# IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

**AT BECKLEY**

**JAMES SURRATT and ROSE SURRATT, et**

**al. (consolidated),**

**Plaintiffs,**

1. **CIVIL ACTION NO. 5:15-CV-15444**

**(consolidated)**

**PINNACLE MINING COMPANY LLC**

**Defendant.**

**DEFENDANT’S MOTION IN LIMINE TO PRECLUDE OPINIONS OF PLAINTIFFS' EXPERT JACK SPADARO**

Defendant Pinnacle Mining Company, LLC (“Pinnacle” or “Defendant”), by counsel, moves this Court in limine to preclude the testimony and introduction of any evidence relating to the opinions of Jack Spadaro (“Spadaro”) at trial.1

* 1. **INTRODUCTION**

It's a real fight; we're up against really powerful forces. You don't get much darker than the coal industry. People who run the coal industry pretty much don't care about the damage they're doing to people or to the land. That's been my experience. They don't see, they can't see.

They're just like Nazis; they don't see what they're doing is wrong. And this Bush administration is a fascist regime. It's the wedding of corporate power and government power. So we're fighting fascism, a modern form of it. We really are.

It's a tough fight but we can win it.2

1 Defendant has already moved for sanctions with respect to Mr. Spadaro for his failure to comply with Rule 26(a)(2). See Docket Entry Nos. 205-06. Certainly, to the extent that this Court grants that particular motion, this motion would be unnecessary.

2 Interview by Silas House & Jason Howard with Jack Spadaro, SILAS HOUSE & JASON HOWARD, SOMETHING'S RISING: APPALACHIANS FIGHTING MOUNTAINTOP REMOVAL, p. 200 (The University Press

Jack Spadaro's political and philosophical leanings are so extreme that he is incapable of forming an objective opinion in a case involving a coal company. By his own admission, Spadaro is exclusively a plaintiff's witness3 in a constant battle against coal companies. For example, Spadaro believes all mountain top removal is illegal, regardless of its form.4 Spadaro has also previously testified that he believes that even if a coal company has not been cited for any regulatory violations in years, the coal company is still violating regulations; the government regulators have just failed to catch them.5

Spadaro's most recent target is Defendant. Plaintiffs have retained Spadaro to provide "expert opinions" regarding Defendant’s activities. However, this is yet another opportunity to speak out yet again against the "evils" of coal companies and to advocate as part of his vendetta against the coal industry. As is discussed below, Spadaro's opinions are unreliable and should be stricken under the standards expressed in *Daubert v. Merrell Dow Pharms.,* 509 U.S. 579, 589 (1993) and its progeny.

* 1. **RELEVANT BACKGROUND**

As this Court is well-aware from the voluminous briefing before it, this case involves Defendants’ allegedly negligent mining near Plaintiffs’ residences and the damages that Plaintiffs claim were caused to their properties by said mining.

of Kentucky 2009). Copies of cited pages of Something's Rising are attached as **Exhibit A**.

3 See Spadaro Depo. at 64-68 (testifying as to the amounts made by way of testifying for plaintiffs), 77-78 (never testified for a defendant), attached hereto as **Exhibit B**.

4 *See* Interview by The Appalachian Voice Online with Jack Spadaro (April 19, 2007), APPALACHIAN VOICES (“[O]verall the industry simply doesn’t give a damn about the people or the environment in this region. This is the kind of movement it’s got to become for [mountain top] mining to be stopped.”).

Copies of cited pages are attached as **Exhibit C.**

5 See Deposition Testimony in J. Spadaro in Barnette v. Grizzly Processing, LLC., Civil Action No. 7:10- CV-00077-ART (E.D. K.Y. 2011) at pp. 56-59, Oct. 6, 2011, attached hereto as **Exhibit D**.

* 1. **ARGUMENT**

Federal law requires that all expert testimony meet certain requirements before the court finds it admissible. *See e.g. Daubert v. MerrellDow Pharms.,* 509 U.S. 579, 589 (1993); *see e.g. Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 152 (1999); FED. R. EVID. 702. Trial judges are obligated to be gatekeepers, allowing only dependable expert testimony to reach the jury and excluding that which is dubious. *Daubert,* 509 U.S. at 589. The party who proposes to introduce the expert has the burden of proving the testimony meets the *Daubert* elements by a preponderance of the evidence. *Asadv. Cont'lAirlines, Inc.,* 314 F. Supp. 2d 726, 731 (N.D. Ohio 2004) (citing *Pride v. BIC Corporation,* 218 F.3d 566, 578 (6th Cir. 2000)).

The Plaintiffs have failed to meet their burden for the admission of Spadaro's proposed testimony. As explained below, Spadaro's testimony is unreliable and irrelevant. Thus, Spadaro fails both requirements for admissibility set by *Daubert,* and the Court should exclude Spadaro as a proper exercise of its gatekeeping function. *See, e.g., Daubert,* 509 U.S. at 589.

