IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

Docket No. 35700

STATE OF WEST VIRGINIA ex rel. THERESA COLEMAN,
Administratrix of Estate of Sara Bryanne Coleman

Petitioner/Plaintiff-Below,

v.

THE HONORABLE DAVID M. PANCAKE, JUDGE and
PATTI HACKNEY, CNM, RN, and
MITCHELL NUTT, M.D.

Respondents/Defendants-Below.

The Honorable David M. Pancake, Judge
Circuit Court of Cabell County, West Virginia
Civil Action No. 06-C-589

RESPONSE AND MEMORANDUM OF LAW ON BEHALF OF THE RESPONDENTS/DEFENDANTS-BELOW, PATTI HACKNEY, CNM AND MITCHELL NUTT, M.D., IN OPPOSITION TO THE RULE TO SHOW CAUSE

Michael J. Farrell, Esquire (WV State Bar # 1168)
Tamela J. White, Esquire (WV State Bar # 6392)
Allison N. Carroll, Esquire (WV State Bar # 10294)
FARRELL, FARRELL & FARRELL, PLLC
914 Fifth Avenue
Post Office Box 6457
Huntington, West Virginia 25772-6457
Phone: (304) 522-9100
Facsimile: (304) 522-9162
Counsel for Patti Hackney, CNM, and Mitchell Nutt, M.D.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Supreme Court of the United States

West Virginia State Case Law

West Virginia State Rules

QUESTION PRESENTED

The sole issue before this Court is whether the trial court substantially abused its discretion in restricting the scope of questions directed to a pathology expert that the Court determined would not lead to the discovery of admissible evidence because when the questioner conceded that the standard of care questions at issue were outside the expertise of the witness and beyond the scope of his opinions disclosed pursuant to Rule 26, W.Va. R. Civ. P.

STATEMENT OF THE CASE

Come now the Respondents/Defendants-Below, Patti Hackney, CNM, RN and Mitchell Nutt, M.D., by and through counsel, Michael J. Farrell, Tamela J. White, Allison N. Carroll and Farrell, Farrell & Farrell, PLLC and hereby respectfully respond and show cause why a Writ of Prohibition should not issue against the Honorable David M. Pancake, Judge of the Circuit Court of Cabell County.

The Petitioner/Plaintiff-Below seeks relief from an eve of trial discovery ruling on a Motion for Protective Order regarding the scope of the inquiry during the deposition of Dr. Richard Mitchell, a pathologist. The issue presented is whether the trial court substantially abused its discretion in restricting the scope of questions directed to a pathology expert that the Court determined would not lead to the discovery of admissible evidence because when the questioner conceded that the standard of care questions at issue were outside the expertise of the witness and beyond the scope of his opinions disclosed pursuant to Rule 26, W.Va. R. Civ. P.

. Because Petitioner had included a list of documents to be produced that related exclusively to the standard of care for a gynecologist or midwife, the trial Court was able to confirm that Petitioner intended to question Dr. Mitchell regarding standard of care subject matters about which he was not an expert and had not opined. Under a *Wilt, Gentry or Daubert* analysis, Dr. Mitchell could not qualify as an expert regarding the standard of care for a gynecologist and midwife presented with a patient diagnosed with dysfunctional uterine bleeding and treated with prescription drugs including Prometrium, LoOvral and Ovcon. Defense counsel stipulated at the Hearing on the Motion for Protective Order that Dr. Mitchell would not offer standard of care opinions at the trial that was scheduled to begin two weeks after the deposition. *See Daubert v Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), *Wilt v.*

Buracker, 191 W. Va. 39, 443 S.E.2d 196 (1993), *cert denied,* 511 U.S. 1129, 114 S. Ct. 2137, 128 L.Ed.2d 867 (1994) and *Gentry v. Mangum,* 195 W. Va. 512, 466 S.E.2d 171 (1995).

Based on the facts presented and the applicable law, this Honorable Court should therefore dismiss the Rule to Show Cause in favor of the trial court and dismiss the Petition for a Writ of Prohibition as improvidently granted. A new trial date of October 25, 2011 has already been confirmed.

I. NATURE OF PROCEEDINGS BELOW

This case was ready for trial with the exception of the deposition of Dr. Mitchell.

The Pre-Trial Conference convened on July 1, 2010, at which time Judge Pancake ruled on thirty-five (35) motions, including three (3) dispositive motions and thirty-two (32) motions in *limine.*

Dr. Allan Chamberlain's Motion for Summary Judgment was granted because his only role in the care and treatment of Sara Coleman was interpretation of an ultrasound on April 8, 2004. No expert opined that his interpretation deviated from the standard of care or proximately caused injury. Following the Pre-Trial Conference, Petitioner and the Respondents filed their proposed *voir dire* and jury instructions as well as their trial witness and exhibit lists.

