

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND
JOHN MARSHALL COURTS BUILDING

MARYANN MACK,	I	
Plaintiff,	I	
	I	
v.	I	Case No. CL08-931
	I	
KENNETH GOODE,	I	
Defendant.	I	
	I	

EXCERPT

MOTIONS IN LIMINE

Before: HONORABLE MELVIN R. HUGHES, JR., JUDGE

February 9, 2009
Richmond, Virginia

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Reported by: Dorothy J. Lewis, CCR
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1 Appearances:

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EMROCH & KILDUFF

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By: WILLIAM P. HANSON, JR., ESQ.
attorney, of counsel for Plaintiff

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TAYLOR & WALKER

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By: BENJAMIN T. OWINGS, ESQ.
attorney, of counsel for Defendant

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SINNOTT NUCKOLS LOGAN, P.C.

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By: RAYMOND J. SINNOTT, ESQ.
attorney, of counsel for Erie Insurance

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WARREN H. BRITT, P.C.

12

By: BRIAN T. DIEHL, ESQ.
attorney of counsel for Century Insurance

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(The hearing in this matter began at 2:33

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p.m.; the court reporter was sworn.)

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THE COURT: There are a number of motions,

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and Mr. Hanson, I think you have most, if not all of

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them.

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MR. HANSON: Your Honor, the first motion

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that I wish to address will deal with what the

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defendant's expert witnesses will be allowed to

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testify to. The first instance that I would like to

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address is they both, in their reports, said that

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based on some tests that they give, the word memory

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1 test and the CARB test, it's C-A-R-B-W-M-T, these are
2 tests which are designed to measure effort given on
3 the dual diagnostic tests, to determine whether a
4 person is really trying or not. They said that based
5 on the results of those tests, that they can tell that
6 the plaintiff is malingering.

7 Well, the MBSS-IV states that malingering,
8 the essential feature of malingering is the
9 intentional production of altered or grossly
10 exaggerated physical or physiological symptoms noted
11 by external incentives.

12 What they are doing, Your Honor, is they
13 are making themselves human lie detector tests. There
14 is no court in this country that allows lie detector
15 evidence, and yet these doctors with a test that is
16 not designed to test for malingering want to come in
17 here and say that in their opinion, in their
18 professional opinion, that someone is lying.

19 Your Honor, that invades the very essence
20 of the jury's function to determine the truth of the
21 witness on the witness stand based on their common
22 sense and their observation of them.

23 So to allow them in here to testify that
24 someone is malingering basically allows them to invade
25 the primary function of a jury in Virginia, and that

1 is to determine the truth or falsity of or whether the
2 witness is to be believed or not.

3 THE COURT: Now, these are all tests
4 administered by neuropsychologists, right? Don't you
5 have one, and doesn't the defendant have one?

6 MR. HANSON: I have one; that is correct.

7 THE COURT: Who is yours?

8 MR. HANSON: I have Dr. Peck.

9 THE COURT: Peck? All right.

10 MR. HANSON: And here is a ruling from
11 Judge Roush in Fairfax along with another ruling that
12 bases it on Judge Roush, along with a federal court
13 case that basically explains the reasons why the
14 federal courts are excluding testimony. It is just as
15 I have represented. It allows the expert with all of
16 his credentials to come in and say that, "In my
17 opinion, I have tested her and she is a liar," and
18 that invades the jury's function, which is to
19 determine whether or not the plaintiff is truthful
20 based on what they see from her on the stand. And I
21 would ask that any testimony on their part in that
22 regard not be allowed and that mention of malingering
23 be struck. It's mentioned in one of the depositions,
24 but that's simple --

25 THE COURT: In Judge Roush's case, was the

1 expert involved a neuropsychologist or...

2 MR. HANSON: Oh, I think it was a
3 neuropsychologist, and I believe it was Dr. Peck.

4 THE COURT: All right.

5 Either one of you want to speak?

6 MR. SINNOTT: Yes. I'll take this one,
7 Judge, try to not duplicate any efforts here.

8 As the Court knows, with
9 neuropsychological testing, these tests are given,
10 some selectively, some focus on different aspects of a
11 person's psychological makeup, et cetera, and this
12 case -- and I would say for the record, first of all,
13 that Dr. Wade is not going to be expressing medical
14 opinions. I don't think we even have to deal with
15 that issue. But he is a neuropsychologist. He
16 selected certain tests for the plaintiff to take. She
17 did take them, and his findings are consistent with
18 the norms that they apply to individuals that take
19 these tests. This is not Dr. Wade's simple opinion
20 that, you know, "I think she's a liar."

