24-6906

No.

IN THE

SUPREME COURT OF THE UNITED STATES

Reginald Mack
— PETITIONER
(Your Name)

vs.

United States
— RESPONDENT(S)

ORIGINAL
FILED
DEC 23 2024
OFFICE OF THE CLERK
SUPREME COURT, U.S.

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for The Fourth Circuit

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Reginald (NMN) Mack
12 Ashe Meadows Drive
Hampton, VA 23664 (757) 776- 5746

QUESTION(S) PRESENTED

Spoliation by the non-moving party: Spoliation refers to the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation. If spoliation occurred by the non-moving party, could it impact the summary judgment decision?

Preclusion of expert witnesses: Courts have discretion in managing the admission of expert testimony. If the lower court precluded the plaintiff from calling government employees or treating physicians as expert witnesses, would it be reviewed under an "abuse of discretion" standards?

Discounting layman's intelligence: In medical malpractice cases, courts must ensure that the jury can understand the issues without unduly discounting their intelligence. If the base of common knowledge for a Virginia jury wasn't determined, it could be a point of contention.

Conflict with other appellate courts: If the Fourth Circuit Court of Appeals' decision conflicts with other appellate courts on the same issue, it could indicate an important federal question that the Supreme Court hasn't settled.

Was the layman's intelligence gravely discounted in this medical malpractice case without determining the base of that common knowledge of a Virginia jury?

Did spoliation occur by the nonmoving party and was Summary a Judgement granted legally with that knowledge?

Did the lower courts abuse their discretion by precluding the Plaintiff from calling his providers, who are government employees, to serve as expert witnesses and the Plaintiff treating physicians?

LIST OF PARTIES
[X] All parties appear in the caption of the case on 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 follows:

LIST OF ALL PARTIES

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RELATED CASES

TABLE OF AUTHORITIES CITED CASES.

- EMERALD POINT, LLC, et al. v. Lindsey HAWKINS, et al (2017)
- Brown v. Gardner, 513 U.S. 115, 119 (1994)
- Akins v. Ben Milam Heat, Air & Elec., Inc. 2019 OK Civ. App. 52 (Okla. Civ. App. 2019)
- Collins v. Korkowski Record 1756-22-4 (Va. Ct. App. Dec. 28, 2023)
- Salem v. United States Lines Company, 82 S.Ct. 1119 (1962)
- Mullis v. McDow No. 1219-23-4 (Va. Ct. App. Aug. 13, 2024)
- Gobble v. Gobble Record No. 0791-18-3 (Va. Ct. App. Feb. 12, 2019)
- HCP Properties-Fair Oaks of Fairfax VA, LLC v. Cnty. of Fairfax Case No. CL-2017-18207 (Va. Cir. Ct. May. 24, 2019)
- Willoughby v. Wilkins 65 N.C. App. 626 (N.C. Ct. App. 1983)
- Dodd v. Sparks Regional Medical Center 90 Ark. App. 191 (Ark. Ct. App. 2005)
- COSTON v. BIO-MEDICAL APP 275 Va. 1 (Va. 2008)
- Hancock v. United States Civil Action 1:20-00483 (S.D.W. Va. May. 18, 2023)
- McGraw v. St. Joseph's Hosp 200 W. Va. 114 (W. Va. 1997)
- Addison v. Monica Civil Action 4:21-CV-P69-JHM (W.D. Ky. Dec. 14, 2021)
- Vickers v. United States I:20 CV 92 MR WCM (W.D.N.C. May. 6, 2021)
- Prasad v. Mercy Med. Ctr. Redding/Dignity Health No. C093599 (Cal. Ct. App. Apr. 1, 2022)
- Former Chief of Staff Priscilla Hawkins (06/28/2018) Entanglement Of Records of Other Veterans,
- VBA Hearing-2021, (Docket number 190916-30701) William Donnelly, Veterans Law Judge, Board of Veterans' Appeals
- VBA Hearing- (Docket number 210728-175337) Paulette Vance Burton, Veterans Law Judge, Board of Veterans' Appeals
- Austin v. Consolidation Coal Company 06/05/1998
- Gentry v. Toyota Motor Corporation 06/07/1996
- Norfolk Southern Railway Co. v. Sumner O1/31/2019
- Holt v. Chalmeta 02/22/2018
- Jackson v. Qureshi 01/16/2009
- Lloyd v. Kime 01/11/2008
- Bio-Medical Applications of VA v. Coston 09/15/2006
- Dickerson v. Fatehi 04/18/1997

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IN THE

SUPREME COURT OF THE UNITED STATES PETITION FOR WRIT OF

CERTIORARI

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

OPINIONS BELOW

[ ] For cases from **federal courts**:

The opinion of the United States Court of Appeals appears at Appendix __B__ to the petition and is
[ ] reported at _____; or, [X] has been designated for publication but is not yet reported; or, [ ] is unpublished.

The opinion of the United States District Court appears at Appendix __A___ to the petition and is
[ ] reported at _____; or, [x] has been designated for publication but is not yet reported; or, [ ] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is
[ ] reported at _____; or, [ ] has been designated for publication but is not yet reported; or, [ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is
[ ] reported at _____; or, [ ] has been designated for publication but is not yet reported; or, [ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 09/23/2024.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing 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 a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. __A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

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

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____A _____.

