In The

Supreme Court of Virginia

RECORD NO. 181002

YASHANA SPRUILL,

Appellant,

v.

BRENDON GARCIA and ANGELA TYLER,

Appellees.

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The appellant, Yashana Spruill, filed a personal injury Complaint in the Circuit Court of the City of Norfolk against the defendants Brendon Garcia and Angela Tyler. (Ap 1-3) Yashana Spruill was a passenger in a vehicle being operated by the defendant Angela Tyler. (Ap 290) After a two-day trial the jury returned a verdict in favor of the defendant Brendon Garcia, and in favor of the plaintiff against the defendant Angela Tyler and awarded zero damages. (Ap 550) Plaintiff appealed the judgment in favor of the defendant Brendon Garcia and the judgment against the defendant Angela Tyler on several grounds.

This appeal was awarded from the judgement rendered by the Circuit Court of the City of Norfolk limited to consideration of the Assignment of Error as it pertains to appellee Angela Tyler only, on the grounds the trial court erred in allowing the admission into evidence of the plaintiff's medical record by affidavit over the plaintiff's hearsay objections. (Ap 552)

STATEMENT OF THE FACTS

On December 5, 2016 the plaintiff, Yashana K. Spruill was a passenger in a vehicle being operated by the defendant Angela Tyler. (Ap 290) Ms. Tyler was driving south on Tidewater Drive in the City of Norfolk, Virginia. (Ap 290) As she approached the intersection of East Bayview Boulevard a vehicle being operated by the defendant Brandon Garcia made a left hand turn in front of Ms. Tyler's oncoming vehicle. (Ap 290) Ms. Tyler testified she had a green light as she entered the intersection. She testified her light was green at the time of the impact. (Ap 292)

The defendant, Brandon Garcia, testified that as he approached the intersection he had a solid green arrow and that the cars in front of him were stopped at the red light. (Ap 241) He testified he had a solid green arrow when he made his left turn onto East Bayview Boulevard. (Ap 284)

Prior to trial a pretrial conference was held before the Honorable Everett A. Martin Jr, on March 1, 2018. (Ap 89-109) At that time the issue of expert designations were discussed. The defendant Garcia had filed a list of expert medical providers and produced medical records attached thereto. (Ap 84-87) The expert designations did not designate the substance of the facts and opinions to which the experts would testify, nor did they provide a summary of the grounds of their opinions. (Ap 15) Counsel for the defendant

Garcia stated that "What we did was list every single doctor that we were going to identify pursuant to § 8.01-399 because we are not allowed to talk to them." (Ap 93) He further stated;

> "Quite frankly, Judge, they're not even really expert witnesses from that standpoint. There's a Supreme Court case that interprets § 8.01-399 that says they can testify to the information continued in their record provided its contemporaneously recorded. That's all we intend to do, is to have them to testify to what's contained in the records provide it's contemporaneously recorded." (Ap 94).

The defendant, Tyler, filed a designation of expert witnesses incorporating by reference the designation of the defendant Garcia. (Ap 13). The defendant, Tyler's list of witnesses and Exhibits did not identify Dr. Ton or Consultants in Pain Medicine (Ap 77-78).

The court overruled the plaintiff's motions on the grounds the witnesses were not timely disclosed and further they were not unknown hired guns brought in by the party to try to give opinions. (Ap 103)

Dr. Jay Berkowitz testified on behalf of the plaintiff. (Ap 328) Dr. Berkowitz testified he reviewed an MRI report and relied upon it in his treatment of the plaintiff (Ap 341). On cross examination, Dr. Berkowitz testified he never saw any note from Dr. Ton [the subject of Defendant's Exhibit 3] and did not rely upon the record in formulating his opinion. (Ap 382-383). He testified he had not seen the report of Dr. Ton (Ap 383).

The plaintiff objected to any reference to Dr. Ton's report on the grounds the medical record had not been provided to the plaintiff, that Dr. Ton had not been identified as a witness, and the record had not been properly authenticated (Ap 497-517).

Yashana Spruill testified on her own behalf (Ap 422-489). She testified she had back flare ups in 2011 and in 2013 (Ap 426). She testified she had an MRI in 2013 and did not have an MRI in 2011 (Ap 428).

On cross examination, counsel for Tyler asked Ms. Spruill if she had been seen by Dr. Ton in 2011 (Ap 454). She testified she had not. Counsel then handed the plaintiff a record and asked the plaintiff if the record refreshed her recollection (Ap 456). The plaintiff testified it did not (Ap 458). She testified on cross examination that she did not know Dr. Ton and was never treated by him. (Ap 456) She testified the document handed to her did not refresh her recollection (Ap 457, 467).

During cross examination by counsel for Garcia, counsel represented to the court that he had all the record custodians under subpoena (Ap 468). The Court noted that the plaintiff said on a number of occasions that she does not recall having an MRI in 2011. (Ap 468) She did not have treatment with a group called Consultants in Pain Medicine on October 3, 2011 (Ap 469).