21 Malinger is actually a term of art in
22 neuropsychological experience, and Dr. Silverman, who
23 is a psychiatrist, well, he used the same word, but in
24 the end basically says the effort wasn't there, there
25 were a number of inconsistent measures, depending upon

1 which test you looked at, and these tests are designed
2 to do certain things. And if you -- and I think
3 Dr. Peck -- not Dr. Peck -- Dr. Wade indicated to me
4 that the answers to one particular test were so bad
5 that they would have been the equivalent of somebody
6 with severe mental and cognitive problems. We're
7 dealing with mild traumatic brain injury in this case.

8 In other words, the wealth of tests that
9 we have exhibited and given these folks over the years
10 are inconsistent conceivably. Whether you use
11 malingerer or some other word, you know, I think it's
12 tomayto(phonetic) and tomahto(phonetic). I mean, in
13 the end this is their jargon. This is the way they
14 do, and this is not new verbiage that they use. On
15 the other hand, Dr. Silverman, who is a psychiatrist
16 and chair of the department at MCV, he does use that
17 word and other words that talk about inconsistencies
18 and so forth. I don't think that takes the issue of
19 the plaintiff's credibility away from the jury.

20 Now, we do have a lot of other issues on
21 this case that bear on it. For example, there is
22 going to be a lot of evidence concerning what
23 plaintiff's representations were to various people,
24 doctors and employers. There is going to be a lot of
25 evidence that it's inconsistent, that she

1 intentionally withheld things from her resume, from
2 various employers and so forth. The long and the
3 short of it is there is a lot of evidence to indicate
4 that this plaintiff was manipulating the facts,
5 manipulating the history. And in this case I think
6 the doctors are going to say she's manipulating the
7 test. And Dr. Silverman's opinions mention it once.

8 Your Honor, he relies in part on the test
9 for his opinions, but Dr. Wade, on the other hand,
10 same test. The only difference was that Dr. Peck
11 decided not to give this test. So we don't have a
12 comparison. Dr. Wade did decide to give this test,
13 and those were the findings from the book after you
14 apply the norms.

15 THE COURT: Well, I don't know. My
16 impression is that he -- I think the doctors can
17 describe what the results of this test were, but to go
18 beyond that to say that the, as I understand it, that
19 the plaintiff is malingering, or leads them to believe
20 that she is malingering, I don't think that would be
21 appropriate.

22 They can testify about what their
23 observations are, about what the test is designed to
24 measure, what the measurements are if it's relevant,
25 but if, in fact, they are being called on to give an

1 opinion about his credibility, you know, the cardinal
2 rule on evidentiary law that one witness can't testify
3 about the credibility of another witness. And this
4 would be the plaintiff who I assume testifies.

5 I think if we go from that point, we'll be
6 all right.

7 MR. HANSON: And that covers what one of
8 my other motions is. Dr. Wade isn't a medical doctor.
9 He shouldn't be able to give medical opinions. He
10 can't given causation opinions, I think they agree.

11 His report is 30-some pages long where he
12 summarizes the medical testimony and then basically
13 gives his opinion that he believes that, and I'll
14 read, "The troublesome aspect of the patient's record
15 concerns her medical history. She has a history of
16 multiple symptoms in different body systems.
17 Diagnostic studies attempting to uncover the
18 underlying etiology of her complaints often yielded
19 unremarkable findings. Her findings did not explain
20 her degree of suffering or lifestyle disruption.

21 "The patient has been involved in several
22 motor vehicle accidents. Symptoms regarding these
23 accidents were not available to me at the time of
24 dictation."

25 Your Honor, if he is not going to give

1 causation questions, I don't think it's appropriate
2 for him to go through her medical history and as a
3 non-doctor comment on what his opinions are concerning
4 the validity of her other symptoms. It went beyond
5 his level of medical expertise even if he was a
6 medical doctor.

7 And then Dr. Silverman wants to do the
8 same thing. You know, he wants to opine on a host
9 of -- and, you know, this lady had had a lot of prior
10 medical problems that have been treated over the
11 years -- but he wants to, as it says in my brief,
12 "Mrs. Mack had multiple physical and physiological
13 problems. Many of her complaints are not
14 substantiated by a medical evaluation. Complaints
15 included migraine headache, degenerative joint
16 disease, multiple allergies, irritable bowel syndrome,
17 chest pain, abdominal pain, hypertension, asthma,
18 extreme fatigue and severe headache, anxiety,
19 depression, loss of balance, GERD, intravenous
20 narcotics, Xanax, Valium and Trazodone."

