

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2007 Term

No. 33284

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

CLINTON SAN FRANCISCO and
JESSIE SAN FRANCISCO, his wife,
Plaintiffs Below, Appellants

v.

WENDY'S INTERNATIONAL, INC.,
Defendant Below, Appellee

Appeal from the Circuit Court of Kanawha County
Hon. Paul Zakaib, Jr., Judge
Case No. 04-C-1014

REVERSED AND REMANDED

Submitted: September 18, 2007
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JUSTICE STARCHER delivered the Opinion of the Court.

CHIEF JUSTICE DAVIS concurs and reserves the right to file a concurring opinion.

JUSTICE BENJAMIN dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. “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.” Syllabus Point 5, *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995).

2. “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 the 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.” Syllabus Point 2, *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993), *cert denied*, 511 U.S. 1129, 114 S.Ct. 2137, 128 L.Ed.2d 867 (1994).

3. “When scientific evidence is proffered, a circuit court in its ‘gatekeeper’ role under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125

L.Ed.2d 469 (1993), and *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993), *cert denied*, 511 U.S. 1129, 114 S.Ct. 2137, 128 L.Ed.2d 867 (1994), must engage in a two-part analysis in regard to the expert testimony. First, the circuit court must determine whether the expert testimony reflects scientific knowledge, whether the findings are derived by scientific method, and whether the work product amounts to good science. Second, the circuit court must ensure that the scientific testimony is relevant to the task at hand.” Syllabus Point 4, *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995).

4. Because the summary judgment process does not conform well to the discipline and analysis that *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993) impose, the *Daubert/Wilt* regime should be employed only with great care and circumspection at the summary judgment stage. Courts must be cautious – except when defects are obvious on the face of a proffered expert opinion – not to exclude debatable scientific evidence without affording the proponent of the evidence adequate opportunity to defend its admissibility. Given the plain language of the *West Virginia Rules of Evidence*, the side trying to defend the admission of expert evidence must be given an adequate chance to do so.

5. A medical opinion based upon a properly performed differential diagnosis is sufficiently valid to satisfy the reliability prong of the Rule 702 inquiry under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993). A differential

diagnosis is a tested methodology, has been subjected to peer review / publication, does not frequently lead to incorrect results, and is generally accepted in the medical community. Opinions based on differential diagnosis must be analyzed on a case-by-case basis, ensuring that the medical expert's application of the technique is reliable and proper in each case.

Starcher, J.:

In this appeal from the Circuit Court of Kanawha County, we are asked to examine an order precluding the plaintiffs below from presenting the testimony of two expert witnesses in a case of food poisoning. The circuit court then went on to grant summary judgment to the defendant, on the basis that the plaintiffs did not have sufficient evidence to support their claim. On appeal, the parties debate whether the two experts – a treating physician and a director of a university food safety program – were qualified to testify and whether their opinions were sufficiently reliable to be admissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993).

After careful review of the record, and of the excellent briefs and arguments by the parties, we find that the circuit court erred in excluding the two experts. As set forth below, we reverse the circuit court’s summary judgment order, and remand the case for further proceedings.

I.
Facts & Background

Around noon on May 1, 2002, appellants Clinton and Jessie San Francisco visited a restaurant in Charleston, West Virginia, owned by the appellee, Wendy’s International, Inc. (“Wendy’s”). At the restaurant’s drive-through window, Mr. San

Francisco purchased, among other items, a “single”-sized hamburger with mustard, onions, pickles and tomato. The appellants then drove off and began eating their meals in the car.

Mr. San Francisco had eaten approximately one-quarter of his hamburger when he noticed that the burger was “red inside and wasn’t done, it was raw,” “tasted funny” and that the texture was “soft.” After this observation, Mr. San Francisco discarded the remainder of the hamburger.

Shortly thereafter, Mr. San Francisco became ill. His stomach began to bother him and he began to sweat profusely. Within one-and-a-half to two hours after eating the hamburger, Mr. San Francisco began experiencing vomiting and diarrhea.

Two days later, after continued pain and discomfort, on May 3, 2002, Mr. San Francisco was admitted to Logan General Hospital.¹ He remained in the hospital until May 13, 2002.

While at Logan General, Mr. San Francisco was treated by Dr. Peter Gregor, a physician who is board certified in internal medicine and cardiology and is familiar, based on his clinical experience, with a food poisoning diagnosis. Dr. Gregor conducted a work-up and analysis of Mr. San Francisco and performed a “differential diagnosis” to determine the cause of his illness. Using this method of diagnosis, during his examination, Dr. Gregor considered and then ruled out other potential causes of Mr. San Francisco’s illness, such as pre-existing gastrointestinal problems, alcohol use, peptic ulcer disease or diverticulitis.

¹The appellants are residents of Logan, West Virginia.

After considering Mr. San Francisco's history and condition – particularly noting that he vomited 1.8 liters of material while in the emergency room, an amount which Dr. Gregor considered substantial – Dr. Gregor concluded to a reasonable degree of medical certainty that Mr. San Francisco was suffering from a foodborne illness caused by the Wendy's hamburger. As Dr. Gregor later stated in his deposition:

If you ask me, do I think a hamburger at a restaurant with diarrhea, vomiting and fluid loss shortly thereafter was the cause of the hospitalization, I would say yes. . . . It was the hamburger.

On April 19, 2004, Mr. and Mrs. San Francisco filed the instant lawsuit against appellee Wendy's, alleging that the appellee had caused injury to Mr. San Francisco by selling an "unsafe, unwholesome, or unfit food product."