Thereafter, on July 23, 2010, approximately two (2) weeks prior to trial, Respondents' pathology expert, Dr. Colin Bloor, suffered a disabling stroke. Defense counsel immediately notified the Court and counsel and sought a brief continuance in order to secure a new pathology expert. The trial was continued from August 9, 2010 to October 19, 2010. Dr. Mitchell was retained and his Rule 26 Disclosure was filed on September 7, 2010. His discovery deposition was noticed for October 5, 2010. The Notice of Deposition was served on September 22, 2010 and the Motion for Protective Order was filed on September 24, 2010. The Hearing convened on

October 1, 2010 and the ruling was orally announced at that time. *See* Appendix A to Response in Opposition to Petition for Writ of Prohibition, pp. 31-32 (October 1, 2010 Hearing Transcript, pp. 14-15). To this day, no Order has been entered regarding the Motion for Protective Order.

This appellate review of an alleged abuse of discretion should focus on the context of the case and the extensive knowledge possessed by the trial Court as to what expert testimony would be admissible.

a. **Facts Giving Rise to the Litigation**

The matter below is a medical negligence action filed by Petitioner on August 15, 2006. Petitioner initially brought suit against Certified Nurse Midwife, Patti Hackney and one of her collaborating physicians, Allan Chamberlain, M.D. Petitioner later amended the Complaint to include Ms. Hackney's other collaborating physician, Mitchell Nutt, M.D. All three providers engaged in an obstetrics and gynecology practice at United Health Professionals, Inc. in Huntington, West Virginia.

The allegations in this action arise from the prescription of oral contraceptives to the decedent, Sara Bryanne Coleman. Petitioner alleges that oral contraceptives should not have been prescribed for treatment of her dysfunctional uterine bleeding and that their ingestion caused blood clots to form and kill Sara Bryanne Coleman on August 16, 2004. Respondents admit that blot clots caused the death but deny that the oral contraceptives caused the blood clots.

Respondents will prove that the triggering event for the formation of blood clots occurred on August 13, 2004 when Sara Coleman injured herself while using a trampoline for recreation. The trampoline event is described in the August 13 paramedic and hospital records based on the disclosures by Theresa Coleman, Tim Coleman and other family members. The trampoline event is corroborated by the conduct of Sara Bryanne Coleman including an August 13 call to her

employer that she was unable to work because she had been injured in an accident and could not work. Her father's testimony confirms that she did not work between August 13 and 16 and that she laid around the house during that weekend. Her mother confirms that Sara Bryanne had sufficient pain on Sunday night, August 15, that she gave her daughter a powerful pain medication, Neurontin, which had been prescribed for the mother. In the early morning hours of Monday, August 16, Sara Bryanne awoke her parents and told them that she had fainted in the bathroom. She wanted medical care but was told by her parents to return to bed. Within two hours, she died and was found dead in her bedroom.

Sixty-one (61) depositions have been taken. Standard of care and causation issues are hotly contested. Petitioner has disclosed two gynecologists (Jeffrey Koren, M.D and Steven Eisinger, M.D), two midwives (Joan Slager, CNM and Claudia Anderson Beckman, Ph.D.), and a hematologist (Alexander Duncan, M.D.), a pharmacologist Randall Tackett, Ph.D.) and a pathologist (State Medical Examiner James Kaplan M.D.) Respondents have disclosed two gynecologists (Paige Hertweck M.D. and Michael Paidas M.D.) who will address the standard of care for a gynecologist and midwife. Respondents' expert witnesses will explain the cause of death based on their respective disciplines including trauma (Stephen Thomas M.D., pharmacology (Kevin Yingling M.D.), hematology (Philip Comp M.D.) and pathology (Richard Mitchell M.D.).

Interpretation of the physical evidence is important in every death case. Even though Dr. Kaplan as State Medical Examiner preserved clot and adjacent tissue, he did not conduct a microscopic examination or otherwise prepare the clots and tissue for microscopic examination. Upon Motion by Respondents, the Court ordered that the tissue be made available for cutting and fixing onto slides by Dr. Angel Cinco so that microscopic examination of the materials could be

accomplished by all qualified experts for both Petitioner and Respondents. Dr. Cinco prepared the slides in May, 2008. Petitioner's hematology and pathology experts have had the same slides now relied upon by Dr. Mitchell. Following their microscopic examinations, Petitioner amended their respective Rule 26 disclosures and presented each expert who reviewed the slides for deposition. Like Dr. Mitchell, neither Dr. Duncan nor Dr. Kaplan claim to be qualified to opine about the standard of care for either a gynecologist or midwife.

b. Applicable Procedural History

Multiple trial dates have been set and continued in this case. The trial date of August 9, 2010 was continued when Dr. Bloor suffered his stroke and Respondents needed time to recruit a replacement pathologist. The trial was continued to October 19, 2010. As a consequence of the issuance of the Rule to Show Cause, the parties have now agreed to October 25, 2011 as the new trial date.

