



IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

IN RE: MARCELLUS SHALE LITIGATION

CIVIL ACTION NO. 14-C-3000

THIS DOCUMENT APPLIES TO THE CONNOR-BERGER TRIAL GROUP:

Robert Carnahan and LeaAnn Carnahan

v.

Williams Ohio Valley Midstream, LLC

Civil Action No. 15-C-110 MSH

Joshua Nelson and Tracie Nelson

v.

Williams Ohio Valley Midstream, LLC

Civil Action No. 15-C-94 MSH

Brenda Rine

v.

Williams Ohio Valley Midstream, LLC

Civil Action No. 15-C-91 MSH

ORDER REGARDING PLAINTIFFS' REQUEST TO CALL WILLIAMS OHIO VALLEY MIDSTREAM, LLC'S EXPERT WITNESS IN THEIR CASE-IN CHIEF

The Court has reviewed *Plaintiffs' Position Regarding Deborah Shepherd* (Transaction ID 65867061) and *Defendant Williams Ohio Valley Midstream, LLC's Brief Concerning Plaintiffs' Request to Call WOVM's Expert Witness During Their Case-In-Chief* (Transaction ID 65866814). Plaintiffs submit they should be allowed to call Deborah Shepherd as an expert witness at trial and/or to use her reports as might be reasonably necessary even in the event that Defendant Williams Ohio Valley Midstream, LLC ("WOVM") does not call her as a witness at trial.

WOVM contends that allowing Plaintiffs to call Ms. Shepherd during their case-in-chief would be fundamentally unfair and would be an unwarranted and inequitable attempt to interrupt WOVM's defense. WOVM retained Ms. Shepherd and paid for her time and work, and its counsel consulted with her throughout her work in this matter. Plaintiffs could have retained an expert to evaluate and testify about the value of their properties, and about any alleged diminution in value of their properties -- an element of damages for which they bear the burden of proof -- but they did not. They could have deposed Ms. Shepherd, but they did not. Having expended no time, money

or resources to secure evidence of an essential element of their claim for damages, WOVM contends that Plaintiffs should not be rewarded, at WOVM's expense, by inconveniencing Ms. Shepherd and WOVM by calling her during their case-in-chief. WOVM further contends that, as noted by the Court at the Pretrial Conference, Plaintiffs do not need expert testimony concerning the value of their respective properties as West Virginia law allows property owners to testify about the value of their property. See, e.g., W. Va. Dep't. of Highways v. Sickles, 161 W. Va. 409, 242 S.E.2d 567 (1978). Plaintiffs are free to provide, if they can, opinions as to the value of their respective properties.

Although it is loath to reward Plaintiffs' counsel for its lack of diligence in securing and preparing its own expert witness on the value of Plaintiffs' properties, the Court **GRANTS** Plaintiffs' request to call Deborah Shepard in their case-in-chief for the following reasons.

WOVM states that it retained Ms. Shepherd to conduct an inspection of the Plaintiffs' respective properties and to provide expert opinions on the value of those properties as of July 1, 2013 -- before WOVM began construction of the Conner-Berger Facility -- and as of February 26, 2020, shortly before her reports were due. Per the Court's scheduling orders, WOVM properly and timely designated Ms. Shepherd as an expert witness. Notably, and importantly, Plaintiffs did not disclose any expert witnesses, and Plaintiffs made the decision to not depose any of WOVM's designated expert witnesses, including Ms. Shepherd. Despite this, Plaintiffs seek to call Ms. Shepherd as "their" expert witness to provide testimony during their case-in-chief.

Plaintiffs state that, on February 26, 2020, they allowed counsel for WOVM and Deborah Shepherd, WOVM's expert, to enter their homes and properties to inspect and document them for the purposes of real estate appraisal services, and they interacted directly with Ms. Shepherd and counsel on that day. On June 15, 2020, Plaintiffs disclosed Ms. Shepherd as a testifying expert witness based on her review of their properties:

Ms. Shepard, upon information and belief, was retained by the Defendant to conduct real estate appraisal services related to the Plaintiffs' properties which are at issue in this action. Ms. Shepard visited the properties as a part of this case and has presumably completed real estate appraisal services. It is anticipated Ms. Shepard will testify on issues related to property value.

Plaintiffs' Expert Witness Disclosure (Transaction ID 65700698).