During discovery, the appellants identified two experts. The appellants identified Dr. Gregor as an expert who would testify that Mr. San Francisco suffered from a foodborne illness caused by the Wendy's hamburger. The appellants also identified Ewen Todd, Ph.D., an expert in food safety and toxicology from Michigan State University. Dr. Todd testified in a deposition that although the symptoms of Mr. San Francisco's illness were most consistent with verotoxin produced by *E. coli* O157:H7 bacteria, he became ill too quickly for a typical *E. coli* infection to have occurred; *E. coli* bacteria apparently require incubation of three to seven days from ingestion to produce enough verotoxin to induce symptoms. Instead, Dr. Todd was of the opinion that *E. coli* bacteria was present on the ground beef in the Wendy's hamburger; that the bacteria had produced verotoxin; and that the ingestion of the verotoxin in the Wendy's hamburger had produced the rapid onset of Mr.

San Francisco's symptoms. Dr. Todd's opinion was based upon a published scientific study which found that four days after *E. coli* bacteria was added to ground beef, verotoxins formed in the beef.²

After the completion of discovery, appellee Wendy's filed a motion for summary judgment – and, subsequently, motions *in limine* – to exclude the testimony of Dr. Gregor and Dr. Todd. The appellee argued that Dr. Gregor was unqualified to render medical testimony on injury and causation, and that neither Dr. Gregor's opinion nor Dr. Todd's opinion met the standards of admissibility under Rule 702 of the *West Virginia Rules of Evidence*, *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993).

In an order dated March 14, 2006, the circuit court excluded the testimony of Dr. Gregor and Dr. Todd, and granted summary judgment to the appellee. The circuit court concluded that under Rule 702, Dr. Gregor was not “qualified as an expert by knowledge, skill, experience, training or education.” Further, the circuit court found that Dr. Todd's opinion was “unreliable as a matter of law and inadmissible” under *Daubert* and *Wilt*. In the absence of the testimony of the two experts, the circuit court found insufficient evidence that Mr. San Francisco suffered from a foodborne illness caused by the Wendy's hamburger, and therefore granted summary judgment to the appellee.

²See Risini D. Weeratna and Michael P. Doyle, “Detection and Production of Verotoxin 1 of *Escherichia coli* O157:H7 in Food,” 57 *Applied and Environmental Microbiology* 2951 (Oct. 1991).

The appellants now appeal the circuit court's March 14, 2006 order.

II. *Standard of Review*

Our review of a circuit court's decision to grant a party a summary judgment under Rule 56 of the *Rules of Civil Procedure* is reviewed *de novo*. Syllabus Point 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Similarly, when we review a circuit court's decision that turns upon an interpretation of the *West Virginia Rules of Evidence*, a question of law is presented that is subject to a *de novo* review. Syllabus Point 1, *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995).

When considering the propriety of a circuit court's decision to admit or exclude the testimony of an expert witness, we generally examine the decision for an abuse of discretion. As we stated in Syllabus Point 6 of *Helmick v. Potomac Edison Co.*, 185 W.Va. 269, 406 S.E.2d 700 (1991):

The admissibility of testimony by an expert witness is a matter within the sound discretion of the trial court, and the trial court's decision will not be reversed unless it is clearly wrong.

See also Syllabus Point 5, *Overton v. Fields*, 145 W.Va. 797, 117 S.E.2d 598 (1960) (“Whether a witness is qualified to state an opinion is a matter which rests within the discretion of the trial court and its ruling on that point will not ordinarily be disturbed unless it clearly appears that its discretion has been abused.”)

However, when a circuit court excludes expert testimony as unreliable under the *Daubert/Wilt* gatekeeper analysis, we will review the circuit court’s method of conducting the analysis *de novo*. Syllabus Point 3, in part, *Gentry v. Mangum, supra*. (“Under *Daubert* . . . and *Wilt* . . . the reliability requirement is met only by a finding by the trial court under Rule 104(a) of the West Virginia Rules of Evidence that the *scientific* or technical theory which is the basis for the test results is indeed ‘scientific, technical, or specialized knowledge.’ The trial court’s determination regarding whether the scientific evidence is properly the subject of scientific, technical, or other specialized knowledge is a question of law that we review *de novo*.”). See also *Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 883 (10th Cir. 2005) (“We review *de novo* whether the district court applied the proper standard in determining whether to admit or exclude expert testimony.”).

With these standards in mind, we turn to the parties’ arguments.

III. *Discussion*

A. *General Principles under Rule 702*

The appellants argue that the circuit court misinterpreted the *West Virginia Rules of Evidence* regarding the admission of expert testimony, resulting in the improper exclusion of the opinions of Dr. Gregor and Dr. Todd about Mr. San Francisco’s injury and its cause. While the admissibility of expert testimony is governed by Rule 702 of the *Rules of Evidence*, several significant cases interpreting that rule – namely *Wilt v. Buracker*, 191

W.Va. 39, 443 S.E.2d 196 (1993) and *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995) – impose a “gatekeeper” duty upon trial courts to screen scientific expert opinions to ensure they are both relevant to the case and based upon reliable methodologies. Accordingly, the issue in this case is whether the circuit court properly performed its “gatekeeper” function under Rule 702.

“The Rules of Evidence embody a strong and undeniable preference for admitting any evidence which has the potential for assisting the trier of fact.” *Kannankeril v. Terminix International, Inc.*, 128 F.3d 802, 806 (3rd Cir. 1997). To assist the trier of fact, Rule 702 of the *Rules of Evidence* permits opinion testimony by an expert, and states:

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.

“Rule 702 reflects an attempt to liberalize the rules governing the admissibility of expert testimony.” *Weisgram v. Marley Co.*, 169 F.3d 514, 523 (8th Cir. 1999). *See also Gentry v. Mangum*, 195 W.Va. at 520, 466 S.E.2d at 179. (“In *Daubert/Wilt*, the *Frye* test was abandoned by the courts, concluding that *Frye*’s rigid standard was inconsistent with the liberal thrust of the Federal and West Virginia Rules of Evidence.”); *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988) (highlighting the “liberal thrust’ of the Federal Rules and their ‘general approach of relaxing the traditional barriers to opinion testimony.’”). The rule “is one of admissibility rather than exclusion.” *Arcoren v. United States*, 929 F.2d 1235, 1239 (8th Cir. 1991).

