

18-6668

Case No.

IN THE
SUPREME COURT OF THE UNITED STATES

Michael E. Tory, Jr.- PETITIONER

vs.

WHITED, (RNB), et al.,- RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF VIRGINIA

PETITION FOR WRIT OF CERTIORARI

ORIGINAL

Supreme Court, U.S.
FILED

OCT 30 2018

OFFICE OF THE CLERK

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QUESTION(S) PRESENTED

Can the State of Virginia in all medical malpractice cases determine the common knowledge and experience of a jury?

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LIST OF ALL PARTIES

☒ All parties appear in caption of case of the cover page

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as following:

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioner respectfully prays that a writ of certiorari is issued to review the judgment below.

☐ For cases from **federal courts**:

The opinion of the United States Court of Appeals at Appendix ___ to the petition and is

- ☐ reported at _____; or,
- ☐ has been published from publication but not yet reported; or,
- ☐ is unpublished

The opinion of the United States District Court at Appendix ___ to the petition and is

- ☐ reported at _____; or,
- ☐ has been published from publication but not yet reported; or,
- ☐ is unpublished

For cases from **state courts**:

The opinion of the United States Court of Appeals at Appendix ___ to the petition and is

- ☐ reported at _____; or,
- ☐ has been published from publication but not yet reported; or,
- ☐ is unpublished

The opinion of the United States District Court at Appendix ___ to the petition and is

- ☐ reported at _____; or,
- ☐ has been published from publication but not yet reported; or,
- ☐ is unpublished

JURISDICTION

☐ For cases from **federal courts**:

The cases on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for hearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix ____.

☐ An extension of time to file the petition for writ of certiorari was granted to including _____ on _____ in Application No. _____ A _____.

The jurisdiction is invoked under 28 U.S.C 1254(1)

☒ For case from **state court**:

The date on which the highest court decided my case was **September 18, 2018**.
A copy of that decision appears at Appendix **A**.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order rehearing appears at Appendix ____.

☐ An extension of time to file the petition for writ of certiorari was granted to and including _____ on _____ in Application No. _____ Appendix ____.

The jurisdiction of this Court is invoked under 28 U.S.C 1257(a)

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

Question Presented

Can the State of Virginia in all medical malpractice cases determine the common knowledge and experience of a jury?

Law And Argument

Appellant argues that his constitutional rights to due process was violated when he was prohibited in accordance to **Virginia Code 8.01-20.1** to rely on the common knowledge and experience of a jury for a civil trial to prove that the prisons medical department was liable for his injuries. The Supreme Court of Virginia has only acknowledged (2) cases where expert testimony was not required in *Beverly Enterprises v. Nichols*, 247, Va 264, 441 S.E2d 1 (1994) and *Jefferson Hospital, Inc V. Van Lear*, 186 Va 74, 41, S.E2d 441 (1947). Appellant appeals the Supreme Court of Virginia decision to not reverse the circuit courts judgment and prays that this honorable court restores his rights to due process. Considering there is no underline determination or guidelines to define a jury's common knowledge or experience range the courts are left solely to depend on their discretion in a variety of medical malpractice cases to seek whether or not expert testimony is needed. With this discretion comes authority and with that authority, regulations should be set in place to protect individuals who set out to rely on a jury's common knowledge and experience. It is impossible that in (71) years there is only (2) cases where expert testimony is not required giving the hundreds of thousands of medical malpractice cases that has been filed across the State of Virginia.

Imagine how many cases of malpractice where expert testimony was not required, however, the Commonwealth abused their authority in enforcing **Va Code 8.01-20.1**. Appellant asks this honorable court this hypothetical question; a patient who suffers from chronic asthma which is a well known respiratory system disorder becomes incarcerated in the Virginia Department of Corrections and during his stay he is being denied medication for his chronic asthma and as a result suffers respiratory failure and dies, does a jury need written expert testimony to show that deviation from the applicable standard

of care is the cause of this patients death? Until a jury is selected there is absolutely no way to determine the common knowledge or experience of that said jury. Juror's are made up of diverse, individuals from many different educational and occupational backgrounds. It would be difficult for the lower courts in this instant case to determine if the subject matter is outside the range of common knowledge and experience of a jury when such common knowledge and experience is undetermined. Common knowledge and experience varies from person to person. The appellant case is not one of diagnoses or is any medical experience required. Appellant suffers from a disorder where inflammation is common in his digestive tract. A gastrointestinal specialist prescribed a specific dosage of inflammatory medication and for a period of (7) months the prison staff deviated from that prescribed dosage. As a result appellant suffered life threatening complications.

