

1 V I R G I N I A

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

2 - - - - - x

3 ANGELA ADAMS,

4 Plaintiff,

5 -vs-

6 JOHN S. HABIT, et al,

7 Defendants.

8 - - - - - x

Circuit Courtroom 5E
Fairfax County Courthouse
Fairfax, Virginia
Tuesday, March 28, 2006

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11 The above-entitled matter came on to be heard
12 before the HONORABLE ARTHUR B. VIAREGG, Judge, in and for
13 the Circuit Court of Fairfax County, in the Courthouse,
14 Fairfax, Virginia, beginning at 9:00 o'clock a.m.

15 APPEARANCES:

16 On Behalf of the Plaintiff:

- 17 PETER S. EVERETT, ESQUIRE
- 18 CHIDI I. JAMES, ESQUIRE
- 19 MARK A. TOWERY, ESQUIRE

20 On Behalf of Defendant Lee Bailey's

21 Transmission, Incorporated:

22 ROBERT E. WORST, ESQUIRE

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1 THE COURT: He's going to testify and that's
 2 the end of the defense?
 3 MR. WORST: That's the end of the defense.
 4 THE WITNESS: Is there going to be a rebuttal?
 5 MR. EVERETT: At this point, I mean, I need to
 6 think that over but I really don't anticipate a rebuttal
 7 case.
 8 THE COURT: Fine. Thank you.
 9 OPEN COURT
 10 THE COURT: Members of the Jury, we'll break
 11 for lunch a little bit early today and we will return at
 12 quarter to 2:00.
 13 (Whereupon, at approximately 12:41 o'clock
 14 p.m., the jury retired from the courtroom.)
 15 THE COURT: We'll stand in recess.
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1 it's live testimony; is that correct?
 2 MR. EVERETT: Right now, yes, Your Honor.
 3 THE COURT: And your concern is that he's
 4 going to be testifying with respect to whether or not what
 5 another expert testified to is believable or not or
 6 credible, et cetera, as opposed to whether or not he
 7 simply takes issue with respect to whether or not you can
 8 consider certain items?
 9 MR. EVERETT: Yes, although I think it also
 10 extends -- Brown v. Corbin is fairly broad and I was
 11 surprised when I read it. It seems to be that I guess if
 12 I could distill it, expert testimony is not an academic
 13 exercise in critiquing what somebody else does
 14 necessarily.
 15 It's presenting positive, affirmative,
 16 relevant evidence in addition to which there certainly is
 17 -- it's not near the province of the jury to be critiquing
 18 the veracity of another witness in that regard.
 19 Along that same line is the malingering sort
 20 of testimony that Dr. Spector wants to introduce. As you
 21 might recall from designation, we talked about it a while
 22 back --
 23 THE COURT: I'm sure I don't. So --

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1 AFTERNOON SESSION
 2 (The Court reconvened at 1:46 o'clock p.m.)
 3 MR. EVERETT: Your Honor, for your
 4 convenience, I would like to hand you up a copy of Dr.
 5 Spector's designation, just so you have it. It's just
 6 that we may be objecting if it's beyond the scope and I'd
 7 just rather be able to pass it off to you to be able to --
 8 THE COURT: Surely.
 9 (Mr. Everett passed up a document to the Court
 10 for his examination.)
 11 MR. EVERETT: We have some questions regarding
 12 the propriety of the testimony. I think I passed up some
 13 cases yesterday. In Brown v. Corbin, I frankly was -- I'm
 14 sorry I didn't file that to you, you know, a week ago.
 15 THE COURT: Is this the one about commenting
 16 on other experts?
 17 MR. EVERETT: Yes. And it's sort of -- the
 18 way I read that is --
 19 THE COURT: Let me find it first.
 20 MR. EVERETT: I'm sorry. Yes.
 21 THE COURT: All right. I have it. And I
 22 guess the distinction is -- and I frankly don't recall the
 23 transcript of -- this deposition is a live deposition or

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1 MR. EVERETT: It's been awhile. I'm sorry.
 2 He wants to criticize Dr. O'Shanick's office for not doing
 3 malingering testing and that -- I literally backtrack.
 4 Malingering testimony, at least according to
 5 one Judge in this Court, Judge Roush, I think you're
 6 familiar with the (unintelligible) case, is verboten.
 7 That's one Judge. But backtrack from that, that's if an
 8 expert says that person's malingering; okay.
 9 In Rose v. Jack which is a Supreme Court case
 10 - I have a copy of that if you would like it at some
 11 point, Your Honor - the Supreme Court affirmed the trial
 12 Court's rejection of malingering testimony when the expert
 13 in that case said, "I'm not sure whether the person is
 14 malingering."
 15 Here, we're a way step before that. He's not
 16 saying anything about Angela Adams, but the implication
 17 is, it's very much an insinuation that she may have been
 18 malingering and that is fundamentally unfair for all three
 19 of those reasons.
 20 One, he doesn't say it. Two, if he was --
 21 sort of thought it, he couldn't say it under Rose v. Jacks
 22 and three, under Judge Roush's ruling, if that's held,
 23 that's commenting on the veracity of a witness.