On September 7, 2010 Respondents disclosed a substitute pathologist, Dr. Richard Mitchell, to testify regarding causation issues. *See* Respondents' Supplemental Expert Disclosure attached as Exhibit 1 to Petitioner's Petition for Writ of Prohibition. Dr. Mitchell is a cardiovascular pathologist and Associate Professor of Pathology at Harvard Medical School in Boston, Massachusetts. As set forth in his disclosure, Dr. Mitchell will offer causation and pathology opinions as to the age and cause of the iliac vein thrombus and pulmonary emboli which resulted in Sara Bryanne Coleman's death on August 16, 2004. He offered no opinions regarding gynecology, nurse midwifery and/or the standard of care applicable thereto. The disclosed opinions by Drs. Kevin Yingling, Philip Comp, Stephen Thomas and Michael Paidas relied upon the findings of Respondents' original pathologist, Dr. Colin Bloor. As set forth in Dr. Mitchell's disclosure, his disclosed opinions about the examination of the Sara Bryanne Coleman tissue

slides did not change any of the opinions disclosed by Drs. Kevin Yingling, Philip Comp, Stephen Thomas and Michael Paidas. *See* Respondents' Supplemental Expert Disclosure attached as Exhibit 1 to Petition for Writ of Prohibition.

Inexplicably, in her Notice of Deposition, Petitioner directed Dr. Mitchell to bring multiple items relating to the practice of obstetrics and gynecology, certified nurse midwifery, and the standard of care for these professions. Specifically, he was instructed to produce the following:

a. In Paragraph 9, Petitioner requested "All materials and things in the deponent's possession that describes the role of an advanced nurse practitioner (certified nurse midwife) in the collaboration with a physician in any and all aspects of patient care."

b. In Paragraph 10, Petitioner requested, "All materials and things in the deponent's possession that describes the role of an advanced nurse practitioner (certified nurse midwife) in the collaboration with a physician with respect to prescriptions recommended by and/or provided to a nurse practitioner."

c. In Paragraph 11, Petitioner requested, "All things in the deponent's possession and/or known to the deponent upon which the deponent relies to claim that Sara B. Coleman was a proper candidate for oral birth control therapy in the amounts prescribed."

d. In Paragraph 12, Petitioner requested, "All things in the deponent's possession and/or known to the deponent upon which the deponent relies to claim that there was not a deviation from the applicable standard of care in this case."

e. In Paragraph 16, Petitioner requested, "Any and all literature, including but not limited to pamphlet(s), teaching material(s) used by the deponent in clinical

practice concerning any and all of the following subject matters: (a) oral birth control; (b) ovarian cysts; (c) dysmenorrhea; (d) menorrhagia; (e) smoking; (f) obesity; (g) blood clots; and (h) a family history of DVTs, blood clots, obesity and smoking."

f. In Paragraph 17, Petitioner requested, "All educational literature, internet search results, medical literature, health education materials and everything of that kind in your possession and/or known to you that supports your allegation that a family history of deep vein thrombosis and/or blood clots and/or smoking, and/or obesity is not a contraindication for oral birth control."

See Notice to Take the Deposition of Dr. Richard Mitchell, attached as Exhibit 2 to Petition for Writ of Prohibition. None of the subjects in the foregoing paragraphs relate to Dr. Mitchell's testimony or clinical practice. Dr. Mitchell is a pathologist with particular expertise in cardiovascular/pulmonary pathology. Understandably, this Court may have been mislead by the incorrect representation in the Petition that "Dr. Mitchell has written numerous articles that include references to the relationship between oral contraceptives and blood clots." Dr. Mitchell's *curriculum vitae* confirms that he has not written "numerous articles that include references to the relationship between oral contraceptives and blood clots." *See* Petitioner's Motion to Stay the Lower Court Proceedings, p. 5; *see also* Exhibit 1, attached hereto, *Curriculum Vitae* of Richard Mitchell, M.D.

A reasonable person might ask why a Motion for Protective Order was necessary when Dr. Mitchell could respond that he was not a gynecologist or midwife and had no standard of care opinions. The answer is that the discovery conducted by Petitioner's counsel has not been normal and that the original pathologist, Dr. Bloor, was examined for approximately eight and one-half

(8 ½) hours about standard of care issues. Even though Dr. Bloor was the only defense pathologist, no questions were asked regarding Sara Bryanne's tissues and clots as depicted in the photographs/micrographs of the tissues and clots prepared by Dr. Bloor. Instead, Petitioner's counsel questioned Dr. Bloor about standard of care issues to which he repetitively responded that he was not qualified to answer standard of care questions because they were beyond the scope of his expertise. Such inquiry was not only a waste of time and resources but they were not likely to lead to the discovery of admissible evidence. Throughout this litigation, Petitioner's counsel have repeatedly and unnecessarily burdened many of the witnesses and the deposition process by improperly seeking to elicit standard of care opinions from multiple lay witnesses as well as non-standard of care experts.

