

No. 25959 & 25960 -

Sherman Jones and Lori Jones v. Patterson Contracting, Inc., a West Virginia corporation; and Grasan Equipment Company, an Ohio corporation

**FILED**

November 24, 1999

DEBORAH L. McHENRY, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**RELEASED**

November 24, 1999

DEBORAH L. McHENRY, CLERK  
SUPREME COURT OF APPEALS  
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Davis, J., concurring in part, dissenting in part:

This case presented two dispositive issues for resolution by the Court. The first issue concerned the propriety of the trial court granting judgment to defendant Patterson Contracting, Inc. On this issue, the majority decided that the trial court correctly granted judgment as a matter of law to Patterson Contracting, Inc. I concur in the majority's decision on this issue, as I believe a fair reading of the evidence, in the light most favorable to the plaintiffs, clearly demonstrates that the plaintiffs failed to present justiciable evidence on each of the elements of a statutory deliberate intent cause of action.

The second dispositive issue presented to this Court concerned the trial court's decision to strike expert testimony presented by the plaintiffs through Keith A. Colombo (hereinafter referred to as "Colombo"), an expert in aeronautical engineering. The majority concluded that any question concerning Colombo's credibility was for jury determination. Therefore, it was reversible error to strike Colombo's testimony. I disagree with the majority's resolution of this issue. Were this issue truly one of credibility, the majority would be unassailably correct in finding that the trial court invaded the province of the jury. However, the issue regarding Colombo did not present a question of credibility; but, it

presented a question of reliability.

Reduced to its most basic form, the issue concerning Colombo was whether or not a rocket scientist can give expert testimony on a mining industry issue for which he had absolutely no experience, training, skill, education or knowledge. The majority has concluded that an expert without any experience, training, skill, education or knowledge in an area for which he or she testifies, may nevertheless testify as an expert because the jury should be allowed to reject the testimony--should the jury understand the expert is unqualified. In my judgment, the position taken by the majority in this case has completely disregarded the body of law this Court has developed on the admission of expert testimony.

The unshakeable conclusion to be reached from the majority decision in this case is that, for example, a pediatrician having no experience, training, skill, education or knowledge in oral surgery, may nevertheless testify as an expert on oral surgery procedures and standards, because his or her lack of experience, training, skill, education and knowledge in oral surgery presents a credibility issue for the jury to determine. This is an unacceptable standard for the admission of expert testimony. I must, therefore, dissent from the majority's decision that the trial court abused his discretion in striking Colombo's testimony. I do so for two reasons. First, Colombo did not qualify as an expert in the area for which he was rendering an opinion. Second, assuming *arguendo*, that a rocket scientist is permitted to testify on a mining industry safety issue, Colombo's testimony was unreliable.

## I.

### **COLOMBO’S TESTIMONY WAS INADMISSIBLE BECAUSE HE WAS NOT QUALIFIED TO TESTIFY AS AN EXPERT ON MINING EQUIPMENT SAFETY**

The majority opinion in this case has taken many of this Court’s well developed legal principles, regarding the admission of expert testimony, and twisted them so as to convey the impression that this Court has historically allowed a witness to testify as an expert in an area where he or she has no experience, training, skill, education or knowledge. Until the decision in this case, our state law has never held that a witness may testify as an expert in an area in which he or she has no experience, training, skill, education or knowledge.

Rule 702 of the West Virginia Rules of Evidence enumerates the broad criteria by which a person may qualify as an expert. Rule 702 states that a person may qualify as an expert based upon “knowledge, skill, experience, training, or education[.]”<sup>1</sup> Justice Cleckley established a workable test for determining whether a person is an expert in the seminal case

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<sup>1</sup>Rule 702 provides: “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 qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.”

of *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995). Syllabus point 5 of *Gentry* states:

In determining who is an expert, a circuit court should conduct a two-step inquiry. First, a circuit court must determine whether the proposed expert (a) meets the minimal educational or experiential qualifications (b) in a field that is relevant to the subject under investigation (c) which will assist the trier of fact. Second, a circuit court must determine that the expert's area of expertise covers the particular opinion as to which the expert seeks to testify.

