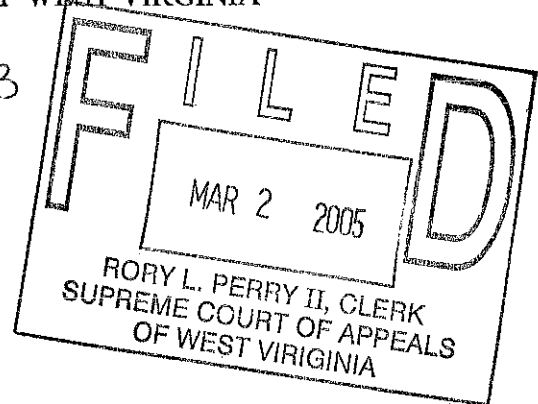


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 04-1713

32513



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

Petitioners and Plaintiffs below,

v.

THE HONORABLE RUSSELL M. CLAWGES, JR., Judge  
of the Circuit Court of Monangalia County, West Virginia;  
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.,

Respondents.

RALEIGH GENERAL HOSPITAL'S RESPONSE TO SHOW CAUSE ORDER

Respectfully Submitted,

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## Issues

1. Did the Circuit Court of Monongalia County abuse its discretion and commit plain error in ruling that a medical expert who had been previously contacted by plaintiff's counsel could be subsequently retained by defense counsel?

## Statement of Facts

On or about May 7, 2003, according to your petitioners, plaintiffs contacted Dr. Stanford Shulman, M.D., a leading expert in the field of Kawasaki's Disease<sup>1</sup> for the purpose of a medical record review. Five days later (May 12, 2003), Dr. Shulman gave counsel for plaintiffs a negative review, presumably informing counsel that there was no deviation from the standard of care against any potential defendant. Within eight days (May 20, 2003) of being rejected by Dr. Shulman, plaintiffs procured from Dr. Leonard Steinfeld an affidavit used to fulfill the requirement of W.Va. Code § 55-7B-6 concerning a medical certificate of merit. (Exhibit 1)

The notice of claim and certificate of merit were mailed on May 27, 2003 and suit was prematurely filed on June 25, 2003. The Circuit Court of Monongalia County dismissed that action (Civil Action No. 03-C-353) upon motions filed by the named defendants. No expert disclosures were made in that action. Plaintiffs filed essentially the same action on January 8, 2004, relying on the previously filed notice of claim and Dr. Steinfeld's certificate of merit.

Respondent Raleigh General Hospital independently located Dr. Shulman as an expert in Kawasaki Disease and retained him to review the medical records on or about February 2, 2004.

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<sup>1</sup> Kawasaki Disease is a febrile condition of unknown cause usually occurring in children five years or younger.

Within a matter of days, Dr. Shulman telephoned counsel for Raleigh General Hospital and informed him that he had previously reviewed these medical records for a plaintiff's firm in West Virginia and had given them a negative review. Respondent's counsel immediately stopped the consultation with Dr. Shulman and has had no other contact with him other than to advise him that the matter of his continued participation in the case will be decided by the Court.

Respondent's counsel notified petitioner's counsel of its contact with and desire to retain Dr. Shulman. Petitioner objected and a motion was filed by Raleigh General Hospital to clarify respondent's ability to retain this expert.

The Circuit Court heard oral arguments and requested briefs from all parties on May 20, 2004. On June 7, 2004, the petitioners disclosed Dr. Steinfeld as their trial expert and Dr. Shulman as a "non-testifying expert" under West Virginia Rules of Civil Procedure 26(b)(A)(ii)(B). There was no scheduling order in place on June 7, 2004 that required any disclosure of expert witnesses. The plaintiffs are not scheduled to disclose expert witnesses until April 1, 2005, by the Circuit Court's scheduling order entered on September 28, 2004.

Petitioner's early expert disclosure was followed four days later (June 11, 2004) by petitioners' "Motion to Prohibit Defendant's Retention of Dr. Stanford Shulman as an Expert Witness." This motion was filed in response to the Circuit Court's order for plaintiffs to submit a brief on the issue of retaining Dr. Shulman by the defendants.

Petitioners have asserted in pleadings that counsel and a nurse paralegal had disclosed to Dr. Shulman a "confidential summary of the medical treatment," "plaintiff's theory of the case," and "discussed the case in great detail" with Dr. Shulman, including strategy decisions with regard to the potential defendant." See plaintiff's "Petition for Writ of Prohibition," page 3, attached as Exhibit 2. In support of their opposition, petitioners' counsel and paralegal created affidavits regarding their

contacts and discussions with Dr. Shulman more than a year earlier. Those self-serving affidavits were submitted, under seal, for an *in camera* inspection by the Circuit Court. Other than an apparent routine medical records transmittal letter to Dr. Shulman, no contemporaneous (with the May, 2003 events) supporting documentation was submitted to the Circuit Court or to this Court.