Following in the footsteps of the U.S. Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), we determined in *Wilt* that trial courts have a gatekeeping function under Rule 702 for determining the admissibility of expert scientific testimony. In *Wilt*, and later in *Gentry*, we explained that circuit courts must conduct a two-part inquiry under Rule 702 and ask: (1) is the witness an expert; and, if so, (2) is the expert's testimony relevant and reliable?

As to the first part of the inquiry, in Syllabus Point 5 of *Gentry* the Court explained the steps that a trial court should take to determine if an expert is qualified to render an opinion under Rule 702:

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.

“Rule 702 permits a circuit court to qualify an expert by virtue of education or experience or by some combination of these attributes. . . . [W]e have stated clearly that a broad range of knowledge, skills, and training qualify an expert as such, and rejected any notion of imposing overly rigorous requirements of expertise.” *Gentry*, 195 W.Va. at 524-25, 466 S.E.2d at 183-84.

Second, if the expert is qualified, the analysis turns to whether the expert's proffered opinion is relevant and reliable. In *Wilt*, this Court adopted a standard similar to

that established by the United States Supreme Court in *Daubert*. The *Wilt* Court stated, in Syllabus Point 2, that:

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 the 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.

We later expounded upon our holding in *Wilt* in Syllabus Point 4 of *Gentry*, where we explained:

When scientific evidence is proffered, a circuit court in its "gatekeeper" role under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993), *cert denied*, 511 U.S. 1129, 114 S.Ct. 2137, 128 L.Ed.2d 867 (1994), must engage in a two-part analysis in regard to the expert testimony. First, the circuit court must determine whether the expert testimony reflects scientific knowledge, whether the findings are derived by scientific method, and whether the work product amounts to good science. Second, the circuit court must ensure that the scientific testimony is relevant to the task at hand.

As noted above, *Daubert* and *Wilt* provide several factors a trial court can apply to assess the reliability of expert testimony: whether the scientific theory and its conclusion can be or have been tested; whether the scientific theory has been subjected to

peer review and publication; whether the scientific theory's actual or potential rate of error is known; and whether the scientific theory is generally accepted within the scientific community. Syllabus Point 2, *Wilt*.

These factors are by no means a definitive checklist or test of reliability. Other courts have developed additional factors, such as whether the scientific theory “was developed for litigation or naturally flowed from the expert’s research; whether the proposed expert ruled out other alternative explanations; and whether the proposed expert sufficiently connected the proposed testimony with the facts of the case.” *Lauzon v. Senco Products, Inc.*, 270 F.3d 681, 687 (8th Cir. 2001) (citations omitted). Sometimes, a theory first appears in court because of “(a) the inability to publish in a peer review journal because of industry control, (b) the testimony is not novel and therefore of little publication interest, [or] (c) the topic is of little general interest.” Larry E. Coben, *Crashworthiness Litigation*, § 24:4 [1998]. A court may treat an expert’s qualifications as circumstantial evidence that he or she has used a scientifically valid methodology or mode of reasoning in drawing his or her conclusions. *Ambrosini v. Labarraque*, 101 F.3d 129, 140 (D.C. Cir. 1996). In sum, regardless of what other factors a court considers, an expert’s opinion is still reliable and admissible if “the expert explains precisely how the conclusions were reached and points to an objective source to show that his or her conclusions are based on a scientific method used by at least a minority of scientists in the field.” Coben, *Crashworthiness Litigation*.³

³One court summarized the non-exclusive guidelines as including:

(continued...)

When assessing the reliability of an expert’s opinion, a trial court’s role as a “gatekeeper” is to determine whether the reasoning or methodology underlying the testimony is scientifically valid. “Evaluating the reliability of scientific methodologies and data does not generally involve assessing the *truthfulness* of the expert witnesses[.]” *Gentry*, 195 W.Va. at 519, 466 S.E.2d at 178, *quoting in part, In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 749 (3rd Cir. 1994). Instead, under *Daubert/Wilt* and *Gentry* a trial court

conducts an inquiry into the validity of the underlying science, looking at the soundness of the principles or theories and the reliability of the process or method as applied to the case. *The problem is not to decide whether the proffered evidence is right, but whether the science is valid enough to be reliable.*

Gentry, 195 W.Va. at 523, 466 S.E.2d at 182. Put simply, a trial court acting as a gatekeeper should take care to not invade the province of the jury, whose job it is to decide issues of credibility and persuasiveness, and to determine the weight that should be given to the expert’s opinion.

³(...continued)

(1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique’s operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses to which the method has been put.

In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 742 n. 8. (3rd Cir. 1994).

The instant case raises a problem, one that was alluded to by the Court in *Gentry*, and that is when and how challenges to the reliability of an expert's testimony are brought under Rule 702 and *Daubert/Wilt*. *Gentry*, 195 W.Va. at 522, 466 S.E.2d at 181. Appellee Wendy's sought the exclusion of the testimony of the appellants' two experts in a motion for summary judgment filed after the close of discovery, but later reiterated its position verbatim in motions *in limine* filed on the eve of trial. The circuit court heard argument from the parties on both sets of motions in a pretrial hearing, and entered a written order that excluded the testimony of both experts and granted summary judgment to the appellee the same day.

