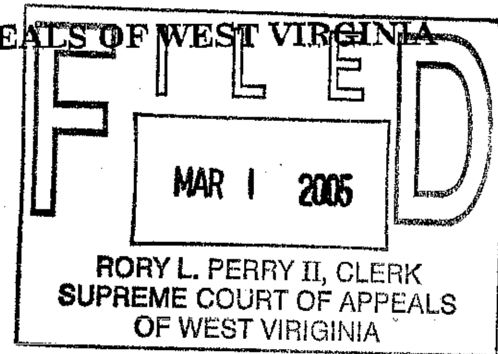
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



BELINDA BILLUPS, as guardian and next friend of JACOB BILLUPS, an infant, BELINDA BILLUPS, and RANDY BILLUPS, individually

Plaintiffs,

v. Appellate No. 32513

WEST VIRGINIA UNIVERSITY HOSPITAL, INC., a West Virginia Corporation d/b/a WEST VIRGINIA UNIVERSITY HOSPITALS, d/b/a WEST VIRGINIA UNIVERSITY CHILDREN'S HOSPITAL; RALEIGH GENERAL HOSPITAL, a West Virginia Corporation d/b/a COLUMBIA RALEIGH GENERAL HOSPITAL; SARASWATHI MOHAN, M.D.; and PETAIAH MOHAN, M.D.

Defendants.

DEFENDANT'S, PETAIAH MOHAN, M.D., RESPONSE TO SHOW CAUSE ORDER

Respectfully Submitted,

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TABLE OF CONTENTS

Table of Contents..........ii

Table of
Authorities..........iii, iv

Introduction..........1

Standard of Review..........2

Statement of Facts..........2

Argument..........4

Conclusion..........9

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TABLE OF AUTHORITIES

Case Law

Glover v. Narick, 184 W. Va. 381, 400 S.E.2d 816 (1990)....................................2

Granger v. Wisner, 656 P.2d 1238, 1240-1242 (1982)..7

Hinkle v. Black, 164 W. Va. 112, 262 S.E.2d 744 (1979).......................................2

Koch Re. Co. v. Jennifer L. Bourdreaux MV, 85 F.3d 1178, 1181 (5th Cir. 1996)..5

Mitchell v. Wilmore, 981 P.2d 172, 175 (Col. 1999)...6

Palmer v. Ozbek, 144 F.R.D. 66, 67 (D. Md. 1992)..5

State ex rel. Allstate Ins. Co. v. Karl, 190 W. Va. 176, 437 S.E.2d 749 (1993)..2

State ex rel. State Auto Mut. Ins. Co. v. Steptoe, 190 W. Va. 262, 438 S.E.2d 54 (1993)..2

State ex rel. UMWA Int'l Union v. Maynard, 176 W. Va. 131, 342 S.E.2d 96 (1985)..2

Tessier v. Plastic Surgery Specialists, Inc., 731 F.Supp. 724, 729 (E.D. Va. 1990)..5

Thornton v. Fed. Deposit Ins. Corp., 297 F.Supp.2d 880, 881-883 (S.D.W.V. 2004)..5

Turner v. Thiel, 553 S.E.2d 765, 768 (Va. 2001)..6

United States v. Salamanca, 244 F.Supp.2d 1023, 1025 (DSD 2003)....................5

Wang Laboratories, Inc. v. Toshiba Corp., 762 F.Supp. 1246, 1248 (E.D. Va. 1991)...5, 6, 7, 8

W.R. Grace & Co. v. Gracecare, Inc., 152 F.R.D. 61, 64 (D.Md. 1993)...................5

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West Virginia Code

W.Va. Code § 53-1-1 (2004 Replacement Vol.) 2

West Virginia Rules of Civil Procedure

Rule26(b)(4)(A)(ii)(B) 3

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DEFENDANT'S, PETAIAH MOHAN, M.D., RESPONSE TO SHOW CAUSE ORDER

I. INTRODUCTION

The defendant, Petaiah Mohan, M.D., by counsel, D. C. Offutt, Jr., Perry W. Oxley, L. R. Sammons, III, and Offutt, Fisher & Nord, submits his response to this Court's Order to Show Cause, entered January 19, 2005. For the reasons set forth more fully herein, the Petitioner's Petition for Writ of Prohibition should be denied, as the petitioner can make out no set of facts entitling it to relief, as the ruling of the Circuit Court was correct.

