

SUPERIOR COURT OF JUSTICE

5 IN THE MATTER OF: THE ESTATE OF GERTRUDE RELLINGER, DECEASED

B E T W E E N:

JOAN SLOVER

Plaintiff

10 - and -

15 JAMES RELLINGER

Defendant

20 E X C E R P T O F P R O C E E D I N G S

BEFORE THE HONOURABLE JUSTICE A. SANFILIPPO
on February 21, 2019, at TORONTO, Ontario

25 APPEARANCES:

E. Earnshaw/ S. Sullivan/

N. Mullins

Counsel for the Plaintiff

E. Flak/ P. Murphy/

30 M. Manning

Counsel for the Defendant

(i)
Table of Contents

SUPERIOR COURT OF JUSTICE
TABLE OF CONTENTS

WITNESSES

5

WITNESSES

Examination
in-Chief

Cross-
Examination

Re-
Examination

10

EXHIBITS

EXHIBIT NUMBER

ENTERED ON PAGE

15

RULING ON VOIR DIRE

1

20

LEGEND

[sic] Indicates preceding word has been reproduced verbatim and is not a transcription error.

(ph) Indicates preceding word has been spelled phonetically

25

Transcript Ordered:

February 21, 2019

Transcript Completed:

July 6, 2019

Ordering Party Notified:

July 8, 2019

30

THURSDAY, FEBRUARY 21, 2019

...EXCERPT OF PROCEEDINGS

R U L I N G O N V O I R D I R E

5
SANFILIPPO, J. (Orally):

On February 13, 2019, the seventh day of this trial, the plaintiff called Dr. Kenneth Shulman to testify. The defendant was aware that Dr. Shulman would be called as an expert litigation witness, to provide expert opinion evidence by reason of the plaintiff's service of a report and Form 53, delivered in accordance with Rule 53.03.

10
15
The plaintiff knew from trial management discussions conducted on the first day of trial, February 4th, 2019, that the defendant intended to object to Dr. Shulman providing expert opinion evidence in this trial, necessitating a *voir dire*.

20
25
30
In advance of Dr. Shulman being called to testify, I invited submissions on the process for the *voir dire*, with the result that the parties agreed upon, and I implemented, a form of blended *voir dire*, wherein Dr. Shulman's evidence would be received in its entirety and I would then hear submissions on the issue of the admissibility of the expert testimony. In the event that I were to rule that Dr. Shulman's evidence is inadmissible, the entirety of his evidence, including any exhibits marked in the *voir dire* would be disregarded. In the event that I were to rule that Dr. Shulman's

Ruling on *Voir Dire* - Sanfilippo, J.

evidence is admissible, the evidence obtained during the *voir dire* would be incorporated as part of the trial record without necessity of duplication.

The *voir dire* process was implemented, with the result that Dr. Shulman provided direct testimony on the afternoon of February 13 and the morning of February 14, and provided testimony on cross-examination on the afternoon of February 14, the entirety of February 15 and the morning of February 19, followed by a brief re-examination that day. I heard legal argument on the *voir dire* following the completion of the re-examination on February 19, 2019.

Having considered all of the submissions, I have reached a decision on the issue raised by the *voir dire*. So that it might assist the parties as they proceed through the remainder of this trial, I will take some time now to explain the basis for my Ruling. I wish to make clear, that I reserve the right to clarify or to refine, or to expand upon the basis for my ruling and the findings that I have made in relation to it, in the Reasons for Decision that I will render at the conclusion of this trial, or, indeed, to summarize my reasons for my determination on this Ruling, but without, of course, modification of the conclusion that I have reached.

The direct examination of Dr. Shulman began with an

5
10
15
20
25
30

explanation of his credentials and qualifications. These were entered into evidence by the plaintiff, even though the defendant does not dispute that Dr. Shulman is a qualified psychiatrist. Dr. Shulman obtained his medical degree in 1973, interned at Mount Sinai Hospital and completed a residency in the Department of Psychiatry from 1974 to 1976. He registered as part of a Fellowship at the Institute of Psychiatry in London, England from '76 to 1978 in geriatric psychiatry. He was admitted to the Royal College of Psychiatrists in the United Kingdom. In 1978, he returned to Canada where he completed his Fellowship in psychiatry in Canada.

Dr. Shulman has accomplishments in both the the practice of psychiatry and in its teaching. In teaching, from 1994 to present, over almost a quarter century, he is a full professor at the Department of Psychiatry at the University of Toronto. He was the head of the geriatric psychiatry division at the University of Toronto from 1983 to 1991. In total, Dr. Shulman has practiced as a full-time active staff member in the Department of Psychiatry at Sunnybrook Hospital from 1978 to present. From 1991 to 2001 he was the Head of Psychiatry. From 2002 to 2016 he held the appointment as the Richard Leward Chair in Geriatric Psychiatry at Sunnybrook Hospital.

