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Motion in Limine to Exclude Expert Testimony Pertaining to Trial Publicity

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1999 DEC 13 P 2:17

GERALD E. FUERST
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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

ALAN J. DAVIS, Special Administrator
of the Estate of
SAMUEL H. SHEPPARD

Plaintiff

vs.

THE STATE OF OHIO

Defendant

Judge Ronald Suster

Case No. 312322

MOTION IN LIMINE TO
EXCLUDE EXPERT TESTIMONY
PERTAINING TO TRIAL
PUBLICITY

Defendant moves this court to exclude the testimony and expert report of Keith Sanders for the reasons outlined in the attached brief.

*Moot
removed from
H witness list*

Respectfully Submitted,
William D. Mason
Prosecuting Attorney
Cuyahoga County

A. Steven Dever

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Brief

Introduction and Facts

Plaintiff's proposed expert witness Keith Sanders is the compiler of a report entitled The Cleveland Press Coverage of the Sheppard Murder Case in Relation to Sensational News Treatment. He created this compilation and analysis on August 22, 1964. It was submitted to the Ohio University School of Journalism as his thesis and as "in partial fulfillment of the requirements for the degree Master of Science." (See Sanders report, cover page). The stated purposes of the report were "[1] to analyze the [Cleveland Press'] treatment of the [Sheppard] case and to determine if that treatment fits the pattern of sensationalism...[and] [2] how that treatment compared to the treatment given three well-known sensationalized cases in the past...[and the report] [3] should aid the student in developing a more clear cut concept of sensationalism...[and] [4] it should offer some insight in to the role of the editors and publishers who are responsible for the existence of sensationalism...[and] [5] it should aid the student in considering how subject content of a story affects selection of the story for publication and the typographical display and position it will receive." (Sanders report, p. 3-4).

Chapter IV of the report is dedicated to the Sheppard case. His report concludes that "(1) The Cleveland Press' coverage of the Sheppard murder case coincided, point for point, with the pattern of sensationalism as developed by the Hall-Mills, Snyder-Gray and Lindbergh-Hauptmann cases; (2) The Cleveland Press was more sensational than the Plain Dealer in its coverage of the case." (Sanders report, p. 147-148). He fails to conclude whether the Cleveland Press coverage, or sensationalism in general is "an

unwholesome feature of the press.” (Sanders report, p. 148). It is merely “a significant aspect of the American Press [and] [I]t needs more study.” (Sanders report, p. 149).

Law & Argument

The controlling United States Supreme Court cases on the admissibility of expert testimony are Daubert v. Merrell Dow Pharmaceuticals (1993), 113 S. Ct. 2786, 509 U.S. 579 and Kumho Tire Company v. Carmichael (1999), 119 S. Ct. 1167. Daubert established the primacy of the Rules of Evidence over the previous reliance on the well-known “general acceptance” standard of Frye v. United States, 54 App.D.C. 46, 293 F. 1013 when considering the admissibility of scientific expert testimony. The Kumho case expanded the use of Evidence Rule 702 to the testimony of non-scientific, technical experts.

The Daubert two-step analysis requires that an “expert’s testimony both [rest] on a [1] reliable foundation and [be] [2] relevant to the task at hand.” Daubert at 2790. An expert’s testimony while interesting, or even compelling is not admissible unless it satisfies both of these steps.

Mr. Sanders thesis posing as his report is not scientific or technical. He even admits that there is a need to “[determine] sensationalism that does not require comparison with other cases. This method, ideally, would be highly objective and statistical in nature.” (Sanders report, p. 148). His report is obviously not statistical or objective. It is merely his subjective opinion of the degree of sensationalism in the Cleveland Press coverage of the Sheppard case in comparison to other presumptively sensational cases. Putting aside the non-scientific and non-technical nature of his thesis, it offers nothing relevant to the determination of any fact in this current case.

“If 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 qualifies as an expert.” Evid. R. 702. (Emphasis added). There is no fact at issue in this case for which Mr. Sanders’ testimony will provide insight to the jury. His testimony while perhaps mildly interesting to some, is irrelevant to whether Dr. Sam Sheppard is innocent of the murder of his wife. A court of law is no place for a gratuitous journalistic history lesson--especially one that has already been learned.

The issue of media impact on the Sheppard murder case was fully litigated and adjudicated by the United States Supreme Court. They remedied that perceived wrong by granting Mr. Sheppard a new trial. Hence, the issue has been resolved and this expert’s testimony on that point is cumulative to that opinion. This case is about whether Sam Sheppard is innocent of the murder of his wife.

Finally, relying on his report, Mr. Sanders has made no analysis of any of the evidence in this case. I remind the court that the State of Ohio is still aware that this trial is, after all, about relevant facts and evidence. He is not an expert in any area that pertains to the factual disputes in this case. While still irrelevant, he does not even conclude in his report whether the Cleveland Press coverage, or the coverage of the media in general, had any affect on the jury. He does not conclude that the media ever possessed, concealed or discovered evidence in either the 1954 or 1966 trials. He does not conclude that the media ever reported about the State of Ohio or the defendant possessing, concealing or discovering evidence in either the 1954 or 1966 trials. At best, he can conclude that sensational media coverage of criminal trials may or may not be bad. (See Sanders report, p. 148). To allow such testimony the court must determine

why such a non-conclusion is relevant to this case. **There is nothing about the guilt or purported innocence of Dr. Sam Sheppard of the murder of his wife on July 4, 1954 that can be shown by the testimony of this purported expert witness.** In short, he gives the jury nothing and wastes the court's valuable time in what will already be a lengthy trial.

Conclusion

For the reasons listed above, defendant requests the court exclude the report and testimony of plaintiff's proposed expert Keith Sanders.

Respectfully Submitted,
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Prosecuting Attorney
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CERTIFICATE OF SERVICE

This Motion to Exclude the Testimony of Plaintiff's Expert Keith Sanders was served upon plaintiffs at 1370 Ontario, The Standard Building, 17th Floor, Cleveland, Ohio 44113, this 13 day of December, 1999 by regular U.S. Mail.



Steven Dever (0024982)

Chief Trial Counsel

Cuyahoga County Prosecutor's Office