II. STANDARD OF REVIEW

Prohibition lies as a matter of right in all cases of usurpation and abuse of power by an inferior tribunal or where the tribunal exceeds its legitimate powers. W. Va. Code § 53-1-1 (2004 Replacement Vol.); *Glover v. Narick*, 184 W. Va. 381, 400 S.E.2d 816 (1990).

A Writ of Prohibition will lie where the abuse of power is so flagrant and violative of a petitioner's rights so as to make the remedy of appeal inadequate. *State ex rel. UMWA Int'l Union v. Maynard*, 176 W. Va. 131, 342 S.E.2d 96 (1985). In determining whether a rule to show cause will issue in prohibition, the inadequacy of other remedies, such as appeal, and the overall economy of effort and money among litigants, lawyers and the Court will be considered. *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979). Accordingly, a writ of prohibition will issue where substantial, clear-cut legal errors are committed, which may be resolved independent of any disputed facts and resolution of the errors is critical to the proper disposition of the case, thereby conserving costs to the parties and economizing judicial resources. *State ex rel. State Auto Mut. Ins. Co. v. Steptoe*, 190 W. Va. 262, 438 S.E.2d 54 (1993); *State ex rel. Allstate Ins. Co. v. Karl*, 190 W. Va. 176, 437 S.E.2d 749 (1993).

III. STATEMENT OF FACTS

On May 7, 2003, counsel for the petitioners contacted Stanford Schulman, M.D. (hereinafter "Dr. Schulman") by telephone and requested that he review the medical records of the infant, Jacob Billups, in preparation for filing a

medical malpractice action against numerous health care defendants. Later the same day, counsel for the petitioners sent a letter to Dr. Schulman briefly summarizing the medical treatment received by infant, Jacob Billups, and enclosing a portion of the relevant medical records. Furthermore, Patricia Lee, R.N., a nurse paralegal, who was employed by counsel for the petitioners, contacted Dr. Schulman via telephone about the case.

On May 9, 2003, Dr. Schulman e-mailed his curriculum vitae to counsel for the petitioners. On May 12, 2003, Dr. Schulman had an additional telephone conversation with counsel for the petitioners in which he gave a negative review of the case, finding there was no deviation from the standard of care by any of the health care provider defendants. Counsel for the petitioners have not demonstrated any further contact with Dr. Shulman after May 12, 2003.

On June 25, 2003, the petitioners filed their Complaint in the Circuit Court of Monongalia County, West Virginia. The petitioners alleged that the defendants, Saraswathi Mohan, M.D., Petaiah Mohan, M.D., West Virginia University Hospital, Inc., and Raleigh General Hospital, were liable for medical malpractice in their treatment of infant, Jacob Billups.

On June 7, 2004, the petitioners identified Dr. Schulman as a non-testifying expert witness pursuant to Rule 26(b)(4)(A)(ii)(B) of the West Virginia Rules of Civil Procedure. However, the defendant, Raleigh General Hospital, identified Dr. Schulman as a testifying expert witness to render standard of care opinions adverse to the petitioners. On June 11, 2004, the petitioners filed a

motion *in limine* to prohibit the defendants' retention of Dr. Schulman as an expert witness at trial. In their motion, the petitioners claim that the defendants should be precluded from retaining Dr. Schulman because they disclosed to him confidential and privileged information. The petitioners attached to their motion documents under seal which evidenced communications between the petitioners and Dr. Schulman. These documents included a copy of a letter from the petitioners' attorneys to Dr. Schulman and affidavits of Attorney Love and Nurse Lee. The Honorable Judge Russell Clawges reviewed said materials in an *in camera* hearing and denied the petitioners' motion, holding that Dr. Schulman should not be disqualified as an expert witness for the defendants. *See*, Order Denying Petitioners' Motion To Exclude attached hereto as "Exhibit A."