In light of Respondents' experience at the deposition of Dr. Bloor and other non-standard of care witnesses, as well as the imminence of trial, defense counsel conferred with Petitioner's counsel and sought to secure his agreement that the witness would not be examined about standard of care opinions because these subjects were beyond his expertise. Unfortunately, Petitioner's counsel refused and insisted that he needed to ask questions about the standard of care.

With time of the essence given the approaching deposition date of October 5, the October 19 trial date and because inquiries into the areas of gynecology and nurse midwifery were beyond his qualifications, Respondents filed a Motion for Protective Order seeking to limit the scope of Petitioner's deposition inquiry to the disclosed causation opinions and Dr. Mitchell's pathology expertise. Examination of Dr. Mitchell about standard of care issues is not calculated to lead to the discovery of admissible evidence.

c. **Hearing on October 1, 2010**

The Hearing on Respondents' Motion for Protective Order took place on October 1, 2010, in conjunction with another Motion regarding the evidentiary deposition of fact witness, Dr. David Ayers. The trial court also ruled upon the Respondents' Motion to Strike Portions of the Evidentiary Deposition of Dr. David Ayers, which provides context to the ruling which is the subject of the pending Petition.

Dr. Ayers' was the treating family doctor for Sara Coleman. As an out of state witness unable to attend trial, it was necessary to conduct an evidentiary deposition of Dr. Ayers on July 5, 2010. At the beginning of his deposition, Dr. Ayers testified that he was Sara Coleman's family doctor and had/has no knowledge of the care by the Respondents and had/has no expert opinions regarding the matters in dispute. *See* Appendix A to Response in Opposition to Petition for Writ of Prohibition, p. 33 (October 1, 2010 Hearing Transcript, p. 22).

Petitioner, in her cross-examination of Dr. Ayers, attempted to elicit opinions with respect to pathology and causation, in particular. Petitioner also, in direct violation of *Rine v. Irisari,* 187 W. Va. 550, 420 S.E.2d 541 (1992) repeatedly asked Dr. Ayers to read into the record hearsay excerpts of the discovery deposition of Dr. James Kaplan, her pathology expert and chief medical examiner who performed Sara Coleman's autopsy. The trial court found such tactics were impermissible and ruled that those portions of the evidentiary deposition were to be stricken.

In conjunction with the foregoing, the trial court also took up the issue of whether to permit Petitioner to once again waste time and resources by asking standard of care questions which were beyond the scope of Dr. Mitchell's expertise and were not reasonably calculated to lead to the discovery of admissible evidence. At the Hearing, Respondents reiterated the limitations on

Dr. Mitchell's qualifications and stipulated on the record that he would not/could not offer opinions as to gynecology, nurse midwifery or the standard of care regarding the same. *See* Appendix A to Response in Opposition to Petition for Writ of Prohibition, p. 29 (October 1, 2010 Hearing Transcript, pp. 5-6).

With comprehensive knowledge of the contested factual and legal issues, completion of all other discovery, completion of the Pretrial Conference, resolution of the dispositive motions and motions in *limine* and submission of the proposed jury instructions, the trial court had the best understanding of what would be admissible testimony and whether questions directed to Dr. Mitchell about standard of care were reasonably calculated to lead to admissible evidence. In this context, Judge Pancake granted Respondents' Motion pursuant to Rule 26(c), and issued a narrowly drawn protective order limiting the scope of inquiry to those matters for which Dr. Mitchell was qualified. In an articulate and succinct explanation of his ruling, Judge Pancake stated:

> [T]he Court is not issuing a "broad" protective order in this case. Instead, it is simply limiting Dr. Mitchell's testimony to his field of expertise, which is pathology. Mrs. Coleman is permitted under the rules to ask Dr. Mitchell his opinion about pathology, not obstetrics and gynecology, et cetera, because they are outside the scope. It would be an undue burden, not to mention expense, for Dr. Mitchell to prepare for such deposition testimony which this line of inquiry would not be permitted at trial as is outside the scope. Further, the Defendants are not claiming a "privilege," but instead arguing that the information and documents are outside the scope. Mrs. Coleman is permitted under the rules to inquire as to any opinions Dr. Mitchell has, even though not broached by the Defendants, within the realm of his expertise. She can fully discover matters and information and knowledge that Dr. Mitchell has pertaining to this case within the framework of his expertise. However, questions concerning obstetrics, gynecology, certified nurse midwifery, and the standard of care for those professions are outside his expertise. The Defendants' motion for a protective order in response to Mrs. Coleman's notice to take the deposition of Dr. Mitchell is granted. Your exceptions and objections are noted.

See Appendix A to Response in Opposition to Petition for Writ of Prohibition, pp. 31-32 (October 1, 2010 Hearing Transcript, pp. 14-15).

