

No. 33383 - *State of West Virginia ex rel. Lambert Turner Jones, II, and Red Jones Auto Mart, Incorporated, a Corporation v. Arthur M. Recht, Judge of the Circuit Court of Ohio County and George P. Naum and Joan Naum*

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OF WEST VIRGINIA

Davis, C.J., concurring, in part, and dissenting, in part:

In this case, the majority correctly determined that Mr. Jones’s expert witness, Dr. Sheptak, should have been permitted to testify and that the circuit court erred by refusing his testimony. I write separately to address two matters. First, although the majority correctly found that Dr. Sheptak should have been permitted to testify, the majority incorrectly limited his testimony to exclude any reference to “biomechanics,” and from that ruling, I respectfully dissent. Insofar as Dr. Sheptak was qualified as a neurosurgeon to render expert testimony in this case, he should have been permitted to offer an opinion as to the neurological effects, if any, of the underlying accident vis-a-vis the injuries which Dr. Naum has attributed thereto. I write further to touch upon a recurrent issue arising in the circuit courts of this State: the automatic exclusion of expert witness testimony even though the expert is qualified to render such an opinion and the expert’s testimony is admissible. *See San Francisco v. Wendy’s Int’l, Inc.*, \_\_\_ W. Va. \_\_\_, \_\_\_ S.E.2d \_\_\_ (No. 33284 Nov. 21, 2007) (Davis, C.J., concurring) (commenting on exclusion of testimony of expert witnesses). *Cf. Walker v. Sharma*, \_\_\_ W. Va. \_\_\_, \_\_\_ S.E.2d \_\_\_ (No. 33308 Nov. 8, 2007) (Davis, C.J., concurring) (emphasizing that once trial court has found expert qualified

to testify, determination of weight to be afforded to expert's testimony rests within province of fact finder). Given the pervasiveness of this problem, a clarification of the circuit courts' "gatekeeper" role," Syl. pt. 4, in part, *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171 (1995), is in order.

Rule 702 of the West Virginia Rules of Evidence authorizes testimony by expert witnesses. Specifically, "[i]f 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." *Id.* See also W. Va. R. Evid. 703 (explaining "[b]ases of opinion testimony by experts"); W. Va. R. Evid. 705 (discussing "[d]isclosure of facts or data underlying expert opinion"); W. Va. R. Evid. 706 (permitting "[c]ourt appointed experts"). It is apparent, then, that Rule 702 requires a trial court to make three threshold determinations: (1) whether "scientific . . . knowledge"<sup>1</sup> would be instructive to rendering a decision in the case, (2) whether the proffered witness is qualified to render an opinion as an expert witness, and (3) whether the expert witness's testimony is admissible.

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<sup>1</sup>Although the Court recognizes a distinction between "scientific" and non-scientific "technical" evidence permitted under Rule 702 and the corresponding analysis to determine such evidence's admissibility, this separate opinion will focus solely upon "scientific" evidence insofar as that is the type of expert testimony that is at issue in the case *sub judice*. See generally Robin Jean Davis, *Admitting Expert Testimony in Federal Courts and its Impact on West Virginia Jurisprudence*, 104 W. Va. L. Rev. 485 (2002) (arguing that no distinction should be made between "scientific" and "technical" evidence).

First, the trial court must ascertain whether “scientific knowledge” would assist the trier of fact in rendering a decision in the case. With respect to this first inquiry, we have explained the term “scientific knowledge,” as used in Rule 702, in the following manner:

“Scientific” implies a grounding in the methods and procedures of science while “knowledge” connotes more than subjective belief or unsupported speculation. In order to qualify as “scientific knowledge,” an inference or assertion must be derived by the scientific method. It is the circuit court’s responsibility initially to determine whether the expert’s proposed testimony amounts to “scientific knowledge” and, in doing so, to analyze not what the experts say, but what basis they have for saying it.

Syl. pt. 6, in part, *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171. Moreover,

[i]n determining whether the testimony will assist the trier of fact, a circuit court is required to make a common sense inquiry into “whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in [the] dispute.”

