

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2007 Term

No. 33383

FILED
November 8,
2007

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL.
LAMBERT TURNER JONES, II, AND
RED JONES AUTO MART, INCORPORATED,
A CORPORATION,
Defendants Below, Petitioners

v.

ARTHUR M. RECHT, JUDGE OF
THE CIRCUIT COURT OF OHIO COUNTY,
and
GEORGE P. NAUM AND JOAN NAUM,
Plaintiffs Below,
Respondents

Petition for a Writ of Prohibition

WRIT GRANTED AS MOULDED

Submitted: September 12, 2007

Filed: November 8, 2007

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George P. Naum and Joan Naum

The Opinion of the Court was delivered PER CURIAM.

CHIEF JUSTICE DAVIS concurs in part, dissents in part, and reserves the right to file a separate opinion.

JUSTICE BENJAMIN concurs and reserve the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. “A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. *W.Va.Code 53-1-1.*” Syl. Pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977).

2. “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).

3. “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 Co.*, 185 W.Va. 269, 406 S.E.2d 700, *cert denied*, 502 U.S. 908 (1991).

4. “In analyzing the admissibility of expert testimony under Rule 702 of the West Virginia Rules of Evidence, the trial court’s initial inquiry must consider whether the testimony is based on an assertion or inference derived from the scientific methodology. Moreover, the testimony must be relevant to a fact at issue. Further assessment should then be made in regard to the expert testimony’s reliability by considering its underlying scientific methodology and reasoning. This includes an assessment of (a) whether the scientific theory and its conclusion can be and have been tested; (b) whether the scientific theory has been subjected to peer review and publication; (c) whether the scientific theory’s actual or potential rate of error is known; and (d) whether the scientific theory is generally accepted within the scientific community.” Syl. Pt. 2, *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993), *cert. denied*, 511 U.S. 1129 (1994).

5. “Pursuant to *West Virginia Rules of Evidence* 702 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. The jury, and not the trial judge,

determines the weight to be given to the expert's opinion.” Syl. Pt. 4, *Mayhorn v. Logan Med. Found.*, 193 W.Va. 42, 454 S.E.2d 87 (1994).

Per Curiam:

Mr. Lambert Jones, II, (hereinafter “Mr. Jones” or “the Petitioner”) seeks a writ of prohibition to prevent enforcement of an order of the Circuit Court of Ohio County excluding certain medical expert testimony in the underlying personal injury action. Mr. Jones contends that the lower court erred in excluding the testimony at issue and argues that such testimony is admissible and essential to a fair trial of the underlying civil action. Subsequent to a thorough review of the briefs, record, and applicable precedent, this Court grants a moulded writ of prohibition.

I. Factual and Procedural History

On April 30, 2003, Mr. Jones and Dr. George P. Naum were involved in a motor vehicle accident in Ohio County, West Virginia. Mr. Jones, driving a Ford Probe, rear-ended Dr. Naum’s Lincoln in a school zone. Dr. Naum thereafter filed a civil action against Mr. Jones, asserting that the impact of the collision had caused physical injuries to Dr. Naum, resulting in neurological problems, such as a concussion, headaches, dizziness, confusion, and memory problems. The central issue in the underlying civil action is whether the medical conditions were caused by the subject motor vehicle accident or were the result of other accidents or unrelated medical conditions suffered by Dr. Naum.

Mr. Jones hired Dr. Peter E. Sheptak, a neurological surgeon,¹ as a defense witness, intending to challenge Dr. Naum's allegation that the collision had caused the neurological conditions. Dr. Sheptak was disclosed as a defense witness on April 12, 2006, almost one year prior to the pre-trial hearing. In a letter dated January 10, 2006, Dr. Sheptak explained as follows:

Upon reviewing the police report and 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.

Dr. Sheptak continued his observations regarding the force of the collision's impact in his deposition testimony on March 29, 2007, as follows:

Q. . . . [I]s it your opinion that the impact lacked sufficient force to have caused Dr. Naum to strike his head?

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

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

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

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

A: Correct.

Q: And the conclusions you've 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.

¹Dr. Sheptak's qualifications are extensive, and his credentials to testify as a neurosurgeon are not challenged.

Dr. Sheptak was also asked whether it would be his 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.” Dr. Sheptak answered: “Yes, that’s what I believe, that it would be highly unlikely.”

On the evening before the scheduled April 6, 2007, pretrial hearing, Dr. Naum served a motion to exclude the testimony of Dr. Sheptak, contending that Dr. Sheptak’s deposition testimony with respect to the neurological components was tainted by his conclusions regarding the change in velocity experienced by Dr. Naum inside the vehicle at the time of the accident. Dr. Naum maintains that such testimony is not admissible because Dr. Sheptak is not a biomechanical expert, that he is not qualified to render the opinions he sought to offer in this matter, and that his conclusions constitute mere speculation and conjecture.