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1 You know far better than I, Your Honor, how
 2 many cases the Court of Appeals and the Supreme Court have
 3 decided about when it talks about commenting on the
 4 veracity of a witness and he's doing much worse than --
 5 he's insinuating that somehow she might have cheated and
 6 it wasn't tested for and I don't think that's appropriate
 7 on that one opinion regarding malingering.
 8 With respect to John v. Im, I don't know if
 9 we're going to have a John v. Im. Are you familiar with
 10 that case, Your Honor? It's a --
 11 THE COURT: I think I read it in the context
 12 of this trial, but you may have to refresh my
 13 recollection.
 14 MR. EVERETT: It's a very short discussion at
 15 the very end, but essentially it says that if you're not
 16 an M.D. you certainly can't comment on causation. I can
 17 actually read --
 18 THE COURT: Yes, yes, I remember reading it.
 19 MR. EVERETT: And so I don't know if he's
 20 going to talk about -- there's some suggestion he wanted
 21 to talk about the MRI's and I think that is absolutely
 22 beyond his area of expertise as not being a physician.
 23 THE COURT: This gentleman's expertise again,

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1 Adams, so he is not being placed nor has he been
 2 designated to testify that in his opinion she is or is not
 3 brain injured.
 4 He is specifically designated to testify about
 5 the way, according to neuropsychologists of determining
 6 from his experience and he -- you'll hear from his voir
 7 dire from the questions that are given to him, the vast
 8 experience he has in the treatment, assessment,
 9 consultation and study of brain injury through the Army.
 10 He's worked with the Army as far as
 11 paratroopers and so forth and other people who have
 12 experienced brain injuries and he will tell you -- his
 13 testimony is being offered to show the accepted way of
 14 testing for brain injury and therefore to show that this
 15 accepted way has not been done in this case.
 16 And, in fact, he's not going to testify that
 17 she is or is not brain injured, but that the testing that
 18 was done based on its reliability, its validity because he
 19 will testify that some of these tests that are used are
 20 outdated, outmoded, they're not norm and this is all
 21 testimony that Dr. O'Shanick testified to in my cross
 22 examination of Dr. O'Shanick.
 23 So the evidence is already there for the

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1 is what?
 2 MR. EVERETT: He's a tester. He's a
 3 neuropsychologist. He -- but he didn't do any testing
 4 here. So he wants to say, I guess, there should have been
 5 testing here and I'm not sure under Brown v. Corbin, I'm
 6 not sure -- he's not really offering any affirmative
 7 evidence.
 8 I tested her, she aced it, she's not brain
 9 injured, there's nothing like that at all. It's all sort
 10 of nitpicking at Dr. O'Shanick's office's neurolinguistic
 11 testing which, by the way, is not her psychological
 12 testing but there's something (unintelligible **it could
 13 be referring to). But that's something for cross
 14 examination.
 15 So I think that we have problems with
 16 malingering, we have problems with the whole idea of
 17 sniping at someone -- another expert's testimony. We
 18 certainly don't have any problems with anything that comes
 19 to the veracity of either Ms. Adams or Dr. O'Shanick.
 20 THE COURT: All right. Mr. Worst.
 21 MR. WORST: Your Honor, in response, I think
 22 the Court has already ruled on this very argument. Again,
 23 Dr. Spector is not -- he did not do testing of Angela

