not an individual suffered a whiplash injury as a result of an impact was a function of a number of variables. (Sheptak Tr., p. 38, lines 14-18) It is clear that whatever those variables are, position of the occupant, use of the seatbelt, position of the headrest, bracing or lack thereof, foreknowledge or lack thereof, weight of the vehicles, design specifications of the vehicles, energy absorbing characteristics of the vehicle, relative speed of the vehicles, override/under ride characteristics of the impact, etc., they have not been identified or considered by Dr. Sheptak in reaching his conclusions. There is no evidence of a scientific investigation or the use of a scientific method.

The respondents submit that a complete analysis of this case would require: (1) a vehicle dynamic analysis, (2) human body dynamic analysis, and (3) human tolerance analysis. A vehicle dynamic analysis is performed in order to determine the forces exerted on the vehicle as a result of the collision. This would require knowledge as to the relative speed of the vehicles at impact and how the energy generated by the impact is translated to and through the vehicles. Human body dynamics analysis is utilized to determine the forces exerted on the human body as a result of the collision. The human tolerance analysis involves the comparison between the resulting forces on the human body and the human body tolerance values which tell us how much force the human body can withstand without injury. This analysis must be undertaken with specific reference to the age, gender, physical condition, and preexisting cervical pathology of the patient. There is no evidence in the record that any such analysis was utilized by Dr. Sheptak to reach his conclusions.

In Daubert, the United States Supreme Court held that the Fed. R. Evid. “assigned to the trial judge the task of insuring that an expert testimony both rests on reliable foundation and is relevant to the task at hand.” The court explained in Kumho Tire Company v. Carmichael, 526 U.S. 137, 152 (1999), that the objective of the “gatekeeping” requirement of Daubert and Rule 702 is “to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” There is no indication of any intellectual rigor that would engender a sense of reliability of the opinions. Evidence which is no more than speculation is not admissible under Rule 702. State v. LaRock, 196 W. Va. 294, 307, 470 S.E.2d 613, 626 (1996). An expert’s opinion is admissible if the basic methodology employed by the expert in arriving at his opinion is scientifically or technically valid and properly applied. Mayhorn v. Logan Medical Foundation, 193 W. Va. 42, 454 S.E.2d 87 (1994). In the case of Brady v. Deals on Wheels, Inc., 208 W. Va. 636, 542 S.E.2d 457 (2000), the court excluded proffered expert testimony of a brake mechanic who was prepared to testify that the vehicle the tortfeasor was operating at the time of the collision had defective brakes. The court affirmed the ruling of the circuit court below which held the testimony inadmissible. The court found that,

The vehicle in question had been stored in a lot subsequent to the accident and according to statements made by appellant’s counsel at oral argument of this case, had been moved several times with a forklift. Mr. Sanson’s (the mechanic) examination of the vehicle occurred approximately two and one-half months subsequent to the accident. The reliability of testimony regarding such questionably preserved evidence in the ability of the witnesses to arrive at any conclusion concerning the condition of the brakes immediately prior to the accident was seriously questioned by the appellees. The vehicle was not safeguarded to preserve the evidence and it was subject to deterioration during storage. The lower court found that

the offered testimony was inadmissible as it would not tend to prove the condition of the brakes on this vehicle at the time it was sold to Mr. Payne by the appellees.

A comprehensive review of an expert's opinion and the basis therefor is warranted and when based on conjecture, speculation and/or supposition it is appropriate that it be excluded.

Dr. Naum contends that the impact caused him to jam his head against the roof of the car thereby producing a concussive syndrome and an aggravation of his preexisting cervical pathology. Dr. Sheptak concluded, on the basis of his interpretation of non-medical facts, *i.e.* the accident report, that, "I also feel it highly unlikely that he struck his head on the roof as he reported to several physicians." Dr. Sheptak has sought to reconstruct the accident in an effort to explain how it is unlikely that Dr. Naum struck his head. It is on that basis, the non-medical basis, that he ruled out concussive syndrome. Dr. Sheptak testified,

Q. Would it be your opinion that because of the speed of the impact and the degree of damage suffered to the vehicles that it would be likely that he suffered such a concussion in this accident.