Although the majority opinion quoted syllabus point 5 of *Gentry*, it failed to completely perform any analysis under this fundamental test to determine whether Colombo was qualified as an expert on the issue for which he was asked to render an opinion. In other words, the majority opinion assumed, contrary to the overwhelming evidence, that Colombo qualified as an expert on the issue for which he was asked to render an opinion. With this assumption, the majority then analyzes the issue in terms of a “qualified” expert. This forced and unreasonable assumption lead the majority to reason that this case turns on the issue of credibility and not admissibility. Both the assumption and conclusion are wrong.

Under the first part of the *Gentry* test it must be shown that a proffered expert meets the minimal educational or experiential qualifications in a field that is relevant to the subject under investigation. Colombo did not satisfy the initial test.<sup>2</sup> The record in this case

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<sup>2</sup>There is no need to discuss the second part of the *Gentry* test because Colombo does not satisfy the first part of the conjunctive test.

is unquestionably clear that Colombo was an expert by education, training and experience in the general area of aeronautical safety engineering. If this case involved aeronautical safety issues, Colombo would probably qualify as an expert. However, this case involved engineering safety devices for a mining industry rock crushing machine. The record is void of any evidence that Colombo had experience, training, skill, education or knowledge regarding engineering safety devices for such a piece of mining equipment.

The majority opines that because Colombo had expertise as a safety engineer in aeronautical devices, he is therefore qualified to testify as an expert on engineering safety devices for mining equipment. The majority's reasoning allows anyone with expertise in a specific area to testify, without experience, training, skill, education or knowledge, as an expert outside of his or her specific area.<sup>3</sup> In other words, the majority, by this decision, has announced that in West Virginia an engineer in bridge safety may testify as an expert about any engineering safety issue, even though he or she has no experience, training, skill, education or knowledge about engineering safety issues outside of bridge safety. I simply cannot accept this result.

## II.

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<sup>3</sup>The majority opinion reaches the conclusion that “[t]his was not predominately or exclusively a ‘mining’ issue.” Such a statement is wrong. This case was absolutely and exclusively about safety devices for a mining industry rock crushing machine.

**COLOMBO'S TESTIMONY WAS INADMISSIBLE  
BECAUSE IT WAS NOT RELIABLE**

While it is my firm position that Colombo did not qualify as an expert to render an opinion on mine safety, even were I categorically wrong, Colombo's testimony was still properly excluded because it was unreliable. One need look no further than the recent decision by the United States Supreme Court in *Kumho Tire Company, Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999), which follows the *Gentry* analysis. That is, any expert testimony must be scrutinized for relevancy and reliability.

The plaintiffs in *Kumho* were involved in an automobile accident that occurred after a tire on their minivan blew out. The plaintiffs filed an action in a federal district court against the tire manufacturer, alleging manufacturing or design defect in the tire. The plaintiffs sought to use the testimony of an engineering expert in tire failure analysis to render an opinion that the tire blew out because of manufacture or design defect. The defendant filed a motion in limine to preclude testimony by the plaintiffs' expert. The federal district court granted the motion after concluding that the expert's testimony was inadmissible because the methodology used by the expert was unreliable.

On appeal to the Eleventh Circuit the district court's ruling was reversed. The Court of Appeals found that the district court improperly applied the test for expert scientific testimony established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113

S.Ct. 2786, 125 L.Ed.2d 469 (1993).<sup>4</sup> Under the reasoning of the Court of Appeals, the *Daubert* test was only applicable to scientific expert testimony.<sup>5</sup> The Supreme Court rejected the Court of Appeals' limitation of *Daubert* to scientific experts.<sup>6</sup> The Supreme Court reasoned as follows:

[I]t would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between “scientific” knowledge and “technical” or “other specialized” knowledge. There is no clear line that divides the one from the others. Disciplines such as engineering rest upon scientific knowledge.

*Kumho*, 526 U.S. at \_\_\_, 119 S.Ct. at 1174.