21 I don't know how many particular medical
22 disciplines are involved in all that, but they are
23 beyond the medical discipline of Dr. Silverman, who
24 has a M.D. in psychiatry. To allow him to just opine
25 without ever talking to these doctors or having the

1 medical expertise really to decide whether or not
2 those diagnoses are supported by the evidence or not,
3 just goes grossly beyond the scope of his expertise,
4 and I would ask that he not be allowed to comment on,
5 you know, that host of her prior medical records,
6 which exceed his medical specialty.

7 If there are prior psychiatric records in
8 there, I think he can comment on that.

9 THE COURT: Are these things that he is
10 indicating, are these things that she is complaining
11 about in this accident, that stem from this accident?

12 MR. HANSON: Well, Your Honor, I would
13 have to say that they are not. Certainly headaches,
14 anxiety, and depression are things that she has voiced
15 concerns of as a result of this accident.

16 I think that as a doctor of psychiatric
17 medicine, he certainly can comment on and take into
18 consideration any prior medical treatment that she had
19 that is within his discipline. But, certainly,
20 allergies, irritable bowel syndrome --

21 THE COURT: Yeah. I was going to take
22 that one as an example. Is your client claiming that
23 she is suffering from irritable bowel syndrome --

24 MR. HANSON: She is not.

25 THE COURT: -- because of this accident?

1 MR. HANSON: She is not.

2 THE COURT: Okay.

3 MR. HANSON: Her family doctor who treated
4 her for, I won't say all of these, but for four years
5 and probably made all the referrals -- these records
6 go back into the '90s -- he has testified that, you
7 know, none of this, none of the things that she
8 manifested prior to the accident account for the
9 presentation that she had afterwards.

10 She has been diagnosed as having mild
11 traumatic brain injury and post-concussion syndrome.
12 You know, things that deal directly with that, he
13 certainly can testify about, because that is within
14 his medical expertise, but all of these other host of
15 concurrent medical problems are something that -- and
16 he, again, takes about 25 pages of his report, more or
17 less, to go through all of these and make his little
18 comments on, and, you know, I don't think that is
19 appropriate for his opinion nor is it necessary for
20 his opinion at trial.

21 THE COURT: All right.

22 MR. OWINGS: In regards to Dr. Wade, he is
23 a psychologist. We are not offering him to offer any
24 opinion as to causation, but as a neuropsychologist
25 it's perfectly appropriate for him to review medical

1 records, to look at this person's medical history and
2 it often comes down to, you know, medical issues and
3 psychological issues are often intertwined, Your
4 Honor, and for Dr. Wade as a psychologist, it's
5 perfectly appropriate for him to review the medical
6 records, to consider those medical records in making
7 his psychological diagnosis.

8 He doesn't offer in his report -- he
9 hasn't offered any sort of opinion regarding medical
10 causation, but he says, you know, looking at her
11 complaints now, the results that he is finding on his
12 testing, his own examination of her, looking at her
13 medical records in the past.

14 THE COURT: Does he -- is he going to say
15 that she does not have a brain injury?

16 MR. OWINGS: I think he would say that his
17 testing is inconsistent with somebody who claims to
18 have a brain injury, but it's appropriate, it's part
19 of their practice to look at other records of people
20 that have seen her, what her complaints have been in
21 the past.

22 In regards to Dr. Silverman, Dr. Silverman
23 is an M.D. He is a medical doctor. He is not
24 offering opinions that she does or doesn't have GERD
25 or stomach problems or anything else, but, again, is

1 part of his --

2 THE COURT: Well, it says here it's not --
3 all these complaints are not substantiated by medical
4 evaluation. I don't know what he -- does he mean she
5 never sought medical treatment for any of these things
6 or that she's complaining of them?

7 MR. OWINGS: No. There are in the medical
8 records multiple complaints, when she goes in and
9 says, "My back hurts," or "My stomach hurts," or "I've
10 got fatigue and depression," and all those other
11 things for which ultimately there is never any
12 explanation or diagnosis.

13 And that's, you know, it's perfectly
14 acceptable for an M.D. to comment upon and review the
15 medical history.

16 The fact that he's not a
17 gastroenterologist, he's not offering an opinion on
18 gastroenterology, he's offering a medical opinion in
19 regards to his field. It's perfectly appropriate for
20 him to review and comment upon the records and
21 materials that he has reviewed as a medical doctor.
22 As a medical doctor, he is competent and qualified to
23 testify as to those records.

24 MR. HANSON: Your Honor, he is giving the
25 opinion that the findings in the records don't

1 substantiate those other medical conditions, and that
2 is something he shouldn't be allowed to do.