At the conclusion of the evidence defendants sought to introduce into evidence medical records of Dr. Ton, by affidavit, arguing the custodian of the record may submit an affidavit in lieu of actually appearing in person (Ap 497-517). Counsel for the plaintiff objected (Ap 497-517).

Plaintiff objected to the admission of the medical record of Consultants in Pain Medicine (Defendant's Exhibit 3) (Ap 538-548) on the grounds that the affidavit was insufficient for the admissibility of medical records. Plaintiff further objected to the records because they were not on the defendants' list of witnesses or exhibits. The records were offered based upon an affidavit dated the second day of trial with no opportunity for the plaintiff to investigate (Ap 538). The court relied upon § 8.01-391(D) for the admissibility of the record and allowed the record into evidence (Ap 512).

The Court noted that documents were being used solely for the purpose of impeachment and therefore did not need to be identified before trial (Ap 516). The Court found the document admissible pursuant to statute and the rule cited (Ap 537). The Court later ruled that the records could be used for any purpose.

ASSIGMENT OF ERROR

II. THE TRIAL COURT ERRED IN ALLOWING THE ADMISSION OF THE PLAINTIFF'S MEDICAL RECORDS WITHOUT TESTIMONY AS TO ITS AUTHENTICITY AND OVER PLAINTIFF'S HEARSAY OBJECTION (Ap 498-517).

STANDARD OF REVIEW

The Court shall review the trial court's decision to admit or exclude evidence using an abuse of discretion standard. *Gelber v. Glock*, 293 Va. 497, 509 (2017); *Harman v. Honeywell International Inc.*, 288 Va. 84, 92 (2014); *Crane Inc., v. Jones*, 274 Va. 581, 590 (2007). This review necessarily includes a determination of whether the circuit court was guided by an erroneous legal conclusion or flawed interpretation of the applicable section of the Code of Virginia. *Gelber v. Glock*, 293 Va. 497, 509 (2017).

Statutory construction is a question of law which is reviewed de novo on appeal. *Bank of the Commonwealth v. Hudspeth*, 282 Va. 216, 221 (2011); *Conyers v. Martial Arts World of Richmond, Inc*, 273 Va. 96, 104 (2007).

ARGUMENT

1. THE TRIAL COURT ERRED IN ALLOWING THE ADMISSION OF PLAINTIFF'S MEDICAL RECORDS WITHOUT TESTIMONY AS TO ITS AUTHENTICITY AND OVER PLAINTIFF'S HEARSAY OBJECTION. (Assignment of Error No. 2)

a. The medical record was inadmissible hearsay as a matter of law pursuant to § 8.01-390.3 of the Code of Virginia.

The trial court admitted into evidence defendant's Exhibit Number 3 (The medical record of Consultants in Pain Medicine) relying upon § 8.01-391 of the Code of Virginia. The defendant, however, failed to comply with § 8.01-390.3 of the Code of Virginia as a prerequisite to the document's admission and therefore the admission of the record by affidavit was not in accordance with the statutory requirements.

§ 8.01.390.3 of the Code of Virginia requires written notice be given to all other parties fifteen (15) days in advance of trial so that all parties have a fair opportunity to challenge the record and certification. In accordance with § 8.01-390.3 the proponent who intends to rely upon a certification of authenticity shall;

1) "Give written notice to all other parties if a certification under this section will be relied upon in whole or in part in authenticating and laying the foundation for admission of each record, and;

2) Provide a copy of the record and the certification to all other parties, so that all the parties have a fair opportunity to challenge the record and certification.

The code section has been fully incorporated into Rule 2:902(6) of the Rules of the Virginia Supreme Court.

The defendant failed to comply with any of the requirements of the statute and rule. The exhibit wasn't notarized until the second day of the trial, March 3, 2018 which in and of itself makes the document inadmissible on its face as a matter of law. The plaintiff timely objected to the admissibility of the record at the time of the trial § 8.01-390.3(B) further requires

> "If any party timely objects to reliance upon the certification, the authentication and foundation required by subdivision (6) of Rule 2:803 of the Rules of Supreme Court <u>shall be made by witness testimony</u> unless the objection is withdrawn" § 8.01-390.3(B)

The trial court erred by allowing the introduction into evidence of the medical record by affidavit over the objection of the plaintiff without the testimony of a witness. The trial court erred by allowing the record into evidence that had not been provided to counsel fifteen (15) days in advance of trial so that the plaintiff had the opportunity to challenge the record. The trial court further erred by allowing the exhibit into evidence because the

affidavit failed to comply with the requirements of § 8.01-390.3 of the Code of Virginia, and Rule 2:902(6) of the Rules of the Supreme Court.

b. The affidavit was insufficient as a matter of law pursuant to Rule 2:803(6) of the Rules of the Supreme Court of Virginia.