Dr. Shulman is the winner of the International Psychogeriatric Association award in the field of psychogeriatrics for 1999. His *curriculum vitae*

Ruling on *Voir Dire* - Sanfilippo, J.

5
10
contains a list of 146 articles that he has authored or co-authored in the field of psychiatry, mostly in geriatric psychiatry. He has authored or co-authored four books, including "The Cambridge Guide to the Psychiatry of Old Age." He has co-edited two books, including "Mental Health and Illness of the Elderly." He has authored or co-authored 45 book chapters, predominantly in the field of geriatric psychiatry.

15
Last, Dr. Shulman has presented 39 academic addresses, principally in the area of geriatric psychiatry, including an address at the Law Society of Upper Canada in 2008 entitled, "A Clinician's Perspective on Testamentary Capacity."

20
25
30
It was in this very topic that Dr. Shulman was tendered to give expert evidence in this trial. Dr. Shulman stated that the work that he has done in this action, as retained by the plaintiff, was to provide an opinion on testamentary capacity from a clinician's perspective: not from a legal adjudicative perspective. Dr. Shulman stated that he could provide expert opinion evidence on what is in the medical records regarding the deceased, Mrs. Gertrude Rellinger; that he could provide detail of the meaning and impact of the testing and screening disclosed by those medical records; the impact of any medication or any condition that she was experiencing, to allow the Court to better understand Mrs. Rellinger's capacity from a medical, psychiatric and cognitive perspective.

5
10
As part of doing so, Dr. Shulman offered a retrospective testamentary capacity assessment, which involves his clinical assessment, made after Mrs. Rellinger's death, of her capacity to execute a Will. This is a "paper assessment", in that it is undertaken without knowing or speaking with the deceased or with others, but is a longitudinal look at her condition in the time period leading to her death by review of medical records and other materials made available.

15
Dr. Shulman offered in direct testimony that the ideal is a contemporaneous assessment, which allows a psychiatrist an opportunity to probe the person. Retrospective assessment has some advantages he said, principally, the advantage of hindsight that allows for a lifetime analysis, a lifestyle assessment, a cross section of a person's life.

20
25
The plaintiff tendered Dr. Shulman to this Court as an expert in geriatric psychiatry to provide expert opinion evidence in the areas of geriatric psychiatry and assessment, retrospectively of testamentary capacity. As I noted, the defendant objected, which necessitated this *voir dire*.

30
Having heard the evidence adduced from Dr. Shulman on this *voir dire*, I must now determine whether it is admissible as expert opinion evidence in this trial.

My analysis begins with the identification of the

5
10
15
20
25
30

test for admissibility of expert opinion evidence in Ontario. The parties agreed that the applicable test is set out in *R. v. Abbey*, 2017 ONCA 640, 140 O.R. (3d) 40, which draws on the test set out in *R. v. Mohan* [1994] 2 S.C.R. 9 and *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182.

The test consists of a two-stage analysis. In the first stage, the expert evidence is only admissible when it meets the threshold requirements of admissibility, which are defined as follows:

- (a) The evidence must be logically relevant.
- (b) The evidence must be necessary to assist the trier of fact.
- (c) The evidence must not be subject to any other exclusionary rule.
- (d) The expert must be properly qualified, which includes the requirement that the expert be willing and able to fulfill the expert's duty to the court to provide evidence that is:
 - (i) impartial;
 - (ii) independent, and;
 - (iii) unbiased.

And there is a fifth requirement, stage 1 factor (e), spoken of considerably by the defendant, that for opinions based on novel or contested science, or science used for a novel purpose, the underlying science must be reliable for that purpose.

In the second stage of this Two-Stage Analysis, the

5 trial judge must determine, in a gatekeeper role, whether the benefits of admitting the evidence outweigh its potential risks. This is sometimes seen as an assessment of whether the evidence's probative value outweighs the potential prejudice that its admission might cause. The court will consider such factors as: (i) legal relevance; (ii) necessity; (iii) reliability; and, (iv) absence of bias.

10 In short, if the proposed expert opinion evidence does not meet the threshold requirements for admissibility in stage one of the Two-Stage Analysis, it is excluded. If it does meet the threshold requirements of stage one, then I have a gatekeeper function in stage two, in the exercise of my discretion, to determine whether the benefits of admitting the evidence outweigh the costs of its admission. If I am not satisfied in stage two, then the evidence will be excluded, even though it has met the threshold requirements.