3 As I said, both of these doctors have
4 pages and pages and pages in the reports where they do
5 that, and it's not necessary to their opinion. It's
6 probably not admissible for other reasons, but one of
7 the primary reasons for it is, you know, is they can't
8 cite experts in support of their opinion. He is
9 giving opinions that medical conditions are beyond his
10 medical specialty are not substantiated in the
11 records, and he is not capable of giving those
12 opinions within a reasonable degree of medical
13 certainty, which would --

14 THE COURT: Well, why is it necessary for
15 them to get into this if none of these things are
16 being claimed by the claimant?

17 MR. HANSON: It's not, but he's doing it.
18 They have both done it in their reports. And Dr. Wade
19 has been listed in his designation of expert testimony
20 by the defendant as testifying as to causation, which
21 I suspect they are not going have him do now, but in
22 regards to him, all of this other stuff just goes to
23 causation.

24 THE COURT: Well, I don't know, gentlemen,
25 I think we have to wait to see what is being offered

1 here, but I've made the observations I've made. It
2 seems to me that some of the things, especially that
3 Dr. Silverman gets into, wouldn't be pertinent,
4 although, since none of these things that he lists
5 here are being claimed as a product of this accident.
6 I guess he's just saying basically we have somebody
7 who has registered a lot of complaints historically
8 and that there doesn't seem to be any backup for it,
9 if you will, and all lead to his assessment that she,
10 this is all psychologically based right now. I guess,
11 is that the idea, that he's going to say, "Well, what
12 she is complaining of can't be found by me to have any
13 medical support, and by the way, she has a history of
14 say, making a lot of complaints and none of the
15 complaints are being substantiated by medical
16 evaluation, therefore that lends credence to my
17 opinion that she is presently not suffering any
18 medical traumatic brain injury," I guess that's the...

19 MR. OWINGS: I think, Your Honor, that's
20 the gist of it. He doesn't find any evidence of brain
21 injury. His report offers --

22 THE COURT: That may be fine, but going
23 back, assessing, saying that she may have complained
24 of having hypertension one day, and there's nothing in
25 the record to suggest that she had hypertension, when

1 that is not a part of the case, is it?

2 MR. OWINGS: Well, Your Honor, I mean,
3 just her medical history, the history of complaints, I
4 think, goes to his opinions.

5 THE COURT: Yes, I know that. But I don't
6 mind him going and giving opinion based on the medical
7 records, but if he goes back and cites specific things
8 that she's complained about and then gives an opinion
9 about those things not being supportable and he's
10 relying on medical -- I'm just wondering what the
11 relevance of him commenting on no, no basis to
12 conclude that she's had hypertension although she
13 complained of it.

14 Is he saying that there is nothing in the
15 record to show what her blood pressure readings were,
16 for example, when she may have visited some doctor
17 some time ago?

18 MR. OWINGS: I'm not sure about the
19 hypertension, Your Honor.

20 THE COURT: Okay. Asthma, fatigue, severe
21 headache. I think it's best to leave this for the
22 trial day.

23 Gentlemen, I may not be here on Thursday
24 to hear this case. Judge Tidey might hear it.

25 MR. HANSON: I'm sorry. What did you say?

1 THE COURT: Judge Tidey.

2 MR. HANSON: Tidey?

3 THE COURT: We're trying to work that out.

4 I'm supposed to be away on Friday and this is --
5 should this take longer than two days?

6 MR. HANSON: Your Honor, that --

7 THE COURT: It shouldn't, but it might.

8 MR. HANSON: That is going to depend in
9 part on some of your rulings today.

10 THE COURT: All right.

11 MR. HANSON: And before we get to that,
12 there is one other ruling that deals with what is
13 contained in the -- there are two medical experts'
14 testimony -- excuse me -- that in April of 2008, Mrs.
15 Mack was involved in another accident. And there are
16 photographs of that accident.

17 THE COURT: There are, the state trooper
18 who investigated that accident has been listed as a
19 witness.

20 MR. HANSON: There is no -- and in review
21 of Dr. Wade's and Dr. Silverman's -- show that they
22 were aware that she was in other accidents, but they
23 do not comment on the effect of that second accident
24 on her post-concussive syndrome.

25 She, you know, back and neck complaints,

1 you know, I think she said were done six months or so
2 after the accident, but, you know, the essence of this
3 case is her post-concussive syndrome, and there is no
4 evidence in the medical records that it had any effect
5 on her post-concussive syndrome, and I think to get
6 into an accident that only involved unrelated things,
7 to have a jury listen to the police officer and look
8 at the photographs, and there was more, much more
9 damage to that vehicle in that accident than in the
10 one, in the case at bar -- to look at those
11 photographs and then speculate that it might have had
12 some effect on post-concussive syndrome, Your Honor, I
13 think something that is not allowable without medical
14 testimony to make it a relevant issue in the case.