*Gentry*, 195 W. Va. at 528, 466 S.E.2d at 187 (quoting Mason Ladd, *Expert Testimony*, 5 Vand. L. Rev. 414, 418 (1952)).

The second inquiry requires the trial court to determine whether the proffered witness is qualified as an expert. To assist trial courts in determining whether a witness should be qualified as an expert, we have adopted a list of factors that should be considered when conducting a Rule 702 analysis:

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.

Syl. pt. 5, *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171. *Accord Cargill v. Balloon Works, Inc.*, 185 W. Va. 142, 146, 405 S.E.2d 642, 646 (1991) (per curiam) (observing that an “expert witness [may be] qualified by knowledge, skill, experience, training, *or* education” (emphasis added)). *See also Gentry*, 195 W. Va. at 525 n.18, 466 S.E.2d at 184 n.18 (“Neither a degree nor a title is essential, and a person with knowledge or skill borne of practical experience may qualify as an expert[.]”).

Third, and finally, after the trial court has determined that the evidence at issue constitutes “scientific knowledge” and that the proffered witness is qualified to testify as an expert, the trial court must decide whether such evidence is admissible. Syl. pt. 6, in part, *Gentry*, 195 W. Va. 512, 466 S.E.2d 171 (“The question of admissibility . . . only arises if it is first established that the testimony deals with ‘scientific knowledge.’” (citations omitted)). The initial inquiry regarding admissibility is whether the proffered testimony is both reliable and relevant:

The first and universal requirement for the admissibility of scientific evidence is that the evidence must be both “reliable” and “relevant.” 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), 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*. On the other hand, the relevancy requirement compels the trial judge to determine, under Rule 104(a), that the scientific evidence “will assist the trier of fact to understand the evidence or to determine a fact in issue.” W. Va. R. Evid. 702. Appellate review of the trial court’s rulings under the relevancy requirement is under an abuse of discretion standard. *State v. Beard*, 194 W. Va. 740, 746, 461 S.E.2d 486, 492 (1995).

Syl. pt. 3, *Gentry*, 195 W. Va. 512, 466 S.E.2d 171. *See also* Syl. pt. 4, *Gentry*, 195 W. Va. 512, 466 S.E.2d 171 (“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.”). *Cf.* Syl. pt. 4, *San Francisco v. Wendy’s Int’l, Inc.*, \_\_\_ W. Va. \_\_\_, \_\_\_ S.E.2d \_\_\_ (No. 33284 Nov. 21, 2007) (“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.”).

Additionally, the trial court also must assess the particular scientific evidence offered by the expert witness, particularly the basis upon which the expert has relied in formulating his/her opinion:

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.

Syl. pt. 2, *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1993). *Cf.* Syl. pt. 1, *Wilt*, 191

W. Va. 39, 443 S.E.2d 196 (“Under Rule 702 of the West Virginia Rules of Evidence, there is a category of expert testimony based on scientific methodology that is so longstanding and generally recognized that it may be judicially noticed and, a trial court need not ascertain the basis for its reliability.”).

Once a trial court has found that a witness is qualified to testify as an expert and that his/her testimony is reliable, the opposing party may discredit the expert’s testimony through cross-examination or contradictory evidence. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596, 113 S. Ct. 2786, 2798, 125 L. Ed. 2d 469, 484 (1993) (“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.”); *Gentry*, 195 W. Va. at 525-26, 466 S.E.2d at 184-85 (same). *See also Watson v. Inco Alloys Int’l, Inc.*, 209 W. Va. 234, 243-44, 545 S.E.2d 294, 303-04 (2001) (““Once a witness is permitted to testify, it is within the province of the jury to evaluate the testimony, credentials, background, and qualifications of the witness to address the particular issue in question. The jury may then assign the testimony such weight and value as the jury may determine.”” (quoting *West Virginia Div. of Highways v. Butler*, 205 W. Va. 146, 152, 516 S.E.2d 769, 775 (1999) (quoting *Cargill v. Balloon Works, Inc.*, 185 W. Va. at 147, 405 S.E.2d at 647))). *Cf. Syl. pt. 3, Walker v. Sharma*, \_\_\_ W. Va. \_\_\_, \_\_\_ S.E.2d \_\_\_ (No. 33308 Nov. 8, 2007) (“Following a trial court’s decision that a physician is qualified to offer expert testimony in a given field, issues 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.”). The fact finder then may determine whether or not the expert is credible. This credibility determination is one to be made by the finder of fact, not by the trial court. *See* Syl. pt. 4, in part, *Mayhorn v. Logan Med. Found.*, 193 W. Va. 42, 454 S.E.2d 87 (1994) (“The jury, and not the trial judge, determines the weight to be given to the expert’s opinion.”).