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

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

LAW AND ARUGUMENT

The appellant argues that his constitutional rights to due process were violated when he was prohibited in accordance with 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 multiple persons in the Hampton VAMC, the Veterans Health Administration, and the Department of Veteran Affairs 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 to the Supreme Court of Virginia's decision to reverse the circuit court's judgment and prays that this honorable court restores his rights to due process. Considering there is no underlying 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 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. Furthermore, Defendant relied on this point as a matter to grant summary judgment in his favor although the plaintiff has pointed several times to the court that Defendant has performed spoliation on several documents. The courts have continued to remain silent without applying any sanctions and instead have granted summary judgment in favor of the Defendant.

While an expert is required in most cases of medical negligence it is not required in this case because expert testimonies from experts from the Defendants side through Board of Veteran Appeals, Judges, Doctors, and Executive Health Officials. The Plaintiff has been granted disabilities through a 38 U.S.C 1151 service connection, which found a nexus under harm caused by the VA.

Common knowledge and experience vary from person to person. The appellant's case is not one of diagnoses, nor is any medical experience required, but rather medical records intermingling that caused and is causing harm through wrongful medication. While the VA has conceded that this harm has already been done it is at least likely that the harm had occurred due to this gross entanglement ofrecords that continues to happen to date. Finally, the Defendant's expert witness, Dr. Cloud, during her Rule 35 examination made several errors citing the wrong records through incorrect diagnosis and assumptions that are not a part of the medical records of the Plaintiff. The Defendant was made aware of spoliation and the errors of Dr. Cloud during deposition. The

Medical negligence and harm have been proven through Judges at the Veteran Board of Appeals, VA Doctors, and Hospital Executives in the documentation that was presented as evidence by the Plaintiff. In the absence of the Defendant's key expert witness, Dr. Cloud, because she would be required to review the Plaintiff's complete medical history, and she had not. In the absence of any expert witness of the Plaintiff or the Defendant, the probative weight of the evidence highly favors the Plaintiff. The Defendants' attempt to undermine the documents and testimony of his Doctors with another Doctor outside of the VA's inventory only sets to prove the Plaintiff's case of medical negligence and malpractice that continues to harm him today.

The Appellant suffers from multiple disorders and conditions that are at least likely the cause of the harm that has led to mental and medical health conditions that are the result of a medical records entanglement that has occurred and has been occurring since the mid-1990s. The medical records mishandled by the Department of Veteran Affairs have led to wrongful arrest and confinement, homelessness, unemployment, divorce, and medical conditions that will never get any better.
It is essential when identify the layman and their level of education to establish an understanding and the 2020 Health Education Standards of Learning Curriculum Framework of the Virginia Department of Education should be considered the minimal education resource for establishing the layman's understanding. The Virginia Board of Education has identified that students will:

- Identify what medicine is and how it can be helpful or harmful (1.i, 2.i,)
- List/draw/select adults who are safe to give medication (3.i)
- Design a sticker for poisonous household items and identify items at home or at school that should have the sticker (1 .j, 2.j,)
- List/draw/select adults who can help with harmful with harmful and unknown substances (3.j,)

Listed as Essential Understandings

- Taking medication incorrectly: taking too much, when not needed or prescribed for someone else, can cause harm to a person. Medicines taken incorrectly can cause headaches, nausea, dizziness, and stomach pain, or may cause more serious damage to the body.

The Appellant respectfully asks the Court to consider; (1) the appellant's medical malpractice case is not as complex as the Defendant suggests; and (2) By Va Code 8.01-20.1 there are no underlining factors determining a juror's or jury's Common Knowledge and experience. *Salem v. United States* Lines Company, 82 S. Ct. 1119 (1962) expert testimony is not only unnecessary but may properly be excluded at the trial judge's discretion (fall primary facts can be accurately and intelligibly described to the 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. Using a High School education in Virginia. the Layman would have a clear understanding to

determine that the Plaintiff was given the wrong medication and that the medication would have had the effects that it had especially when his first symptoms were most of the symptoms that each high school student is taught.

CASES

- Railway Company v. Kellogg, 94 U.S. 469 (1867)
  Chron's disease affects patients differently and its symptoms range from minor to moderate, to severe. The appellant can provide written expert testimony through a 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) the appellant without written testimony would 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, still discrimination may nevertheless be so unjustifiable as to be violative of due process. U.S.C.A. Const. Amends. 5, 14.

- The Appellant argues the case is an issue of treatment and care nonetheless, however not a complex issue, it is also an issue where the allegations of negligence involve common sense. The Supreme Court of Virginia contends the range of common knowledge and experience exception is narrow. 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 interfered with Virginian's constitutional rights to due process of law.

- In Brown v. Gardner, 513 U.S. 115, 119 (1994), the Supreme Court held that section 1151 did not impose any requirement of a showing of fault on the part of VA, but merely required that an injury have been incurred or aggravated "as a result of' VA hospitalization, treatment, or other specified activities. The Court stated that the statutory language "is naturally read simply to impose the requirement of a causal connection between the 'injury' or 'aggravation of an injury' and 'hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation."' Id. at 119

- Akins v. Ben Milam Heat, Air & Elec., Inc.