In *Gentry*, the Court suggested that *Daubert/Wilt* challenges to scientific evidence should be rare, and said that "most scientific validity issues will be resolved under judicial notice pursuant to Rule 201." *Id.* However, when challenges need to be made, the *Gentry* Court indicated that motions *in limine* are likely the best vehicle, because "the best time to review and resolve scientific issues is at the pretrial level." 195 W.Va. at 521, 466 S.E.2d at 180. In making a motion *in limine*, the initial burden of production rests on the opponent of the expert's opinion. 195 W.Va. at 522, 466 S.E.2d at 181.

Daubert/Wilt challenges can play a role during the summary judgment phase of civil litigation. However, the few courts addressing the issue have concluded that the *Daubert* gatekeeping regime is of limited utility in the context of a summary judgment motion, and have held that the better practice is to permit the parties a hearing to defend the admissibility of an expert's proffered opinion. As one court stated:

The fact that *Daubert* can be used in connection with summary judgment motions does not mean that it should be used profligately. A trial setting normally will provide the best operating environment for the triage which *Daubert* demands. *Voir dire* is an extremely helpful device in evaluating proffered expert testimony . . . and this device is not readily available in the course of summary judgment proceedings. Moreover, given 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. Because the summary judgment process does not conform well to the discipline that *Daubert* imposes, the *Daubert* regime should be employed only with great care and circumspection at the summary judgment stage.

We conclude, therefore, that at the junction where *Daubert* intersects with summary judgment practice, *Daubert* is accessible, but courts must be cautious – except when defects are obvious on the face of a proffer – not to exclude debatable scientific evidence without affording the proponent of the evidence adequate opportunity to defend its admissibility.

Cortés-Irizarry v. Corporación Insular de Seguros, 111 F.3d 184, 188 (1st Cir. 1997). Like the instant case, in *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412 (3rd Cir. 1999), the appellate court reviewed an order by a trial court that excluded a plaintiff’s expert report under *Daubert* and then granted summary judgment to a defendant. The *Padillas* court found the trial court’s failure to hold a hearing to review the *Daubert* issue was an abuse of discretion, stating:

We have long stressed the importance of in limine hearings under Rule 104(a) in making the reliability determination required under Rule 702 and *Daubert*. See *United States v. Downing*, 753 F.2d 1224, 1241 (3d Cir.1985) (“It would appear that the most efficient procedure that the district court can use in making the reliability determination is an in limine hearing.”). In *In re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829 (3d

Cir.1990), we reversed a summary judgment for defendants because the district court, in excluding expert evidence under Rule 703, had failed to “provide [] the plaintiffs with sufficient process for defending their evidentiary submissions.” *Id.* at 854. We explained:

The adversarial process upon which our legal system is based assumes that a fact finder will give the parties an adequate opportunity to be heard; if it does not, it cannot find facts reliably. Thus, the detailed factual record requirement, firmly entrenched in our jurisprudence, requires adequate process at the evidentiary stage, particularly when a summary judgment may flow from it.

Id. (citations omitted). We reiterated our *Paoli* holding in *Hines v. Consolidated Rail Corp.*, 926 F.2d 262, 272 (3d Cir. 1991) (“A detailed factual record is required at the evidentiary stage, particularly when a summary judgment may result.”). And in *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994), we declared:

Given the “liberal thrust” of the federal rules it is particularly important that the side trying to defend the admission of evidence be given an adequate chance to do so.

Id. at 739 (citation omitted); *see also* Margaret A. Berger, *Procedural Paradigms for Applying the Daubert Test*, 78 Minn. L.Rev. 1345, 1365 (1994) (reviewing admissibility of expert testimony in light of the “liberal thrust” of the Federal Rules of Evidence).

186 F.3d at 417.

Although courts considering the question have found that *in limine* hearings are generally recommended prior to making a *Daubert*-type determination, they are not required. “The only legal requirement is that the parties ‘have an adequate opportunity to be

heard' before the district court makes its decision." *Group Health Plan, Inc. v. Philip Morris USA, Inc.*, 344 F.3d 753, 761 n.3 (8th Cir. 2003). But by holding a hearing focused exclusively on the expert's proffered opinion, both the trial court and this Court on appellate review will be fully informed. As the Mississippi Supreme Court recently stated,

Prior to any *Daubert* determination or other decision regarding the proffer of expert evidence, the parties must be afforded the opportunity to be heard. We generally recommend that the trial court conduct an in limine hearing specifically on the subject, as this procedure will result in full briefing and argument by the parties regarding the proposed expert testimony. This will not only assist the trial court in its function as evidentiary gatekeeper; it will provide a fuller record for an appellate court should the parties contest the evidentiary ruling. While an in limine hearing may not be necessary in all cases, it does provide the most efficient manner of addressing the issue in many cases.

Smith ex rel. Smith v. Clement, ___ So.2d ___, ___, 2007 WL 2874937, *3 (Miss. Oct. 4, 2007).

We therefore hold that because the summary judgment process does not conform well to the discipline and analysis that *Daubert* and *Wilt* impose, the *Daubert/Wilt* regime should be employed only with great care and circumspection at the summary judgment stage. Courts must be cautious – except when defects are obvious on the face of a proffered expert opinion – not to exclude debatable scientific evidence without affording the proponent of the evidence adequate opportunity to defend its admissibility. Given the plain language of the *West Virginia Rules of Evidence*, the side trying to defend the admission of expert evidence must be given an adequate chance to do so.

With these guidelines in mind, we turn now to the specific arguments of the parties concerning the proffered expert opinions of Dr. Gregor and Dr. Todd.

B.
The Testimony of Dr. Gregor

The appellants argue that the circuit court abused its discretion in excluding Dr. Gregor's testimony, because (1) Dr. Gregor is qualified as an expert to render an opinion on the identity and cause of appellant Mr. San Francisco's illness, and (2) Dr. Gregor's opinion is reliable under *Daubert/Wilt*.

