

No. 29966    --    Marybeth Davis, an incarcerated person by her next friend and her power of attorney, Gary Davis; Paul S. Detch, Attorney v. Gregory Wallace; Irvin Sopher; Elizabeth Scharman; Anne Hooper; Basi Zitelli; and Dorothy Becker; State of West Virginia

**FILED**

**July 3, 2002**

RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**RELEASED**

**July 3, 2002**

RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

Starcher, Justice, concurring:

I believe the majority opinion is correct in this case. Though artfully pled, it seems to me that the dissenting opinion is the one that has “missed the boat” on the underlying case. The unnecessarily harsh dissent is but a lengthy essay on the issue of whether there exists in West Virginia a cause of action for negligence or malpractice against forensic experts. The majority opinion clearly acknowledges that there is *not* a cause of action for suing an opposing party’s expert witness in West Virginia, and there is absolutely no language in the majority opinion that advocates for the creation of such a claim.

At issue is whether the trial court abused his discretion by assessing \$8,500.00 in sanctions against the appellants for promoting what the appellants perceived to be an advancement in our current law. The trial court properly determined that the theory of law propounded by the appellants does not support a cause of action in our State. However, the trial court also determined that the appellants were in violation of *West Virginia Rules of Civil Procedure*, Rule 11 [1998], and had a “vexatious, wanton, or oppressive intent to intimidate the appellees.”

The majority merely acknowledges that there is an emerging body of case law and scholarly work that have begun to question the granting of absolute immunity to expert witnesses, often known in legal circles as “hired guns,” for their in-court testimony and out-of-court preparations. Several law review articles and courts have begun to argue that it is not unreasonable to expect that expert witnesses should be held to standards of their profession both in and outside of the courtroom, and several jurisdictions have permitted such law suits. Considering the developing trend, the appellants’ suit against the State’s expert witnesses should not be seen as frivolous. Thus, this Court was within its authority to find that the trial court erred in levying sanctions.

*West Virginia Rules of Civil Procedure*, Rule 11(b) [1998], clearly permits a lawyer to urge “the extension, modification, or reversal of existing law or the establishment of a new law[.]” Lawyers should be praised for their innovations, even if their innovations run a little far afield. The law is an evolving entity -- not a museum piece to be studied under glass. And, on occasion, what may be seen by some as a frivolous argument may become tomorrow’s cutting-edge legal theory.

For all of the hand-wringing and complaints of the sky falling, what the dissenting opinion portends as “rough seas ahead” is actually a self-imposed, artificially-created tempest in a teapot.