On July 1, 2020, Defendant WOVM disclosed Ms. Shepherd as a testifying expert witness:

Ms. Shepherd will testify about her appraisal of each of the properties involved in the Conner-Berger Trial Group. Copies of Ms. Shepherd's appraisal reports are being mailed to Plaintiffs' counsel separately, and each contains the opinions, and the grounds for the opinions, of Ms. Shepherd as to each of the properties identified in each respective report.

Ms. Shepherd may also testify concerning property values in general as to Marshall County, West Virginia, and the extent to which property values have been generally impacted by the natural gas industry, coal mining, and other industrial activity, and the extent to which the property values of the properties in the appraisal reports have been impacted by industrial activities, including the construction and operation of the Conner-Berger Facility.

Defendant Williams Ohio Valley Midstream, LLC's Expert Witness Disclosure (Transaction ID 65740043). On August 5, 2020, both the Plaintiffs and the Defendant WOVM again listed Ms. Shepherd on their final witness disclosures for trial. *Plaintiffs' Disclosure of Witnesses* (Transaction ID 65826064) and *Defendant Williams Ohio Valley Midstream, LLC's Anticipated Trial Witness List* (Transaction ID 65824996).

The facts demonstrate that Ms. Shepherd was identified as a testifying expert witness, she physically inspected the subject properties while interacting with Plaintiffs and issued reports that were provided directly to the Plaintiffs regarding her work. Under these circumstances, the Plaintiffs must be allowed to call Ms. Shepherd as a witness in their case-in-chief at trial, whether or not Defendant WOVM might choose to call her in its case-in-chief.

As stated in *SEC v. Koenig*, 557 F.3d 736, 744 (7th Cir. 2009), "[a] witness identified as a testimonial expert is available to either side; such a person can't be transformed after the report has been disclosed." In *Guinn v. CRST Van*, 2011 WL 2414393 (U.S.D.C. W.D. Oklahoma) the district

court allowed a defendant to call one of plaintiff's disclosed experts after the expert had prepared a report and after the plaintiff attempted to withdraw the individual as an expert. The *Guinn* court stated that "[w]here an expert is designated to testify at trial, 'the expert is recognized as presenting part of the common body of discoverable, and generally admissible information and testimony available to all parties.'" *Id.* at *2.

Although West Virginia does not have a case directly on point, the Supreme Court of Appeals of West Virginia has addressed the issue of calling an opposing party's Rule 35 expert witness at trial. *Luster v. Brown*, 182 W.Va. 122 (1989). In *Luster*, the plaintiff was examined by the defendant's medical expert pursuant to Rule 35 of the West Virginia Rules of Civil Procedure. The defendant's expert witness found that the plaintiff needed surgery for TMJ issues. After the Rule 35 examination had occurred, the trial court ordered the defendant to provide a report to the plaintiff or to inform the plaintiff that the expert witness would not be used. The defendant produced the report. Later, the defendant filed a motion attempting to prevent the plaintiff from using the report or the witness. The trial court allowed the plaintiff to use the report and the witness at trial. The Supreme Court affirmed, stating "we cannot help but agree that the defendant cannot obtain a report, initially stating that it may be used at trial, and then change his mind once the report is received, pretending it never occurred." *Id.* 182 W.Va. at 125.

Although *Luster* involved a formal Rule 35 examination of the plaintiff, the facts of *Luster* are analogous. Had Plaintiffs not agreed to the inspection by Ms. Shepherd, Defendant WOVVM could have sought an order from this Court requiring her inspection to occur. Instead, the parties worked together to allow her to visit and the properties and perform her inspections. Both sides listed Ms. Shepherd as an expert witness for trial, both sides listed her on their final witness lists and her reports were not only produced but were identified by Defendant WOVVM on its final exhibit list. Under these circumstances, Plaintiffs will be allowed to call Ms. Shepherd as a witness in their case-in-chief, whether or not Defendant WOVVM chooses to call her in its case-in-chief.

For the foregoing reasons, Plaintiffs' request is GRANTED. Neither party may elicit testimony from Ms. Shepard regarding the circumstances of her retention as an expert witness. Plaintiffs are ORDERED to compensate Ms. Shepherd for her time spent in preparing for and appearing at trial and shall pay one day of Ms. Shepherds appearance fee in advance.

A copy of this Order has this day been served on all counsel of record electronically via File & ServeXpress.

It is so **ORDERED**.

ENTER: August 25, 2020

/s/ Derek C. Swope
Lead Presiding Judge
Marcellus Shale Litigation
Midstream Cases