Rule 2:803(6) of the Rules of the Supreme Court of Virginia outline the requirements of proof to be established by affidavit, witness testimony, or combination of witness testimony and certification necessary for the admissibility of a business record as an exception to the hearsay rule. The admissibility of a business record as evidence pursuant to § 8.01-390.3 and § 8.01-391 of the Code of Virginia must establish;

(A) the record was made at or near the time of the acts, events, calculations, or conditions by-- or from information transmitted by-- someone with knowledge;

(B) the record was made and kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making and keeping the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 2:902(6) or with a statute permitting certification; and

(E) neither the source of the information nor the method or circumstances of preparation indicate a lack of trustworthiness.

The affidavit submitted with defendant's Exhibit 3 failed to establish any of the elements of proof necessary to overcome the hearsay objection. Rule 2:803(6) of the Rules of the Supreme Court of Virginia requires much more than the deficient certificate of authenticity offered by the defendant in this case.

c. Authenticity of the medical record did not make the facts and opinions in the document admissible in accordance with the "Modern Shopbook Rule".

Assuming arguendo the affidavit satisfied the foundation requirements of Rule 2:803(6) and Rule 2:902(6) of the Rules of the Supreme Court of Virginia, the medical records contained facts and opinions that were inadmissible in violation of the Modern Shopbook Rule. Virginia has adopted the Modern Shopbook Rule regarding the admission into evidence of verified business records. *Neeley v. Johnson,* 215. Va. 565 (1975). Admissibility of documents properly authenticated require that the facts or events be within the personal knowledge and observation of the recorder to which he could testify if called as a witness. *Neeley v. Johnson*, 215. Va. 565 (1975) *Boone v. Commonwealth*, 213 Va. 695, 697 (1973).

Virginia's Modern Shopbook Rule has been adopted in Rule 2:803(6) of the Rules of the Supreme Court of Virginia. They were adopted to implement established principles under common law and not to change any established case law rendered prior to adoption of the Rules. see; Rule 2:102. The hearsay exceptions admissible at trial also may include,

(1) Present sense impressions

(2) Excited utterance

(3) Then existing mental, emotional, or physical conditions

(4) Statement for purposes of medical treatment

(5) Recorded recollection

(6) Records of regularly conducted activity

The medical record admitted into evidence in this case contained inadmissible hearsay that do not fall within any of the foregoing exceptions. The record contained opinions of Dr. Martin Ton of back and bilateral leg pain. His impression of bilateral lumbar radiculopathy was a medical opinion. More importantly, the record states he reviewed the MRI and his opinion and conclusions of degenerative disc disease at L4-L5 and disc bulges both at L4-L5 and LS-SI are hearsay within hearsay. The medical opinions of Dr. Ton were inadmissible hearsay. The very purpose of the rule is to protect the judicial system from the opinions of the absent "experts" whose qualifications

have not been established and whose pronouncements are immune to cross examination. *McMunn v. Tatum*, 237 Va. 558, 566 (1989); *Harman v. Honeywell, Inc*, 288 Va. 84, 93 (2014); *Gelber v. Glock*, 293 Va. 497, 514 (2017).

CONCLUSION AND RELIEF SOUGHT

For the reasons set forth herein, the medical record of Consultants in Pain Medicine should not have been admitted into evidence. The affidavit submitted in support of the admission of the record was

1) Inadmissible as a matter of law pursuant to § 8.01-390.3 of the Code of Virginia

2) Insufficient as a matter of law pursuant to Rule 2:803(6) and the Rule 2:902(4) and (6) of the Rules of Evidence of the Supreme Court of Virginia, and

3) Contained facts and opinions in violation of Rule 2:803 and the Virginia Modern Shopbook Rule

Appellant respectfully request that a new trial be granted on the issues of damages only in accordance with principles of the law set forth herein.

The appellee has made no argument that the liability was not properly decided, therefore a new trial on damages only should be ordered.

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CERTIFICATE OF SERVICE

I hereby certify compliance with Rule 5:26 and Rule 5:26(e), including that three copies of the foregoing Brief of Appellant and Joint Appendix have been hand-filed with the Clerk of the Virginia Supreme Court and electronic copies of the same have been filed, via VACES. On this same day, an electronic copy of the Brief of Appellant was served, via email and electronic copies on CD of the Brief of Appellant and Appendix have been served, via UPS Ground Transportation to counsel for Appellee on this 22nd day of April, 2019 at the following addresses:

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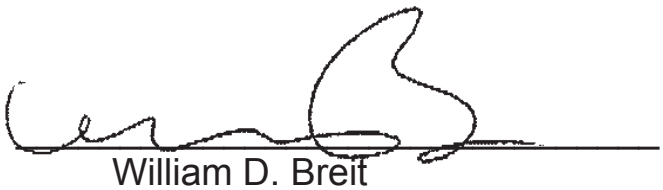

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