As to Dr. Gregor's qualifications as an expert, the appellants assert that Dr. Gregor is a physician board-certified in internal medicine with a sub-specialty in cardiovascular disease. During his time in practice from 1979 until 2002 (some 23 years), Dr. Gregor treated numerous gastrointestinal conditions, including diagnosing and treating multiple patients suffering from foodborne illnesses. The appellants point out that the *Gentry* Court stated that "once an expert passes the minimal threshold, further credentials *affect the weight* of the testimony *not its admissibility*." 195 W.Va. at 523 n. 14, 466 S.E.2d at 182 n. 14. The appellants therefore argue that because Dr. Gregor is qualified to diagnose patient illnesses (including foodborne illnesses), diagnose the cause of those illnesses, and then treat patients in a hospital setting, he is similarly qualified to render an opinion on the diagnosis and cause of an illness in a courtroom.

The appellee, however, argues that Dr. Gregor does not have a specialization in gastroenterology or epidemiology. Further, Dr. Gregor had never testified in court

regarding foodborne illnesses prior to this case, had never conducted research or studies on the topic, and had never worked in the fields of epidemiology or public health. The appellee cites to Dr. Gregor's own deposition testimony, where he admitted that medical experts in other fields would be better qualified to render an opinion:

A. . . . And I'm not an expert in the etiology of foodborne illness, nor do I claim to be one today.

Q. Okay. Would you then defer to the opinions of a qualified gastroenterologist or infectious disease expert on those issues regarding etiology?

A. As regards to organism?

Q. Right. Organism or causation.

A. Yes.

The appellee argues that, while Dr. Gregor is highly qualified as a board certified cardiologist, he is not a gastroenterologist, infectious disease physician, public health physician, or epidemiologist – all of which are medical fields that deal specifically with foodborne illnesses. Accordingly, the appellee asserts that the circuit court was fairly persuaded that Dr. Gregor did not possess the necessary threshold of expertise to testify, and properly was within its discretion in excluding Dr. Gregor's testimony.

After careful consideration, we reject the appellee's position because it is directly contrary to Rule 702 and our holding in *Gentry*. Rule 702 states that a broad range of knowledge, skills, and training qualify an expert as such, and *Gentry* made clear that we have rejected any notion of imposing overly rigorous requirements of expertise. In *Gentry*,

the Court expressed the concern that there is no “best expert” rule, and “[n]either a degree nor a title is essential, and a person with knowledge or skill borne of practical experience may qualify as an expert.” 195 W.Va. at 525 and n. 18, 466 S.E.2d at 184 and n. 18. Therefore, “[b]ecause of the ‘liberal thrust’ of the rules pertaining to experts, circuit courts should err on the side of admissibility.” *Id.*

The *Gentry* Court stated plainly that “[d]isputes as to the strength of an expert’s credentials . . . go to weight and not to the admissibility of their testimony. 195 W.Va. at 527, 466 S.E.2d at 186, *citing Daubert*, 509 U.S. at 594 (“Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”). *See also* Syllabus Point 3, *Walker v. Sharma*, ___ W.Va. ___, ___ S.E.2d ___ (No. 33308, Nov. 8, 2007) (“[I]ssues that arise as to the physician’s personal use of a specific technique or procedure to which he or she seeks to offer expert testimony go only to the weight to be attached to that testimony and not to its admissibility.”)

As a physician board-certified in internal medicine, with several decades of experience diagnosing and treating patients with foodborne illnesses, Dr. Gregor meets the minimal educational or experiential qualifications in a field that is relevant to the subject under investigation which will assist the trier of fact. A broad range of knowledge, skills and training qualify Dr. Gregor to offer his opinion regarding the diagnosis and cause of Mr. San Francisco’s illness. Furthermore, Dr. Gregor’s area of expertise covers the particular opinion as to which he seeks to testify. While a physician with a specialization in gastroenterology

or epidemiology might, as the appellee wishes, be better qualified to render an opinion on behalf of the appellants, *Gentry* and Rule 702 do not impose such “overly rigorous requirements of expertise.” *Gentry*, 195 W.Va. at 524-25, 466 S.E.2d at 183-84. “While the court may rule that a certain subject of inquiry requires that a member of a given profession, such as a doctor, an engineer, or a chemist, be called, *usually a specialist in a particular branch within the profession will not be required.*” 195 W.Va. at 526, 466 S.E.2d at 185, *quoting* Charles McCormick, *Evidence* ¶ 14 at 29 (1954).

Accordingly, we conclude that the circuit court erred in excluding Dr. Gregor’s testimony on the basis that Dr. Gregor was not qualified to offer expert testimony under Rule 702.

Once an expert is deemed qualified, the trial court must address whether the methodology underlying the expert’s conclusion is reliable. The appellants argue that Dr. Gregor’s opinion is reliable under the *Daubert/Wilt* analysis, and that the circuit court erred when it excluded the opinion.

The appellants assert that Dr. Gregor’s opinion was formed through a scientific method called “differential diagnosis.” “Differential diagnosis involves ‘the determination of which one of two or more diseases or conditions a patient is suffering from, by systematically comparing and contrasting their clinical findings.’” *McClain v. Metabolife Intern., Inc.*, 401 F.3d 1233, 1252 (11th Cir. 2005) (*quoting* *Dorland’s Illustrated Medical Dictionary* 240 (Douglas M. Anderson et al. ed., 29th Ed. 2000)). “Differential diagnosis, or differential etiology, is a standard scientific technique of identifying the cause of a medical

problem by eliminating the likely causes until the most probable one is isolated.” *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 262 (4th Cir. 1999).