After the Court announced its ruling on the Motion for Protective Order, Petitioner unilaterally canceled the October 5, 2010 discovery deposition of Dr. Mitchell and announced her intention to seek a Writ of Prohibition based thereon. In an effort to preserve the trial date, Respondents offered to make Dr. Mitchell available for an October 13, 2010 deposition. Petitioner declined to take his deposition on this additional date. There is simply no abuse of discretion where, as here, the trial court held that questions regarding opinions not held by the witness, outside the scope of his expertise would not lead to the discovery of admissible evidence.

SUMMARY OF ARGUMENT

The trial court did not substantially abused its discretion in restricting the scope of questions about the standard of care for gynecologists and midwives when the deponent is a pathologist who is not a standard of care expert and has not opined about the conduct of the gynecologist and nurse midwife. The trial court did not impose any restrictions upon Petitioner's counsel regarding the opinions disclosed or the pathology expertise. Petitioner's counsel concedes that the questions at issue are outside the expertise of the witness and beyond the scope of the opinions disclosed for Dr. Mitchell pursuant to W.Va. R. Civ. P. 26. Rule 26 of the West Virginia Rules of Civil Procedure therefore controls this issue and was properly applied by the trial court. Upon review, this Court must apply the substantial abuse of discretion standard. Plenary review has not been sought by the Petitioner nor is it warranted based upon the record.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is requested in this matter. Pursuant to the Rule to Show Cause entered October 13, 2010, oral arguments have been scheduled to take place on Tuesday, January 11, 2011 at 10:00 a.m. before this Honorable Court.

ARGUMENT

The sole issue before this Court is whether the trial court substantially abused its discretion in restricting the scope of questions directed to a pathology expert when the questioner concedes that the standard of care questions for gynecology and midwifery are outside the expertise of the witness and beyond the scope of his Rule 26 opinions. Upon proper application of the heightened standard of review necessary to obtain relief from a discovery order pursuant to a writ of prohibition, the answer must be no.

I. A Writ of Prohibition Is An "Extraordinary" Remedy Not Warranted by the Court's Narrowly Drawn Discovery Ruling

As an exercise of this Court's original jurisdiction, a writ of prohibition represents an extraordinary remedy, which will be limited solely "to circumstances 'of an extraordinary nature.'" *State ex rel. Fidelity and Guaranty Co. v. Canady*, 194 W.Va. 431, 460 S.E.2d 677 (1995). A writ of prohibition may only issue in circumstances "where the trial court has no jurisdiction or having such jurisdiction [where it] exceeds its legitimate powers." *Syl. Pt. 1, Packard v. Perry*, 221 W.Va. 526, 528, 655 S.E.2d 548, 550 (2007) (additional citations omitted).

Further, a writ of prohibition cannot serve "as a substitute for writ of error, appeal or certiorari.'" *Syl. Pt. 2, Horkulic v. Galloway,* 222 W.Va. 450, 454, 665 S.E.2d 284, 288 (2008) (quoting Syl. Pt 1, *Crawford v. Taylor,* 138 W.Va. 207, 75 S.E.2d 370 (1953)). Justice Cleckley, concurring in *State ex rel. W.Va. Secondary Schools Activity Commission v. Hrko*, 193 W.Va. 32, 454 S.E.2d 77 (2003), explained that mere doubt as to the correctness of a pretrial ruling is not

sufficient to invoke this Court's writ power and that a writ should not be permitted where, as here, any error could be addressed properly on appeal:

> When appropriate, writs of prohibition and mandamus provide a drastic remedy to be invoked only in extraordinary situations. "[O]nly in exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy." *Will v. United States*, 389 U.S. 90, 95, 88 S.Ct. 269, 273, 19 L.E.2d 305, 309 (1967). (Citation omitted). *See also Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988).
>
> Mere doubt as to the correctness of a trial court's ruling on a motion in limine regarding an evidentiary issue is an insufficient basis to invoke this Court's writ power. To justify this extraordinary remedy, the 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. Thus, writs of prohibition, as well as writs of mandamus and habeas corpus, should not be permitted when the error is correctable by appeal.

In her Petition, Mrs. Coleman alleges nothing more than a complaint as to the correctness of Judge Pancake's pretrial ruling as to the scope of a discovery deposition of a replacement pathology expert. She preserved her objection to the ruling on the record to the trial court's interlocutory order and thus has preserved the matter for the appellate record. The appellate process is therefore the appropriate forum in which to challenge the trial court's discretionary pretrial ruling. *See State ex rel. W.Va. Secondary Schools Activity Commission v. Hrko*, 193 W.Va. 32, 454 S.E.2d 77, (2003) (Cleckley, J., concurring) (n.1 "Therefore, we should not allow a writ of prohibition to substitute for an appeal.); *County Court v. Boreman*, 34 W.Va. 362, 366, 12 S.E. 490, 492 (1890)("But it does not lie for errors or grievances which may be redressed in the ordinary course of judicial proceedings, by appeal or by writ of error"); Syl. Pt. 2, *Woodall v. Laurita*, 156 W.Va. 737, 195 S.E.2d 717 (1973)("Where prohibition is sought to restrain a trial court from the abuse of its legitimate powers, rather than to challenge its jurisdiction, the appellate court will review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate, and only if the appellate court determines that the

abuse is so flagrant and violative of petitioner's rights as to make a remedy by appeal inadequate, will a writ of prohibition issue.").