The Circuit Court, having heard oral arguments, read the briefs of all parties and been privy to the self-serving affidavits, issued its ruling on August 20, 2004. See Exhibit 3. The Circuit Court noted that neither this Court nor the West Virginia Rules of Civil Procedure directly address this issue. Taking general guidance from Thornton v. Federal Deposit Insurance Company, 297 F.Supp. 2d 888 (S.D.W.V. 2004), the Circuit Court stated:

From Thornton, the Court concludes that although it has the inherent power to disqualify experts, that it should be reluctant to disqualify experts and that the party moving for disqualification bears a high standard of proof.

Exhibit 3, p. 3

Judge Clawges adopted the test for deciding disqualification matters suggested by the parties in their briefs and following the majority of jurisdictions, including Wang Laboratories, Inc. v. Toshiba Corp., 762 F. Supp. 1246 (E.D. Va. 1991) and Turner v. Thiel, 553 S.E. 2d 765 (Va. 2001). The test for disqualification set forth two basic questions to be answered: "First, was it objectively reasonable for the first party who claims to have retained the consultant to conclude that a confidential or privileged relationship existed? Second, was any confidential or privileged information disclosed by the first party to the consultant?" (Exhibit 3, p. 4) Answering the first question, the Circuit Court concluded that during the time frame the plaintiffs had Dr. Shulman reviewing the records (May 7 to May 12, 2003), it was reasonably objective for the plaintiffs to conclude that they had a confidential relationship with Dr. Shulman. However, the Court also held

Petitioners seek to overturn a decision by the Circuit Court of Monongalia County that allows the defendants, in a medical malpractice action, to retain a leading expert in the field of Kawasaki Disease. As set forth in the factual statement above, petitioners claim to have previously disclosed confidential and protected information to the same expert which prohibits defendants from retaining that expert. The Circuit Court rejected plaintiffs' efforts to keep Dr. Stanford Shulman's opinions from a jury in this matter.

Neither this Court nor the West Virginia Rules of Evidence or Rules of Civil Procedure directly address the core question of what standard to apply in this factual situation. A number of other Courts have addressed this issue and there appears to be a common test applied across the country that was relied on by Judge Clawges in making his decision in this matter.

West Virginia Rule of Evidence 403 states that all relevant evidence is admissible unless otherwise excluded. West Virginia trial courts are invested with significant discretion in making evidentiary and procedural rulings. Absent a few exceptions, the Supreme Court will review the underlying decision under an abuse of discretion standard. (Gonzalez v. Conley, 199 W.Va. 288, 484 S.E. 2d 171 (1997)). The Circuit Court did not abuse its discretion in ruling that the plaintiffs had failed to meet the necessary high threshold to disqualify Dr. Shulman from testifying for the defendants.

In Wang, the Eastern District of Virginia set forth a two questions test to be applied when a party seeks to disqualify an opposing expert based on alleged previous disclosure of confidential information by the moving party. The two questions that both must be answered in the affirmative are:

1. Was it objectively reasonable for the petitioners (plaintiffs below) to conclude that a confidential relationship existed, and

2. That confidential or privileged information was disclosed by the plaintiffs to the consultant.

Wang at 1248-9

This respondent is at a significant disadvantage in resisting the show cause order by not being privy to the affidavits submitted to the Circuit Court under seal for an *in camera* inspection.<sup>2</sup> Despite plaintiffs' opportunity to create their own version of a revisionist history of their conversations and alleged disclosures of "confidential or privileged information" to Dr. Shulman, the Circuit Court was not impressed. This respondent can only conclude that, other than the four corners of the affidavits, that the evidence supports only a straightforward medical review by Dr. Shulman and not a sharing of strategies or mental impressions. The oral opinion issued by Dr. Shulman in favor of the subsequent defendants caused plaintiffs to immediately obtain a more favorable opinion from their eventually disclosed expert, Dr. Leonard Steinfeld. Plaintiff has not offered any affidavit from Dr. Shulman claiming to have received confidential information during their telephone conversation.