15 MR. SINNOTT: Judge, if these
16 photographs -- if this accident that brought about the
17 lawsuit was in June of '05? '06?

18 MR. HANSON: '06.

19 MR. SINNOTT: And she was in another
20 accident in April of '07.

21 THE COURT: I just heard '08.

22 MR. SINNOTT: '08? Was it in '08? '07?
23 '08. In any event, the one we are here about, she was
24 in a large black SUV that's got a quarter-sized dent
25 on the back bumper. These other photographs, car was

1 on the interstate, ran into a jersey wall at high
2 speed and shows a lot of damage. It's being offered
3 simply to show that there are other possibilities to
4 whether, one, she has the condition to begin with, and
5 two, it was exacerbated by another accident.

6 Neither of her experts thought that that
7 was significant. That's fine, but I think the jury is
8 allowed to exercise its common sense and say, "Wait a
9 second. You've got photographs showing almost no
10 damage on the one part and all this damage on the
11 other part" --

12 THE COURT: Will there be evidence of what
13 she complained of as a result of the later accident?

14 MR. SINNOTT: I don't think she was
15 treated at the emergency room. I think that was all
16 she had.

17 MR. HANSON: She had some neck and back
18 complaints after that, but there is no complaints of
19 concussive syndrome. He stated, he says, "They can
20 speculate on the possibility that if she" -- and that
21 shows the prejudicial nature of this. If it's wild
22 jury speculation, here they are claiming that she got,
23 you know, traumatic brain injury in this one accident
24 where there's not a whole lot of damage, and yet why
25 didn't she get something else in this accident where

1 there is a lot of damage? If there are experts who
2 come in and offered some medical opinion to link that
3 up, then it may potentially be admissible. But they
4 haven't. And it's not the subject for wild jury
5 speculation. That would be the same thing as me
6 coming in here, being able to put on a picture of an
7 automobile accident and not put on any medical
8 testimony that the injuries my lady claims from the
9 accident were the result of it, it's just never going
10 to be allowed in Virginia.

11 THE COURT: You mentioned that there was
12 going to be a state trooper investigating that
13 accident. He was on the list of witnesses, right?

14 MR. SINNOTT: Yes. He's been
15 subpoenaed to --

16 THE COURT: Is he going --

17 MR. SINNOTT: -- photographs.

18 THE COURT: Is he the only person going to
19 be involved with describing what happened in that
20 accident?

21 MR. SINNOTT: What he found when he
22 arrived there and photographs of the vehicle and
23 complaints.

24 THE COURT: Does he have any statements
25 he's going to offer?

1 MR. SINNOTT: She claimed to be injured at
2 the scene.

3 THE COURT: At that scene?

4 MR. SINNOTT: Yes.

5 THE COURT: Did she indicate what her
6 complaints were?

7 MR. SINNOTT: There are, Judge. I don't
8 have them at my fingertips. This is just probative.
9 We're not -- to be perfectly frank, we're not offering
10 any medical testimony and, frankly, bioengineering,
11 biomechanical testimony is sort of suspect anyway, but
12 the photograph shows that she was in a much more
13 severe accident after the fact.

14 THE COURT: Well --

15 MR. SINNOTT: That's a probative fact that
16 the jury can consider. I don't think that even the
17 plaintiff's experts can say, "Well, severity of an
18 accident," she can have a brain injury from this
19 little bitty accident where there was no MRIs that
20 show any concrete --

21 THE COURT: Well, I wouldn't -- I don't
22 think it will be -- I think it will be all right to
23 have evidence about a subsequent accident if the facts
24 and the background of the second accident are all
25 postured in such a way that you could give the jury

1 some information about how that may have played --

2 MR. SINNOTT: It's certainly possible.

3 THE COURT: -- and how it may come into
4 play or at play with regard to injuries she is
5 claiming in this accident.

6 MR. HANSON: But there is no medical
7 evidence on that. He wants the jury to look at the
8 photographs and the vehicles in these two accidents,
9 and then speculate as to why she was injured in one
10 and not injured in the other. Had had a concussive
11 event, I guess. She was injured in the second
12 accident, but she did not have a concussive event in
13 that accident.

14 So I don't, I think it's grossly
15 prejudicial.

16 THE COURT: Well, are the doctors, their
17 doctors going to give an opinion about the second
18 accident?

19 MR. HANSON: Their doctors have not been
20 listed in their designation to give an opinion about
21 it, and they have not given an opinion about it in
22 their reports. So they should not be allowed to give
23 an opinion about it. Therefore it is, per se,
24 irrelevant. And he wants to prejudice the jury with
25 photographs of much greater damage in one accident

1 where there's a concussive event and allow them to
2 speculate in exactly what is speculate.

