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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO.33284

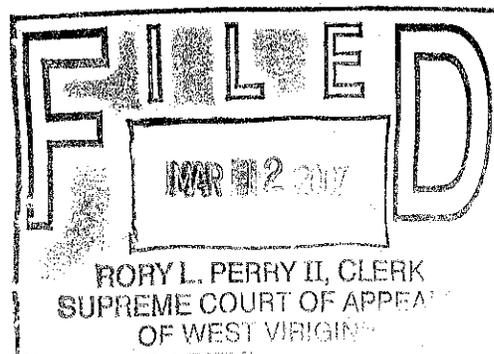
CLINTON SAN FRANCISCO and  
JESSIE SAN FRANCISCO, his wife,

Appellants/Plaintiffs below,

v.

WENDY'S INTERNATIONAL INC.,

Appellee/Defendant below.



BRIEF OF THE APPELLEE

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## I. INTRODUCTION

"This case involves the hamburger \* \* \* that ubiquitous meat dish, the piece de resistance of every roadside eatery." *People v. Enders*, 237 N.Y.S.2d 879, 882 (N.Y. Cr. Ct. 1963). Mr. San Francisco bought his allegedly uncooked "piece de resistance" from the Defendant's fast food restaurant. He claims the hamburger made him ill very shortly after consuming a small portion of it. To prove that the hamburger was the culprit of his illness, he tried to use two expert witnesses. The circuit court judge granted the Defendant's motions in limine to exclude these witnesses. Mr. San Francisco's counsel conceded that without these witnesses, he had no case. Because of this, the circuit court decided that a trial just wasn't on the menu, and granted summary judgment to the Defendant. Mr. San Francisco now appeals this decision.

## II. FACTS

### A. Facts concerning Mr. San Francisco's illness.

Around noon on May 1, 2002, Clinton San Francisco ordered a "single" sized hamburger from the drive-in window of the Wendy's restaurant located in the Patrick Street Plaza in Charleston, West Virginia. R. at 180-81. Mr. San Francisco and his wife then immediately began traveling to the Barboursville Mall, R. at 181, a travel time of less than one hour. R. at 181.<sup>1</sup> Once on Interstate 64 to the mall, Mr. San Francisco began eating his hamburger. R. at 181. He ate about a quarter of it and then noticed that it was "red inside and wasn't done, it was raw," and discarded the remainder of it. R. at 181. Before arriving at the Barboursville Mall, Mr. San Francisco began to experience nausea and attempted unsuccessfully to vomit upon arrival at the mall. R. at 181. When his wife and

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<sup>1</sup>According to [www.google.com/maps](http://www.google.com/maps) the distance between Charleston and Barboursville is a distance of perhaps some 43.2 miles with an average driving time of about 45 minutes.

granddaughter exited the mall, the group immediately traveled to his daughters' home, where he immediately vomited and had diarrhea. R. at 181.

On May 3, 2002, Mr. San Francisco was admitted to Logan General Hospital where he was diagnosed with gastroenteritis, a generalized inflammatory process of the gastrointestinal tract, and intractable diarrhea. R. at 181. His laboratory results were negative for any foodborne parasite or bacteria for which he was tested. R. at 181.

While hospitalized at Logan General, Mr. San Francisco was visited a single time by Dr. Peter Gregor, a cardiologist. R. at 181. Dr. Gregor performed a consultation to rule out that Mr. San Francisco's heart was related to his illness. R. at 181.

In the seven days preceding his illness, Mr. San Francisco ate: homecooked chicken strips, a ham, homemade beef stew, pork chops, and potato salad, among others items. R. at 181-82. Additionally, he visited his grandson in the hospital in the days before his illness. R. at 182.

No one else reported illnesses from that day's service at Wendy's, including Mr. San Francisco's wife, co-plaintiff Jessie San Francisco, who also allegedly ate a portion of her own undercooked hamburger. R. at 182.

The San Francisco's sued over his illness alleging that it was caused by the hamburger R. at 8-10.