15 I have in mind, as I conduct my analysis, the statement by Justice Binnie in the Supreme Court decision in *R. v. J-L.J.*, 2000 SCC 51 at paragraph 28: "...the trial judge should take seriously the role of 'gatekeeper'."

25 Beginning with stage one and the most obvious factor first: factor 1(d). Dr. Shulman is clearly a qualified geriatric psychiatrist. This is admitted by the defence and it is beyond question.

30

Ruling on *Voir Dire* - Sanfilippo, J.

5
10
Moreover, I am satisfied that Dr. Shulman is able to provide his expert opinion evidence in an impartial, independent and unbiased manner, consistent with the view of impartiality set out by Justice Cromwell in the *White Burgess* decision at paragraph 12, where impartiality requires that the expert express: "their own unbiased, professional opinion and...are independent in the sense that their opinion is the product of their own, independent conclusions based on their own knowledge and judgement."

15
20
25
30
Dr. Shulman showed, in testimony a clear understanding of his duty as a litigation expert under *Rule 53*. He confirmed that his duty is to the court, and not to any party. The manner by which he gave evidence, thoughtfully considered his answer to the questions posed, emphasizing that his role is to assist the court, made clear that he has no concern whether his opinion on retrospective testamentary capacity assessment is accepted or not, or which party prevails in the case. His mandate, as expressed in many occasions in his testimony, is to provide a clinician's perspective of what he observed in Mrs. Rellinger at times material through the records, to the issue of her testamentary capacity and to thereby assist the Court in understanding how these clinical observations and findings might impact her capacity.

I determine that stage one factor (d) of the first

Ruling on *Voir Dire* - Sanfilippo, J.

5
stage of the Two-Stage Analysis is satisfied, in that I find that Dr. Shulman is a qualified geriatric psychiatrist who is willing and able to provide opinion evidence to me that is impartial, independent and unbiased.

10
I turn then to factor 1(a): that the evidence must be logically relevant. At this admissibility threshold stage, I am required to determine only whether the opinion evidence offered by Dr. Shulman is "logically relevant", which means that it must be relevant to a fact in issue in the case.

15
Dr. Shulman is presented to provide evidence on two areas: geriatric psychiatry principles that pertain to issues raised in this case; and a clinician's retrospective testamentary capacity assessment of Mrs. Rellinger.

20
Dr. Shulman's report was filed and presented to me as part of the *voir dire*. This allowed me, on the consent of the parties, to assess the expert's methodology, to analyze whether in the content of the report the expert proposes to testify according to his areas of expertise or outside of his area of expertise. It allowed an opportunity to assess the tone of the report, to discern any bias or partiality. I found all of these considerations to support its admission.

25

30
Dr. Shulman's retrospective testamentary capacity assessment is that, at material times, Mrs.

5 Gertrude Rellinger suffered from delusions directed to her daughter, the plaintiff Ms. Joan Slover, and that these delusions affected Mrs. Rellinger's thinking, behaviour and testamentary dispositions. Dr. Shulman offers evidence that a "delusion" is a "fixed, false belief that is out of keeping with one's educational, cultural and religious background." He offers general geriatric psychiatry input on cognitive impairment and compensatory delusions, with specific application to how these may affect testamentary capacity.

10
15 Dr. Shulman's conclusion is that Mrs. Rellinger suffered from a mild cognitive impairment manifested most acutely by delusional thinking. It is his clinical opinion that these delusions influenced her decision-making about her Will and testamentary acts, and that this would make her incapable if she was making decisions based on those delusions.

20
25 In detailed and thorough submissions in writing and delivered orally, the defendant's principal objection to the admission of Dr. Shulman's evidence is that it is not reliable. The defendant argues this with particular emphasis in relation to factor 1(e) of the first stage analysis and in the second stage analysis as to gatekeeping.

30 In *Abbey #2*, 2017 ONCA 640, the Court of Appeal stated at paragraph 112 that:

5
"Reliability" is an express factor the trial judge must consider at the gatekeeper stage; and reliability is a key component of the evidence's probative value and thus of another express factor, "legal relevance".

10
I will address the issue of reliability later in these Reasons, as the submission that Dr. Shulman's expert opinion is not reliable is a fundamental submission by the defendant that is applied to multiple factors within the Two-Stage Analysis.

15
Subject to comments that I will then make shortly on the issue of reliability, I find that Dr. Shulman's expert opinion evidence is relevant to the factual issues in this case. It is relevant to my assessment of Mrs. Rellinger's testamentary capacity and, in particular, the clinical observations capable of being made of the evidence from a geriatric psychiatry standpoint, and it is relevant to my understanding of the psychiatric issues that have permeated this case to the time of this *voir dire*.

25
30
I turn then to factor 1(b) of the first stage of the Two-Stage Analysis: the evidence must be necessary to assist the trier of fact. In *R. v. Mohan* at page 23, the Supreme Court stated that in order to be admitted the, "expert opinion evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their

technical nature." Conversely, the evidence is not necessary where the trier of fact can easily draw the necessary technical conclusions without it.

In citing *R. v. Abbey #1*, [1982] 2 SCR 24 at page 42, the Supreme Court stated that:

"helpful as a threshold is too low a standard. Rather the evidence must help the trier of fact appreciate the matters in issue due to their technical nature or because the relevant area is not understood by the average person."

I find that the manner by which the issues in this case have been developed in this trial to date and through the *voir dire* makes necessary the expert opinion testimony on geriatric psychiatry, as well as clinical observations and clinical conclusions, that may be relevant to my determination of testamentary capacity.

This expert opinion testimony is necessary to assist in appreciating the technical aspects of the following issues that have been brought forward to date:

1. The capacity assessment performed by Ms. Woynarski.
2. The Columbia Forest and Life on the Avenue charts and progress notes.

3. The St. Joseph Hospital records.
4. The evidence on psychiatric issues presented by Dr. Kennel.
5. The evidence anticipated to be presented by the defendant through the defendant's contemporaneous capacity assessor, Dr. Yiu.
6. The psychiatric issues of cognitive impairment and delusional incapacity.
7. Issues raised by the defendant of a psychiatric nature, including counter transference, bias from counter-transference; the possibility of transient fluctuations in lucidity; the possibility of fluctuations in cognitive state; the continuous or transient components of cognitive impairment; the psychoanalytical meaning of the term "well defended"; the fluctuations in cognitive state resulting from pain, discomfort, anger; the impact of personality traits such as chronic dishonesty or false accusation on the issue of capacity.

In regard to these elements of a psychiatric nature and others, the defendant has specifically placed geriatric psychiatry matters in issue. In fact, they are embedded in the record adduced through the *voir dire*. This makes necessary the geriatric psychiatric input available from an expert such as Dr. Shulman.

Ruling on Voir Dire - Sanfilippo, J.

5 I find that Dr. Shulman's expert opinion evidence on general issues of geriatric psychiatry is necessary to appreciating the technical aspects of the psychiatric elements that are present in this action as well as to assist in appreciating the clinical aspects of the testamentary capacity issue.

10 In making this determination, I am mindful that in *R. v. Mohan* at page 24, the Supreme Court stated that, the "rule which excluded expert evidence in respect of the ultimate issue...is no longer of general application." However, special scrutiny must be given on the issue of reliability, and this will be addressed later in my reasons, and the requirement of necessity will, as the court requires, be "strictly enforced". Dr. Shulman is presented to provide expert opinion evidence on the clinical aspects of testamentary capacity through his retrospective assessment. I find that his evidence on these points of a clinical nature meet the threshold requirement of necessity.

25 I turn then to stage one factor (c): the evidence must not be subject to any other exclusionary rule. The defendant objects to the admission of Dr. Shulman's expert opinion evidence on the retrospective capacity assessment on the basis that it contravenes the exclusionary hearsay rule. Specifically, the defendant submits that Dr. Shulman's proposed expert opinion evidence on the issue of retrospective capacity assessment is based

on hearsay evidence and must, therefore, be excluded.

5 I point out that I did not hear this objection being made in regard to Dr. Shulman's expert opinion evidence on the issue of general principles of geriatric psychiatry, which is not predicated on any evidence that could be seen to be hearsay.

10 The plaintiff submits that Dr. Shulman's expert opinion evidence on the issue of testamentary capacity is largely illustrated by 33 documents that were identified by him at the time of delivery of his expert report. Most of these documents have been admitted in evidence as exhibits through 15 testimony of the plaintiff's experts or were marked as exhibits, also during the course of this voir dire. The plaintiff, therefore, contends that these documents are not hearsay, but rather proven in the trial in the development of the evidence to 20 date. However, I have nonetheless assessed this issue, on the basis that certain of the evidence relied on by Dr. Shulman in formulating his opinions on testamentary capacity, constitutes 25 hearsay.

30 The defendant relies on cases where the court has placed little or no weight on an expert's opinion where the facts on which the opinion is based were not proven. This is seen in *R. v. Lavallee*, [1990] 1 S.C.R. 852 and *R. v. Sheriffe*, [2015] O.J. No. 6609. In those cases, the court made clear

5 that if an expert is relying on the truth of an out-of-court statement or document, the expert opinion evidence can have little or no weight if the out-of-court statement or document is not proven and thereby shown to be excluded by virtue of hearsay.

10 The defendant is critical that Dr. Shulman did not interview the sources of the evidence that he relies upon, including the parties in this case and including the plaintiff witnesses called, as well as the defence witnesses expected to be called. In relying on evidence attributed to these parties through medical records, charts, notes and reports, the defendant submits that Dr. Shulman's expert opinion relies entirely on hearsay and ought to be excluded.

20 I do not accept the defendant's submission that Dr. Shulman's expert opinion evidence ought to be excluded because the factual record on which he relies may, in part, be shown to be unproven as to its truth and therefore hearsay.

25 In considering the threshold requirements of admissibility at this stage, I accept that in formulating his expert opinion, Dr. Shulman is not relying on the truth of certain of the records on which he bases his views, but rather is presenting clinical observations and input and a clinical analytical framework that hinges on its weight, on my factual determinations of the evidence on which
30

5
Dr. Shulman relies. In fact, Dr. Shulman emphasized in testimony on numerous occasions that the clinical observations and input and the general geriatric psychiatric principles that he offered to the Court, were based, at least in part, on presumed or assumed facts that were up to the Court only to determine.

10
He was candid that his expert opinion evidence was required to be moulded onto whatever factual determinations the Court may make and that my acceptance of his expert opinion of Mrs. Rellinger's delusional condition resulting in cognitive impairment would depend on those factual determinations.

15
I find, as well, that to the extent that Dr. Shulman's expert opinion evidence on testamentary capacity is shown to rely on certain evidence that is not proven, then the weight or use of the opinions may be affected. I do not accept, however, that his use of certain evidence that has not been proven, and has not been relied upon him for the truth of its contents, prevents me from admitting his expert opinion evidence at this
20
25
threshold admissibility stage.

30
I find that Dr. Shulman's expert opinion evidence on general issues of geriatric psychiatry certainly does not attract any exclusionary rule. I also find that his expert opinion on the issue of retrospective testamentary capacity, similarly, is

not capable of being excluded by reason of an exclusionary rule.

This takes us to stage one analysis factor (e): For opinions based on novel or contested science or science used for a novel purpose, the underlying science must be reliable for that purpose.

Dr. Shulman's expert opinion evidence is sought to be admitted, as I have stated, on issues of geriatric psychiatry and retrospective testamentary capacity assessment. The defendant objects to the admission of any expert opinion evidence on retrospective testamentary capacity assessment on the basis that it constitutes novel or contested science and is not reliable, relying heavily on *R. v. Trochym*, 2007 SCC 6. I will deal first with the contention that the retrospective testamentary capacity assessment in this case, is novel science.

In this case, the plaintiff contends that Mrs. Rellinger suffered from delusions at the time of her will making in 2013 on onward and, therefore, lacked cognitive capacity to make testamentary dispositions.

Dr. Shulman's retrospective testamentary capacity assessment is whether Mrs. Rellinger was free of a mental disorder, in this case delusions that affected the distribution of her estate. My determination of whether Dr. Shulman's retrospective testamentary capacity assessment constitutes novel science, as is contended by the

defendant, is made in the factual and situational-specific context of this case.

5 Dr. Shulman testified that retrospective testamentary capacity assessment is: "A clinical opinion that is based on part art and part science." It assesses capacity from a clinical assessment.

10 The objecting defendant concedes that testamentary capacity assessments made contemporaneously are admissible in evidence. Indeed, the objecting defendant seeks to rely on evidence of Dr. Yiu, on her testamentary capacity assessment of Mrs. Rellinger. As such, the objecting defendant's
15 contention that Dr. Shulman's capacity assessment is inadmissible as novel science is because it is retrospective in nature.

20 The defendant cross-examined Dr. Shulman on a passage at page 112 of a chapter entitled, "Retrospective Assessment of Testamentary Capacity," in his book, "Clinical Aspects of Psychology":

25 "Contemporaneous assessment has many clear advantages including the opportunity to probe and cue the testator to determine whether a clear, consistent wish is evident in relation to the legal test for
30 testamentary capacity. However, a retrospective assessment has some advantages, especially in situations in

which the level of the testator's cognitive and psychiatric status is not clear, at the time of the execution of the Will."

5
10
Dr. Shulman agreed with the defendant that a contemporaneous assessment is ideal, but a retrospective assessment takes a longitudinal approach to look over the testator's state of mind over a long period of time. This is particularly relevant where a false, fixed belief occurs over time.

15
20
I do not accept that the contemporaneous assessment considered material and useful by the defendant is rendered 'novel science' or less material because it is made retrospectively as opposed to contemporaneously. Rather, it is viewing the same issue from a different perspective. I note that many of the types of medical and psychiatric opinions offered in trials are retrospective in nature, such as certain types of defence medical examinations.

25
30
Dr. Shulman testified that he first performed retrospective capacity assessments almost 30 years ago. He has published broadly on this area and his work has been fully peer reviewed. Further, retrospective testamentary capacity assessments are far from novel in our courts. As a non-exhaustive sampling, I noted that cases relied on by the objecting defendant were instances in which

retrospective capacity assessments were admitted into evidence but then considered as to weight.

5
10
In *Burby v. Ball*, [2017] A.J. No. 1447, a case cited by the defendant as being critical of the use of retrospective capacity assessments, the opinions of two doctors who had performed these assessments were admitted into evidence and then considered as to weight. Similarly, in *Piscitelli v. Dinelle*, [1999] O.J. 4396, this evidence was admitted and then assessed as to weight. Similarly, in *Wasylynuk v. Bouma*, [2018] A.J. No. 250.

15
20
25
I was also referred to decisions in which retrospective testamentary capacities assessments authored by Dr. Shulman were admitted into evidence. The plaintiff relied heavily on *Wilson v. Mac*, [1998] O.J. No. 3733, a decision of Sanderson, J., wherein the court considered two contemporary assessments, as well as a retrospective assessment conducted by Dr. Hermann, a psychiatrist with whom Dr. Shulman has co-authored publications. Sanderson, J. relied on the retrospective capacity assessment over the contemporaneous assessments, at paragraph 203 of that decision. Not only was the retrospective assessment admitted into evidence, it was preferred.

30
In *Morris v. Rivard*, 2016 ONSC 4436, 23 E.T.R. (4th) 140 at para. 16, Dr. Shulman's assessment was accepted and found to have assisted the court in

assessing whether there was undue influence exerted by the testator's son.

5 In *Birtzu v McCron*, 2017 ONSC 1420 at para. 117, Dr. Shulman's retrospective testamentary capacity assessment was accepted by the court and admitted into evidence.

10 In *Walman v. Walman Estate*, 2015 ONSC 185 at paragraph 35, Justice Corbett admitted Dr. Shulman's retrospective capacity assessment. In *Maroanda v. Colliton*, 2010 ABQB 354 at paragraph 60, Dr. Shulman's retrospective testamentary capacity assessment was admitted into evidence.

15 In *Stekar v. Wilcox*, 2016 ONSC 5835 at paragraph 55, Justice Lederer admitted into evidence a retrospective capacity assessment conducted by Dr. Shulman. In *Sweetnam v. Lesage*, 2016 ONSC 4058 at paragraph 170, Justice Gray admitted into evidence and considered the retrospective capacity assessment of Dr. Shulman, as well as the retrospective capacity assessment conducted by Dr. Hermann. And, finally, *Park v. Park*, 2013 ONSC 25 431.

30 The objecting defendant submitted that a different result would have occurred had the admissibility of retrospective capacity assessment been considered after the Supreme Court of Canada decision in *R. v. Trochym*. That decision was in 2007. The cases I have just referred to postdate *R. v. Trochym*.

5 Further, since 2007, indeed, in the last few years, the Ontario Court of Appeal has considered retrospective capacity assessments in 2 cases. In *Foley v. McIntyre*, 2015 ONCA 382, 125 O.R. (3d) 721, at paragraphs 31 to 32 the Court of Appeal upheld the trial judge's reference and reliance on a retrospective capacity assessment.

10 In *Neuberger v. York*, 2016 ONCA 191 at paragraphs 41 to 43, the Ontario Court of Appeal specifically referred to Justice Greer's application and use of a retrospective capacity assessment, and commented on its review and summary of the medical records.

15 It is noteworthy that in the *R. v. Trochym* decision relied upon by the defendant, Justice Deschamps stated at paragraph 31:

20 "Not all scientific evidence, or evidence that results from the use of a scientific technique, must be screened before being introduced into evidence. In some cases, the science in question is so well established, that judges can rely on the fact that the admissibility of evidence based on it has been clearly recognized by the courts in the past."

25
30 The objecting defendant referred to several cases in which Ontario courts have considered expert psychiatric opinions of retrospective testamentary capacity assessment and weighed it, applied it or

5 disregarded it. However, the defendant was not able to identify and refer me to a single case, since retrospective testamentary capacity assessment were first considered by our court decades ago, in which psychiatric expert opinion of retrospective testamentary capacity assessment has been ruled to be inadmissible.

10 I find that the expert opinion evidence sought to be admitted from Dr. Shulman of his retrospective testamentary capacity assessment of Mrs. Rellinger, in this case, is not novel science.

15 In light of my finding that the retrospective testamentary capacity assessment proposed to be admitted into evidence is not novel science, in this case, I do not need to assess for purposes of factor 1(e) of the stage one assessment whether the evidence is reliable. However, I will now assess the reliability of Dr. Shulman's proposed opinion evidence, as the issue of reliability is pertinent to the issue of relevance in both my stage one assessment as well as to my stage two gatekeeping function. I recognize that as the opinion evidence proposed to be received from Dr. Shulman are clinical opinions affecting the ultimate issue, 20 testamentary capacity, that the assessment of reliability must be rigorous.

25
30 I will first assess the reliability of Dr. Shulman's expert opinion evidence in the context of the areas in which it was principally challenged by

the objecting defendant.

5
10
15
20
First, the defendant submitted that Dr. Shulman's opinion evidence was not reliable because he ought to have interviewed the parties, Joan Slover and James Rellinger, to obtain their evidence pertinent to his assessment of their mother. He states as well that Dr. Shulman ought to have interviewed the witnesses with evidence of the issues in this case. Dr. Shulman stated that he did not do so because this was not his role. He is not an investigator, but a clinician conducting a review of materials provided to him and to thereby provide expert opinion evidence that I can apply, should I choose to do so, to the facts as I find them to be in this trial. I agree with Dr. Shulman's explanation on this issue. I also expect that had Dr. Shulman conducted those investigative steps, that he would have then been critiqued for having stepped outside his role as a geriatric psychiatrist.

25
30
The defendant submits that the expert opinion evidence is not reliable because Dr. Shulman did not equally examine all the evidence. Dr. Shulman testified to having looked at the six boxes of file material provided to him. He stated that this is the greatest amount of documentation that he has reviewed in a single case in his long career. He stated that he attributed greater or less emphasis on the documents, depending upon his assessment. When cross-examined on how he selected the 33 documents that he relied upon in the construction

of his report, he stated that they were illustrative of the opinions that he had reached. I find that Dr. Shulman's method of review of the documentation provided to him was reliable.

5
10
15
The defendant submits that the expert opinion evidence is not reliable because it has not been peer reviewed. The 146 articles that Dr. Shulman has authored or co-authored in the field of geriatric psychiatry or psychiatry in general, the six books that he has authored or co-authored and the forty-five book chapters that he has authored or co-authored with others, all establish that his work in geriatric psychiatry and in retrospective testamentary capacity assessment has been peer reviewed.

20
25
30
The defendant submits that the expert opinion evidence is not reliable because it cannot be tested. I do not accept the submission that the retrospective testamentary capacity assessment is unreliable on this basis alone. Other types of expert opinions, routinely accepted by our court, are incapable of empirical or scientific validation, such as expert opinions by medical experts on chronic pain. Further, the contemporaneous testamentary capacity assessments that will urged upon me by the defendant are no more capable of being empirically validated than a retrospective assessment.

The defendant objects that the expert opinion

5
evidence is not reliable because the assessment is not made at a "pinpoint in time". I see this as a question of weight, or to use of the opinion as reliable to certain points in time but not to others. This does not make the opinion unreliable to all points in time. This consideration goes more to the use and application, weight and use of the opinions rather than their admissibility.

10
Likewise, the submission that the expert opinion evidence is not reliable because Dr. Shulman's assessment is only of testamentary capacity and not of capacity to contract. This means that the expert opinion evidence may, subject to other determinations that will not presently be made, be relevant to Mrs. Rellinger's capacity to execute some but not all types of documents in this trial. But this factor does not make the evidence that Dr. Shulman is capable of providing unreliable for all the documents.

15
20
25
30
Dr. Shulman is being offered to provide expert opinion evidence in his recognized field of expertise. Having reviewed the expert opinion evidence that he is presented to offer, I find that this opinion evidence is directly drawn from the core area of his expertise. The "part art and part science" approach that he has taken, the methodology that he has applied has been used in similar cases repeatedly, over many years, and has been peer reviewed. Retrospective testamentary capacity assessments have been tested by cross-

examinations and scrutinized by other courts in other cases and have not only been admitted into evidence but have been relied upon.

5 I am satisfied that Dr. Shulman's expert opinion evidence is reliable for the purpose of its admission into this trial.

