

No. 30313 -- State of West Virginia ex rel. Dorsey Wiseman and Harriet C. Wiseman v. Honorable John L. Henning, Jr., Judge of the Circuit Court of Randolph County, Charles E. Stanley and Atha Trucking, Inc., a West Virginia corporation

**FILED**

**July 3, 2002**

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

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Maynard, Justice, dissenting:

I would have denied the writ of prohibition because I do not believe that the trial court's order preventing the petitioner's expert witness from testifying constitutes a substantial, clear-cut, legal error.

Syllabus Point 2 of *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993)

states:

In analyzing the admissibility of expert testimony under Rule 702 of the West Virginia Rules of Evidence, the trial court's initial inquiry must consider whether the testimony is based on an assertion or inference derived from the scientific methodology. Moreover, the testimony must be relevant to a fact at issue. Further assessment should then be made in regard to the expert testimony's reliability by considering its underlying scientific methodology and reasoning. This includes an assessment of (a) whether the scientific theory and its conclusion can be and have been tested; (b) whether the scientific theory has been subjected to peer review and publication; (c) whether the scientific theory's actual or potential rate of error is known; and (d) whether the scientific theory is generally accepted within the scientific community.

The totality of the majority's reasoning for finding that Dr. Hussein's testimony

is scientifically reliable is as follows:

The record reflects that Dr. Hussein was a member of several specialized cancer research societies, and had substantial interaction with other cancer specialists. He was a specialist in cancers such as that suffered by Mr. Wiseman, and was director of the Myeloma Program at the Cleveland Clinic. Dr. Hussein's preferred opinion that multiple myeloma can result from a trauma was based upon: his extensive treatment of Mr. Wiseman; his treatment of five other patients at the Cleveland Clinic who had trauma-induced myelomas; his study of the physiological process of tissue injury causing chronic inflammation and overstimulation of cells, which triggers the growth of cancerous cells; his interaction with other specialists who also believe that trauma can trigger the occurrence of myeloma; and the handful of published studies by other cancer centers that have identified local tissue injury, including a bone fracture, as a risk factor for causing multiple myeloma.

First, we see that Dr. Hussein has treated Mr. Wiseman and "five other patients at the Cleveland Clinic who had trauma-induced myelomas." This is not helpful to our analysis because six myeloma patients are not a sufficient number to constitute a representative scientific sample. Further, the assertion that these six patients had trauma-induced myelomas begs the question before the trial court. Second, although there is evidence that Dr. Hussein has studied the physiological process of tissue injury and the growth of cancerous cells, that is no evidence that Dr. Hussein's study has been subjected to peer review and publication or whether his theory's actual or potential rate of error is known. Finally, while there is evidence that other specialists believe Dr. Hussein's theory, and that "a handful" of published articles

espouse the theory, it is undisputed that the theory is not generally accepted within the scientific community.

In sum, I believe that the circuit court properly excluded Dr. Hussein's proffered testimony as unreliable in light of the five factors set forth above. Accordingly, I dissent.