Chron's disease is a very well known popular inflammatory disease which the public has been educated on its effects on the human body. Who is to say the common knowledge and experience a potential juror may or may not have concerning this disorder. It is (2) arguments the appellants respectfully asks this honorable court to consider; (1) appellants medical malpractice case is not complex as the courts suggests; and (2) *in* accordance with **Va Code 8.01-20.1** there is no underlining factors determining a juror's or jury's common knowledge and experience. In *Salem v. United States Lines Company*, 82 S.Ct. 1119 (1962) *expert testimony is not only unnecessary but may properly be excluded in trial judge's discretion if all primary facts can be accurately and intelligibly described to jury, and if they, as men of common understanding, are as capable of comprehending primary facts and of drawing correct conclusions from them as are witnesses possessed of special or peculiar training, experience, or observation.* The reasoning for appellant choosing per **Va. Code 8.01-20.1** to rely on the common knowledge and experience of a jury is due to the evidence that would have been presented at trail. Gastrointestinal Specialist at MCV in Richmond had specified in their medical notes for appellant a treatment regimen for his severe symptoms of Chron's disease. It is clear that appellants chronic illness was to be treated aggressively with the inflammatory drug Humara prescribed 80 mgs biweekly.

Appellant health responded well to the medication which began November 18, 2015 and his condition did not began to worsen until his dosage was decreased.

In Milwaukee And Saint Paul Railway Company v. Kellogg, 94 U.S. 469 (1867) experts are not permitted to state their conclusions where the subject of proposed inquiry is a matter of common observation upon which the lay or uneducated mind is capable of forming a judgment. Chron's disease varies from patient to patient, however, without written expert testimony through appellant's medical files constructed by a licensed Gastrointestinal Specialist the jury would have been made fully aware of his diagnosis and the treatment recommended. What is the proximate cause of an injury is ordinarily a question for the jury and is not a question of science or of legal knowledge and is to be determined as a fact in view of the circumstances of the facts attending it, and the primary cause may be the proximate cause of the disaster, though it may operate through successive instruments. Milwaukee And Saint Paul Railway Company v. Kellogg, 94 U.S. 469 (1867)

Chron's disease effects patients differently and its symptoms ranges from minor, moderate, to severe. Appellant can provide written expert testimony through subpoena of his medical files. It is absurd to think if the facts and conditions in the instant case were explained clearly to a jury (*without knowing the jury's common knowledge and experience*) that appellant without written testimony will be unable to **(a)** show the defendant deviated from the applicable standard of care, and **(b)** that deviation was a proximate cause of the injuries claimed. *The concepts of equal protection of the laws and due process both stem from the American ideal of fairness, and are not mutually exclusive, nor are the concepts always interchangeable, in that equal protection of the laws is a more explicit safeguard of prohibited unfairness than due process of law, but a discrimination may nevertheless be so unjustifiable as to be violative of due process. U.S.C.A.Const. Amends. 5, 14.*

Appellant argues to this honorable court the instant case is an issue of treatment and care nonetheless, however not a complex issue, it is also an issue where the allegations of negligence involves common sense. The Supreme Court of Virginia contends the range of common knowledge and

experience exception is narrow. The Supreme Court of Virginia is keen is identifying what does not fall within the realm of that range but in the past (71) years has been uncertain as to what does. In 2005 when the Virginia General Assembly introduced **Va. Code 8.01-20.1** the interpretation of the code has solely been beneficial only to the courts and interfering with Virginians constitutional rights to due process of law.

Statement Of The Case

On January 24, 2017 appellant filed a medical malpractice claim against Keen Mountain Correction Center Medical Department for altering the Gastrointestinal Specialist orders in treating his severe Chron's disease with the inflammatory drug Humara. Appellant was to receive (80) mgs biweekly to prevent and treat any flare ups and inflammation caused by his chronic illness. The medical staff at Keen Mountain altered the prescribed dosage only administering (40) mgs of Humara biweekly for for an extended period of (7) months resulting in severe life threatening complications with appellants health. Appellant elected to rely on the common knowledge and experience of a jury in contrast to written expert testimony. Appellant argued his medical file and the undisputed fact that for (7) months his Chron's disease was improperly treated is sufficient enough evidence that the prison's staff deviated from their applicable standard of care. Appellant's state tort claim was dismissed on January 11, 2018 by the Buchanan County Circuit Court for failing to provide written expert testimony in support of his claim. On September 18, 2018 the Supreme Court of Virginia dismissed appellants appeal concurring with judgment from the lower courts.

Reason(s) For Granting The Writ

- Appellant has made a *prima facie* showing that a substantial part of his Constitutional Rights to Due Process is in jeopardy and failure to address this abuse of discretion will result in a fundamental miscarriage of justice.
- The *Virginia General Assembly* in not properly enforcing **8.01-20.1** is not giving citizens of Virginia a fair chance to a jury trial when the common knowledge and experience of the jury is not defined on the Va. Code.
- For only (2) cases in the past (71) years to be the only cases deemed to not need expert testimony by the Supreme Court of Virginia is unconstitutional.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Date:

10/31/18