  2019 OK Civ. App. 52 (Okla. Civ. App. 2019) 137 In Yuanzong Fu v. Rhodes. 2015 UT 59,355 P.3d 995, the Utah Supreme Court held the court's failure to make the ruling regarding wiJJ:fulness before imposing a sanction of default judgment for a discovery violation did not require reversal, and "the sanction may be affirmed if the record and the court's factual findings demonstrate a basis for them." In a negligence case tried to a

jury, Emerald Point, LLC v. Hawkins, 808 S.E.2d 384, 392-393 (Va. 2014) the appellant (landlord) argued that a spoliation instruction is inappropriate "in the absence of an express finding the responsible party acted in bad faith." As noted in the opinion, the trial court had ruled that the instruction would be given and stated the landlord "did nothing in bad faith."

► Collins v. Korkowski

Record 1756-22-4 (Va. Ct. App. Dec. 28, 2023)
We review a trial court's "ruling on the admissibility of testimony, whether expert or lay, ... for an abuse of the court's discretion." Emerald Point, LLC v. Hawkins, 294 Va. 544, 553 (2017). "[W]hen the issue is whether a fact or opinion which is the subject of expert testimony has been adequately disclosed in response to a proper discovery inquiry under Rule 4:l(b)(4)(A)(i),

► Mullis v. McDow

No. 1219-23-4 (Va. Ct. App. Aug. 13, 2024)
We review a trial court's "ruling on the admissibility of testimony, whether expert or lay, ... for an abuse of the court's discretion." Emerald Point, LLC v. Hawkins, 294 Va. 544, 553 (2017).

► Gobble v. Gobble

Record No. 0791-18-3 (Va. Ct. App. Feb. 12, 2019)
Spoliation occurs when a party on notice of litigation destroys or fails to preserve evidence in its custody, and the lack of evidence damages the opposing party's ability to prove an element of its claim. Emerald Point, LLC v. Hawkins, 294 Va. 544, 556 (2017). When material evidence is destroyed with the deliberate intent to deprive the opposing party of its use at trial, the court may impose sanctions.

► HCP Properties-Fair Oaks of Fairfax VA, LLC v. Cnty. of Fairfax Case No. CL-2017-18207 (Va. Cir.
Ct. May. 24, 2019)
A de bene esse deposition is taken for the express purpose of later "use at trial." See Emerald Point v. Hawkins, 294 Va. 544,552,808 S.E.2d 384,389 (2017). To take or do anything "de bene esse" is to allow or accept it for the time being until it comes to be more fully examined, when it may be accepted or rejected.

► Willoughby v. Wilkins 65 N.C. App. 626 (N.C. Ct. App. 1983)
Concluding the trial judge erred in barring cross-examination of the defendants' medical expert regarding prior medical malpractice claims; "evidence of prior medical negligence claims brought against the expert witness are admissible to show bias or interest in the part of the expert"; and stating: "We hold that the jury should be allowed to consider that an expert witness in the medical negligence case has previously been

sued for medical negligence, for the jury, could find that this would lead the expert witness to have a bias or interest"

We hold that where a case has been set for trial peremptorily, whether on the motion of one of the parties or on the motion of the senior resident judge or chief district court judge, the court may not properly refuse to intervene to compel discovery on a material feature of the case, such as the identity of expert witnesses in a medical negligence case. Plaintiff moved, at the close of their evidence, to exclude the testimony of the defendants' experts, based on the defendants' failure to seasonably supplement their answers. We note that the imposition of sanctions under Rule 37 of the Rules of Civil Procedure for failure to comply with Rule 26 (e) is within the sound discretion of the trial judge. American Imports, Inc. v. G. E. Employees W. Region Fed. Credit Union, 37 N.C. App. 121,245 S.E.2d 798 (1978). But cf. Shepherd v. Oliver, 57 N.C. App. 188, 290 S.E.2d 761, rev. denied, 306 N.C. 387,294 S.E.2d 212 (1982). We reverse here, not for the trial judge's failure to impose sanctions under Rule 37, but because of improper denial of the plaintiffs motion to compel discovery. The trial court erred in denying on 21 April 1982 the plaintiffs motion to compel discovery of expert witnesses' identities when the case previously had been peremptorily set for 24 May 1982. The judgments in favor of defendants Wilkins and Griffin must be reversed and the case remanded for a new trial.

► Dodd v. Sparks Regional Medical Center
90 Ark. App. 191 (Ark. Ct. App. 2005)
In Dodd, supra, this court upheld a grant of summary judgment to defendants in a medical malpractice case on the basis that the plaintiffs expert witness was not qualified to offer an expert opinion.
Appellees ultimately filed motions for summary judgment. Cumulatively, appeUees asserted that the allegations in the complaint concerning the diagnosis, treatment, and care of Ms. Dodd stated claims for medical negljgence which required the support of expe1t testimony. They contended that they were entitled to judgment as a matter of law because the appellant had failed to produce any expert testimony. In response, the appellant offered the affidavits of Dr. Norman F. Westermann and registered nurse Mary Ann Spencer. Tn addition, the appellant presented the deposition testimony of registered nurse Nadine Killion and Harold Trisler, who was the director of nursing in charge of the psychiatric unit at the time of Ms. Dodd's death. The appellant also contended that the allegation against Sparks concerning the placement of the doorstop presented a claim for ordinary negligence for whjch expert testimony was not required. Appellees responded that the witness's appellant offered did not qualify as experts, that there was no testimony setting forth the applicable standard of care, and that the appellant had failed to establish that the failure to remove the doorstop was the proximate cause of Ms. Dodd's death.

