

No. 33215 *Mary Ann Kominar, as Administratrix of the Estate of Jason Kominar, Deceased v. Health Management Associates of West Virginia, Inc., d/b/a Williamson Memorial Hospital, Inc., Pelagio P. Zamora, Inc.; Mingo County Emergency Medical Services Authority, a West Virginia statutory organization; Mingo County Ambulance Service, Inc., a corporation; and Critical Link Ambulance Service*

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June 28, 2007

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RORY L. PERRY II, CLERK

**SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

Starcher, J., concurring:

I wholeheartedly concur with the majority's decision. As the majority opinion indicates, the trial in the court below derailed at the moment of the flawed jury selection and never recovered thereafter. I write separately, however, to address an evidentiary issue that arose at trial that the majority opinion sidestepped.

The majority opinion briefly mentions the appellant's argument that the trial court erred by refusing to allow expert testimony from the decedent's embalmer. Instead, the trial court would only allow the embalmer to testify as a fact witness.

At trial, a critical issue for the jury to resolve was whether the decedent suffered a major artery laceration during his accident, a laceration which might have been the proximate cause of his death. Defense experts testified that the decedent had sustained a major artery laceration and had completely "bled out" before the ambulance had arrived at the scene of the accident.

The appellant offered the expert testimony of the decedent's embalmer on the issue of whether there was any leakage of embalming fluid due to a major artery laceration. The embalmer, offering his opinion in a deposition, stated that if there had been a tear in the

aorta or other artery he would have seen the tear during embalming because the fluid would escape from the tear. The appellant apparently had difficulty obtaining the embalmer's testimony at trial, and the trial court sustained the appellees' objections to use of the deposition testimony. For these reasons, this Court sidestepped the question of the admissibility of the embalmer's expert testimony.

But I believe, on retrial, it is pretty clear that an embalmer could offer an expert opinion under Rule 702 of the *West Virginia Rules of Evidence*.

According to the provisions of Rule 702, a witness may be qualified as an expert by "knowledge, skill, experience, training, *or* education." *Id.* (emphasis added). In *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995), this Court identified three major requirements of Rule 702 as: "(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." 195 W.Va. at 524, 466 S.E.2d at 183. We explained in *Gentry* "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" as long as there is a match between the expert's area of expertise and the particular opinion the expert will offer. 195 W.Va. at 525, 466 S.E.2d at 184.

Consequently, pursuant to Rule 702, the question of whether a particular embalmer may be permitted to testify as an expert regarding relevant postmortem observations must be determined in light of the specific educational or experiential qualifications of the individual embalmer, and any evidence adduced as to the capability of

the professional embalmer to draw conclusions from such observations. *Cf.* Syllabus Point 11, *State v. Weisengoff*, 85 W.Va. 271, 101 S.E.2d 450 (1919) (testimony of undertaker describing conditions of the body he prepared for burial was admissible in consideration of the witness' background and experience); *Tracy v. Cottrell*, 206 W.Va. 363, 383, 524 S.E.2d 879, 899 (1999) (same under Rule 702 of the *West Virginia Rules of Evidence*).

I otherwise concur fully with the majority's opinion.