The appellants indicate that Dr. Gregor was on staff at Logan General Hospital on May 3, 2002, and treated Mr. San Francisco in the hospital’s emergency room. Dr. Gregor noted his patient’s symptoms, particularly noting that Mr. San Francisco vomited 1.8 liters while in the emergency room. After considering his patient’s symptoms and history, Dr. Gregor ruled out various likely causes for the illness after finding no pre-existing gastrointestinal problems, no alcohol use, no peptic ulcer disease and no history of diverticulitis. Dr. Gregor conducted a clinical examination of Mr. San Francisco, reviewed his medical history, his recent travel history, and his food intake history. Taking all of these factors together, Dr. Gregor eliminated various likely causes and concluded that the most probable cause of Mr. San Francisco’s problem was a foodborne illness caused by the allegedly undercooked Wendy’s hamburger. When asked why he chose the undercooked hamburger as the cause of plaintiff’s illness as opposed to other possibilities, Dr. Gregor explained “[i]t’s the highest probability of a series of possibilities.”

The appellee responds by arguing that Dr. Gregor’s opinion is still unreliable and inadmissible. While Dr. Gregor might be trained in the process of deducing a disease based on a set of symptoms and laboratory tests, the appellee argues that Dr. Gregor was essentially speculating about the cause of Mr. San Francisco’s illness. The appellee suggests in its brief, as a factual matter, that there are “more obvious culprits of Mr. San Francisco’s

illness” in the foods that Mr. San Francisco ate⁴ and in the people that Mr. San Francisco visited⁵ in the week preceding his eating of the Wendy’s hamburger. But in answer to the appellants’ legal position, the appellee essentially argues that a differential diagnosis of a particular illness does not necessarily result in a relevant and reliable opinion of the cause of the illness. “The ability to diagnose medical conditions is not remotely the same, however, as the ability to deduce, delineate, and describe, in a scientifically reliable manner, the causes of those medical conditions.” *Wynacht v. Beckman Instruments, Inc.*, 113 F.Supp.2d 1205, 1209 (E.D. Tenn. 2000).

In general terms, physicians routinely rely upon differential diagnosis for establishing causation. The overwhelming majority of courts that have addressed the issue have held that a medical opinion on causation based upon a reliable differential diagnosis is sufficiently valid to satisfy the reliability prong of the Rule 702 inquiry. “Most circuits have held that a reliable differential diagnosis satisfies *Daubert* and provides a valid foundation for admitting an expert opinion. The circuits reason that a differential diagnosis is a tested methodology, has been subjected to peer review / publication, does not frequently lead to

⁴In the week before eating the hamburger, Mr. San Francisco ate a ham, home-cooked chicken strips, homemade beef stew, pork chops, potato salad, and other items. The appellee asserts that the time lapse between eating these foods and the onset of illness is an incubation period consistent with the general state of medical knowledge concerning the length of time it takes for tainted food to cause food poisoning.

⁵Mr. San Francisco visited his grandson in the hospital in the days before his illness. The appellee posits that Mr. San Francisco may have contracted a bacteria or virus from another individual or from contact with a surface of some sort during this visit.

incorrect results, and is generally accepted in the medical community.” *Turner v. Iowa Fire Equip. Co.*, 229 F.3d 1202, 1208 (8th Cir. 2000).⁶ *In accord*, *Heller v. Shaw Indus., Inc.*, 167 F.3d 146, 154-55 (3rd Cir. 1999) (noting “that differential diagnosis ‘consists of a testable hypothesis,’ has been peer reviewed, contains standards for controlling its operation, is generally accepted, and is used outside of the judicial context.”).

Even with all the advances of medical science, the practice of medicine remains an art. A properly conducted and explained differential diagnosis is not “junk science.” If a differential diagnosis provides a sufficient basis on which to prescribe medical treatment with potential life-or-death consequences, it should be considered reliable enough to assist a fact finder in understanding certain evidence or determining certain fact issues.

Coastal Tankships, U.S.A., Inc. v. Anderson, 87 S.W.3d 591, 604-05 (Tex.App. 2002).

⁶*See, e.g., Feliciano-Hill v. Principi*, 439 F.3d 18, 25 (1st Cir. 2006) (finding that differential diagnosis is a reliable technique under *Daubert*); *Bitler v. A.O. Smith Corp.*, 391 F.3d 1114, 1123-24 (10th Cir. 2004) (finding that differential diagnosis is “a common method of analysis” and is reliable under *Daubert*); *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1058-59 (9th Cir. 2003) (recognizing differential diagnosis as a reliable method); *Mattis v. Carlon Elec. Prods.*, 295 F.3d 856, 861 (8th Cir. 2002) (holding that “[a] medical opinion based upon a proper differential diagnosis is sufficiently reliable to satisfy *Daubert*”); *Hardyman v. Norfolk & W. Ry. Co.*, 243 F.3d 255, 261 (6th Cir. 2001) (recognizing differential diagnosis as an acceptable method of determining causation); *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 262 (4th Cir. 1999) (holding that differential diagnosis is a reliable technique “of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated”); *Zuchowicz v. United States*, 140 F.3d 381, 387 (2nd Cir. 1998) (upholding district court decision to admit differential diagnosis testimony); *Ambrosini v. Labarraque*, 101 F.3d 129, 140-41 (D.C.Cir.1996) (holding that because expert opinion was based on differential diagnosis, district court abused its discretion in refusing to admit it); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 758 (3rd Cir. 1994) (upholding district court decision to admit differential diagnosis because it “has widespread acceptance in the medical community, has been subject to peer review, and does not frequently lead to incorrect results.”).