► COSTON v. BIO-MEDICAL APP 275 Va. 1 (Va. 2008)

Determining that expert testimony was unnecessary where the plaintiff alleged that the defendant's employees twice placed her in a defective chair, causing her to fall and strike the ground both times. The circuit court entered a pretrial order that required the plaintiff to identjfy her expert witnesses on or before June 9, 2005. The plaintiff failed to identify any expert witness who would testify about the applicable standards of care owed by the defendant to the plaintiff and deviations from those standards. Subsequently, the defendant filed a motion for summary judgment and asserted that the plaintiff could not establish a prima facie case of medical negligence because she failed to identify any expe11 witnesses who would testify about the applicable standards of care.

► Hancock v. United States
Civil Action 1:20-00483 (S.D.W. Va. May. 18, 2023)

W.Va. Code§ 55-7B-3. Generally, proof of medical negligence requires expert testimony. Bellomy v. United States, 888 F.Supp. 760, 763-64 (S.D.W.Va. 1995); also see Syllabus Point 2, Roberts v. Gale, 149 W.Va. 166, 139 S.Ed.2d 272 (1964) ("It is the general rule that in medical malpractice cases, negligence or want of professional skill can be proved only by expert witnesses."). Specifically, expert testimony is required when a medical negligence claim involves a determination of whether a plaintiff was properly diagnosed or treated, or whether the health care provider was the proximate cause of the plaintiffs injuries. Banfi v. American Hospital for Rehabilitation, 207 W.Va. 135, 140, 529 S.E.2d 600, 605-06 (2000); also see Nottingham v. United States, 201 7 WL 3026926, * 7 (S.D.W.Va. July 17, 2017)(1. Johnston) (dismissing case where plaintiff failed to provide expert testimony establishing a breach in the standard of care and that the alleged breach was the proximate cause of plaintiffs alleged injury); Wallace v. Community Radiology, 2016 WL 1563041, * 8 (S.D.W.Va. April 18, 2016)(1. Faber) (finding plaintiff failed to meet her burden to establish proximate causation where there was no expert testimony supporting such and it was not the type of case where proximate causation was "reasonably direct or obvious"); Dellinger v. Pediatrix Medical Group, P.C., 232 W.Va. 115, 124-25, 750 S.Ed.2d 668, 677-78 (2013)(concluding that the lack of expert medical testimony as to causation was fatal to a medical negligence claim); Totten v. Adongy, 175 W.Va. 634,640,337 S.E.2d 2, 8 (1985)(distinguishing cases were expert testimony was unnecessary because causation was "reasonably direct or obvious"). Expert testimony, however, is not required "where the lack of care or want of skill is so gross as to be apparent, or the alleged breach relates to non-complex matters of diagnosis and treatment within the understanding of lay jurors by resort to common knowledge and experience." Farley v. Shook, 218 W.Va. 680, 629 S.E.2d 739 (2006).

► McGraw v. St. Joseph's Hosp 200 W. Va. 114 (W. Va. 1997)

Holding that patient who fell while nurses were attempting to assist him back to bed raised an issue involving "routine hospital care" that did not require expert medical evidence to establish a standard of care.

There is a "common knowledge" exception to the general rule, that is, medical negligence is as blatant as a "fly floating in a bowl of buttermilk" so that all mankind knows that such things are not done absent negligence.... We see little difference in matters of medical malpractice between the question of the applicability ofres ipsa at the close of a plaintiff's proof and the common knowledge exception to the expert medical proof requirement in a summary judgment before trial. It seems to us that the inference of negligence obtained by the application of res ipsa which creates a jury issue and the common knowledge exception to the requirement of expert testimony in summary judgments are just about Siamese twins in that both require that it be evident to all, that is judicial notice be taken, that the injury complained of does not ordinarily occw- absent negligence.

We note some general principles that our prior cases have developed in this area. In syllabus point 1 of Farley, we stated that "'[i]t is the general rule that in medical malpractice cases negligence or want of professional skill can be proved only by expert witnesses.' Syl. pt. 2, Roberts v. Gale, 149 W. Va. 166, 139 S.E.2d 272 (1964)."

► Addison v. Monica
Civil Action 4:21-CV-P69-JHM (W.D. Ky. Dec. 14, 2021)

The plaintiff alleges that he began receiving medication for his back pain on June 28, 2021, which was a "yellowish circle colored pill." Plaintiff states that on July 3, 2021, Nurse Monica gave him an "oval white pill" and that Plaintiff told her that it did not look like the pill that he had been taking. The plaintiff alleges that Nurse Monica told him that "different carrier's pills look different." The plaintiff states that he then took the pill and began to feel "really weird" and that he slept the rest of that day and all night.

The plaintiff alleges that the following day Nurse Monica told him that she had in fact given him the wrong medication. The plaintiff states, "Giving me someone else's medication could have killed me, lucky it didn't.""[A) district court must (1) view the complaint in the light most favorable to the plaintiff and (2) take all well-pleaded factual allegations as true." Tackett v. M & G Polymers, USA, LLC, 561 F.3d 478, 488 (6th Cir. 2009) (citing Gunasekera v. Irwin. 551 F.3d 461,466 (6th Cir. 2009) (citations omitted)). "[A) prose complaint, however in artfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." Erickson v. Pardus, 551 U.S. 89 (2007) (quoting Estelle v. Gamhle, 429 U.S. 97, 106 (1976)). However, while liberal, this standard of review does require more than the bare assertion of legal conclusions. See Columbia Natural Res., Inc. v. Tatum, 58 F.3d 1101, 1109(6th Cir.