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<sup>4</sup>This Court adopted the *Daubert* test for admission of expert scientific testimony in *Wilt v. Buracker*, 191 W.Va. 39, 46, 443 S.E.2d 196, 203 (1993) (“We conclude that *Daubert's* analysis of Federal Rule 702 should be followed in analyzing the admissibility of expert testimony under Rule 702 of the West Virginia Rules of Evidence. The trial court's initial inquiry must consider whether the testimony is based on an assertion or inference derived from scientific methodology. Moreover, the testimony must be relevant to a fact at issue. Further assessment should then be made in regard to the expert testimony's reliability by considering its underlying scientific methodology and reasoning. This includes an assessment of (a) whether the scientific theory and its conclusion can be and have been tested; (b) whether the scientific theory has been subjected to peer review and publication; (c) whether the scientific theory's actual or potential rate of error is known; and (d) whether the scientific theory is generally accepted within the scientific community.”).

<sup>5</sup>In *Gentry* this Court extended the *Daubert/Wilt* analysis to all experts.

<sup>6</sup>In *West Virginia Division of Highways v. Butler*, \_\_\_ W.Va. \_\_\_, 516 S.E.2d 769 (1999) this Court specifically declined to adopt the holding in *Kumho*. Upon closer reflection, it is obvious that *Kumho's* holding is consistent with *Gentry*. That is, both *Gentry* and *Kumho* took the *Wilt/Daubert* analysis and simply made it applicable to all proffered expert testimony.

The Supreme Court further concluded:

[T]he trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. That is to say, a trial court should consider the specific factors identified in Daubert where they are reasonable measures of the reliability of expert testimony.

*Kumho*, 526 U.S. at \_\_\_, 119 S.Ct. at 1174.

The next issue addressed by the Supreme Court in *Kumho* was whether the district court abused its discretion in excluding the testimony of plaintiffs' tire engineering expert. The opinion observed:

The District Court did not doubt [the expert's] qualifications, which included a masters degree in mechanical engineering, 10 years' work at Michelin America, Inc., and testimony as a tire failure consultant in other tort cases. Rather, it excluded the testimony because, despite those qualifications, it initially doubted, and then found unreliable, "the methodology employed by the expert in analyzing the data obtained in the visual inspection, and the scientific basis, if any, for such an analysis."

*Kumho*, 526 U.S. at \_\_\_, 119 S.Ct. at 1176-1177.

After a careful review of facts in the case, the Supreme Court concluded that the district court was correct in excluding testimony of plaintiffs' expert. "Rule 702 grants the district judge the discretionary authority, reviewable for its abuse, to determine reliability in light of the particular facts and circumstances of the particular case." *Kumho*, 526 U.S.

at \_\_\_\_, 119 S.Ct. at 1170.

In syllabus point 3 of *Gentry*, Justice Cleckley plainly, clearly and unequivocally held that “[t]he first and universal requirement for the admissibility of [expert] evidence is that the evidence must be both ‘reliable’ and ‘relevant.’” The Fourth Circuit Court of Appeals addressed the issue of the reliability of an expert’s testimony in *Redman v. John D. Brush & Co.*, 111 F.3d 1174 (4th Cir. 1997). In *Redman* the owner of a burglarized safe filed a products liability action against the safe manufacturer, alleging that the safe was negligently designed. The trial court allowed the plaintiff to present expert testimony showing a manufacturing defect in the design of the safe. The jury returned a verdict for the plaintiff. On appeal the Fourth Circuit reversed.

The Fourth Circuit reversed the judgment in *Redman*, in part, because it found the district court committed error in admitting testimony by the plaintiff’s metallurgic expert.

*Redman* held:

The problem with the admissibility of [the testimony] is that Redman's expert was not qualified to testify about industry standards. He had never before analyzed a safe, engaged in the manufacture or design of safes, or received any training regarding safes. Even more importantly, he was not personally familiar with the standards and rating systems for fire protection capacity and burglary protection capacity used in the safe industry. He acknowledged that his only knowledge of safes was acquired in preparation for this trial through discussions he had initiated with people who sold, distributed, or repaired

safes.