In Wang, there were letters between counsel and the expert in the dispute labeled "Confidential Attorney-Work Product" that contained an outline of potential defenses as envisioned by Wang's counsel. The expert wrote the attorney a three and a half page single-spaced typed report that made reference to the "Work Product" letter (Id. p. 1247). Your petitioners (presumably) have submitted no such writings sharing his mental impressions or strategies with Dr. Shulman.

The Supreme Court of Virginia in Turner v. Thiel, 262 Va. 597, 553 S.E. 2d 765 (2001) faced the identical question presented in this case. Plaintiffs had a medical expert review a case, the expert declined to serve after reviewing the medical records and the same physician was contacted by the defendant nine months later. The Turner court adopted the two prong test and concluded that

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<sup>2</sup> This respondent's request to be provided copies of the submitted affidavits is pending with this Court.

plaintiffs did have a reasonable expectation of confidentiality and had disclosed privileged information. The distinguishing facts are that in Turner, plaintiffs were able to produce a two-page letter from counsel to the expert that “revealed his mental impressions and trial strategies” Id. 768. Applying an abuse of discretion review, the documentary proof contained work product. The Circuit Judge of Monongalia County, having reviewed the submitted information, concluded that the plaintiffs claimed privileged materials were “most, if not all” documents that would be discoverable during the course of a medical malpractice action (Exhibit 3, pp. 4-5)

It was appropriate for Judge Clawges to conclude that plaintiffs did have a reasonable expectation of a confidential relationship for the approximate five days in May, 2003 between the time Dr. Shulman was contacted, reviewed the medical records and gave a negative report to plaintiffs’ counsel. It is clear that there was no other contact between plaintiffs and Dr. Shulman ever again until their transparent attempt to include him in their very premature expert disclosure pleading as a retained but non-testifying expert. Plaintiffs’ counsel, to the best of this respondent’s knowledge, has not and likely can not supply to the Court any evidence of a continuing relationship with Dr. Shulman or their retention of him as a non-testifying consultant. Plaintiffs’ counsel do not generally continue to pay experts who have adverse opinions to their position.

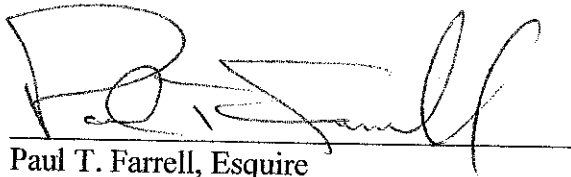
Plaintiffs failed to establish the second standard regarding proof of having disclosed confidential or privileged information. Without that proof, to the satisfaction of the trial judge, the respondents are entitled to retain Dr. Shulman to assist the triers of fact in reaching a just verdict. Plaintiffs are attempting to exclude relevant information from an expert who previously rejected their overtures to testify against the defendants. The search for the truth should not be interfered with by strategy based maneuvers by plaintiffs’ counsel.

**Conclusion**

The Circuit Court of Monongalia County was in the best position to determine whether plaintiffs below had met the high standard required to disqualify an expert witness in order to keep relevant expert opinions, already known to plaintiffs, from the eventual finders of fact in this case. Judge Clawges' determination that plaintiffs' counsel and nurse paralegal's self-serving affidavits did not persuade him that any privileged or confidential information was disclosed, is clearly a discretionary decision and not clearly wrong. Plaintiffs are not prejudiced by the Circuit Court's decision in that they already know, without the cost of an expert deposition or even written discovery, what the defense expert's opinion will be at trial.

For these reasons, this respondent requests that the writ of prohibition be denied and that the matter be remanded to the Circuit Court for imposition of fees and costs against your petitioners.

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By counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
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BELINDA BILLUPS, as  
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WEST VIRGINIA UNIVERSITY HOSPITAL, INC.,  
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UNIVERSITY HOSPITALS, d/b/a WEST VIRGINIA  
UNIVERSITY CHILDREN'S HOSPITAL;  
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HOSPITAL; SARASWATHI MOHAN, M.D.; and  
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CERTIFICATE OF SERVICE

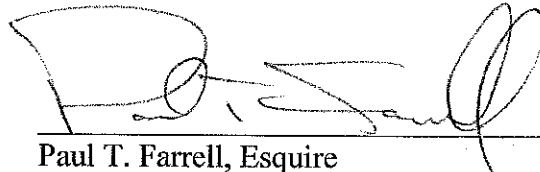
I, Paul T. Farrell, do hereby certify that I have served a copy of the foregoing *Raleigh General Hospital's Response to Show Cause Order* by mailing a true and exact copy thereof by United States mail, postage prepaid, this 1<sup>st</sup> day of March, 2005, as follows:

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