No. 28402 -- Lora D. Kiser v. Carrel Mayo Caudill, M.D.

Starcher, J., concurring, in part, and dissenting, in part:

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OF WEST VIRGINIA

I concur with the majority opinion's decision to reverse the trial court's directed verdict for the defendant, Dr. Carrel Mayo Caudill. The majority correctly acknowledges that, although counsel for the plaintiff, Lora D. Kiser, may have been dilatory in producing Dr. Barnes as an expert, his testimony should have been allowed at trial. The defendant had over 2 years to take Dr. Barnes' deposition and prepare for trial -- his disclosure could in no way be termed a "surprise."

I dissent, however, to the majority opinion's holding that the circuit court fairly excluded testimony by the other expert for the plaintiff, Dr. Brill, regarding the standard of care the defendant should have exercised. Dr. Brill was qualified to give an opinion about the standard of care which a doctor should have followed in 1973 regarding a neurological problem such as a tethered spinal cord, and an opinion that the defendant doctor had breached the standard of care. The circuit court essentially excluded Dr. Brill's opinions because he was a "neurologist," not a "neurosurgeon."

The issue in this case was not whether Dr. Caudill erred in some surgical procedure performed upon the plaintiff; the issue was whether he should have performed surgery at all, or referred the plaintiff to another doctor for surgery. Dr. Brill was highly qualified in the area of diagnosing and treating pediatric, neurologic problems, and could address these questions, regardless of whether he ever performed neurologic surgery himself.

The theory of the plaintiff's case was that in 1973, Dr. Caudill diagnosed the plaintiff with a tethered spinal cord, but that he was negligent in not explaining the significance of the tethered cord, or suggesting any other course of action, to the plaintiff's parents. After he saw the plaintiff's condition, he did nothing about it. In essence, the plaintiff contends that Dr. Caudill should have recommended additional surgery, further testing, or further examination by another specialist -- and contends that had this been done, many of the plaintiff's problems may have been avoided.

Dr. Brill, a specialist in pediatrics and neurology, was offered by the plaintiff to give an opinion about Dr. Caudill's conduct in 1973.

Dr. Brill testified that he received his medical degree from Columbia University in New York City, and that he is licensed to practice medicine in Pennsylvania, Delaware, and New Jersey. More importantly, Dr. Brill testified that he is a specialist in pediatric neurology, and that he has been board certified in pediatrics and neurology. In fact, Dr. Brill indicated that he himself was a board examiner for those fields.

Dr. Brill testified that he had routinely diagnosed and treated children with neurologic problems. He indicated that he had examined and diagnosed thousands of children with neurologic diseases. For the 12 years preceding his testimony he had been teaching pediatrics and neurology at Thomas Jefferson University in Philadelphia, Pennsylvania.

Dr. Brill stated that he was an expert on the pediatric and neurologic processes used in 1973, and had done extensive reading on the topic. He was familiar with the standard of care in 1973 for the diagnosis and treatment of neurologic conditions, including a tethered spinal cord. He also stated that based upon his experience and reading he was able to testify as to the standard of care in diagnosing and

treating neurologic conditions, including recognizing the symptoms of a tethered cord, determining whether surgical intervention was warranted, and determining whether a doctor should have referred a patient for surgery.

Based upon these qualifications, Dr. Brill gave the opinion that the defendant, Dr. Caudill, breached the standard of care in 1973 when treating the plaintiff.

This Court has made patently clear that "Rule 702 of the *West Virginia Rules of Evidence* is the paramount authority for determining whether or not an expert is qualified to give an opinion." Syllabus Point 6, in part, *Mayhorn v. Logan Medical Foundation*, 193 W.Va. 42, 454 S.E.2d 87 (1994). This Court should therefore have looked to Rule 702 to determine whether Dr. Brill was qualified to give an opinion.

West Virginia Rules of Evidence Rule 702 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 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." *Gentry v. Mangum*, 195 W.Va. 512, 524, 466 S.E.2d 171, 183 (1995)

The majority opinion should have focused on the first requirement of Rule 702 -- that the proffered witness was an expert "by knowledge, skill, experience, training, or education" -- and the fact that this requirement has been liberally construed by this Court. We stated in *Gentry v. Mangum* that in determining who qualifies as an expert, a trial court should conduct a two-step inquiry.

> First, a circuit judge 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, the circuit court must determine that the expert's area of expertise covers the particular opinion as to which the expert seeks to testify. There must be a match.

195 W.Va. at 525, 466 S.E.2d at 184. *See also*, Syllabus Point 5 of *Gentry v. Mangum*. We cautioned in *Gentry v. Mangum* "that 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." *Id*.

When this standard is applied to the case at hand, it is clear that the circuit court abused its discretion in refusing to qualify Dr. Brill as an expert. Applying the test set forth in *Gentry*, it is apparent that first, Dr. Brill (a) had substantial educational and experiential qualifications relating to pediatric neurologic problems; (b) that his field of expertise is relevant to the diagnosis and treatment of tethered spinal cords in children; and (c) this expertise would have assisted the trier of fact. Second, this expertise relates to the testimony that Dr. Brill was anticipated to give a trial: that the defendant was negligent in his treatment of the plaintiff's tethered spinal cord.

The mere fact that Dr. Brill stated he did not perform pediatric neurologic surgery is irrelevant. He could still give an opinion on how the average doctor, in 1973, would go about diagnosing and treating a tethered spinal cord. Based upon this record, I would have ruled that the circuit court abused its discretion in refusing to qualify Dr. Brill as an expert.

I therefore respectfully concur, in part, and dissent, in part, to the majority's opinion.