However, while most courts recognize the methodology of differential diagnosis as a scientifically valid way of determining causation, the same courts also warn that opinions based on differential diagnosis must be analyzed on a case-by-case basis, ensuring that the expert's application of the technique is reliable and proper in each case. As the Eleventh Circuit Court of Appeals explained:

[A]n expert does not establish the reliability of his techniques or the validity of his conclusions simply by claiming that he performed a differential diagnosis on the patient. . . . “No one doubts the utility of medical histories in general or the process by which doctors rule out some known causes of disease in order to finalize a diagnosis. But such general rules must . . . be applied fact-specifically in each case.”

McClain v. Metabolife Int'l, Inc., 401 F.3d at 1253 (quoting *Black v. Food Lion, Inc.*, 171 F.3d 308, 314 (5th Cir. 1999)); see also *In re Paoli*, 35 F.3d at 758 (Differential diagnosis “is a method that involves assessing causation with respect to a particular individual. As a result, the steps a doctor has to take to make that (differential) diagnosis reliable are likely to vary from case to case[.]”)

Thus, an expert's use of differential diagnosis is reliable and valid only if the expert applied the technique in a manner which is also reliable. “A reliable differential diagnosis typically, though not invariably, is performed after physical examinations, the taking of medical histories, and the review of clinical tests, including laboratory tests, and generally is accomplished by determining the possible causes for the patient's symptoms and then eliminating each of these potential causes until reaching one that cannot be ruled out or

determining which of those that cannot be excluded is the most likely.” *Westberry*, 178 F.3d at 262 (citation and internal quotation marks omitted).

The elements of a differential diagnosis may consist of the performance of physical examinations, the taking of medical histories, and the review of clinical tests, including laboratory tests. A doctor does not have to employ all of these techniques in order for the doctor’s diagnosis to be reliable. A differential diagnosis may be reliable with less than all the types of information set out above. . . .

Depending on the medical condition at issue and on the clinical information already available, a physician may reach a reliable differential diagnosis without himself performing a physical examination, particularly if there are other examination results available. In fact, it is perfectly acceptable, in arriving at a diagnosis, for a physician to rely on examinations and tests performed by other medical practitioners.

Kannankeril v. Terminix Intern., Inc., 128 F.3d at 807. *See also In re Paoli*, 35 F.3d at 762 (“[E]valuation of the patient’s medical records is a reliable method of concluding that a patient is ill even in the absence of a physical examination.”) “A differential diagnosis that fails to take serious account of other potential causes may be so lacking that it cannot provide a reliable basis for an opinion on causation. However, a medical expert’s causation conclusion [based on a differential diagnosis] should not be excluded because he or she has failed to rule out every possible cause of a plaintiff’s illness. The alternative causes suggested by a defendant affect the weight that the jury should give the expert’s testimony and not the admissibility of that testimony.” *Westberry*, 178 F.3d at 265 (citation and internal quotation marks omitted).

Differential diagnosis is not a scientific method which lends itself to establishing a direct link between an activity and an illness or injury. Instead, it is a method by which a physician “considers all relevant potential causes and then eliminates alternative causes. . . .” Federal Judicial Center, *Reference Manual on Scientific Evidence* 214 (1994). It is a process of elimination based upon a study limited to an evaluation of the patient alone.

We therefore conclude that a medical opinion based upon a properly performed differential diagnosis is sufficiently valid to satisfy the reliability prong of the Rule 702 inquiry under *Daubert/Wilt*. A differential diagnosis is a tested methodology, has been subjected to peer review / publication, does not frequently lead to incorrect results, and is generally accepted in the medical community. Opinions based on differential diagnosis must be analyzed on a case-by-case basis, ensuring that the medical expert’s application of the technique is reliable and proper in each case.

When Dr. Gregor was questioned regarding his opinion as to causation, and why he chose the undercooked hamburger as the cause of the appellant’s illness as opposed to other possibilities, Dr. Gregor explained that “[i]t’s the highest probability of a series of possibilities.” Appellee Wendy’s argues that Dr. Gregor’s differential diagnosis was unreliable because he failed to definitively rule out all other potential causes for Mr. San Francisco’s illness. However, we believe that the alternative causes suggested by the appellee affect the weight that the jury should give the expert’s testimony, and not the admissibility of that testimony. *See, e.g., McCulloch v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2nd Cir. 1995) (recognizing that perceived faults in a doctor’s differential diagnosis are

matters for cross-examination that do not affect admissibility); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d at 764-65 (recognizing that failure to account for all possible causes does not render expert opinion based on differential diagnosis inadmissible; only if the expert utterly fails to consider alternative causes or fails to explain why the opinion remains sound in light of alternative causes suggested by the opposing party is the expert's opinion unreliable for failure to account for all potential causes).

We therefore conclude that, under a *Daubert/Wilt* analysis, Dr. Gregor's differential diagnosis of the cause of Mr. San Francisco's illness is reliable and admissible.

C.
The Admissibility of Dr. Todd's Testimony

The appellants next argue that the circuit court erred in excluding the testimony of their food safety expert, Dr. Todd, on the basis that his theory was unreliable. Dr. Todd indicated that Mr. San Francisco's rapid illness was consistent with eating pre-formed verotoxin produced by *E. coli* 0157:H7 bacteria in the undercooked Wendy's hamburger. The circuit court excluded Dr. Todd's opinion based upon the appellee's argument that there has, to date, been limited publication or peer review on this subject, and that none of the medical tests performed on Mr. San Francisco at Logan General Hospital – several days after eating the hamburger – found verotoxin or *E. coli* bacteria.