During the hearing on the motion to exclude the testimony, the trial court initially responded by indicating that Dr. Sheptak “is not getting knocked out completely at all.” In further discussion, however, the trial court observed that it was extremely difficult to “separate the various” parts of Dr. Sheptak’s testimony, attempting to limit his testimony to appropriate medical conclusions without incorporating his personal opinions regarding the force of the collision. The trial court requested suggestions regarding the appropriate method of separating “that which may be related to the accident itself in terms of mechanics of it and

that related just to his history, including his heart history and everything else[.]” Counsel for Mr. Jones indicated that if the court chose not to permit testimony from Dr. Sheptak regarding the “biomechanical issues - - in other words, the force of the impact - - then he can simply talk about everything else.” Counsel explained: “His opinions of everything else stand alone and independent and separate from any biomechanical aspect. He indicated he’s not a biomechanical expert.” The trial court expressed the belief that “[i]t’s all part of a fabric of his opinions, which include the biomechanical part of the equation, and he’s not qualified to do that.”

The trial court ultimately held that Dr. Sheptak’s testimony would not be admitted at trial, finding that the “neurological issues . . . are enmeshed . . . inextricably entwined, with biomechanical aspects of which he’s not qualified. And it is not possible to demarcate that part of his testimony from the neurosurgery.” The petitioner now seeks a writ of prohibition to prevent the complete exclusion of Dr. Sheptak’s testimony.

II. Standards of Review

This Court explained the standard of review applicable to a writ of prohibition in syllabus point two of *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977), as follows: “[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or

having such jurisdiction exceeds its legitimate powers. *W.Va.Code 53-1-1.*² “The writ [of prohibition] lies as a matter of right whenever the inferior court (a) has not jurisdiction or (b) has jurisdiction but exceeds its legitimate powers and it matters not if the aggrieved party has some other remedy adequate or inadequate.” *State ex rel. Valley Distributors, Inc. v. Oakley*, 153 W.Va. 94, 99, 168 S.E.2d 532, 535 (1969).

In syllabus point four of *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996), this Court explained as follows:

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

²West Virginia Code § 53-1-1 (1923) (Repl. Vol. 2000) provides as follows:

The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.

that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

With regard to the specific issue of the admissibility of expert testimony, this Court stated as follows in syllabus point six of *Helmick v. Potomac Edison Co.*, 185 W.Va. 269, 406 S.E.2d 700, *cert. denied*, 502 U.S. 908 (1991): “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.” Applying those standards of review to the issue sub judice, we examine the Petitioner’s request for a writ of prohibition.

III. Discussion

Rule 702 of the West Virginia Rules of Evidence governs the admissibility of testimony by expert witnesses. That rule provides as follows:

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

Rule 703 of the West Virginia Rules of Evidence outlines the factual basis upon which an expert may found his opinion, providing as follows:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Underlying all admission issues is the instruction of Rule 403 of the West Virginia Rules of Evidence, providing that a trial court may exclude evidence because “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” In syllabus point two of *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993), *cert. denied*, 511 U.S. 1129 (1994), this Court explained:

In analyzing the admissibility of expert testimony under Rule 702 of the West Virginia Rules of Evidence, the trial court’s initial inquiry must consider whether the testimony is based on an assertion or inference derived from the scientific methodology. Moreover, the testimony must be relevant to a fact at issue. Further assessment should then be made in regard to the expert testimony’s reliability by considering its underlying scientific methodology and reasoning. This includes an assessment of (a) whether the scientific theory and its conclusion can be and have been tested; (b) whether the scientific theory has been subjected to peer review and publication; (c) whether the scientific theory’s actual or potential rate of error is known; and (d) whether the scientific theory is generally accepted within the scientific community.

With specific regard to the weight to be given to an expert opinion, this Court explained as follows in syllabus point four of *Mayhorn v. Logan Medical Foundation*, 193 W.Va. 42, 454 S.E.2d 87 (1994): “Pursuant to *West Virginia Rules of Evidence* 702 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. The jury, and not the trial judge, determines the weight to be given to the expert's opinion." The Supreme Court of the United States, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), recognized the difficulties inherent in analyzing expert opinion and observed that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." 509 U.S. at 596.

In the case sub judice, Dr. Naum essentially contends that Dr. Sheptak's testimony is inadmissible because it is based upon a personal opinion which Dr. Sheptak is not qualified to render. The discussion among counsel for the parties and the trial judge, referenced above, reveals the difficulty in discerning a method of separating Dr. Sheptak's neurological testimony from his opinion regarding the biomechanical components of the accident. However, such separation is absolutely essential in this case. Wholesale exclusion of Dr. Sheptak's testimony, some of which is based upon thorough and competent medical evaluation, is not warranted. In *Minner v. American Mortgage and Guaranty Co.*, 791 A.2d 826 (Del. 2000), the Superior Court of Delaware examined several challenges to portions of testimony of proposed expert witnesses. With measured precision, the court isolated specific portions of testimony deemed admissible at trial and excised those portions which were considered inadmissible. With regard to the projected testimony of Dr. Grace Ziem, for instance, the court explained that "some of Dr. Ziem's proposed testimony lacks the required

relevance and reliability necessary to be presented to the jury as expert testimony[.]” 791 A.2d at 859. However, the court determined that the acceptable portions of Dr. Ziem’s testimony should be permitted. The court held:

In summary, the Court will allow Dr. Ziem to testify as to her diagnoses and theories of causation on RADS and TE. She will not, however, be permitted to testify as to her diagnoses of SBS and MCS because they are not valid medical diagnoses. She also will not be able to give her expert medical opinion that the Plaintiffs’ FM and CFS were caused by the building because these conditions have no known etiology and Dr. Ziem has not followed a sufficient scientific methodology in her opinion of causation. Thus, Dr. Ziem can only testify as an expert on limited diagnoses and care must also be taken not to overstate her status as a treating physician.

Id.

Likewise, the opinions of Dr. David W. Messinger were examined, and the admissible portions were selected.

Dr. Messinger’s opinions as to the Discover Card building being the cause of the Ms. Brennan’s CFS and FM, two conditions which have no known etiology, are unsupported by sound scientific theory or methodology or by the identification of specific causative agents. The Court will, however, allow Dr. Messinger to testify as to what he feels is the cause of the chronic sinusitis in the Plaintiffs, a disease which has known causes. Therefore, the Defendants’ Motion in Limine as to Dr. Messinger is GRANTED in part and DENIED in part.

Id. at 862.

The Delaware court also examined the tendency of counsel to utilize a medical diagnosis expert as a causation expert and cautioned that the expert “should be allowed to testify as to the valid diagnoses that he made as to all three of these Plaintiffs, but his testimony should be limited to his diagnoses. . . . [He] cannot be used as a causation expert.” *Id.* at 863. The court observed: “For the most part, the problem with the Plaintiffs’ medical experts is that they make unsupported jumps as to causation and then ask the Court to make an unwarranted and unwise leap of faith.” *Id.* at 867.

It is this issue of causative link that provides the stumbling block in the present case. Dr. Sheptak is not a biomechanical expert, and the trial court was absolutely correct to exclude testimony regarding his opinion of the biomechanical components of the underlying civil action. However, as difficult as it might be to distinguish between Dr. Sheptak’s biomechanical opinions and his neurosurgery opinions, such demarcation must be accomplished. We note that Petitioner’s counsel offered on the record to find a suitable accommodation and demarcation, but that offer was rejected by the trial court.

This Court recognizes that cases involving inadmissible portions of expert opinion pose a particularly challenging task to both the trial court and trial counsel. In this matter, this Court finds that the trial court erred in excluding the testimony of Dr. Sheptak in its entirety. Some modified use of the evidence must be achieved to permit the admissible portions of the testimony to be presented to the jury. This Court does not find that the

entirety of Dr. Sheptak's testimony is tainted by his inadmissible perceptions regarding the biomechanics of the collision. Dr. Sheptak's testimony must be strictly restricted to medical testimony. Issues regarding the force of impact must be redirected to experts qualified in accident reconstruction or biomechanics. It is also noted that some of the difficulties may be addressed by the use of hypothetical questions grounded on evidence admissible from other witnesses possessed of the necessary expertise that Dr. Sheptak clearly lacked.

These conclusions are consistent with this Court's prior applications of the Rules of Evidence regarding admissibility of expert testimony and the liberal thrust of those rules. *See Short v. Appalachian OH-9, Inc.*, 203 W.Va. 246, 253, 507 S.E.2d 124, 131 (1998) (stating that "the essence of Rule 702 is that of assisting the fact finder's comprehension through expert testimony"); *Tanner v. Rite Aid of West Virginia, Inc.*, 194 W.Va. 643, 654 n. 17, 461 S.E.2d 149, 160 n. 17 (1995) ("Helpfulness to the jury . . . is the touchstone of Rule 702"). In *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995), this Court recognized that the Rules of Evidence are liberal and that a trial court should "err on the side of admissibility." 195 W. Va. at 525, 466 S.E.2d at 184.

Based upon the foregoing, this Court grants the writ of prohibition, as moulded by this opinion, and remands this matter to the trial court for further proceedings consistent with this opinion.

Writ granted as moulded.