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1 foundation for Dr. Spector that the raw data underlying
 2 the testing was destroyed, so therefore, there's no way to
 3 determine the validity of the results of the tests.
 4 He will testify that the tests themselves are
 5 outdated. They're not norm for somebody of the age of Ms.
 6 Adams and a number of other things that go to what is the
 7 foundation of Dr. O'Shanick's opinion here.
 8 And in trial, any party is allowed to attack
 9 the foundation of the other party's expert and that's
 10 exactly what Dr. Spector is doing here. A foundation of
 11 the opinion that she has a brain injury is not adequate
 12 and not reliable in this case and that's what Dr. Spector
 13 has been designated to do.
 14 THE COURT: Is he going to testify that Dr. --
 15 I've forgotten his name -- that Dr. O'Shanick's opinion,
 16 therefore, is unsupportable?
 17 MR. WORST: His testimony will be that because
 18 of the testing he used, that it lacks the foundation to
 19 come to the opinion based on the standards that have been
 20 set throughout the courts and throughout the industry of
 21 psychiatrists, psychologists and medical doctors, that
 22 that foundation is lacking and therefore, you cannot rely
 23 on these tests and these tests are not valid and so

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1 therefore --

2 THE COURT: I'm not going to permit him to

3 testify to that effect. He may testify with respect to

4 the tests -- he may refer to specific tests but he may not

5 comment on the opinion of the -- of Dr. O'Shanick. in this

6 case.

7 MR. WORST: All right. I won't -- I

8 understand. Actually, I don't believe I was going to ask

9 him about Dr. O'Shanick's opinion.

10 THE COURT: I thought that's what you were

11 saying.

12 MR. WORST: But I am going to ask him about

13 the testing, the acceptable testing, what testing would he

14 have done as a neuropsychologist, what testing was done in

15 this case, how did the two compare, what are the

16 shortcomings of testing, information that has to do with

17 that kind of thing based on his experience after building

18 a foundation through his experience and his review of the

19 medical records.

20 THE COURT: And secondly --

21 MR. WORST: And the other issue was

22 malingering?

23 THE COURT: Yes.

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1 of objective tests of effort?

2 THE COURT: With respect to -- yes, effort or

3 malingering; that's right.

4 MR. WORST: All right. Is there -- is that

5 all that is being limited? As far as the outdated tests

6 that were used, can he testify --

7 THE COURT: Well, he may not comment on Dr.

8 O'Shanick's --

9 MR. WORST: Right. He cannot --

10 THE COURT: -- opinion.

11 MR. WORST: -- comment on his opinion.

12 THE COURT: You may elicit from him testimony

13 with respect to the specific tests that were done separate

14 and apart from the malingering effort, however we want to

15 call it, and he is not to testify in that area.

16 MR. WORST: Okay.

17 MR. EVERETT: I would also suggest about -- in

18 terms of destroying of some test data there's nothing in

19 this designation about that.

20 MR. WORST: Well, that was certainly raised on

21 the cross examination of Dr. O'Shanick and I certainly

22 think that's open for discussion at this point.

23 MR. EVERETT: I think it needs to be in this

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1 MR. WORST: There is no testimony that he is

2 aware of her malingering or not, but in order to

3 understand the validity and reliability of testing from a

4 neuropsychologist -- for a brain injury, it's a very

5 important factor to understand within an objective test

6 whether or not the patient was putting forth the best

7 effort. That was not done in this case.

8 THE COURT: Well, I'm going to require that he

9 not testify in that area. I think this is quintessential

10 a situation where there's a balancing with regard to, on

11 one hand, the probative value of that testimony and on the

12 other, the prejudice. And I concur with Mr. Everett that

13 that is, in the absence of somebody coming in and

14 testifying that that's an issue, I'm not going to permit

15 it.

16 I'm going to ask that you talk to your expert.

17 Tell him of my ruling and to insure that this is not

18 addressed during his testimony.

19 MR. WORST: Okay. So to make sure I

20 understand and I --

21 THE COURT: I understand.

22 MR. WORST: -- address him correctly, I am to

23 instruct him that there should be no testimony on the lack

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1 designation.

2 MR. WORST: Well, the designation talks about

3 the validity of testing. That's another basis.

4 THE COURT: I'm going -- these are issues that

5 could have been developed earlier, apparently weren't. He

6 will not be permitted to testify to that either.

7 MR. WORST: All right. Let me instruct Dr.

8 Spector.

9 THE COURT: All right. Thank you, sir.

10 (Mr. Worst left the courtroom.)

11 (Pause.)

12 (Mr. Worst returned to the courtroom.)

13 MR. WORST: I'm ready to proceed, Your Honor.

14 THE COURT: All right. Bring the jury in,

15 please.

16 (Whereupon, at approximately 2:00 o'clock

17 p.m., the jury returned to the courtroom and resumed their

18 seats in the jury box.)

19 THE COURT: Call your next witness, Mr. Worst.

20 MR. WORST: Defense calls Dr. Jack Spector.

21 (The witness entered the courtroom.)

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