Instead, a writ may only be used "to correct... substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate...." *Syl. Pt. 1, West Virginia Fire & Casualty Co. v. Karl,* 199 W.Va. 678, 679, 487 S.E.2d 336, 337 (1997) (quoting *Syl. Pt. 1, Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979) (additional citations omitted)).

In this instance, Judge Pancake issued a narrowly drawn ruling eighteen (18) days before trial, limiting a pathology expert's deposition to those subjects within his expertise pursuant to W.Va. R. Evid. 702 and its application under *Daubert*, *Gentry*, and *Wilt*. *See* Appendix A to Response in Opposition to Petition for Writ of Prohibition, p. 32 (October 1, 2010 Hearing Transcript, p. 15) ("She can fully discover matters and information and knowledge that Dr. Mitchell has pertaining to this case within the framework of his expertise. However, questions concerning obstetrics, gynecology, certified nurse midwifery, and the standard of care for those professions are outside his expertise."). Petitioner did not state in the opposition to the Motion for Protective Order, in the colloquy with the trial court or in its Petition for a Writ of Prohibition how the questions about standard of care were reasonably calculated to lead to the discovery of admissible evidence. Petitioner cannot and does not demonstrate in her Petition how a trial court's ruling limiting the scope of a discovery deposition, with regard to subjects outside an expert's area of expertise, constitutes a substantial, clear-cut, legal error.

II. Discovery Rulings Will Not Be Disturbed via Writ of Prohibition Absent A Clear Legal Error Resulting from a Substantial Abuse of Discovery.

Where, as here, a writ of prohibition is sought from a lower court's discovery ruling, the petition must be reviewed in light of the applicable abuse of discretion standard. In general, a circuit court's ruling on discovery issues will be reviewed for an abuse of discretion. *Fidelity*,

194 W.Va. at 439, 460 S.E.2d at 685, quoting *McDougal v. McCammon*, 193 W.Va. 229, 235, 455 S.E.2d 788, 794 (1995). This Court has explained that an abuse of discretion will only occur "when [the trial court's] rulings on discovery motions are clearly against the logic of the circumstances then before the court, and so arbitrary and unreasonable as to shock our sense of justice and to indicate lack of careful consideration." *B.F. Specialty Co. v. Charles M. Sledd Co.*, 197 W.Va. 463, 475 S.E.2d 555 (1996). Petitioner advanced no facts or legal arguments that the narrow ruling regarding this deposition was "clearly against the logic of the circumstances then before the Court." Rule 26 expressly authorized the action taken by Judge Pancake.

While a discovery ruling may in rare instances be reviewed pursuant to the plenary power of this Court, plenary review will apply only when the circuit court's ruling turns on a misinterpretation of the West Virginia Rules of Civil Procedure, *i.e.*, by failing to make a finding or applying the wrong legal standard. *State ex rel. Erie Ins. Property & Cas. Co. v. Mazzone*, 220 W.Va. 525, 648 S.E.2d 31 2007; *see also* Syl. Pt. 5, *State ex rel. Med. Assurance of W.Va. Inc. v. Recht*, 213 W.Va. 457, 583 S.E.2d 80 (2003). Here, there is no allegation that Judge Pancake failed to make a finding or that he applied the wrong legal standard. As set forth in the October 1, 2010 Hearing transcript, Judge Pancake articulated the basis for his ruling in detail, relying upon Rule 26 of the W.Va. R. Civ. P. in granting the Motion for Protective Order. He distinguished each case cited by Petitioner in opposition to the Motion for Protective Order and afforded counsel an opportunity to explain how the case applied. Counsel conceded that he had not read one of the cited cases and that he could not provide any other legal support other than his interpretation that Rule 26 allowed him to ask this pathologist about anything he wanted. Petitioner has not identified any basis for this Court to invoke its plenary powers and review this

ruling on any basis other than abuse of discretion. Therefore, Judge Pancake's ruling is subject solely to the abuse of discretion standard on appellate review.