1995). The court's duty "does not require [it] to conjure up unpled allegations," McDonald v. Hall, 610 F.2d 16, 19 (1st Cir. 1979), or to create a claim for a plaintiff. Clark v. Nat'l Travelers Life Ins. Co., 518 F.2d 1167, 1169 (6th Cir. 1975). To command otherwise would require the court "to explore exhaustively all potential claims of a pro se plaintiff, [and] would also transform the district court from its legitimate advisory role to the improper role of an advocate seeking out the strongest arguments and most successful strategies for a party." Beaudett v. City of Hampton, 775 F.2d 1274, 1278 (4th Cir. 1985).

► Vickers v. United States
1:20 CV 92 MR WCM (W.D.N.C. May. 6, 2021)
"Medical Negligence" due to the actions of CGVAMC, specifically including the failure to review Ms. Vickers' "complete medical record," and provide "follow-up" testing

► Prasad v. Mercy Med. Ctr. Redding/Dignity Health No. C093599 (Cal. Ct. App. Apr. 1, 2022)
Motion for summary judgment/Tort- negligence/ Tort- Medical Malpractice/ Hospitals and Healthcare/ General Medical and Surgical Hospitals.
In October 2020, the trial court granted summary judgment in favor of defendant. In doing so, the court rejected the plaintiff's challenges to Dr. Luce's declaration. The court ruled that Dr. Luce's medical opinions were not inadmissible due to a lack of personal knowledge, explaining that a medical expert can rely on a patient's medical records in offering opinions in a medical negligence case. The court further ruled that Dr. Luce's declaration was not inadmissible under Sanchez, explaining that medical experts may rely on hearsay statements in a patient's medical records in forming their opinions, as long as a hearsay exception applies or that same information is placed before the court in some other manner.

► VBA Hearing -2021, (Docket number J909J6-30701)

In May 2019, the Veteran's treating VA physician submitted a statement that it was likely that the Veteran's complaints were potentially accounted for by the incorrect prescribing of Prolixin. The physician was deeply suspicious that the Veteran bad been prescribed Prolixin in error for many years. The physician explained that although the VA records document only one incident in which Prolixin was incorrectly prescribed to the Veteran in 1994, given that there was proof that the veteran's file had been intermingled with another veteran with the same name, as well as the two veterans were hospitalized during the sarpe time period of the initial incorrect prescription, as well as other factors, it was convincing this incorrect dosage/ prescription occurred. William Donnelly, Veterans Law Judge, Board of Veterans' Appeals

- VBA Hearing- (Docket number 210728-175337)
  The VA concedes that the Veteran was sent Prolixin for a prolonged period of time, for a repeated period of time. This concession is made despite medical evidence of record that may suggest otherwise as there is evidence of record that may suggest otherwise as there is evidence that the Veteran's file had been intermingled with another Veteran's file had been intermingled with another Veteran's file, and as the Veteran is already service-connected for dystonia based on incorrect long-term use of Prolixin. - Paulette Vance Burton, Veterans Law Judge, Board of Veterans' Appeals

- Austin v. Consolidation Coal Company 06/05/1998 Pursuant to Rule 5:42, a certified question from a United States District Court is answered in the negative because Virginia law would not recognize intentional or negligent interference with a prospective civil action against a third party by spoliation of evidence as an independent tort under the facts of this particular case.

- Gentry v. Toyota Motor Corporation 06/07/1996 Since the trial court abused its discretion in dismissing with prejudice the plaintiffs' action against a Japanese vehicle manufacturer and other defendants for damages sustained wrule operating an allegedly defective pickup truck because of spoliation of evidence, the judgment is reversed and the case remanded for further proceedings.

- Norfolk Southern Railway Co. v. Sumner 01/31/2019 In the appeal of a judgment for an employee in an action under the Federal Employers' Liability Act. the defendant railroad waived most of its arguments regarding testimony by the plaintiffs expert witness, and to the extent the testimony fell outside the range of expert opinion there was no error in permitting reference to matters within the common knowledge and experience of the jurors. Because evidence of causation in FELA cases where the events surrounding an injury are unwitnessed is often entirely circumstantial, the result must depend on the inference lo be drawn from the evidence. Here, there was evidence to support the inference that the defendant's negligence played a part, however small, in causing the fall into a trackside ravine which was the source of the plaintiff's injury. The evidence may also have been sufficient to support an inference that the plaintiffs fall resulted from causes unrelated to the defendant's negligence. Under the settled principles governing FELA cases, that juxtaposition created a jury issue as to which inference should be drawn. The judgment is affirmed.

- Holt v. Chalmeta 02/22/2018 In a medical malpractice case, the circuit court abused its discretion when it refused to qualify plaintiffs only proposed expert witness under Code § 8.01-581.20. In a case where treatment of a newborn with respiratory distress was at issue, the board-certified pediatrician and neonatologist proffered by the plaintiff met both the knowledge and active clinical practice requirements of Code § 8.01-581.20. It was an abuse of discretion to disqualify this witness from testifying, and the subsequent entry of summary judgment for the defense was an error. The judgment is reversed, and the action is remanded for further proceedings consistent with this opinion.