3 MR. SINNOTT: Judge, we are not offering
4 any medical evidence on the photographs. The
5 photographs exist. It shows a much worse accident
6 after the fact. Even the plaintiff in her own
7 deposition admitted she was in the accident, had a lot
8 of damage and that she suffered some relatively minor
9 injuries as a result.

10 It's a probative fact that the jury can
11 consider when weighing all the evidence here to
12 decide, you know, if this accident had a bearing, did
13 it not have a bearing, does it go to show in the first
14 accident she couldn't have been hurt. You know, there
15 is a lot of speculation that could be drawn from that.
16 It's a simple fact that she had a subsequent accident.
17 It would come into any personal injury case, and this
18 is a personal injury case.

19 In addition to the brain injury, she
20 claimed to have some other neck problems as well.
21 It's part of the case. It's partly the fact that it
22 was a second accident much more severe. The jury can
23 assess whatever weight they want to, because it's a
24 fact in the chronology in the case after the first
25 accident. That's what we're asking for.

1 In fact, the plaintiff, who has admitted
2 most of the facts, may on cross-examination admit
3 everything we want to about the fact that there was an
4 accident, here's the photograph, and yes, I had some
5 complaints. If she says that on the stand, maybe we
6 don't even need to bring the trooper.

7 THE COURT: Well, are those complaints
8 indicative of the problem she is complaining about
9 from this accident?

10 MR. SINNOTT: She had muscular problems
11 after both accidents.

12 MR. HANSON: Your Honor, we don't intend
13 to claim any muscular problem as far out as that
14 accident were in the future.

15 So if she were saying, "I'm having neck
16 problems still from this accident," I think they can
17 bring in the photographs from the second accident and
18 go, "Here's the second accident."

19 You know, if they have some medical
20 testimony that she had a neck problem as a result of
21 that accident, either from her medical records or
22 expert testimony, here they want to come in and
23 speculate on an injury that there is no evidence she
24 sustained in that accident, without her statements
25 that occur in the medical records or medical doctors

1 that say it came in the medical records.

2 It is grossly prejudicial, and he is, can
3 use the word, "possibility," "speculation." These are
4 words that have never been used to admit evidence in
5 Virginia. You know if he had, if -- and he has said
6 that he wants this to come in for the jury just to
7 speculate on. And that has never been the test for --

8 THE COURT: Well, I think it will have to
9 wait to see what happened, but this sounds
10 problematical as to whether or not it is admissible or
11 not. I would have to wait to hear it.

12 MR. HANSON: I would ask that they not
13 mention it in opening, then, Your Honor.

14 THE COURT: All right. I think that would
15 be appropriate.

16

17

18 * * * * *

19

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21 (The proceeding was concluded at 4:12
22 p.m.)

23

24

REPORTER'S CERTIFICATE

25 I do hereby certify that the foregoing is a true

CHANDLER and HALASZ, INC.
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1 and accurate transcription of my stenographic notes taken
2 in this matter.

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Dorothy J. Lewis
Shorthand Reporter
Certified Court Reporter
Certification No. 0315017

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VIRGINIA:

IN THE CIRCUIT COURT OF THE COUNTY OF SPOTSYLVANIA

CHRISTOPHER D. WIGHINGTON,

Plaintiff,

v.

Case No.: CL07-1074

SHELTER SYSTEMS LIMITED
and DAVID P. WEISS, III,

Defendants.

ORDER

The parties appeared on October 9, 2009, by counsel, for argument on Plaintiff's motion to exclude or limit the testimony of Defendants' experts, Edward A. Peck, III, Ph.D. and Jed S. Vanichkachorn, M.D. The rulings of the court are as follows:

1. Plaintiff's Motion to Exclude or Limit Defendants' Expert, Edward a. Peck, III, Ph.D., is GRANTED in part and DENIED in part as follows:

a. Dr. Peck is not a vocational expert, and, accordingly, shall not be permitted to testify about the Plaintiff's vocational capabilities.

b. Dr. Peck is not a pharmacologist, pharmacist, medical doctor, or psychiatrist authorized to prescribe medication, and, therefore, shall not be permitted to testify about medication interactions.

c. Dr. Peck shall not be permitted to testify about the credibility or veracity of the plaintiff, however he may testify as to his diagnosis of major depression with somatization.

d. Dr. Peck shall be permitted to testify about his neuropsychological test data, but in accordance with *John v. Im*, 263 Va. 315 (2002), he shall not be permitted to

By: *Yousifh*
Kilgore
Phelan
11-19-09

provide causation testimony concerning Plaintiff's alleged brain injury, including whether Dr. Peck's test data is consistent with a concussive head injury or brain injury.