On December 16, 2004, Petitioners filed a Petition for Writ of Prohibition with this Court, asserting the Circuit Court and Honorable Judge Russell Clawges committed reversible error by not granting Petitioners' motion *in limine* disqualifying Dr. Schulman as an expert witness for the defendants. Respondent, Petaiah Mohan, M.D., filed a Response on January 5, 2005. On January 19, 2005, this Court issued a Show Cause Order to the Respondent.

IV. ARGUMENT

The issue before this Honorable Court is whether the Circuit Court exceeded its authority by denying the petitioners' motion to prohibit the defendants' retention of Dr. Schulman as an expert witness in the underlying

medical malpractice case after having a prior relationship with the petitioners. The petitioners correctly stated that this issue has not been addressed by this Court, nor is it directly addressed by the West Virginia Rules of Civil Procedure or the West Virginia Rules of Evidence.[1] According to the majority of sister jurisdictions who have addressed the issue before this Court, the following two part test should be applied when determining whether an expert should be disqualified: (1) First, was it objectively reasonable for the first party who claims to have retained the consultant to conclude that a confidential relationship existed? (2) Second, was any confidential or privileged information disclosed by the first party to the consultant? *Wang Laboratories, Inc. v. Toshiba Corp.*, 762 F.Supp. 1246, 1248 (E.D. Va. 1991); *See also, Mitchell v. Wilmore*, 981 P.2d 172,

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[1] The Court in *Thornton v. Fed. Deposit Ins. Corp.*, 297 F.Supp.2d 880, 881-883 (S.D.W.V. 2004), addressed the issue of expert disqualification. In *Thornton*, Judge Faber stated the following:

> [i]t is well settled that 'federal courts have the inherent power to disqualify experts.' *Koch Re. Co. v. Jennifer L. Bourdreaux MV*, 85 F.3d 1178, 1181 (5th Cir. 1996); *see also, W.R. Grace & Co. v. Gracecare, Inc.*, 152 F.R.D. 61, 64 (D.Md. 1993) ('The Court has the inherent power to disqualify experts. That power derives from the necessity to protect privileges which may be breached when an expert switches sides, and from the necessity to preserve public confidence in the fairness and integrity of judicial proceedings'). 'Courts are generally reluctant to disqualify expert witnesses, especially those . . . who possess useful specialized knowledge.' *Palmer v. Ozbek*, 144 F.R.D. 66, 67 (D. Md. 1992). Accordingly, cases that granted disqualification are rare. *See Koch*, 85 F.3d at 1181; *see also United States v. Salamanca*, 244 F.Supp.2d 1023, 1025 (DSD 2003) ('***Nevertheless, disqualification is a drastic measure which courts should hesitate to impose except when absolutely necessary***'). This is so, in part, because sometimes disqualification motions are brought for purely strategic reasons. *see, W.R. Grace & Co.*, 152 F.R.D. at 64. ***A party showing for disqualification bears a 'high standard of proof' to show that disqualification is warranted.*** *Tessier v. Plastic Surgery Specialists, Inc.*, 731 F.Supp. 724, 729 (E.D. Va. 1990).

Thornton, 297 F.Supp.2d at 881-882 (emphasis added).

175 (Col. 1999); *Turner v. Thiel*, 553 S.E.2d 765, 768 (Va. 2001).

Under this test, if the answer to both questions is in the affirmative, then the trial court must disqualify the expert witness. *Toshiba Corp.*, 762 F.Supp. at 1248. However, if either question yields a negative response, then disqualification likely is inappropriate. *Id.* Furthermore, the party moving for disqualification has the burden to prove the grounds for disqualification and the non-waiver of confidentiality on behalf of the expert in question. *Id.* The discussion of mere technical or procedural information about a case does not meet the party's burden for disqualification. *Id.* Moreover, when the confidentiality of information has been waived or is routinely discoverable, then disqualification is not warranted either. *Id.*

The Arizona Supreme Court addressed the issue at bar in *Granger v. Wisner*, 656 P.2d 1238, 1240-1242 (1982). In *Wisner*, the plaintiff, Virginia Granger (hereinafter "Mrs. Granger"), contacted plastic surgeon, Boyd Burkhardt, M.D. (hereinafter "Dr. Burkhardt"), in an effort to retain him as an expert to review her case prior to asserting a claim for medical malpractice against defendant, H. Kern Wisner, M.D. (hereinafter "Dr. Wisner"). Dr. Burkhardt gave an unfavorable opinion to Mrs. Granger and after suit was filed Dr. Wisner identified Dr. Burkhardt as a potential witness at trial. Mrs. Granger filed a motion to prohibit Dr. Burkhardt from testifying at trial pursuant to Rule 26(b)(4)(B) of the Arizona Rules of Civil Procedure. However,

the trial court denied the motion and Mrs. Granger appealed.

