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THE QUANDARY IN WEST VIRGINIA WHEN QUALIFYING MEDICAL EXPERTS BY BALANCING THE MPLA WITH RULE 702

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I. INTRODUCTION

When a Plaintiff in a medical malpractice case alleges a deviation from an appropriate medical standard of care which proximately caused their injuries and damages, careful considerations must be made in qualifying each expert. Moreover, these same considerations can be used in disqualifying an expert from testifying as to the appropriate medical standard of care. The underlying question is whether there is a deviation from the accepted standard of care in the particular field of medicine or specialty in which a medical professional was practicing at the time of the alleged deviation. There are two issues in qualifying or disqualifying an expert: (1) whether the expert is qualified to testify as to the accepted standard of care in the particular field of medicine or specialty; and (2) whether the medical professional followed the accepted standard of care in exercising the degree of care, skill and learning required or expected of a reasonable, prudent health care provider in the particular field or specialty acting in the same or similar circumstances. The expert must first be qualified to testify as to the accepted standard of care before the expert may be permitted to testify whether the medical professional followed the accepted standard of care. In order to ensure that an expert is properly qualified, the *Medical Professional Liability Act* must be balanced with Rule 702 of the *West Virginia Rules of Evidence*.

As an example of confronting the apparent tension between the MPLA and Rule 702, a recent trial court *Order* will be discussed wherein a the Defendant was granted summary judgment after the court disqualified Plaintiffs' expert from testifying as to the accepted standard of care in the Defendant's specialty. As a result, the Plaintiffs did not have an expert to testify that the Defendant deviated from the accepted standard of care and thus was unable to prove by a preponderance of the evidence a *prima facie* case of medical negligence.

II. BALANCING THE MPLA WITH RULE 702 WHEN QUALIFYING EXPERTS

The MPLA explicitly sets forth prerequisites for the admissibility of expert testimony regarding medical care. Specifically, the MPLA requires that the proposed expert actually hold the opinion expressed, that the expert believe in the opinion to a reasonable degree of medical probability, and that the expert witness possesses professional knowledge and expertise coupled with the knowledge of the applicable standard of care to which his or her expert opinion testimony is addressed. *See W.Va. Code* §55-7B-7(a)(1) through -7(a)(4) [2005]. Additionally, the statute clearly requires that "the expert witness is engaged or qualified in a medical field in which the practitioner has experience and/or training in diagnosing or treating injuries or conditions similar to those of the patient." *W.Va. Code* §55-7B-5 [2005].

The West Virginia Supreme Court has interpreted this code section to govern the qualifications of a proposed expert witness in a medical malpractice action in connection with Rule 702 of the *West Virginia Rules of Evidence*. See *Dolen v. St. Mary's Hospital of Huntington*, 203 W.Va. 181, 186, 506 S.E.2d 624, 629 (1998) [discussing the Court's holding in *Mayhorn v. Logan Medical Foundation*, 193 W.Va. 42, 454 S.E.2d 87 (1994)] that the legislature had the authority to enact *W.Va. Code* § 55-7B-7 governing the competency of witnesses, but the rules of evidence will be used in qualifying an individual as an expert). In *Dolen,* the Court described a Circuit Court's analysis for the qualifications of a proposed expert under the rules as follows:

> 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.

[internal quotations omitted] *Id*. at 186, 629 [quoting *Gentry v. Magnum*, 195 W.Va. 512, 525, 466 S.E.2d 171, 184 (1995)].

Under Rule 702, a trial court must ensure that the credentials and experiences of the expert witness include the field of expertise in which the expert is rendering the opinion. Rule 702 of the *West Virginia Rules of Evidence* provides that "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."

The West Virginia Supreme Court has held "the provisions of the Rules of Evidence governing testimony by experts is paramount authority for determining whether or not an expert witness is qualified to give an opinion." *Louk v. Cormier*, 622 S.E.2d 788 (W.Va. 2005) and *Mayhorn v. Logan Medical Foundation,* 193 W.Va. 42, 454 S.E.2d 87 (1994)(overruling *Gilman v. Choi*, 406 S.E.2d 200 (W.Va. 1990) on the issue of the validity of *W.Va. Code* §55-7B-7 [1986] in light of the West Virginia Rules of Evidence.)

There are two sections under the *Medical Practice Liability Act* that are applicable in determining whether an expert's testimony will assist the trier of fact, pursuant to Rule 702. First, in a per curium opinion, the Court in *Stewart v. George*, 607 S.E.2d 394 (W.Va. 2004) analyzed *W.Va. Code* §55-7B-3(a) in determining whether a health care provider deviated from the applicable standard of care and whether the deviation was the proximate cause of the injury to the Plaintiff. *W.Va. Code* §55-7B-3(a) [2003] provides:

> The following are 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: (1) the health care provider failed to exercise that degree of care, skill, and learning required or expected of a reasonable, prudent health care provider in the profession or class

> to which the health care provider belongs acting in the same or similar circumstances and (2) such failure was a proximate cause of the injury or death.
>
> *W.Va. Code* §55-7B-3(a) [2003]

Even though *Stewart* primarily focused on the issue of proximate cause, the Court authoritatively cited to *W.Va. Code* §55-7B-3(a) which sets forth the required elements of proof in a medical malpractice case. Essentially, a Plaintiff must prove that his or her injuries were proximately caused by a failure of the medical professional to follow the accepted standard of care by failing to exercise the degree of care, skill and learning required or expected of a reasonable, prudent health care provider in the particular field or specialty acting in the same or similar circumstances.