When seeking the extraordinary remedy of a writ of prohibition on discretionary rulings, the Petitioner must prove not only an abuse of discretion, but that the abuse was a clear legal error rising to the level of a substantial abuse of discretion. "A writ of prohibition will not issue to prevent a simple abuse of discretion by the trial court." *State ex rel. Peacher v. Sencidiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977). In order to warrant the extraordinary relief of a writ of prohibition, the Petitioner must prove that the trial court committed a clear legal error as the result of a substantial abuse of discretion. *State ex rel. Ward v. Hill*, 200 W.Va. 270, 489 S.E.2d 24 (1997); *See also Nutter v. Maynard*, 183 W.Va. 247, 250, 395 S.E.2d 491, 495 (1990) ("extraordinary relief [may be granted] where a discovery order presents a purely legal issue in an area where the bench and bar are in need of guidelines"). Petitioner has not identified any "legal error" much less a "clear legal error." The unique circumstances of this case do not present an appropriate platform to provide guidelines to bench and bar because rarely will a trial court rule on the scope of an expert's discovery deposition after the Pretrial Conference and on the eve of trial. Dr. Mitchell's declarations that he is not a gynecologist or midwife are not admissible. He is a pathologist who will explain the tissues and clots preserved on the slides.

This Court has long disfavored the issuance of writs of prohibition with respect to discretionary rulings. *State ex rel. W.Va. Secondary Schools Activity Commission v. Hrko*, 193 W.Va. 32, 454 S.E.2d 77 (2003)(Cleckley, J. concurring)(noting that as recently as 1980, this Court indicated it would not hear writs from interlocutory rulings on evidentiary rulings). In those rare instances where a writ was issued, findings of substantial abuses of discretion were reserved for clear misapplications of applicable law or atypical discovery issues such as orders to

compel the production and disclosure of privileged materials, because the harm resulting therefrom would not be correctable upon appeal. *See State ex rel. Brison v. Kaufman*, 213 W.Va. 624, 629, 584 S.E.2d 480, 485 (2003); *State ex rel. Parsons v. Zakaib*, 207 W.Va. 385, 389, 532 S.E.2d 654, 658 (2000); *See also State ex rel. Allstate Ins. Co. v. Gaughan*, 203 W.Va. 358, 508 S.E.2d 75(1998)(regarding materials subject to attorney client privilege and work product doctrine); *State ex rel. U.S. Fidelity and Guaranty Co. v. Canady*, 194 W.Va. 431, 460 S.E.2d 677 (1995)(regarding materials subject to the attorney-client privilege and work product doctrine); *State ex rel. Shroades v. Henry*, 187 W.Va. 723, 421 S.E.2d 264 (1992)(regarding documents subject to the medical peer review privilege). This Court has never granted the extraordinary remedy of a writ based solely upon a trial court's ruling as limiting the scope of a discovery deposition to matters reasonably calculated to lead to the discovery of admissible evidence. To do so on these facts would eviscerate the discretionary power ceded to the trial court by Rule 26.

In *State ex rel. W.Va. Secondary Schools Activity Commission v. Hrko*, Justice Cleckley endorsed Respondents' position that the use of writs of prohibition to challenge discretionary rulings is not appropriate: "Thus, in the absence of a jurisdictional defect, the administration of justice is not well served by challenges to discretionary rulings of an interlocutory nature. The matters are best saved for appeal." *State ex rel. W.Va. Secondary Schools Activity Commission v. Hrko*, 193 W.Va. 32, 454 S.E.2d 77 (2003) (n.1, Cleckley, J., concurring)

As set forth in the Petition for Writ of Prohibition and the October 1, 2010 Hearing Transcript, attached as Appendix A to the Response in Opposition to the Petition for Writ of Prohibition, the trial court's ruling was made on the eve of trial when it knew precisely what evidence was going to be admissible and what evidence would be excluded. Because of the

unique circumstances presented and because the narrowly drawn ruling is based on the unambiguous text of Rule 26 that authorizes limitation of the scope of a discovery deposition to those matters reasonably calculated to lead to the discovery of admissible evidence, there is nothing before this Court which would rise to the level of an "extraordinary circumstance" constituting a substantial abuse of discretions which would warrant the issuance of a writ. To do so under West Virginia law would effectively require the creation a new syllabus point or a restrictive amendment to the scope of W.Va. R. Civ. P. 26.

III. The Trial Court Correctly Exercised Its Broad Discretion Under W.Va. R. Civ. P. 26; Therefore, the Trial Court's Ruling Was Not A Substantial Abuse of Discretion.

Petitioner cannot demonstrate any abuse of discretion in the trial court's ruling, as it was a proper and narrowly drawn exercise of the trial court's authority to limit the scope of discovery pursuant to W.Va. R. Civ. P. 26.

It is a well-established tenet of West Virginia jurisprudence that the trial court has broad discretion in the management and control of the discovery process, including discovery depositions. *State ex rel. Myers v. Sanders*, 526 W.Va. 544, 549, 526 S.E.2d 320, 325 (1999); *See also B.F. Specialty Co. v. Charles M. Sledd Co.*, 197 W.Va. 463, 465, 475 S.E.2d 555, 557 (1996); *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E.2d 788 (1995);

Justice Benjamin in his concurring and dissenting opinion in *State ex rel. Hamrick v. Stucky*, 220 W.Va. 180, 640 S.E.2d 243 (2006), acknowledges the benefit of allowing the trial court to manage the case because it understands the "finer aspects" of the dispute and the case.