- Jackson v. Qureshi OI/16/2009 In a medical wrongful death action, because the evidence demonstrated that a proffered medical expert witness met the statutory "knowledge" and "active clinical practice" requirements under Code§ 8.01-581.20 to testify with regard to the medical procedure at issue, the circuit court's judgment dismissing the case with prejudice after finding that the expert could not testify is reversed and the case is remanded for further proceedings.

- Lloyd v. Kime OI/11/2008 In a medical malpractice case, the trial court did not err in using deposition evidence to resolve a motion in lirnine and subsequent motion for summary judgment where no objection was made, or in holding that an expert witness was not qualified under Code § 8.01-581.20 to testify on standard of care and breach thereof respecting intraoperative negligence. However, it was an abuse of discretion to conclude that the expert was not qualified to testify on these issues with respect to postoperative negligence, or causation as to either allegation of negligence. The judgment is affirmed and reversed in part, and the case is remanded.

- Bio-Medical Applications of VA v. Coston 09/15/2006 In a medical malpractice case, after briefing and oral argument of the defendant's motion for summary judgment concerning the absence of any expert witness supporting the plaintiffs claims, the trial judge announced a ruling for the defendant and invited further comments of counsel. The plaintiffs attempt to take a nonsuit at that time came too late. The trial court's ruling allowing a nonsuit is reversed and the case is remanded for further proceedings.

- Dickerson v. Fatehi 04/18/1997 If the facts alleged and admitted by a doctor in a medical malpractice case were presented to a jury, the jurors, absent expert testimony, reasonably could determine, by calling upon their common knowledge and experience, whether the doctor was negligent and whether his negligence was a proximate cause of the plaintiffs injuries, and thus the trial court erred in ruling that expert testimony was necessary to establish the standard of care. The trial court's judgment for the defendant is reversed and the case is remanded.

STATEMENT OF THE CASE

The 30-year (1994-2024) entanglement of medical records of at least 5 other (known of) Reginald Macks and one Earl Platt caused the providers, and mailing pharmaceutical service with the VA to prescribe the wrong medications. The wrong patient medications and entangled files led to multiple surgeries and irreversible conditions. The plaintiff bas undergone multiple surgelies and has had his gallbladder removed, with nerve-damaging conditions. Plaintiff has maintained during discovery that spoliation has taken place in what can only be an effort by Defendant to cover up the criminal trespass. 8.01-379.: I. Spoliation of evidence. (B) If evidence that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it or is otherwise disposed of altered, concealed, destroyed, or not preserved, and it cannot be restored or replaced through additional discovery, the court (i) upon finding prejudice to another party from such loss, disposal, The Courts should not have granted Summary Judgement in favor of the Defendant when there is any doubt as to the evidence of [triable] issues" Silman v Twentieth Century-Fox Film Corp, 3 NY2d 395, 404 [1957]."

The Court may sanction a spoliation party by, fining the party, issuing a contempt citation, permitting an adverse inference on Jury Instruction. As a separate sanction, or in addition to other sanctions, courts, respond to discovery abuses by limiting the evidence or testimony that may be introduced by the sanctioned party's ability to object to the opposing party's evidence.
Plaintiff records, which were reviewed by Dr. Cloud, the Defendants expert witness were altered and it was unjust to award a Summary Judgment in the Defendants favor. The Plaintiff's records have been removed or altered are the following used to stack evidence to the advantage of the Defendant.

- Information that distinguished Reginald NMN Mack from Reginald Edward Mack where the statement (Mack, Reginald 112-56-9432[HAM] RET MEDI OUT PT 1992 CLIN) is deleted from 1992-1998. This RET MEDI statement belongs to Reginald E Mack who retired in 1977. Pex-1
- Defendant records show the removal of treating VA Facilities that are listed in Plaintiff's records, the facilities belong to Reginald R Mack(Austin MHV 200), Reginald M Mack (VBA Corp (200 Corp), Reginald E Mack (Richmond VA) 652. Pex-2 Plaintiff has visited and was treated in the past at the Richmond VA for testing/ex-rays only.
- Hampton VA has uploaded Plaintiff's medical records from 1992-2003 into Reginald E Mack's file. This entanglement would make it difficult for Defendant to distinguish what records belong to the Plaintiff or verify the records are accurate in trial. Pex-3

When Defendant asked for the expert witness, he also informed Plaintiff that he was forbidden from calling his treating physicians based on *Touhy laws*, and without confirmation or approval from the Defendant or Courts if my witnesses were allowed, the only word that Plaintiff had was Defendant's word that was a legal representative of

the United States. The treating physicians were government-affiliated and VA doctors through contract or Government Service. None of the Government employees were at the disposal of the Plaintiff; Administrative personnel, Pharmacy personnel, or providers without the Court's permission, the Plaintiff was held at bay by *Touhy*. Frye Standard is used to determine the admissibility of an expert's scientific testimony and other types of evidence, established in Frye v. United States, 293 F. 1013 (D.C. Cir. Rule 2:701 of the Virginia Rules of the Supreme Court states that lay witness testimony is admissible if it is based on personal experience or observations, helps the trier of fact understand the witness's perceptions, and can relate to any matter.