. . . In this case, an expert in the relevant field would be familiar with the design and manufacture of safes and the industry standards regarding safes. There is no proof and no reason to believe that such an expert would rely on conversations with store personnel to identify a standard of burglar protection capacity.

. . . In the absence of an industry standard for burglar deterrence, it would be speculative and misleading for the expert to opine that the safe did not meet that undefined standard.... Under these circumstances, it was error to permit Redman's expert to testify that the safe was not "burglar deterrent."

*Redman*, 111 F.3d at 1179-1180.

The decision in *Redman* is important for several reasons. First, *Redman* recognized that merely because a person is an expert in metallurgy, does not immediately qualify that person to render an opinion on whether a metal safe was negligently designed. Second, *Redman* acknowledged that a person with general metallurgical knowledge could render such an opinion on whether a metal safe was negligently designed, if such person obtained adequate knowledge to formulate an opinion. Third, and most importantly, *Redman* held that for a person with only general metallurgical knowledge to testify as an expert on negligent design of a safe, the source of the person's knowledge must be reliable.

In the instant proceeding, Colombo's expertise was in aeronautical engineering safety. Colombo was asked to render an expert opinion on engineering safety requirements for a piece of mining equipment. For Colombo to qualify as an expert on engineering safety

requirements for a mining industry rock crushing machine, he had to demonstrate knowledge in the area that would be consistent with an actual expert in the field of mining equipment safety. After the trial court listened to Colombo's testimony, the trial court concluded that Colombo did not have the knowledge of mining equipment safety that an expert would have in the field of mine safety. *See Black v. Food Lion, Inc.*, 171 F.3d 308, 311 (5th Cir. 1999) ("The overarching goal of [the trial court's] gate-keeping requirement ... is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.").

Notwithstanding these facts, the majority opinion states that: "Mr. Colombo exhibited extensive knowledge of safety mechanisms and safety issues in general; his lack of distinctive knowledge of the workings of the mining industry should not render his testimony inadmissible." The majority conceded that Colombo knew nothing about the issue upon which he was called to render an opinion. Yet, the majority concluded that because he was competent in other safety matters his testimony was admissible. Based upon Rule 702 and this Court's *Gentry* analysis, the logical and correct conclusion to reach was that Colombo's testimony was unreliable and therefore inadmissible.

The majority further supports its decision by relying upon the fact that

Colombo was familiar with mining industry ANSI standards. What the majority failed to mention was that the ANSI standards relied upon by Colombo were not the applicable versions for the equipment at issue. In other words, Colombo used the wrong ANSI standards to reach his opinion. Unfortunately, the majority disregarded this critical fact and determined the matter a question of credibility for the jury.

Colombo's use of outdated ANSI standards goes to the issue of reliability and ultimately admissibility. Consistent with the United States Supreme Court's ruling in *Daubert*, we have made it a cornerstone requirement that an "assessment should ... be made in regard to the expert testimony's reliability by considering its underlying scientific methodology and reasoning." *Wilt v. Buracker*, 191 W.Va. 39, 46, 443 S.E.2d 196, 203 (1993).<sup>7</sup> In syllabus point 4 of *Mayhorn v. Logan Medical Foundation*, 193 W.Va. 42, 454 S.E.2d 87 (1994) we unequivocally held that "an expert's opinion is admissible if the basic methodology employed by the expert in arriving at his opinion is scientifically or technically valid and properly applied." Justice Cleckley cautioned this Court that "[e]vidence which is no more than speculation is not admissible under Rule 702." *State v. LaRock*, 196 W.Va.

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<sup>7</sup>*Daubert* made clear that, when determining whether the expert's opinion has a reliable foundation, the trial judge's "focus . . . must be solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 595, 113 S.Ct. at 2797. *National Bank of Commerce of El Dorado v. Associated Milk Producers, Inc.*, 191 F.3d 858, 862 (8th Cir. 1999) ("The focus of the district court's analysis of the proffered evidence is appropriately limited solely to principles and methodology, not on the conclusions that they generate.").