2. Plaintiff's Motion to Exclude or Defendants' record review expert, Jed S. Vanichkachorn, M.D., is GRANTED in part and DENIED in part as follows:

a. Dr. Vanichkachorn may testify in his area of expertise – orthopedic surgery. In accordance with *McMun v. Tatum*, 237 V. 558 (1989) and *Commonwealth v. Wynn*, 277 Va. 92 (2009), Dr. Vanichkachorn's testimony on direct examination shall be limited to identifying the records he reviewed and relied upon and stating his opinions. He may rely upon hearsay matters of opinion and fact from the records reviewed and base his opinions thereon, but may not repeat any hearsay matters of opinion or fact in course of his direct examination.

b. Provided, however, that Dr. Vanichkachorn's opinion that "[m]ost cervical and lumbar strains after motor vehicle accidents resolve within a period of approximately 3-6 months" shall be excluded on the grounds that Dr. Vanichkachorn's opinion is simply an average and does not apply specifically to the Plaintiff. Dr. Vanichkachorn will be allowed, if so disclosed in a supplemental expert designation that complies with Rule 4:1(b)(4)(A)(i), to testify if his opinion is that the cervical and lumbar strains of Plaintiff Christopher Wighington should have resolved within a period of approximately 3-6 months after the accident.

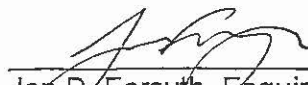
The Clerk shall mail a copy of this Order to all counsel of record.

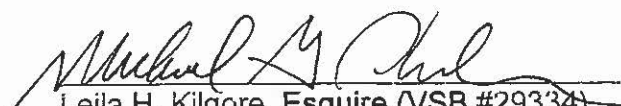
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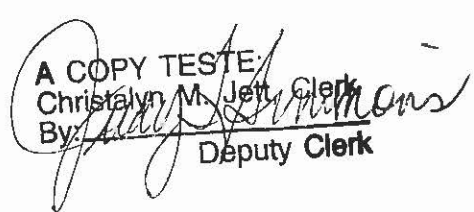
JUDGE

SEEN AND OBJECTED TO FOR THE REASONS STATED ON THE RECORD:


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A COPY TESTED:
Christalyn M. Jeff, Clerk
By: 
Deputy Clerk

VIRGINIA:

IN THE CIRCUIT COURT OF THE CITY OF RICHMOND

RANDY WEBB,

Plaintiff,

v.

Case No. CL 09-1234

GARCIA FAMILY, INC.,

Defendant.

ORDER

The parties, by counsel, appeared on January 19, 2010 to present argument on several motions regarding evidence sought to be presented or excluded during the upcoming trial scheduled in the Circuit Court of the City of Richmond. The Court has reviewed the briefs filed by counsel, has considered the arguments presented at the hearing and has reviewed the cases cited in support of and in opposition to the motions before the Court. The Court makes the following rulings to the motions now before the Court:

1. Regarding the plaintiff's Motion in Limine to exclude evidence of the plaintiff's criminal record, the motion is granted in part and denied in part. The motion is granted to the extent that the defendant may not introduce evidence that the plaintiff was previously arrested nor may the defendant introduce evidence that the plaintiff was convicted of any crime not involving moral turpitude. The defendant may introduce evidence of the fact that the plaintiff was convicted of a felony for purposes of impeachment. The defendant may not introduce that the plaintiff is a "registered sex offender" unless it is to rebut contrary evidence on this specific issue presented by the plaintiff. The Motion is granted in part on the representation of plaintiff's counsel that plaintiff will not be presenting evidence of plaintiff's good character during his case. Should the plaintiff's evidence at trial include character evidence or of specific acts or conduct relating to the specific incidents or acts giving rise to the criminal convictions, then the defendant may renew its motion and the trial court may consider whether such evidence is admissible in rebuttal of such evidence.

2. Regarding the plaintiff's Motion in Limine to exclude evidence of plaintiff's 1987 hospitalization at Central State hospital, the motion is denied. The motion is denied on the representation of defendant's counsel that at trial the evidence related to the 1987 hospitalization will include evidence of plaintiff's complaints of injuries, disorders or symptoms which plaintiff contends were the result of the April 2008 incident that gives rise to this case and that the records of the earlier hospitalization contain similar complaints of

injuries, disorders or symptoms. The Motion is denied on the specific ground argued by the plaintiff that the hospitalization is too remote in time or its introduction would be unduly burdensome.