10 I find then that Dr. Shulman's expert opinion evidence satisfies the first stage of my analysis. I then proceed to the second stage: the gatekeeper function.

15 The second stage in my assessment of whether to admit expert opinion evidence is that the discretionary gatekeeping step. In *Bruff-Murphy v. Gunawardena*, 2017 ONCA 502, 138 O.R. (3d) 584, at para. 36, the Ontario Court of Appeal described that this step requires that I: "...balance the potential risks and benefits that admitting the evidence, in order to decide whether the potential benefits justify the risks."

20
25 In *R. v. Bingley*, 2017 SCC 12 at para. 16, the Supreme Court stated that the expert evidence should be admitted if its probative value outweighs its prejudicial effect, and should be excluded where its prejudicial effect exceeds its probative value.

30 In *Abbey #2*, 2017 ONCA 640, the Court of Appeal adopted at paragraph 54 the statement by Doherty,

Ruling on *Voir Dire* - Sanfilippo, J.

5
10
15
20
25
30

J. A. in *Abbey 1* at para. 87, that the reliability of the proposed expert evidence is central to its probative value and thus to the benefits of admitting it. The requirement of reliability was similarly emphasized in *R. v. Trochym* and *R. v. J.-L.*, 2000 SCC 51. As stated in *Abbey #2* at paragraph 112: ... "reliability" is an express factor the trial judge must consider at the gatekeeper stage; and reliability is a key component of the evidence's probative value and thus of another express factor, "legal relevance".

I find that the cost benefit analysis favours admission of this evidence. The defendant's witness list already factors that Dr. Shulman's evidence may be admitted such that no additional trial time will be required. I do not see a prejudicial effect in admitting the evidence that cannot be addressed by hearing submissions by the defendant in closing argument concerning the use that I should make of the testimony, and the weight that I should attribute to it. I find that there is probative value in admitting the evidence for all the reasons that I have now provided. On the basis of these reasons, I have concluded that the requirements of the test for admission into evidence of expert opinion as set out in *R. v. Abbey #2*, which draws on the test set out in *R. v. Mohan* and *White Burgess*, are satisfied in this case. As such, I exercise my discretion to admit Dr. Shulman as an expert geriatric psychiatrist to provide expert opinion evidence in the areas of

geriatric psychiatry and retrospective testamentary capacity assessment.

5
10
In admitting the expert opinion testimony of Dr. Shulman, I am mindful that my gatekeeping function in relation to his testimony, like that of any expert witness admitted to testify, is not discharged by the threshold decision to qualify the expert, but is ongoing throughout the trial. In paragraph 66 of *Bruff-Murphy* the Court of Appeal made this clear:

15
20
25
"...the court's residual discretion to exclude prejudicial evidence is an ongoing one that continues throughout the trial. It may be invoked if prejudice manifests after initially admitting the evidence. ...the court has a residual discretion to exclude expert evidence even after admitting it, if trial prejudice emerges that was not apparent at the time of admission."

25
30
The threshold decision to admit the expert opinion evidence means that it will form part of the trial record for me to consider in adjudicating this case. I will assess its use, application or weight as part of my adjudication of the issues raised in the entirety of this trial.

In light of the consent provided by the parties at the initiation of the *voir dire*, the evidence from this *voir dire*, including all exhibits marked

Ruling on *Voir Dire* - Sanfilippo, J.

during the course of the *voir dire*, will now be treated as trial evidence for all the purposes of the trial in this action without the necessity of duplication.

This *voir dire* pertaining to the admissibility of the evidence of Dr. Shulman is now concluded.

...END OF EXCERPT AS REQUESTED

FORM 2
CERTIFICATE OF TRANSCRIPT (SUBSECTION 5(2))
Evidence Act

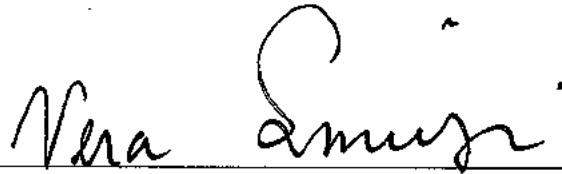
5 I, Vera Simachowskyi, certify that this document is a true and
accurate transcript of the recording of *Joan Slover v. James
Rellinger* in the Superior Court of Justice held at, TORONTO,
ONTARIO, taken from Recording No.
10 4899_709_20190221_094754__10_SANFILA, which have been
certified in Form 1.

15

20

~~JUL 08 2019~~

Date



(Signature of Authorized Person)

Vera Simachowskyi

ACT # 2675510211

1-855-443-2748

25

vsimachowskyitranscripts@vptranscription.com

30