

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State of West Virginia ex rel., Dr. Todd Tallman, M.D.

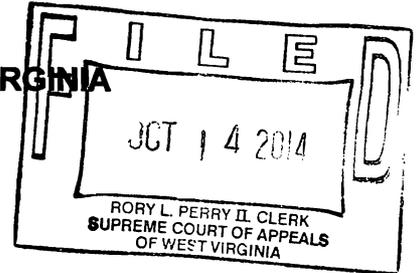
Petitioner,

vs.

Honorable Susan B. Tucker, Judge of the
Seventeenth Judicial Circuit, Patricia M. Powell,
as Executrix of the Estate of Robert L. Powell,
and Patricia M. Powell, individually,

Respondents.

**RESPONSE OF PATRICIA M. POWELL, ET AL.
TO PETITION FOR WRIT OF PROHIBITION**



Docket No. 14-0948

Patricia M. Powell,
As Executrix of the Estate of
Robert L. Powell, and
Patricia M. Powell,
Respondents by Counsel


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This matter comes before this Honorable Court pursuant to the filing of a Petition for a Writ of Prohibition filed by the Petitioner (Defendant below), Dr. Todd Tallman, M.D. The Petition comes about as a result of the Circuit Court's "Order Granting Plaintiff's Motion in Limine to Exclude Defendant's Expert Opinion." Comes now, Patricia M. Powell, as Executrix of the Estate of Robert L. Powell, and Patricia M. Powell, individually, Respondent, by her Counsel, Frances C. Whiteman and Kristine A. Burdette, and she hereby responds in objection to the Petition for Writ of Prohibition.

I. Statement of the Case; Facts; and Procedural History

The case was filed in the Circuit Court of Monongalia County alleging medical negligence from the medical care (and lack thereof) which was provided by the Petitioner/Defendant, Dr. Todd Tallman, M.D. to the decedent, Robert L. Powell. The Respondent/Plaintiff alleged that the care provided by Dr. Tallman was negligent, and lead to the death of Mr. Powell. The Petitioner has denied such negligence.

The Circuit Court entered an initial Scheduling Order on March 7, 2013. In the said Order, Respondent's/Plaintiff's trial experts were to be disclosed by May 31, 2013, and the Petitioner's/Defendant's trial experts were to be disclosed by July 12, 2013. Pursuant to the Scheduling Order, all expert witnesses were to be made in accordance with West Virginia Rule of Civil Procedure 26(b)(4).

On July 3, 2013, Respondent made her expert witness disclosure, which was a narrative report of Dr. Leonard Milewski, M.D., dated March 12, 2012. The report is very same report which was utilized by the Respondent to obtain the screening

certificate of merit prior to the filing of this case. The Petitioner's counsel did not ever object to the timing of the filing of the expert disclosure, however Petitioner's counsel disputed that the Respondent's expert disclosure met the requirements of WVRCP 26(b)(4), and insisted that it was not in the right form. Petitioner's counsel transmitted correspondence to Respondent's counsel that until the Respondent's properly made an expert disclosure, the Petitioner would delay his expert witness disclosure. The Respondent's counsel indicated to the Petitioner's counsel that the disclosure was proper and sufficient.

On November 15, 2013, several months after the Petitioner's expert witness disclosure deadline (which was July 12, 2013), the Petitioner filed an expert witness disclosure. The disclosure merely identified David A. Meyserson, M.D. and Dr. Jeffrey Marks, M.D. as Petitioner's experts, and contained only a general description of the experts' opinions.

Then on November 25, 2013, Petitioner filed a "Motion to Strike Plaintiff's Expert Witnesses and Preclude Them From Testifying at the Trial, or in the Alternative, to Compel Complete Expert Witness Disclosures" again arguing that the Plaintiff's disclosures did not meet the requirements of WVRCP 26(b)(4). The Petitioner's counsel did not immediately ask that the Court hear the motion, delaying the issue from a decision. Finally, the Petitioner's Counsel noticed the hearing and it was heard on April 9, 2014.