> Discovery has increasingly become a "tool" of opportunity in the strategy arsenal of many of today's litigators. Purposeful delaying, oppressive requests, unwarranted "fishing expeditions", boiler plate objections, and myriad other "tools" are too often today the means by which one side or another to a case seeks an advantage. As a Court, we must encourage trial judges to manage discovery in cases before them fairly and to sanction those who would misuse the discovery system. That includes affirming the choices a trial

> court makes regarding a discovery commissioner absent an abuse of discretion. The trial court knows the finer aspects of the parties and the case herein far better than this Court ever could. This is especially so when the matter is before us on the limited record of a petition seeking extraordinary relief. It is that trial judge who knows best who should be a discovery commissioner absent an objective basis for bias by the discovery commissioner or other proper cause.

See also B.F. Specialty Co. v. Charles M. Sledd Co., 197 W.Va. 463, 465, 475 S.E.2d 555, 557 (1996) ("We believe that the trial court judges who managed this case did so in laudable fashion and certainly did not abuse their discretion in the control and management of this case").

"All phases of the deposition examination are subject to the sound discretion of the court, which can make any orders necessary to prevent the abuse of the discovery and deposition process." *State ex rel. Myers v. Sanders*, 206 W.Va. 544, 549, 526 S.E.2d 320, 325 (1999). Petitioner cannot dispute that Rule 26 authorizes the trial court to impose restrictions on discovery. The Rule implicitly acknowledges that the trial court has discretion when imposing limitations. Here, Petitioner fails to describe or demonstrate prejudice from this ruling in the context of this case or how the "needs of the case" are adversely impacted by the restriction imposed. Clearly, none of the testimony by fact witnesses will be affirmatively or negatively impacted by Dr. Mitchell's explanations as to why he has no opinions about the standard of care for a gynecologist or a mid-wife. Following the publication of the Rule 26 disclosure for Dr. Mitchell, Petitioner did not file a Rule 26(e) supplemental disclosure for her experts that one or more of them relied upon the newly disclosed opinions. Therefore, none of Petitioner's experts have asserted that they are negatively impacted by the deposition restriction. Petitioner never explained to the trial court or this Court how Dr. Mitchell's testimony about his lack of knowledge regarding the standard of care for treating dysfunctional uterine bleeding and the prescription of Prometrium, LoOvral and Ovcon will be admissible at the trial of this case.

In the context of expert testimony, opinions must be based upon an expert's "knowledge, skill, experience, training, or education" in order to be admissible. W.Va. R. Evid. 702. Furthermore, only the trial court may properly qualify a witness as an expert pursuant to *Daubert, Gentry, Wilt* and their progeny. "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." Syl. Pt. 5, *Gentry v. Mangum,* 195 W.Va. 512, 466 S.E.2d 171 (1995). Syl. Pt.6, *Jenkins v. CSX Transp., Inc.* 220 W.Va. 721, 649 S.E.2d 294 (2007).

CONCLUSION

The trial court's ruling that narrowly and appropriately restricted Petitioner from inquiring as to the standard of care for gynecology and nurse midwifery was expressly authorized by Rule 26 and constituted a proper exercise of its discretion pursuant to W.Va. R. Civ. P. 26 and in accordance with W.Va. R. Evid. 702. Petitioner has utterly failed to demonstrate any prejudice from the ruling or any basis to show how the stipulated denials of expertise and opinions about standard of care would be admissible at trial. In light of the repetitive and burdensome efforts by Petitioner's counsel to transform every witness into an expert about the association between the ingestion of oral contraceptives and the formation of clots, the trial court acted appropriately in narrowly limiting the scope of the examination because such evidence from this deponent witness would not have been admissible. Petitioner presents no facts or applicable law which would support the issuance of a Writ of Prohibition. Publication of an opinion that restricts this trial court's application of Rule 26's standards will cause discovery to be more expensive and

wasteful of time and resources. The public policy of fairly regulating discovery through Rule 26 is best served by affirming the trial court's ruling and/or dismiss the Petition for a Writ of Prohibition. It is therefore respectfully requested that this Court vacate the Rule to Show Cause and dismiss this case as improvidently granted.

Patti Hackney, CNM, RN
Mitchell Nutt, M.D.
Respondents/Defendants

By Counsel

Michael J. Farrell, Esquire (WV State Bar #1168)
Tamela J. White, Esquire (WV State Bar # 6392)
Allison N. Carroll, Esquire (WV State Bar #10294)
Farrell, Farrell & Farrell, PLLC
P.O. Box 6457
Huntington, WV 25772-7457
Phone: (304) 522-9100
Facsimile: (304) 522-9162

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE