No. 27664 -- Crystal Kay Brady, Administratrix of the Estate of Joseph Matthew Payne, deceased v. Deals on Wheels, Inc., Carlos Hodge & Edwin L. Stratton
AND
Robert Allison and Kathryn Allison v. Deals on Wheels, Inc., Carlos Hodge & Edwin L. Stratton, Harley Blankenship and E. Lucille Curry and Crystal K. Brady, Administratrix of the Estate of Joseph Matthew Payne

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OF WEST VIRGINIA

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Starcher, J., dissenting:

This case presents the most obvious, easy-to-understand example of a jury question that I have seen in many years. The majority opinion goes to great lengths to prove that the plaintiff's expert witness wasn't "reliable" or "credible," and therefore concludes that plaintiff failed to lay out a *prima facie* case of negligence.

The facts in this case are simple: the decedent bought a sports car from a used car dealer. He drove the car several miles from the dealership, went around a corner, lost control, wrecked and died.

The defendant car dealer says the decedent was driving his new sports car too fast -- 60 miles per hour in a 35 miles per hour zone. The plaintiff hired an expert who says there were no brakes on the sports car -- even if the decedent wanted to slow down, he couldn't have. Brake fluid was leaking from the left rear brake drum in large quantities. In sum, we are left wondering, was the decedent killed by driving too fast, or by driving a car with no brakes? This is a classic question for jury resolution.

Yet both the circuit court and the majority opinion reached the conclusion that there was an "absence of reliability" in the plaintiff's expert testimony. The majority opinion finds that the sports car purchased by the decedent was "questionably preserved evidence," and therefore any opinions reached

by the plaintiff's expert must be "seriously questioned." In other words, both the circuit court and the majority opinion decided that because the plaintiff's expert was not, by their measure, credible, the opinion could be rejected under the *Rules of Evidence*.

We have said repeatedly that questions regarding the truthfulness or credibility of a witness -- expert or otherwise -- are questions for a jury. *See* Syllabus Point 3, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994) ("The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."); *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59, 459 S.E.2d 329, 336 (1995) ("credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge"). The circuit court and the majority opinion abandoned this fundamental rule. Both the circuit court and the majority opinion made credibility determinations about the plaintiff's expert, and decided that the evidence just couldn't be that reliable.

The real concern of both the circuit court and the majority opinion was the possible mishandling, alteration, damage, or destruction of the sports car by the plaintiff's expert. However, the solution in such circumstances is not to reject the expert testimony; the solution is to instruct the jury regarding the spoliation of evidence.

If a party can reasonably anticipate litigation, then the party has an affirmative duty to preserve any relevant evidence. When a party mishandles, alters, damages or destroys evidence so as to impair an opponent's opportunity to litigate a case, a trial court should usually give an "adverse inference" instruction to the jury, such that the jury may infer that the altered or missing evidence, if it had been

available, would have been unfavorable to the offending party's case. *See Tracy v. Cottrell*, 206 S.E.2d 363, 371-374, 524 S.E.2d 879, 887-90 (1999).

In the instant case, the proper, fair remedy would have been to instruct the jury that, if it believed that the plaintiff and the plaintiff's expert had failed to preserve the brake system on the sports car, thereby depriving the defendant and the jury an opportunity to examine the evidence, then the jury could infer that the brake evidence, if it had been available for examination, would have been unfavorable to the plaintiff's case.

A *prima facie* products liability case requires showing that the defendant sold the plaintiff a defective product, and that the defective product proximately caused injury to the plaintiff. In the instant case, the circuit court's and majority opinion's exclusion of the plaintiff's expert testimony eliminated all of the plaintiff's evidence that the defendant sold the decedent a defective sports car. From that point on, any of the discussion in the majority opinion regarding proximate cause is irrelevant.[1]

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[1]The circuit court and the majority opinion appear to focus intently on whether the plaintiff produced expert testimony on causation. Both focused on whether there was evidence proffered by the plaintiff to indicate that a lack of brakes on the decedent's sports car actually caused or contributed to the decedent's accident, and whether the decedent had a "habit" or "pattern and practice" of applying the brakes to slow vehicles.

The circuit court and the majority opinion both carry the litigation mentality to new levels -- does it really take an expert to say that a lack of brakes would contribute to an accident when the car was going 60 miles per hour around a sharp, 35 mile per hour curve? Do we really need expert testimony to show that, to a reasonable degree of certainty, the decedent used his brakes to slow his sports car down?

The majority's reasoning threatens to make a simple lawsuit financially unfeasible for all but the wealthy, making true the maxim "He who has the most lawyers, wins."

Common sense suggests that this case presented a simple, classic set of facts for a jury to sort out. The circuit court and the majority opinion improperly decided that the plaintiff's expert was not reliable, thereby gutting the plaintiff's liability case. I therefore respectfully dissent.

I am authorized to state that Justice McGraw joins in this dissent.