The Circuit Court heard the aforementioned motion on April 9, 2014. The Court indicated during the hearing that the Petitioner's motion was not well-received and said, "I don't understand your argument, because it is wrong." The Court denied the

Petitioner's motion with respect to Respondent's treating physician experts, and regarding the report of Dr. Milewski, the Court accepted the offer of the Respondent's counsel that the Respondent's counsel could merely copy and paste the report of Dr. Milewski into another form. On June 5, 2014, the Respondent filed another Expert Witness Disclosure identifying Dr. Milewski, which contained the contents of Dr. Milewski's original report exactly. The Petitioner did not object to the contents of this re-submitted disclosure.

The Petitioner thereafter, on July 14, 2014, conducted the deposition of Dr. Milewski. Pursuant to the Court's Amended Scheduling Order, discovery closed on July 14, 2014. On July 30, 2014, after the close of discovery and after the close of the Defendant's expert disclosure, the Petitioner filed a Supplemental Expert Witness Disclosure. The Supplemental Disclosure provided very detailed descriptions and the particulars of the opinion of Petitioner's expert medical witnesses, which they would testify to at trial, the majority of which were not supplied in Petitioner's initial disclosure on November 15, 2013.

On August 1, 2014, the Respondent filed a "Motion in Limine to Exclude Defendant's Expert Opinion." The motion sought a ruling from the Circuit Court to prevent the Petitioner's expert from testifying as to any opinions contained in the Petitioner's supplemental expert disclosure on the grounds that the supplemental disclosure was made outside of the Court's discovery deadline. The Circuit Court ruled in favor of the Respondent, and granted Respondent's motion.

The Circuit Court's ruling found that the supplemental disclosure, which contained specific opinions rendered by the Petitioner's experts, was made well past

the Court's expert disclosure deadline, past the Court's discovery deadline, and approximately six weeks prior to trial. The Circuit Court ruled that it agreed with the Respondent's argument that the Petitioner was attempting to "bootstrap" the Petitioner's vague initial expert disclosures by filing a detailed disclosure well after the disclosure and discovery deadline under the guise of "supplementation" of their expert disclosures under Rule 26(e)(1)(B) of the West Virginia Rules of Civil Procedure.

The Circuit Court noted that the Petitioner had argued that a supplementation of disclosures with very detailed supplemental disclosure was in following with the requirements of Rule 26(e)(1)(B) that mandates a party to supplement discovery with "the identity of each person expected to be called as an expert witness, the subject matter on which the expert is expected to testify, and the substance of the expert's testimony." The Court also noted that the argument was "disingenuous" because the Petitioner had Dr. Milewski's detailed report since July 2013, and the Petitioner could have pursued discovery regarding the same and to disclose Petitioner's own experts' report. The Circuit Court correctly found that "[Petitioner's] counsel's choice to delay disclosure of its experts' opinions was imprudent." Finally, the Court ruled that "[Petitioner's] current arguments appear to be merely a mechanism to attempt to introduce additional expert disclosures under the guise of "supplementation" under Rule 26(e)(1)(B) well beyond the deadlines mandated by this Court for disclosure of expert witness opinions and curiously close to the commencement of trial in this matter."

ARGUMENT

II. A Writ of Prohibition Should Not Lie in This Case Inasmuch As the Circuit Court's Decision Did not Exceed Its Legitimate Powers and was Not Clearly Erroneous As a Matter of Law

Pursuant to West Virginia Code § 53-1-1, a “writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or having such jurisdiction, exceeds its legitimate powers.” “Prohibition relief may be invoked only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or in which, having jurisdiction, they are exceeding their legitimate powers, and a writ of prohibition may not be used as a substitute for writ of error, appeal, or certiorari.” State ex rel. Keenan v. Hatcher, 210 W. Va. 307 (2001).

The West Virginia Supreme Court of Appeals held in Syl. Pt. 2, State of West Virginia ex rel. Games-Neely v. Overington, 230 W. Va. 739 (2013),

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 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. 4, State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (1996).

The Circuit Court of Monongalia County's decision to exclude the specific and particular opinions of the Petitioner's medical experts which were disclosed on July 29, 2014, was absolutely the correct ruling and not clearly erroneous as a matter of law. The Petitioner was well aware of the discovery and disclosure deadline which was established by the Circuit Court's Scheduling Order, and that discovery and disclosure deadline was July 14, 2014. The Petitioner wants to bootstrap his reservation of the right to supplement his earlier November 15, 2013 Expert Witness Disclosure which contained only a generalized medical opinions, completely devoid of the particular and specific opinions required for trial testimony. The Petitioner did have the right to supplement that disclosure, but the supplementation should have been made prior to the Petitioner's deadline of July 14, 2014. The Circuit Court was well within its discretion to rule that since the Defendant was unfairly disclosing expert opinions very close to the eve of trial, they should be excluded. The Circuit Court did not exceed its legitimate powers.

The Petitioner argues that the Circuit Court's Order "serves to dissuade and discourage the supplementation of expert disclosures prior to trial." To the contrary, the Circuit Court's ruling does nothing to dissuade or discourage supplementation of discovery. The Circuit Court's Order expects supplementation of discovery by the discovery deadlines which the Court Ordered. The penalty for not complying with an expert disclosure deadline when trial is bearing down on the parties, is exclusion of expert opinion testimony.

The Petitioner also argues that since the Respondent did not seek to take the

deposition of Petitioner's medical experts or serve interrogatories upon the Petitioner regarding his experts' opinions, that the supplementation of the Petitioner's experts' specific opinions, after the disclosure deadline, is somehow okay and should be excused. Respondent did not need to take the deposition of Petitioner's medical experts or serve interrogatories to explore that Petitioner's medical experts' opinions because the Respondent was relying on the Petitioner's first very general, unspecific, medical expert opinions of November 15, 2014. Respondent believed that if that was *all* that Petitioner's medical experts could testify to, then that testimony need not be further discovered. Respondent's strategy need not be second-guessed by the Petitioner.

Petitioner argues that after a discovery/expert disclosure issue was resolved by a April 19, 2014 hearing and then an Agreed Order entered, that he was *only then* was able to take the deposition of Respondents medical expert, Dr. Leonard Milewski. Petitioner had refused to move along with any discovery of any form for nine (9) months because Petitioner had argued that the Plaintiff did not comply with Rule 26(b)(4)(A)(i). At the April 19, 2014 hearing, the Court indicated to Petitioner's Counsel that the Court did not understand the Petitioner's argument because he was wrong about Respondent's disclosure, and that Respondent had complied with the Rule. Respondent offered to copy and paste the previous disclosure into another form, and that resulted in the Agreed Order memorializing the hearing. The Court was not happy with the Petitioner's delay tactics and criticized the same. The Petitioner could have taken the deposition of the Respondent's expert after learning of that expert's opinions which were disclosed nine (9) months before on July 3, 2013. Dr. Milewski's opinions

had not changed in those nine (9) months, as evidenced by his deposition testimony. Thus, Petitioner's experts had known all along about the opinions of Respondent's expert and Petitioner should have disclosed his experts' opinions long before July 29, 2014. Petitioner deliberately waited until after the discovery/disclosure Deadline to disclose his experts' opinions, and that is not fair to the Respondent.

In reviewing the Games-Neely five factors which are necessary for the Writ of Prohibition to issue, it is clear that the Petitioner cannot meet the factors. The party seeking the writ, the Petitioner, does have other adequate means, such as direct appeal, to obtain the desired relief. Petitioner is treating the Petition for Writ of Prohibition as an interlocutory appeal which is not permitted in this jurisdiction. The deliberate choice which the Petitioner made to not file his expert opinion disclosures until after the deadline has put him in quite a predicament. Of course the Defendant is prejudiced by not being able to put on his experts to testify as to their specific and particular opinions, but the Petitioner's prejudice is of his own making. If the Defendant loses at trial, he can appeal the verdict.

The second factor is whether the Petitioner will be damaged or prejudiced in a way that is not correctable on appeal. If the Petitioner is damaged or prejudiced, it was because of his own decisions and trial strategy.

The third factor is whether the lower tribunal's order is clearly erroneous as a matter of law. The Circuit Court order is not clearly erroneous as a matter of law. The Order is clearly correct as a matter of law. As a matter of law, the Court made a ruling in accordance with the Court's own Scheduling Order.

The fourth factor is whether the lower tribunal's order is an oft repeated error or

manifests persistent disregard for either procedural or substantive law. The Circuit Court Order is not a repeated error, nor has it been at all demonstrated that it manifests a persistent disregard for either procedural or substantive law.