The foregoing analysis sets forth the detailed inquiry trial courts are required to conduct when a party offers scientific evidence through the testimony of an expert witness. Trial courts should not exclude testimony by an expert until they have considered the nature of the evidence and the expert’s qualifications in accordance with these factors; credibility determinations rest with the fact finder, not the trial court. Wholesale exclusion of expert testimony is appropriate *only* when such evidence is determined to be “junk science.” *See Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1321 n.18 (9th Cir. 1995) (observing that “the two prongs of Rule 702 work in tandem to ensure that junk science is kept out of the . . . courtroom”); *Gentry*, 195 W. Va. at 526, 466 S.E.2d at 185 (same). Otherwise, expert testimony is presumptively admissible unless application of the three threshold factors requires a contrary conclusion. “Rule 702 adopts a liberal stance on admitting expert testimony and favors admissibility[.]” *Wilt*, 191 W. Va. at 53, 443 S.E.2d at 210 (Neely, J., concurring). In other words, “there is no ‘best expert’ rule. Because of the ‘liberal thrust’ of the rules pertaining to experts, circuit courts should err on the side of admissibility.”

*Gentry*, 195 W. Va. at 525, 466 S.E.2d at 184 (citation omitted). *See also McDougal v. McCammon*, 193 W. Va. 229, 236, 455 S.E.2d 788, 795 (1995) (“Under Rule 401 [of the West Virginia Rules of Evidence], evidence having *any* probative value whatsoever can satisfy the relevancy definition. Obviously, this is a liberal standard favoring a broad policy of admissibility.”).

Despite our prior holdings instructing trial courts on the procedure to follow to determine the admissibility of expert testimony, the trial court in this case did not conduct such an analysis but rather prohibited the expert from testifying *in toto*. Applying the foregoing standards to the case *sub judice*, it is apparent that the first prong of the above-described analysis has been met insofar as the evidence Mr. Jones sought to introduce through his expert, Dr. Sheptak, is both scientific in nature and would assist the trier of fact in rendering a determination of the case. Through Dr. Sheptak, a neurosurgeon, Mr. Jones sought to establish the extent to which the injuries that Dr. Naum contended had resulted from his accident with Mr. Jones were likely attributable thereto. Thus, this evidence goes directly to the issue of causation.

Moreover, the parties do not dispute that, pursuant to the second inquiry, Dr. Sheptak is qualified to testify as an expert witness in this case. The only dispute that the parties had as to Dr. Sheptak’s qualifications concerned the subject matter about which he was qualified to testify. Under the third factor regarding the admissibility of the expert’s

testimony, the majority delineated between those matters about which Dr. Sheptak would be permitted to testify, *i.e.*, neurological findings and conclusions, and those matters about which he would not be permitted to testify, *i.e.*, opinions as to the “biomechanics” of the underlying accident and the effects thereof. I disagree with this demarcation. Rather, as a neurosurgeon qualified to render an opinion in this case about Dr. Naum’s neurological injuries, if any, resulting from his underlying accident with Mr. Jones, Dr. Sheptak should have been permitted to testify as to whether, in his expert opinion, the injuries that Dr. Naum attributed to said accident were, in Dr. Sheptak’s opinion, actually caused by that accident or whether Dr. Naum’s ailments were the result of another cause or causes.

In summary, because the majority properly considered the nature of the evidence and the expert’s qualifications to determine that Dr. Sheptak should be permitted to testify, I concur in the majority’s decision to grant as moulded the requested writ of prohibition. However, I respectfully dissent from that portion of the majority’s opinion prohibiting Dr. Sheptak from testifying as to matters deemed by the majority to constitute “biomechanics.”