The Constitution of Virginia statute, Rules of the lower court's decision conflicts with decisions of other appellate courts on the same issue, and it involves an important federal question that has not been settled by this Court. Additionally, the lower court's ruling has significant implications for public policy and the administration of justice.

The Supreme Court of Virginia, or other evidentiary principles. Evidence that is not relevant is not admissible. Affidavits or Declarations: An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affidavit or declarant is competent to testify on the matters stated.

Evidence Code 720(a) allows a person to testify as an expert witness "if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expe1t on the subject to which his testimony relates.

The problem with the Court's ruling is that the Defendant is attempting to circumvent the plaintiff's claim by creating a case based on bewilderment around the doctors involved when this case is based on medical negligence caused by the wrong medications. The Defendant has made this claim on more than one occasion that this started with mailed medication that was intended for another patient with the same name, which was because of records entanglement. The VA has already admitted to this record's entanglement and the harm that it has at least likely done. The Plaintiff is attempting to get doctors outside of the VA to say something contrary, but he represents the Hampton VAMC. It was later through the investigation/discovery of the Defendant that Mr. Mack found that his records were entangled with 5 other Reginald Macks and an Earl Platt, which caused the Department of Veteran Affairs to give him the wrong medication on more than one occasion. The scope of practice that the providers acted under is not in question entirely but the vehicle that led to the cause of the pain was the entanglement/spoliation of records which in turn caused the Plaintiff lifelong pain.

Virginia law states that "Malpractice" means any tort action or breach of contract action for personal injuries or wrongful death, based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient. (Chapter 21.1. Medical Malpractice, Article 1. Medical Malpractice Review Panels; Arbitration of Malpractice Claims. 8.01-581.1. Definitions)

The Plaintiff has asserted since the inception of the case that he was harmed by wrongful medications that were given to him because of an entanglement of records. The Plaintiffs doctors at the time had no idea that this was happening because of the records entanglement. The Department of Veteran Affairs through this grotesque entanglement of records continues to mix the Plaintiff's records up with other Veterans with benefits, claims, and medical treatment. The Plaintiffs life has been gravely affected by this ignored harm that plagues him and his family to date. The evidence indicates a material issue of fact that does not require an expert opinion, bearing on liability for consideration of the court. As it pertains to a provider being allowed to provide expert witness testimony when Defendant made it clear that he was not going to allow, "Current and former employees of the United States to be contacted but may only be contacted through the undersigned counsel and in compliance with the applicable *Touhy* requirements. See United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951); 38 C.F.R. §14.800-.810. The Plaintiff ceased any form of contact heeding the warning from the Defendant who is a member of the United States Government with legal bearings. The Plaintiff planned to use these witnesses/treating physicians as non-expert and expert witnesses to the treatment of the Plaintiff.

This case is about the malpractice and negligence of the wrong medication, records entanglement involving privacy act violations through mishandling of PU and HIPPA violations of Plaintiff's information through various routes to which Defendant has yet to provide any form of evidence contrary to that claim.

In a review of Virginia law, it appears that 22 Ya. Admin. Code 40-151-750 - medication was not adhered to in hindsight by numerous physicians who neglected to perform the actions in 22 Ya. Admin. Code 40-151-750 G. Then the subsequent errors might not have happened.

The entanglement of records of five other Reginald Macks and one Earl Platt has had devastating consequences for Reginald Mack as well as two others who have perished whose records were entangled with his. (Reginald Edward Mack & Reginald Eugene Mack) Pex-4 &4a. The consequences of these errors were also prevalent in this trial with Dr. Cloud an expert witness of the Defendant committing the same egregious error mistaking the Plaintiff with another Reginald Mack. Dr. Cloud's expert witness testimony listed the following evaluations that are incorrect:

- Hampton VA outpatient medical records dated November 30, 1994, in which the treating provider observes that 'PT received/took wrong meds x1month... no prolonged harm'(US-00000059, 88 &25); Plaintiff documents show several medications on October 12, 1994 / 04-14-1995, prescribe to plaintiff. The plaintiff document also verifies that the side effects he experienced were front cranial headaches and preference to sleep.Pex-5 US- 00000343) refers to Reginald E Mack with no side effects as both veterans overlapped each other hospital stays.Pex-6
- Hampton VA inpatient medical record dated December 31, 1994, in which the treating provider notes that "pharmacy records indicate 'PT is on INH-he denies states there

was a mix-up in names.

Plaintiff documents from his lab testing from July 1994, support his statement that he was not on INH. This document also verifies that Reginald Edward Mack and Reginald NMN Mack's names are listed on the document. Pex-7. The plaintiff's ingestion of the wrong medications caused Hampton VA to rush the Plaintiff by ambulance to Sentra Hospital. Pex-8

Plaintiff was treated by Dr. Ridgely for elevated reading, liver damage, and critical WBC Pex-8a. Dr. Ridgely is also listed as one of the Plaintiff's treating physicians. Dr. Cloud's testimony on administrative claims was out of the scope of her practice as defined Section 541-2900 of the Virginia Code. Expert witnesses can be disqualified if they lack the necessary qualifications, have a conflict of interest, or provide unreliable or biased testimony. There is evidence that the defendant has inaccurate records that no expert of sound mind can testify to its accuracy. Any expert testimony cannot be admissible due to the uncertainty/ spoliation and entanglement discovered.