Finally, the fifth Games-Neely factor is whether the lower tribunal's order raises new and important problems or issues of law of first impression. Scheduling Orders have long been in effect, and the Supreme Court's view of them has been that the Orders must be entered by a Circuit Court, and they must be adhered to by the parties. This Court, in Caruso v. Pearce, 678 S.E.2d 50 (W. Va. 2009), held that "Rule 16(b) requires active judicial management of a case, and mandates that a trial court "shall ... enter a scheduling order" establishing time frames for the joinder of parties, the amendment of pleadings, the completion of discovery, the filing of dispositive motions, and generally guiding the parties toward a prompt, fair and cost-effective resolution of the case."

The Petitioner argues that this Court should be guided by the ruling in West Virginia Dept. of Transp., Div. of Highways v. Parkersburg Inn, Inc., 222 W. Va. 688 (2008), however, the Parkersburg Inn case is about supplementing discovery and that if a party does not timely supplement discovery, as with expert opinions, then the expert opinion can be excluded. The Order of the Circuit Court of Monongalia County is clearly in line with Parkersburg Inn. The Petitioner just does not like it that its experts' opinion have been excluded because the disclosure was not timely made by Counsel, the Respondent timely objected to the untimely disclosure, and that the Petitioner will be foreclosed in presenting his expert opinions, to the detriment of the Petitioner and his attorneys.

This Court should be guided by State ex rel. State Farm Fire & Cas. Co. v. Madden, 192 W. Va. 155, 451 S.E.2d 721, 727 (1994), where this Court ruled that if defense counsel wished to extend a disclosure or discovery deadline, as ordered in the Scheduling Order, as it related to expert witness disclosures and designations, counsel should have filed a motion to extend, instead of allowing the deadline to pass without taking any action. Defense Counsel in State Farm Fire did no such thing. In the case at bar, if Defense Counsel wished to extend the deadline for disclosure and discovery, Defense Counsel should have filed a motion to extend the deadline.

Petitioner's/Defense Counsel did no such thing and expected the Respondent/Plaintiff and the Court to acquiesce to the late disclosure of experts' opinions.

Petitioner's/Defense Counsel, in this case, allowed the deadline to pass without taking any action. Thus, according to the ruling in State Farm Fire, this Court should find that the Petitioner's/Defense Counsel did nothing to extend their disclosure/discovery deadline, and that the exclusion by the Circuit Court of the supplement disclosure was well within the Circuit Court's discretion.

Parties must make expert disclosures at the times and in sequence that the Court orders. Rule 26 creates a duty to supplement, not a right to supplement after the disclosure deadline. Supplementation under Rule 26 does not create a loophole for a party to revise an initial report to its advantage. Rather, supplementation under the Rules means correcting inaccuracies, or filling the interstices of an incomplete report based on information that was not available at the time of the initial disclosure. In the context of supplementing an expert report, any additions or changes must be disclosed

by the time the party's pretrial disclosures are due. The Petitioner's new and so-called supplemental disclosures were new and different, rather than supplemental information. The so-called supplemental disclosures would force the Respondent to expend additional money, paying Respondent's expert, to review the additional and new opinions. The Petitioner should not be rewarded for his delay. Petitioner's late disclosure, after the deadline for discovery, ensured the Respondent had no opportunity to depose or ask interrogatories of the Petitioner's experts. The Petitioner's late disclosure also foreclosed the application of rebuttal opinion and testimony from Respondent's expert, Dr. Milewski, since it was after the close of discovery. The Court should not permit this underhanded and unfair litigation tactic.

III. Conclusion

WHEREFORE, your Respondent/Plaintiff Below hereby requests that this Honorable Court deny the Petition for a Writ of Prohibition which was filed by the Petitioner/Defendant Below.

PATRICIA M. POWELL, et al.,
Respondent/Plaintiff Below


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CERTIFICATE OF SERVICE

I, Frances C. Whiteman/Kristine Burdette, do hereby certify that I transmitted a true copy of the foregoing

**RESPONSE OF PATRICIA M. POWELL, ET AL.
TO PETITION FOR WRIT OF PROHIBITION**

this 13th day of October, 2014, by fax transmission and/or email as follows:

Stephen R. Brooks, Esquire
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Judge Susan B. Tucker
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