**B. Mr. San Francisco's expert witnesses.**

In order to meet their burden of proof, the San Francisco's hired two experts: (1) Dr. Gregor, the cardiologist who performed the single consultation at Logan General Hospital; and (2) Ewen Todd, Ph.D., a food safety and toxicology expert. R. at 182. Wendy's moved to exclude the testimony of these two witnesses, alleging that (1) Dr. Gregor was unqualified

to render requisite medical testimony on injury and causation; and (2) Dr. Todd's opinions do not meet the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1993). R. at 182.

**1. Dr. Gregor.**

In addressing the admissibility of Dr. Gregor's testimony, the circuit court looked to West Virginia Rule of Evidence 702 and this Court's opinion in *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171, 183 (1995). R. at 184. The circuit court looked to the three factors this Court set out in *Gentry* concerning expert witness qualification: (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. R. at 184. The circuit court also applied the two-step, multi-pronged inquiry to determine whether the witness is an expert:

- 1) 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; and
- 2) Whether the expert's area of expertise covers the particular opinion as to which the expert seeks to testify.

With respect to Dr. Gregor, the circuit court determined that he is unqualified to render the opinions that plaintiff suffered from a foodborne illness and that the foodborne illness was proximately caused by the Wendy's hamburger. R. at 184.

The circuit court found that Dr. Gregor is a board-certified cardiologist, but with no specialized training in the fields of gastroenterology, infectious disease, public health, or epidemiology, which fields Dr. Gregor concedes govern the study of foodborne illness. R. at 184-85. The circuit court also found that Dr. Gregor has never offered opinions regarding

foodborne illness prior to the instant litigation, conducted no research or studies in this field, and performed no work in the fields of epidemiology or public health, areas that Dr. Gregor admitted encompassed food poisoning. R. at 185. The circuit court also found that Dr. Gregor himself admitted that he was not an expert on the etiology of foodborne illness. R. at 185.

**2. Dr. Todd.**

Ewen Todd, Ph.D., an expert in food safety, offered a non-medical opinion that plaintiff was intoxicated with a pre-formed verotoxin present in the allegedly undercooked hamburger. R. at 185. Dr. Todd testified that although plaintiffs' symptoms were most consistent with an *e coli* infection, he became ill too quickly for an *e coli* infection to have occurred as *e coli* bacteria require incubation of three to seven days from the ingestion of the bacteria to produce symptoms. R. at 185. Therefore, Dr. Todd theorized that plaintiff became ill from a "preformed toxin" known as verotoxin, which is produced by *e coli* bacteria. R. at 185. Dr. Todd surmised that, rather than the hamburger containing solely *e coli* bacteria, the *e coli* had already produced the verotoxin, which was then ingested by plaintiff. R. at 185.

The circuit court applied *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) and *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (W. Va. 1993), to determine "whether the reasoning or methodology underlying the testimony is scientifically valid." R. at 186. In order to do so, the circuit court applied *Wilt* and assessed (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. R. at 186.

Dr. Todd admitted that there has been no scientific testing, nor peer review or publication of his theory regarding preformed verotoxin in ground beef causing rapid-onset illness. R. at 186. The only publication Dr. Todd presented even remotely addressing his theory was a nearly fifteen year-old study where *e coli* was added to milk and ground beef and held at a temperature of 98.6° for four days which resulted in the formation of forming verotoxin, but the study contained no information regarding (1) whether the ingestion of verotoxin in humans causes illness, and, if so, what amount of verotoxin must be ingested, (2) what symptoms verotoxin intoxication causes, nor (3) the incubation period between ingestion and onset of symptoms. R. at 186-87.

Moreover, Dr. Todd conceded that, with respect to the verotoxin theory, there was no evidence whatsoever that the hamburger plaintiff ingested contained verotoxin. R. at 187. Dr. Todd conceded that this is a rare occurrence that simply does not occur in absence of "abusive" manufacturing conditions, and Dr. Todd conceded there was no evidence of such conditions in this case. R. at 187. Dr. Todd agreed that plaintiff's rapid onset of symptoms was inconsistent with any known and generally accepted incubation periods for foodborne organisms which would be found in undercooked ground beef. R. at 187.