The Court in *Wisner* affirmed the trial court's decision and held:

> [w]e recognize that Rule 26(b)(4)(B) deals with the ability of a party to discover information about or from an adversary's non-witness consultants. The rule does not address itself to the admissibility at trial of the testimony of such an expert which is elicited by the opponent. Further, the rules of discovery provide no expressed basis for the suppression of such testimony.

Wisner, 656 P.2d at 1242.

In this case, since there is no authority in West Virginia, the test established by *Toshiba Corp.* should be applied to the facts of the instant case. First, was it objectively reasonable for the petitioners to conclude that a confidential relationship existed with Dr. Schulman? For the Court to answer this question, it must look to the nature and frequency of the contacts the petitioners had with Dr. Schulman. The petitioners contacted Dr. Schulman on a few occasions regarding his review of the medical records of the infant, Jacob Billups, in order for Dr. Schulman to give an opinion as to whether the standard of care was breached by the various defendant health care providers in the underlying medical malpractice case. After Dr. Schulman gave the petitioners an unfavorable opinion, there was no other further contact between the petitioners and Dr. Schulman. Thus, it is clear given the nature and infrequency of the contacts between Dr. Schulman and the petitioners that it is not objectively reasonable for the petitioners to conclude that a confidential relationship existed with Dr. Schulman. As such, the petitioners cannot meet

the first element of the *Toshiba Corp.* test.

The second element of the *Toshiba Corp.* test is whether there was any confidential or privileged information disclosed by the petitioners to Dr. Schulman? The petitioners contend that confidential and privileged information was passed to Dr. Schulman by petitioners' counsel and Nurse Lee, a contention allegedly supported by documents submitted to the Circuit Court for *in camera* hearing. However, the Circuit Court noted that "[m]ost, if not all, of the information contained in those submissions, is contained in the medical records of the infant, Plaintiff." *See*, Exhibit A.

Clearly, the confidential and privileged information allegedly disclosed to Dr. Schulman was readily discoverable information because that same information was available in the medical records of the infant, Jacob Billups. Furthermore, after Dr. Schulman gave an unfavorable opinion regarding the standard of care rendered to Jacob Billups, all communications between the petitioners and Dr. Schulman was discontinued, as was any further opportunity for disclosure of confidential and privileged materials. Therefore, it is clear the answer to the second prong of the *Toshiba Corp.* test would also be "no." Thus, the Circuit Court correctly denied the petitioners' motion to prohibit Dr. Schulman from testifying as an expert on behalf of the defendants in the underlying medical malpractice case.

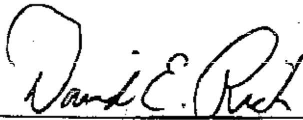
V. CONCLUSION

WHEREFORE, the respondent, Petaiah Mohan, M.D., humbly submits

his Response to this Court's Order to Show Cause, entered on January 19, 2005, and moves this Honorable Court to deny the petitioners' Writ of Prohibition, and for any and all relief this Court may deem appropriate.

PETAIAH MOHAN, M.D.

BY COUNSEL



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Defendants.

CERTIFICATE OF SERVICE

I, David E. Rich, counsel for Defendant, Petaiah Mohan, M.D., do hereby certify that I have served a true and accurate copy of the foregoing **"Defendant, Petaiah Mohan, M.D.'s, Response to Show Cause Order"** on the following individuals via facsimile and by placing the same in the United States Mail, first class, potage prepaid, on the 1st day of March, 2005:

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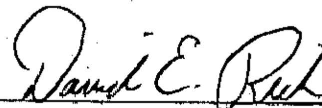

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