

No. 33383

State of West Virginia ex rel. Lambert Turner Jones, II, and Red Jones Auto Mart, Incorporated, a corporation, v. Arthur M. Recht, Judge of the Circuit Court of Ohio County, and George P. Naum and Joan Naum

FILED

**December 19,
2007**

released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Benjamin, Justice, concurring:

I write separately to make clear that, *so long as an adequate foundation is established for his opinion*, Dr. Peter E. Shepek (hereinafter “Dr. Shepek”) may testify as a qualified neurological expert regarding his opinion as to whether the automobile collision at issue in the underlying litigation might cause the kind of neurological injuries claimed by George P. Naum.¹ I therefore agree with the majority opinion that the trial court erred and that Dr. Sheptak’s testimony may not be excluded in its entirety, at least to the extent his testimony is restricted to medical issues. I must disagree, however, with my colleague, Chief Justice Davis, in her partial dissent to the extent that she would permit Dr. Sheptak to testify regarding “the ‘biomechanics’ of the underlying accident and the effects thereof.” Davis,

¹Dr. Sheptak’s proposed testimony, however, went further. In his correspondence and deposition testimony, Dr. Sheptak stated that from his reading of the accident report and “other history,” the accident had caused no discernible damage to either vehicle, had an extremely low level impact, and lacked sufficient force to make it highly unlikely that the accident had caused Naum to strike his head on the roof of his automobile and to suffer a concussion. In its order excluding Dr. Sheptak’s testimony, the trial court held that because “the neurological issues . . . are enmeshed . . . inextricably entwined, with biomechanical aspects of which he’s not qualified. And it is not possible to demarcate that part of his testimony from the neurosurgery.”

concurring, in part, and dissenting, in part, p. 10.

Under Rule 702 of the *West Virginia Rules of Evidence*, “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.”

Additionally, Rule 703 of the *West Virginia Rules of Evidence* provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Moreover, this Court has previously held that “[a]ny physician qualified as an expert may give an opinion about the physical and medical cause of injury[.]” Syl. Pt. 5, in part, *State v. Jackson*, 171 W. Va. 329, 298 S.E.2d 866 (1982); Syl. Pt. 3, in part, *State v. McKenzie*, 197 W. Va. 429, 475 S.E.2d 521 (1996)(*per curiam*)(same).

Undoubtedly, Dr. Shepek is familiar with the types of neurological injuries which can be expected to be sustained in various types of collisions by virtue of his knowledge, skill, experience and training. As such, if the proper foundation were established, it would be perfectly acceptable for him to provide his opinion on whether it is

possible for a neurological injury such as that claimed by Dr. Naum to be sustained in a collision having characteristics similar to the collision at issue herein. For example, once evidence has been introduced regarding the speed and impact of the collision, a series of hypothetical questions could properly be posed to Dr. Shepek inquiring based upon his experience as to the type of neurological injury he would expect to see under such conditions, whether he believes the neurological injury claimed by Dr. Naum is possible under such conditions and/or whether something else is more likely to have caused the neurological injury claimed. What Dr. Shepek may properly be prohibited from testifying about, however, is the actual “biomechanics” of the accident itself; *i.e.*, whether the mechanics of the accident were sufficient to create some level of force and whether that force would cause an occupant to strike his head on the roof of the car. Dr. Shepek is qualified to render an opinion regarding Dr. Naum’s alleged neurological injury. He has not been qualified to render an opinion on biomechanics.