

No. 33284 - *Clinton San Francisco and Jessie San Francisco, his wife v. Wendy's International, Inc.*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, C.J., concurring:

In the case *sub judice*, the trial court excluded the testimony of the appellants' two expert witnesses because it concluded that Rule 702 precluded their testimony. The majority has correctly determined, however, that both of the plaintiffs' experts should have been permitted to testify insofar as their proffered scientific testimony is essential to a decision in the case, the experts are qualified to render an opinion as such, and their proffered testimony is admissible. *See* W. Va. R. Civ. P. 702.

I write separately to reiterate my position in a similar case decided this term of Court, *State ex rel. Jones v. Recht*, ___ W. Va. ___, ___ S.E.2d ___ (No. 33383 Nov. 8, 2007) (Davis, C.J., concurring, in part, and dissenting, in part), and to emphasize to trial courts that the requirements of Rule 702 are not so unattainable as to require the almost automatic exclusion of expert witnesses. All too often this Court is called upon to decide a case in which the trial court has been reluctant to permit an expert witness to testify despite the fact that the witness's credentials qualify him/her as an expert and the matters about which the expert is called to testify are both relevant and reliable to the case at hand. Rather

than freezing like a proverbial deer in the headlights, however, trial courts should be mindful that scientific evidence presented through expert witnesses is presumptively admissible. *See, e.g., Gentry v. Mangum*, 195 W. Va. 512, 525, 466 S.E.2d 171, 184 (1995) (“Because of the ‘liberal thrust’ of the rules pertaining to experts, circuit courts should err on the side of admissibility.” (citation omitted)); *Wilt v. Buracker*, 191 W. Va. 39, 53, 443 S.E.2d 196, 210 (1993) (Neely, J., concurring) (“Rule 702 adopts a liberal stance on admitting expert testimony and favors admissibility[.]”).

Adherence to the guidelines for admitting expert testimony set forth in my *Jones* concurrence affords trial courts the opportunity to evaluate proffered scientific evidence to ensure that such evidence is, in fact, admissible while still fulfilling their duty as gatekeepers to preclude the improper admission of evidence that is not reliable and not relevant. *See* 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.”). *See also* Syl. pt. 3, in part, *Gentry*, 195

W. Va. 512, 466 S.E.2d 171 (“The first and universal requirement for the admissibility of scientific evidence is that the evidence must be both ‘reliable’ and ‘relevant.’”).

Because the majority opinion correctly determined the appellants’ experts should have been permitted to testify in this case, I concur in the majority’s decision.