- To further show negligence there is a Earl Platt in Reginald NMN Mack's medical records from the VA Record Grabber. Ex-9
- Hampton VA does not have any records of the Plaintiff being registered at the Hampton VA until October 1997. Pex-10
- Reginald Edward Mack's caregiver/ sibling Shirley Heywood Mack wrote a statement that verified that her brother was missing medications that coincides with Plaintiff's statement of mailed medications. Pex-11
- Spoliation of evidence has been noticed in serval PDF Files ex-(US-00017217) pages 284- 303, 341-344, 353-368, 389-399.

The evidence was never argued as to whether the medication was received but what harm the medication could have done or didn't do. The Defendant has jumped to the effects of the medication and not the receipt of the medications. The possible damage that the medication caused appears to be a moot point when in the absence of the medications, there is no asse1tion of the side effects but the presence at least likely provides causation. Proffering an expert witness to state the effects that this has happened because this was given appears to be in the layman's understanding, which every Virginia high school graduate understands side effects.

The Plaintiff's natural life has been interrupted by these medications and with or without them cannot be discussed because the multiple conditions are here, and we will never know what without them looks like. Speculation of the opposite is not in the interest of justice when the negative results that each of the medications has caused are here.

STATUTES AND RULES

The Courts should not have granted Summary Judgement in favor of the Defendant when there is any doubt as to the evidence of [triable] issues" Silman v Twentieth Century-Fox Film Corp, 3 NY2d 395, 404 [1957]."

The Court may sanction a spoliation party by, fining the party, issuing a contempt citation, permitting an adverse inference on Jury Instruction. As a separate sanction, or in addition to other sanctions, courts, respond to discovery abuses by limiting the evidence or testimony that may be introduced by the sanctioned party's ability to object to the opposing party's evidence.

Plaintiff records, which were reviewed by Dr. Cloud, the Defendants expert witness were altered and it was unjust to award a Summary Judgment in the Defendants favor. The Plaintiff's records have been removed or altered are the following used to stack evidence to the advantage of the Defendant.

According to Virginia Law, the plaintiff must establish that
(1) the defendant owed the plaintiff a legal duty,
(2) the defendant breached the duty, and such breach was
(3) a proximate cause of the plaintiff's
(4) damages e.g. Atrium Unit Owners Ass'n v. King, 266 Va. 288 (2003). "[A] health care provider owes a duty of reasonable care to the patient." Fairfax Hospital v. Patricia Curtis, 254 Va. 437, 442 (1997). "The standard of care by which the acts or omission are to be judged shall be that degree of skill and diligence practiced by a reasonably prudent practitioner in the field of practice or specialty in this Commonwealth." (Va. Code 8.01-581.20). Then the plaintiff must prove "proximate cause" and according to the Virginia Model Jury Instructions 5.000-5.0005 A proximate cause of damage is a cause that, in a natural and continuous sequence, produces the [damage], it is a cause that without which would not have occurred."

The primary and secondary causes of intended medications that were given to Plaintiff have not been argued by Defendant who continues to use the wrong medical records when making her assessment (See Dr. Cloud's statements). If the Defendant is the

determining factor to be considered for expert testimony to determine the standard of care that was required by the defendant (Virginia Model Jury Instructions Civil No. 35.050.) the problem remains that the Hampton VAMC did in fact through mishandling medical records and medication cause at least proximate harm to the Plaintiff. The wrong medication was provided to the wrong patient with the same name which has caused a cascade of physical and mental health conditions. During this claim, there has been a continuous wrong occurred by the Defendant's expert witness reviewing medical records that have been entangled in Plaintiff's medical records when she referred to a dead Veteran's files as Plaintiff's.

Based on the specifics of the case that the Plaintiff has claimed, the expert witnesses of the providers and the harm that the medication caused because of the records entanglement have not been argued or discussed. The Plaintiff requests the witnesses who are employees of the government testimony be inadmissible and respectfully asks the Court to overturn the decision to grant the Defendant's Motion for Summary Judgement (No. 35).

REASONS FOR GRANTING THE PETITION

The appellant has made a showing that multiple reversible errors in the trial of this case with the scope of the issues will be subject to a new trial on remand. Dr. Cloud's testimony must be considered extremely flawed in lieu of, the plaintiff's testimony of spoliation that has at least likely occurred. Additionally, the common knowledge of jurors in the Commonwealth of Virginia as high school graduates provides a basis that covers the common knowledge needed to draw a fair conclusion on the wrongful/side effects of medication in the absence of an expert testimony. In the interest of justice, spoliation sanctions must be applied to the Defendant, and we cannot say the error was harmless.

In the case Schroeder v. United States VA, 2023 U.S. Dist. LEXIS 85835 (D. Kan. May 16, 2023) the courts took issue with the VA's failure to consider one of the "most important aspects of a Touhy request" - "whether production of records...is appropriate or necessary under the rules of procedure governing the case or matter in which the demand or request arose." Like Schroeder in that case Plaintiff finds the Defendant's decision was arbitrary, capricious, or an abuse of discretion. The conclusory reliance on select Touhy factors should not be enough for the VA to deny requests for information necessary to civil litigation, regardless of who is asking for it.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Reginald Mack *(Pro Se)*

Date: 23rd day of December 2024

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