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

Davis, C.J., concurring:

The instant appeal required this Court to decide yet another case involving the testimony of an expert witness. While this case is distinguishable from other recent decisions of this Court involving the exclusion of expert witness testimony insofar as the West Virginia Medical Professional Liability Act (hereinafter “the MPLA”) provides additional admissibility guidelines, the mere fact that this case is before us provides further proof that the trial courts of this State continue to experience difficulties when ruling upon matters involving expert witnesses. *See San Francisco v. Wendy’s Int’l, Inc.*, ___ W. Va. ___, ___ S.E.2d ___ (No. 33284 Nov. 21, 2007); *State ex rel. Jones v. Recht*, ___ W. Va. ___, ___ S.E.2d ___ (No. 33383 Nov. 8, 2007). *See also* W. Va. Code § 55-7B-3(a) (2003) (Supp. 2007) (reciting “necessary elements of proof that an injury or death resulted from the failure of a health care provider to follow the accepted standard of care”); W. Va. Code § 55-7B-7(a) (2003) (Supp. 2007) (requiring plaintiff to establish “[t]he applicable standard of care and a defendant’s failure to meet the standard of care” by expert testimony and providing guidelines therefor). Unlike the *Jones* and *San Francisco* cases, however, the primary challenge faced by the trial court in this case involved the scope of the expert testimony presented by the appellant. The trial court determined that such testimony did not satisfy Mr.

Walker's burden of proof as to the standard of care and causation in accordance with the MPLA. The majority opinion correctly determined, though, that Dr. Lewis's testimony was sufficient to satisfy Mr. Walker's burden of proof.

In this case, the trial court erroneously applied the now obsolete locality rule to find that Dr. Lewis was not qualified to render an opinion as to the standard of care applicable to Mr. Walker's claims of medical negligence. The trial court determined that Dr. Lewis's credentials qualified him as an expert in the field of urology but concluded that Dr. Lewis's lack of familiarity with the particular methodology employed by Mr. Walker's treating physician rendered him unable to testify as to the national standard of care and whether a deviation therefrom had occurred. Instead, having determined Dr. Lewis to be competent to testify as an expert, the trial court should have permitted the jury to assess the proper weight to be afforded to Dr. Lewis's testimony vis-a-vis his employment of and familiarity with a treatment practice different from that employed in Mr. Walker's actual treatment. *See Watson v. Inco Alloys Int'l, Inc.*, 209 W. Va. 234, 243-44, 545 S.E.2d 294, 303-04 (2001) ("Once a witness is permitted to testify, it is within the province of the jury to evaluate the testimony, credentials, background, and qualifications of the witness to address the particular issue in question. The jury may then assign the testimony such weight and value as the jury may determine." (internal quotations and citations omitted)); Syl. pt. 4, in part, *Mayhorn v. Logan Med. Found.*, 193 W. Va. 42, 454 S.E.2d 87 (1994) ("The jury, and not the trial judge, determines the weight to be given to the expert's opinion.").

Insofar as the majority correctly determined that the appellant's expert witness was qualified to render an opinion as to standard of care and causation and that questions as to the weight to be accorded to the expert's testimony were properly within the province of the jury, I concur in the majority's decision.