A. Yes. That's what I believe that it would be highly unlikely.

A medical article can delineate what injuries might be expected given a certain set of parameters surrounding the nature of a collision but a medical article is not a substitute for the reconstruction of a collision. Dr. Sheptak has reconstructed the accident without any training, calculation or methodology then, by a leap of faith, concluded Dr. Naum suffered no injury as a result thereof. Throughout the deposition Dr. Sheptak was questioned extensively about his qualifications in occupant kinematics, biomechanics and any additional qualifications that he might contend that he had that would qualify him. (Sheptak Tr., p. 58). Petitioners' counsel made no effort

to rehabilitate Dr. Sheptak. In fact, petitioners' counsel did not ask a single question of Dr. Sheptak when it was clear from the thrust of the respondent's counsel's questions that a record was being created regarding Dr. Sheptak's lack of qualifications. The conclusions Dr. Sheptak reached regarding the nature of the collision and its potential to have produced injury were so manifestly enmeshed and intertwined with his ultimate opinions that the trial court found it impossible to parse his opinions. The essence of Rule 702 of the WVRE is that of assisting the fact finder's comprehension through expert testimony. Short v. Appalachian O.H.-9, Inc., 203 W. Va. 246, 507 S.E.2d 124 (1998). "Helpfulness to the jury is the touch tone of Rule 702." Tanner v. Rite Aid of West Virginia, Inc., 194 W. Va. 643, 654, 461 S.E.2d 149, 160 (1995). The trier of fact cannot be assisted by testimony from an expert witness who knows absolutely nothing about the issue to which he intends to testify. Reliability is a cornerstone admissibility requirement. Kumho Tire Company, Ltd. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed.2d 238 (1999).

Dr. Sheptak is not qualified to render opinions regarding the potential of the impact in this case to have caused the injuries of which Dr. Naum complains. The petitioner has failed to establish that Dr. Sheptak performed a scientifically reliable investigation which produced a scientifically reliable opinion. Dr. Sheptak admitted that it is not his customary practice to utilize a review of an accident report and/or incorporate facts or data therein to reach medical conclusions or to offer medical care. Dr. Sheptak has performed no rigorous analysis adequate to explain conclusions he has reached. Dr. Sheptak's testimony is full of conjecture, supposition, and speculation. Rule 702 of the WVRE does not permit the admissibility of expert witness testimony which relies, in whole or in part, on conjecture, supposition, and/or speculation.

**4. The trial court's order is not as oft repeated error or manifests persistent disregard for either procedural or substantive law.**

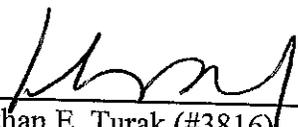
There is nothing in Respondents' brief to suggest that the trial court's order reflects an oft repeated error or manifests persistent disregard for either procedural or substantive law. The Respondents do, however, make a generalized argument that they have been denied a right to a fair trial because the trial court excluded Petitioners' medical expert and not the Respondent's expert. The Petitioner suggests that this constitutes an "uneven standard" that grants "special rights" to the Respondent.

To respondent's knowledge there is no standard requiring an even number of experts on each side of a case. Respondents' experts were properly disclosed and based their opinions on the medical facts of the case. The Petitioner has not sought a writ of prohibition to prohibit Respondent's experts from testifying. The Respondent's experts, their qualifications and the substance of their opinions are not at issue before this Court. The Petitioners' expert, however, choose to base his opinions on non-medical facts and findings beyond his area of expertise and has, therefore, been properly precluded from testifying. To permit this expert to testify would be unfair and improper.

The Petitioners further argue that the Respondent has engaged in trial by ambush which resulted in the "shocking and inappropriate" ruling by the trial court. As has been extensively documented throughout this brief, the Petitioners' voluntarily joined with the Respondent in this discovery schedule in an effort to seek resolution of this case. The arguments by the Petitioners relative to this issue are belied by the record before this Court.

5. **The trial court's order does not raise new and important problems or issues of law of first impression.**

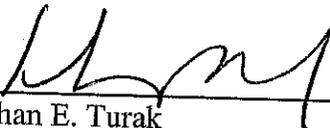
There is nothing in the record, alleged by either the Petitioners or the Respondent, to suggest that the trial court's order raises new and important problems or issues of law of first impression.

  
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**CERTIFICATE OF SERVICE**

Service of the foregoing **Response Brief** was had upon the petitioners by mailing a true and correct copy thereof by U. S. mail, postage prepaid, this 11 day of April, 2007, to:

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