1. **SPADARO'S TESTIMONY IS IRRELEVANT.**

Expert testimony is relevant when it is helpful to the trier of fact. *Daubert,* 509 U.S. at 590. Expert testimony does not assist the jury when the opinion can be easily "derived from common sense, common experience, the jury's own perceptions, or simple logic."

*U.S. v. Corey,* 207 F.3d 84, 97 n. 11 (1st Cir. 2000) (quoting 29 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6274 (1997)). Spadaro's opinions fail to rise to the level of expert proof.

In opinions two, three, and six, Spadaro states that Defendant “deliberately failed to comply”, “demonstrated a reckless disregard”, and “deliberately ignored long standing commonly used methods of mining. . .” See Spadaro Report, attached hereto as **Exhibit E**.

It is true, in light of *Kumho,* that expert testimony may concern more than just scientific analysis. "The areas of inquiry that expert testimony may address are . . . broad, including scientific and technical questions as well as any other area of specialized knowledge." *Christophersen v. Allied-Signal Corp.,* 939 F.2d 1106, 1110 (5th Cir. 1991) (en banc).

A party's intent, however, is not one of these areas. "The intent of the parties is an issue within the competence of the jury and expert opinion testimony will not assist the jury, within the meaning of [Rule 702], in determining the factual issue of intent." *CMI- Trading, Inc. v. Quantum Air, Inc.,* 98 F.3d 887, 890 (6th Cir. 1996), *abrogation on other grounds recognized by Morales v. American Honda Motor Co., Inc.,* 151 F.3d 500, 515 n.4 (6th Cir. 1998).

As with many of his opinions, Spadaro's "expert opinion" regarding the intent of Defendant is another overreach expressly prohibited by the Federal Rules of Evidence. The jury does not need Spadaro's assistance to determine Defendants' motivations for doing anything. Simply put, a fact finder can understand and appreciate the factual testimony just as easily as Spadaro. Thus, Spadaro's "expert" testimony suggesting the intent of Defendant is not admissible under Rule 702 because it does not assist the trier of fact.

1. **SPADARO MAY NOT GIVE LEGAL CONCLUSIONS ON ULTIMATE ISSUES.**

Under Federal Rule of Evidence 704, while an expert's testimony in a civil trial may "embrace[] an ultimate issue to be decided by the trier of fact," that issue "must be a factual one." *Berry v. City of Detroit,* 25 F.3d 1342, 1353 (6th Cir. 1994). An expert may not testify in the form of a legal conclusion. *Id.; see also, Anderson v. Suiters,* 499 F.3d

1228, 1237 (10th Cir. 2007); *Scottsdale Ins. Co. v. City of Waukegan,* 689 F. Supp. 2d 1018, 1022 (N.D. Ill. 2010) (experts may not testify "as to legal conclusions that will determine the outcome of the case").

In *Berry,* an expert witness testified that a police department's refusal to discipline officers who used excessive force amounted to "deliberate indifference" - a determinative legal issue in the plaintiff's action under 42 U.S.C. § 1983. *Berry,* 25 F.3d at 1353. The Sixth Circuit held that the expert could not testify that "lax discipline policies indicated that the City was *deliberately indifferent* to the welfare of its citizens." *Id.* (emphasis added). Otherwise, the expert's function "would be to tell the jury what result to reach." *Id.* at 1354. Moreover, "[e]ven if a jury were not misled into adopting outright a legal conclusion proffered by an expert witness, the testimony would remain objectionable by communicating a legal standard—explicit or implicit—to the jury," a job reserved solely for the court. *Id.* (quoting *Hygh v. Jacobs,* 961 F.2d 359, 364 (2d Cir. 1992)).

As noted, in his opinions Spadaro concludes that Defendant “deliberately failed” to comply with the law, “demonstrated a reckless disregard” for safety, and “deliberately ignored” methods of mining. Spadaro's conclusions that Defendant’s actions were deliberate and reckless are clear invasions of the domain of the jury. Yet, instead of allowing a jury to hear and weigh all of the evidence, Spadaro is providing them with their ultimate conclusion.

The prohibition against expert legal conclusions remains even when the expert purports to interpret an agency's application of its own regulations. *Ames v. Van Dyne,* 100 F.3d 956, 1996 WL 662899, at \*4 (6th Cir. 1996) (discussed below). *See also United States v. Adams,* 314 F. App'x 633, 649-50, 2009 WL 282126 (5th Cir. 2009) (expert

opinion that defendant violated federal tax law was inadmissible); *United States ex rel. Barron v. Deloitte & Touche, LLP,* 2008 WL 7136949, at \* 6 (W.D. Tex. Aug. 20, 2008) (expert witness was precluded from testifying about Medicaid regulations because he was "not an employee charged with enforcing, interpreting and distributing Medicaid rules and regulations" and sought to testify that "defendants actually violated these rules and regulations"). In *Ames,* a fork lift operator was injured when a truck driver pulled away from the dock while the fork lift operator was still loading the truck. Ames, the fork lift operator, proffered the opinions of a non-lawyer expert witness that the driver had violated certain federal regulations that "set a standard of duty and care on the part of the defendants ... [a]nd breach of these standards ... is, in fact, actionable negligence." *Id.* at

\*1. The expert based his opinion on his extensive experience in the trucking industry and a thorough review of the relevant regulations. The Sixth Circuit affirmed the trial court's

decision to exclude the expert's testimony.

