No. 24978 - Connie Dolen v. St. Mary's Hospital of Huntington, Inc., a corporation; Ernest Tonski, M.D., d/b/a ER Physicians Group; Dennis Burton, M.D.; and Radiology, Inc., a corporation.

Maynard, Justice, dissenting:

I dissent because I disagree with both the majority's legal analysis and the decision reached in this case. Also, I have very strong concerns about the probable ramifications of this decision in all medical malpractice cases. In short, I believe the circuit court did not err in excluding the testimony of Dr. Triplett because, according to our rules, Dr. Triplett's testimony would not meet the standards for competency stated in W.Va. Code § 55-7B-7.

The majority apparently believes that in order to qualify as an expert witness in a medical malpractice case, a person's testimony need only meet the relevancy requirement of West Virginia Rule of Evidence 702. The majority bases its refusal to consider the requirements of W.Va. Code § 55-7B-7, dealing with the competency of witnesses in medical malpractice

cases, on Syllabus Point 6 of *Mayhorn v. Logan Medical Foundation*, 193 W.Va. 42, 454 S.E.2d 87 (1994). If the majority's reading of *Mayhorn* is correct, I must also disagree with *Mayhorn.*

"For evidence to be admissible it must satisfy the three requirements of authenticity, relevancy, and competency." 1 Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers,* § 6-1(A) (3rd ed. 1994) at 604. Rule 601 of the West Virginia Rules of Evidence concerns the *competency* of witnesses while "'Rule 702 of the *West Virginia Rules of Evidence* . . . is concerned primarily with the *relevancy* of expert testimony.'" *Wilt v. Buracker,* 191 W.Va. 39, 46 n. 12, 443 S.E.2d 196, 203 n. 12 (1993), *cert. denied,* 511 U.S. 1129, 114 S.Ct. 2137, 128 L.Ed.2d 867 (1994), *quoting Gilman v. Choi,* 185 W.Va. 177, 179, 406 S.E.2d 200, 202 (1990), *overruled on other grounds, Mayhorn v. Logan Medical Foundation,* 193 W.Va. 42, 454 S.E.2d 87 (1994). Because Dr. Triplett appears to have specialized knowledge that would assist the trier of fact in understanding the evidence or determining a fact in issue, I agree with the majority that Dr. Triplett's testimony is *relevant.* However, we must not end our inquiry

into whether Dr. Triplett is qualified to testify at this point. Next, we must determine whether Dr. Triplett is *competent* to testify as a witness in this case.

Rule 601 states, "Every person is competent to be a witness **except as otherwise provided for by statute or these rules**." (Emphasis added.) By specifically providing an exception in this rule for statutory provisions, the Court has elected to defer to the Legislature when the Legislature enacts statutes on the competency of witnesses. W.Va. Code § 55-7B-7 is concerned primarily with the *competency* of expert testimony in a medical malpractice action. *See Gilman, supra.* Therefore, W.Va. Code § 55-7B-7 operates as an exception to the Rules of Evidence concerning the competency of witnesses. W.Va. Code § 55-7B-7 (1986) provides,

> The applicable standard of care and a defendant's failure to meet said standard, if at issue, shall be established in medical professional liability cases by the plaintiff by testimony of one or more knowledgeable, competent expert witnesses if required by the court. Such expert testimony may only be admitted in evidence if the foundation, therefor, is first laid establishing that: (a) The opinion is actually held by the expert witness; (b) the opinion can be testified to with reasonable

> medical probability; (c) such expert witness possesses professional knowledge and expertise coupled with knowledge of the applicable standard of care to which his or her expert opinion testimony is addressed; (d) such expert maintains a current license to practice medicine in one of the states of the United States; and (e) such expert is engaged or qualified in the same or substantially similar medical field as the defendant health care provider.

Analyzing the proposed testimony of Dr. Triplett under this standard, it is obvious that it falls short on three counts.

First, W.Va. Code § 55-7B-7 is mainly concerned with the applicable **standard of care**. Obviously, therefore, an expert witness's competency is partly determined by his or her knowledge of the standard of care governing a specific field, situation, procedure, or area of knowledge. The number of x-ray films Dr. Triplett has read is simply not helpful on this point. Dr. Triplett, an oral surgeon, does not possess the requisite knowledge of the applicable standard of care governing the conduct of Dr. Tonski, an ER physician. Second, it is undisputed that Dr. Triplett does not maintain a current license to practice medicine in one of the states of the United States. Third, Dr. Triplett has never been

employed as an emergency room doctor or radiologist. We must conclude, therefore, that Dr. Triplett does not qualify as a *competent* witness in this medical malpractice case under W.Va. Code § 55-7B-7.

By adopting Rule 601, which specifically allows exceptions provided for by statute to the Rules of Evidence on competency, this Court has granted the Legislature the power to draft statutes like W.Va. Code § 55-7B-7. By crafting Syllabus Point 6 of *Mayhorn,* however, this Court has removed that power. This is unfortunate because W.Va. Code § 55-7B-7 makes good sense. The majority's rule, on the other hand, makes very little sense. By mandating that expert testimony in medical malpractice cases meet only the *relevancy* requirements of Rule 702 and not the *competency* requirements of W.Va. Code § 55-7B-7, this Court ignores the plain language of Rule 601; neglects the logic of the competency standards provided by the Legislature; and creates a situation where any Tom, Dick or Harry who reads the latest edition of the *New England Journal of Medicine* can testify as an expert witness in a medical malpractice case.

Where are we headed now? Will we allow registered nurses to give expert testimony against physicians? Because they have more knowledge than the general public about medical matters, they qualify as an expert witness under the majority opinion. Can a chiropractor now testify against an orthopedic surgeon? Chiropractors have greater knowledge and would apparently qualify as expert witnesses. What about podiatrists? What about emergency medical technicians? What about allowing midwives, who are licensed in West Virginia, to testify against obstetricians? Under the rules articulated by the majority, all of these "experts" are now competent witnesses and could give relevant evidence in medical malpractice cases. How about acupuncturists or, for that matter, embalmers? I could go on forever, but I have made my point.

The majority's holding greatly diminishes the standards of admissibility governing expert testimony. In the instant case, the result may not be that bad. Dentists are high level professionals, and it appears that Dr. Triplett is experienced and skillful. The problem, however, as noted above, is that the bar is now lowered for everyone. I believe the

majority opinion makes bad law and produces a bad result. Therefore, I respectfully dissent. I am authorized to state that Justice McCuskey joins in this dissenting opinion.