3. Regarding the plaintiff's Motion in Limine to exclude evidence of plaintiff's prior drug or substance abuse, particularly his use of marijuana, the motion is granted unless the defendant will be introducing and the trial court accepts expert medical testimony or evidence that such substance use is the or a proximate cause of any of the complaints, symptoms, behaviors, disorders or conditions which the plaintiff contends were caused by the April 2008 incident at defendant's restaurant.

4. Regarding the plaintiff's Motion in Limine to exclude comments or observations by one or more of defendant's expert witnesses that the plaintiff is "malingering" or is motivated by "secondary gain" or is lying as a reason to explain plaintiff's complaints of injury, symptoms, or disorders, the motion is granted. The defendant's witnesses may not comment or opine on the general veracity or credibility of the plaintiff's testimony or that the plaintiff's complaints, condition, or symptoms are the result of or are motivated by "secondary gain". On the other hand, the Court denies the motion to the extent that a defendant expert witness, if deemed qualified and accepted by the trial judge as an expert witness in the field of administering and interpreting neuropsychological tests, may provide expert opinion testimony, provided it is to a reasonable degree of certainty, that particular test results or responses to such tests questions, are or are not reliable and whether such results should or should not be relied upon in the formulation of a diagnosis of a brain injury.

5. Regarding defendant's Motion in Limine to exclude the testimony of expert witness Charles Crim, the motion is granted in part and denied in part. Provided that the trial judge, based on evidence presented at trial, accepts Mr. Crim as an expert witness to testify as to the matters, observations and opinions offered at trial;

A. The motion is denied to the extent and on the ground that plaintiff's expert disclosure contains matters, opinions or observations made prior to Mr. Crim conducting a physical inspection of the site or location where the April 2008 incident occurred. Such matters are for cross examination.

B. The motion is granted to the extent that Mr. Crim will not be permitted to render or offer an opinion that the defendant was negligent or that the defendant's negligence was a or the proximate cause of the bell falling and injuring the plaintiff in April of 2008.

C. The motion is granted to the extent and on the ground that the trial judge finds the testimony of Mr. Crim is speculative or includes hearsay evidence. Conversely, the motion is denied to the extent that Mr. Crim's testimony, including the basis and grounds for an opinion, is based on facts in evidence.

D. The motion is denied to the extent and on the ground that Mr. Crim's testimony, as disclosed in plaintiff's expert witness disclosure, invades the province of the jury or is not relevant to the issues in the case and such testimony may be offered on the following matters, if otherwise properly disclosed prior to trial: (i) observations and opinions regarding his analysis of the materials chosen to affix or secure the bell to the stand; (ii) observations including measurements of the distance that the bell fell from the stand and the forces

involved when it struck the plaintiff provided there is adequate admissible testimony of how the bell fell and struck the plaintiff; (iii) observations that there were other materials or alternative methods to affix or secure the bell to the stand that would have reduced the risk that the bell would fall from the stand, and (iv) that the manner of affixing or securing the bell to the stand was not safe and that alternative methods or materials, if used, would have been more safe than those used as of the April 2008 incident. On the other hand, Mr. Crim may not render an opinion regarding his belief or opinion regarding whether or not the placement of or the location of where the bell and stand were placed was unsafe as that is a matter that would be within the province and common knowledge of the jury and not appropriate for expert testimony.

6. Regarding defendant's Motion to Exclude evidence of the results of a Positron Emission Tomography ("PET") scan, the motion is granted in part and denied in part. The motion is denied to the extent that the Court will permit Dr. Mark Herbst to testify about the results of his observations of the results of the scan to the extent that such testimony relates to any observed abnormalities of the brain. The Motion is granted to the extent that Dr. Herbst will not be permitted to render an opinion that the any observed abnormalities were caused by a traumatic injury to plaintiff's brain.

7. Regarding the defendant's Motion to Compel the plaintiff to produce copies of income tax returns, the motion is denied because plaintiff's counsel stated during argument that the plaintiff was not asserting any claim for lost wages, loss of future income or loss of earning capacity.

The contents of this Order were electronically sent to counsel for the parties and therefore they did not have the opportunity to note on the Order whatever objections either may have to the rulings contained in this Order. Accordingly, the Court will permit counsel for the parties to note their objections to the Court's rulings by adding their notations of objections to this Order at any time before the commencement of the trial.

Jay Swett January 21, 2010
Judge Date

A Copy,
Teste: DEVILL M. DEAN, CLERK
BY: N. Phelps D.C.