To allow an expert, even a real expert, to testify that the statutes and regulations established certain duties . . . and that the statutes were violated, would be, in effect, to allow the expert to tell the jury that the defendants were negligent.

Moreover, the statutes and regulations that were the proposed subjects of [the expert's] testimony had nothing whatsoever to do with the facts of this case. Whether they were violated is no more relevant to the case than it is relevant whether the truck driver had violated any other unrelated laws, and there could be no possible legitimate reason for testimony with respect to them. In short, the district court did not abuse its discretion in finding that [the expert's] proposed testimony would not have been helpful to the trier of fact.

*Id.* at \*4.

Spadaro seems to have decreed himself an agent of both MSHA (the federal agency that fired him) and the West Virginia Department of Environmental Protection (“WVDEP”) and

concluded that Defendant was in violation of the law. Spadaro should not be permitted to provide legal conclusions about unfounded regulatory violations that would tell the jury that the Defendant was negligent. Again, Spadaro has reached well past his role as a purported expert and attempts to act as judge and jury.

Like the expert's inadmissible conclusion in *Berry,* Spadaro's legal conclusions are that Defendants' actions were reckless or deliberate and that Defendant violated federal and/or state regulations.

1. **SPADARO IS TOO BIASED TO BE RELIABLE.**

As "Judge Weinstein has explained: [e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." *Daubert,* 509 U.S. at 595 (citations omitted). Thus, the reliability gatekeeping requirement is important because "expert witnesses are not always unbiased " *Nelson v. Tennessee Gas Pipeline Co.,* 243 F.3d 244, 252 (6th Cir.

2001) (quoting *Turpin v. Merrell Dow Pharm. Inc.,* 959 F.2d 1349, 1352 (6th Cir. 1992)) (internal quotation marks omitted).

In addition to the fact that Spadaro's opinions are both irrelevant and unreliable, Spadaro has an extreme bias against the coal industry and the governmental authorities that regulate it.6 For example, Spadaro describes mountaintop removal as morally wrong and a practice the government is protecting. Spadaro describes the coal industry as Nazis and the prior Bush administration as Fascists. Some of Spadaro's other comments about coal companies:

* + It's a real fight, we're up against really powerful forces. It doesn't get much darker than the coal industry.7
	+ I saw what happens if coal companies are allowed to do [what] they want and the government doesn't have the gumption to make

7SOMETHING'S RISING at p. 200.

6*See* Rebecca Leung, *A Toxic Cover-Up?,* CBS NEWS (Feb. 11, 2009), (the government thought they could just roll over Spadaro and he would be gone but he will fight forever, whatever it takes). A copy of the article is attached as **Exhibit F**.

them follow the law. I was determined to do all I could to protect people from that ever happening again.8

* + [O]verall the industry simply doesn't give a damn about the people or the environment in this region. And I can say that with authority . . . They've just created these wastelands 9

While many other quotes could be listed, these examples make clear that Spadaro has an extreme bias against all coal companies. In all likelihood, Spadaro created his opinions about how the Plaintiffs and their properties were allegedly affected before he even knew where the Plaintiffs lived or what their complaints were. As discussed, *supra*, Spadaro, when previously presented with a hypothetical about a coal company that had not been found in violation of any regulations by the government, still would not agree that this would be an indication that the coal company was in compliance with the regulations. Rather, Spadaro opined that a coal company is always in violation of the state and federal regulatory scheme.

As with the many other cases for which Spadaro has been retained, he is waging a battle against coal companies nationwide.10 His bias against coal companies is so profound that a trier of fact cannot reasonably rely upon his opinions.

* 1. **CONCLUSION**

For the foregoing reasons, Defendant’s motion *in limine* to exclude the testimony of Spadaro should be granted.

# PINNACLE MINING COMPANY, LLC

By Counsel

8Jack Spadaro, Julian Marin "Whistle Blower Feels the Heat" The Highlands Voice January 2004 p.

11. A copy of the article is attached as **Exhibit G**.

9*See* Exhibit C.

10*See* SOMETHING'S RISING at 200 ("We're fighting fascism We really are.").

*/s/ John J. Meadows*

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**CERTIFICATE OF SERVICE**

I hereby affirm that on this date, April 17, 2017, I caused the foregoing

# *“*DEFENDANT’S MOTION IN LIMINE TO PRECLUDE OPINIONS OF PLAINTIFFS'

**EXPERT JACK SPADARO*”*** to be filed via the CM/ECF electronic filing system and, by virtue of the same, electronic notification will be served as follows:

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 */s/ John J. Meadows*