294, 307, 470 S.E.2d 613, 626 (1996). “[T]he majority confuses the [credibility] of an expert witness--a matter for the jury--with the reliability of his or her methodology--a matter initially for the trial judge.” *In re Unisys Savings Plan Litigation*, 173 F.3d 145, 161 (3d Cir. 1999) (Becker, J. dissenting). See *Newman v. Hy-Way Heat Systems, Inc.*, 789 F.2d 269, 270 (4th Cir.1986) (“[N]othing in the Rules appears to have been intended to permit experts to speculate in fashions unsupported by ... evidence.”). In my judgment, the majority opinion has dismantled the reliability criterion set out in *Wilt v. Buracker*, 191 W.Va. 39, 46, 443 S.E.2d 196, 203 (1993) and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and replaced it with credibility. See *United State v. Charley*, 189 F.3d 1251, 1266 (10th Cir. 1999) (“Rule [702] imposes a special gatekeeping obligation on the trial judge to ensure that an opinion offered by an expert is reliable”); *United States v. Harris*, 192 F.3d 580, 588 (6th Cir. 1999) (“[T]his Circuit has broadly applied *Daubert's* ... reliability analysis to all evidence offered under Rule 702.”); *Allison v. McGhan Medical Corp.*, 184 F.3d 1300, 1310 (11th Cir. 1999) (“While meticulous *Daubert* inquiries may bring judges under criticism for donning white coats and making determinations that are outside their field of expertise, the Supreme Court has obviously deemed this less objectionable than dumping a barrage of questionable scientific evidence on a jury, who would likely be even less equipped than the judge to make reliability and relevance determinations and more likely than the judge to be awestruck by the expert's mystique.”).

In addressing the issue of expert testimony in *Gentry*, 195 W.Va. at 524, 466 S.E.2d at 183, this Court noted that “Rule 702 has three major requirements: (1) the witness must be an expert; (2) the expert must testify to scientific, technical or specialized knowledge; and (3) the expert testimony must assist the trier of fact.” I find it difficult to believe that Colombo’s inaccurate and unreliable testimony could “assist the trier of fact.”<sup>8</sup>

In summary, the concept of reliability is an issue for trial court determination. The concept of credibility is a jury question. In this case, the majority has confused the two issues. As such, and for the reasons set forth, I concur in part and respectfully dissent in part from the majority’s decision in this case. I am authorized to state that Justice Maynard joins

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<sup>8</sup>See *Short v. Appalachian OH-9, Inc.*, 203 W.Va. 246, \_\_\_, 507 S.E.2d 124, 131 (1998) (“[T]he essence of Rule 702 is that of assisting the fact finder's comprehension through expert testimony.”); *Tanner v. Rite Aid of West Virginia, Inc.*, 194 W.Va. 643, 654 n. 17, 461 S.E.2d 149, 160 n. 17 (1995) (“Helpfulness to the jury ... is the touchstone of Rule 702.”). The circuit court properly found that the trier of fact could not be assisted by testimony from a proffered expert witness who knew absolutely nothing about the issue to which he was testifying. “[T]he trial court heard the evidence and granted a motion to strike the testimony. . . . On this record, there is no principled way for us to second guess that ruling; nor [should] we strain to do so.” *LaRock*, 196 W.Va. at 307, 470 S.E.2d at 626. See *Allison v. McGhan Medical Corp.*, 184 F.3d 1300, 1311-1312 (11th Cir. 1999) (“The judge's role is to keep unreliable and irrelevant information from the jury because of its inability to assist in factual determinations, its potential to create confusion, and its lack of probative value.”); *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 262 (4th Cir. 1999) (“[T]he obligation [is on] a district court to determine whether expert testimony is reliable and relevant prior to admission”); *Cortes-Irizarry v. Corporacion Insular De Seguros*, 111 F.3d 184, 188 (1st Cir. 1997) (“A trial setting normally will provide the best operating environment for the triage which *Daubert* demands . . . . [G]iven the complex factual inquiry required by *Daubert*, courts will be hard-pressed in all but the most clearcut cases to gauge the reliability of expert proof on a truncated record.”).

me in this dissent.