The appellants argue that Dr. Todd's theory is logical and is supported by published literature. Based upon Mr. San Francisco's symptoms, Dr. Todd concluded to a reasonable degree of probability that the cause of Mr. San Francisco's illness was from pre-

formed verotoxin produced by *E. coli* in ground beef. To support this, Dr. Todd cited to a study in a journal which found that *E. coli* sitting in uncooked ground beef can produce verotoxin. Furthermore, the appellants point to Dr. Todd's wealth of knowledge on the subject of food safety; the record contains Dr. Todd's *curriculum vitae*, which extends for some 77 single-spaced pages.⁷

The appellees respond that Dr. Todd's conclusions are not reliable under a *Daubert/Wilt* analysis. The appellees concede that, in *Daubert*, *Wilt* and *Gentry*, trial judges were admonished that the focus of their reliability analysis must be "solely on principles and methodology, not on the conclusions they generate." *Daubert*, 509 U.S. at 595. See Syllabus Point 2, *Wilt* (a trial court's inquiry must assess an expert's conclusion "by considering its underlying scientific methodology and reasoning."); *Gentry*, 195 W.Va. at 523, 466 S.E.2d at 182 ("The problem is not to decide whether the proffered evidence is right, but whether the science is valid enough to be reliable.").

Still, the appellees contend that "nothing in the Rules [of Evidence] appears to have been intended to permit experts to speculate in fashions unsupported by . . . the uncontroverted evidence." *Gentry*, 195 W.Va. at 527, 466 S.E.2d at 186 (citation omitted).

The appellees assert that Dr. Todd's opinion is based on assumptions which are speculative

⁷The record indicates that Dr. Todd secured a Ph.D. in the "Taxonomy of Staphylococci and Micrococci" in 1968 from the University of Glasgow, Scotland. He then emigrated to Canada, where he worked until 2001 as a research scientist on the "reporting and surveillance of foodborne disease" for the Health Protection Branch of Health Canada. Dr. Todd is currently the Director of the National Food Safety and Toxicology Center at Michigan State University.

and are not supported by the record. For instance, the appellees point out that there are no laboratory results identifying the foodborne organism that caused Mr. San Francisco's illness. Further, while Dr. Todd's opinion is based upon a study indicating that meat containing *E. coli* bacteria can – after four days at a temperature of 98.6 – develop verotoxins, the appellee points out that Dr. Todd presumed in forming his opinion that the Wendy's hamburger was handled under “abusive” manufacturing conditions. In other words, the appellee contends that Dr. Todd speculated that the meat in the Wendy's hamburger was mishandled,⁸ and speculated that the meat contained *E. coli* bacteria, when there is no direct evidence in the record to support that position.

The appellants counter the appellee's position by arguing that, in proving a food poisoning lawsuit, positive proof by scientific testing is not required. Instead, the appellants argue that “[i]n the absence of direct evidence of the defectiveness of the food, recovery could be supported by circumstantial evidence if every other reasonable hypothesis as to the cause of the plaintiff's illness could be excluded.” *Castleberry's Food Co. v. Smith*, 424 S.E.2d 33 (Ga. 1992). We agree.

To begin, this Court has never required “positive proof by scientific testing to establish a factual basis for medical diagnosis and opinion.” *Bussey v. E.S.C. Restaurants*,

⁸We note, however, that Dr. Todd said in his deposition that his opinion was based upon county health department inspection reports which, on five occasions, cited the Wendy's restaurant for “temperature abnormalities” such as “temperatures that were either above the recommended temperature for storage of food or below the temperature for dishwasher use.”

Inc., 270 Va. 531, 537, 620 S.E.2d 764, 767 (2005). Dr. Gregor testified, in his deposition, that Logan General Hospital – a rural hospital – had limited laboratory facilities to test for foodborne illnesses, and that it was not standard medical practice to retain bodily fluids for later testing. As the *Bussey* court indicated, “food poisoning is a ‘fairly common illness’ for which scientific testing would not be cost effective, and the ‘emphasis is on the last meal before the event.’” *Id.*

The circuit court based its decision to exclude Dr. Todd’s testimony, in large part, upon the fact that his conclusion had not been tested, and that his theory had not been subjected to peer review and publication. Syllabus Point 2, *Wilt*. However, these factors listed in *Wilt* are by no means a definitive checklist or test of reliability. Our review of the record indicates that Dr. Todd sufficiently connected the proposed testimony with the facts of the case. Because food poisoning is a fairly common illness, we see nothing novel in Dr. Todd’s theory that would warrant great interest in its publication. Further, a court may treat an expert’s qualifications as circumstantial evidence that he or she has used a scientifically valid methodology or mode of reasoning in drawing his or her conclusions. *Ambrosini v. Labarraque*, 101 F.3d 129, 140 (D.C. Cir. 1996). Dr. Todd’s extensive background in food safety circumstantially suggests he used a valid methodology in drawing his conclusions. Simply put, we believe that Dr. Todd’s opinion is admissible because he explained precisely how the conclusions were reached, and pointed to an objective source to show that his conclusions were based on a scientific method used by at least a minority of scientists in the field.

We believe that the conflict between the positions taken by the parties regarding Dr. Todd's conclusions did not render his testimony unreliable, but instead created a jury issue regarding the weight to be given to the testimony. Accordingly, we find that the circuit court erred in excluding Dr. Todd's testimony.

D.
Order Granting Summary Judgment

Finally, the appellants contend that the circuit court erred in granting summary judgment to the appellees, after excluding both of the appellant's causation witnesses.

“A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).” “Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.” Syllabus Point 4, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

The circuit court granted summary judgment on the basis that the appellants had no evidence of causation, that is, no evidence that the Wendy's hamburger was the cause of Mr. San Francisco's illness. Having found that the circuit court erred in excluding both of the appellants' causation experts, we now find that the appellants made a sufficient showing on an essential element of the case that they had the burden to prove. Accordingly,

because it now appears from the record that genuine issues of fact exist to be tried, we find that the circuit court erred in granting summary judgment.

IV.
Conclusion

The circuit court's order of March 14, 2006 is reversed, and the case is remanded for further proceedings.

Reversed and Remanded.