The second applicable section in determining whether an expert's specialized knowledge will assist the trier of fact, pursuant to Rule 702, is *W.Va. Code* §55-7B-7 [2003] providing:

> The applicable standard of care and a defendant's failure to meet the standard of care, if at issue, shall be established in medical professional liability cases by the plaintiff by testimony of one or more knowledgeable, competent expert witnesses if required by the court. Expert testimony may only be admitted in evidence if the foundation therefor is first laid establishing that:
>
> (1) The opinion is actually held by the expert witness;
>
> (2) the opinion can be testified to with reasonable medical probability;
>
> (3) the expert witness possesses professional knowledge and expertise coupled with knowledge of the applicable standard of care to which his or her expert opinion testimony is addressed;
>
> (4) the expert witness maintains a current license to practice medicine with the appropriate licensing authority of any state of the United States: *Provided,* That the expert witness' license has not been revoked or suspended in the past year in any state; and
>
> (5) the expert witness is engaged or qualified in a medical field in which the practitioner has experience and/or training in diagnosing or treating injuries or conditions similar to those of the patient.

> If the witness meets all of these qualifications and devoted, at the time of the medical injury, sixty percent of his or her professional time annually to the active clinical practice in his or her medical field or specialty, or to teaching in his or her medical field or speciality in an accredited university, there shall be a rebuttable presumption that the witness is qualified as an expert.
>
> *W.Va. Code* §55-7B-7 [2003]

W.Va. Code §55-7B-7 [1986] previously provided that an expert be 'engaged or qualified in the same or substantially similar medical field as the defendant health care provider.' *Louk* and *Mayhorn* specifically addressed this requirement in overruling *Gilman*, and held that Rule 702 does not provide that the legislature may outline when a witness should be found to be qualified as an expert. *Louk,* at 797*, Mayhorn*, at 49, 94. Even though the West Virginia Supreme Court has not had an opportunity to analyze the 2003 amendments to *W.Va. Code* §55-7B-7, it is clear that the Legislature intended to amend *W.Va. Code* §55-7B-7(e) [1986] to comport to recent decisions on this issue. The 2003 amendment removed the language that the expert be 'engaged or qualified in the same or substantially similar medical field as the defendant health care provider' and replaced it with *"*the expert witness is engaged or qualified in a medical field in which the practitioner has experience and/or training in diagnosing or treating injuries or conditions similar to those of the patient."

While these considerations must be made when balancing the Rule 702 of the *West Virginia Rules of Evidence* with the MPLA , the qualification of an expert witness falls within the discretion of the trial court. "Whether a witness is qualified to state an opinion is a matter which rests within the discretion of the trial court and its ruling on that point will not ordinarily be disturbed unless it clearly appears that its discretion has been abused." *Dolen v. St. Mary's Hosp. of Huntington, Inc*., 203 W.Va. 181, 506 S.E.2d 624 (1998)(citing Syl. Pt. 5, *Overton v. Fields*, 145 W.Va. 797, 117 S.E.2d 598 (1960).

III. A RECENT EXAMPLE OF THE APPARENT TENSION BETWEEN THE BALANCE OF THE MPLA AND RULE 702 WHEN SEEKING TO DISQUALIFY AN EXPERT WITNESS

In the recent case of *Dunlap v. McGrew*, Plaintiffs alleged that Mr. Dunlap suffered from a stroke due to Dr. McGrew deviating from the appropriate standard of care in performing a root canal; failing to prevent and treat an infection; and failing to provide appropriate follow-up care. Plaintiffs identified their only expert as Dr. Michael Golding, a retired thoracic and cardiovascular surgeon, to testify as to the standard of care for endodontists such as Dr. McGrew and the reasonableness of the endodontic care provided to Mr. Dunlap by Dr. McGrew.

In balancing between the Rules of Evidence and the MPLA, Defendant carefully crafted arguments that Dr. Golding was not qualified to testify as to the standard of care applicable to endodontists. Specifically, Defendant pointed to the fact that Dr. Golding had no experience in the filed of endodontics or the standard of care for treating endodontic conditions such as the endodontic infection for which Dr. McGrew treated Mr. Dunlap. Furthermore, Defendant requested that the trial court grant summary judgment because Plaintiffs were unable to establish a prima facie case of medical negligence without a qualified expert to testify to the applicable standard of care and breach thereof, according to *Withrow v. West Virginia University Hospitals, Inc*., 576 S.E.2d 527, 213 WVA. 48 (2002).

In balancing Rule 702 with WVA. Code §§ 55-7B-3(a) and 55-7B-7 of the MPLA, the trial court found that (1) Dr. Golding was not qualified to render an opinion as to the standard of care in the field of endodontics; and (2) because Dr. Golding was not qualified to render an opinion as to the applicable standard of care to which endodontists are held accountable, that Dr. Golding's testimony will not assist the trier of fact in determining whether Dr. McGrew deviated from the

appropriate standard of care in providing endodontic treatment to Mr. Dunlap, prescribing antibiotics, or in providing follow-up care. (See *Order*) Plaintiffs did not appeal this *Order* to the West Virginia Supreme Court.

IV. CONCLUSION

Although Rule 702 is paramount, a balance must be made between the MPLA and Rule 702 in qualifying an expert witness. Rule 702 of the *West Virginia Rules of Evidence* requires an expert's testimony to assist the trier of fact in determining whether the medical professional deviated from the appropriate standard of care in the particular field of medicine or specialty. *WVA. Code* §55-7B-7 requires an expert to be qualified in order to render an opinion as to the appropriate medical standard of care in the particular field of medicine or specialty in which the medical professional practices and is held accountable. Nonetheless, the trial court may in its discretion find the expert not qualified to testify as to the appropriate standard of care or whether a deviation from that standard of care occurred. *Dunlap v. McGrew* is an example of the balancing test between Rule 702 and the MPLA when attempting to disqualify an expert in a medical negligence case.