### III. STANDARD OF REVIEW

"The admissibility of testimony by an expert witness is a matter within the sound discretion of the trial court, and the trial court's decision will not be reversed unless clearly wrong." Syl. Pt. 5, *State v. Dennis*, 216 W. Va. 331, 335, 607 S.E.2d 437, 441 (2004) (quoting Syl. Pt. 6, *Helmick v. Potomac Edison Co.*, 185 W. Va. 269, 406 S.E.2d 700 (1991)).

“[A]n appellate court should strive to uphold discretionary rulings made by trial judges and avoid in almost every case tampering with that discretion.” *State v. David D. W.*, 214 W. Va. 167, 178, 588 S.E.2d 156, 167 (2003) (per curiam) (Maynard, J., concurring). This deferential standard of review is equally applicable when the exclusion of expert testimony results in summary judgment. *General Elec. Co. v. Joiner*, 522 U.S. 136, 142-143 (1997) (“We . . . reject respondent’s argument that because the granting of summary judgment in this case was ‘outcome determinative,’ it should have been subjected to a more searching standard of review. On a motion for summary judgment, disputed issues of fact are resolved against the moving party—here, petitioners. But the question of admissibility of expert testimony is not such an issue of fact, and is reviewable under the abuse-of discretion standard.”). See also *Watson v. Inco Alloys Intern., Inc.*, 209 W. Va. 234, 238, 545 S.E.2d 294, 298 (2001) (similar).

“In general, an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court makes a serious mistake in weighing them.” *Gentry v. Mangum*, 195 W. Va. 512, 520 n. 6, 466 S.E.2d 171, 179 n. 6 (1995). “[D]eference that is the hallmark of abuse-of-discretion review,” *General Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997), because this Court does not “substitute its judgment for the circuit court’s.” *Shafer v. King’s Tire Serv., Inc.*, 215 W. Va. 169, 177, 597 S.E.2d 302, 310 (2004) (citations omitted). Indeed, this is a point “every lawyer already knows: that two judges can decide discretionary matters differently without either judge abusing his or her discretion.” *Ellis v. United States*, 313 F.3d 636, 653 n.10 (1<sup>st</sup> Cir. 2002). Accord *United States v. Williams*, 81 F.3d 1434, 1437 (7<sup>th</sup> Cir. 1996) (emphasis deleted) (“It is

possible for two judges, confronted with the identical record, to come to opposite conclusions and for the appellate court to affirm both. That possibility is implicit in the concept of a discretionary judgment.”); *Maniscola v. Kenworthy*, 2002 Mass. App. Div. 203 ¶ 4 (“implicit in the abuse of discretion standard is the possibility that two judges might come to opposite conclusions on the same set of facts, both of which might pass muster on appellate review.”).

#### IV. ARGUMENT

##### A. The expert testimony requirement in foodborne illness cases.

In a food poisoning case, “[t]he injured patron must show that his discomfort was caused by something that the law considers a defect.” John H. Sherry, *The Laws of Innkeepers—For Hotels, Motels, Restaurants and Clubs* 401-02 (Rev. Ed. 1981). And, additionally, the plaintiff “must also prove that the unfitness caused his injury.” *Id.* at 410.

“Decisional law has recognized that food poisoning cases are difficult to substantiate generally because the suspected food has been ingested and is unavailable for analysis. Nevertheless, like any other personal injury action the plaintiff must prove that the food was unwholesome or unfit and caused his illness, irrespective of whether the action is based on negligence or warranty.” *Minder v. Cielito Lindo Restaurant*, 136 Cal. Rptr. 915, 918 (Cal. Ct. App. 1977). Consistent with the clear repudiation of *post hoc ergo propter hoc*, *Audio Investments v. Robertson*, 203 F. Supp.2d 555, 581 (D.S.C. 2002) (“Most federal courts have rejected the validity of that maxim in determining whether a causal connection exists.”); *State ex rel. Juvenile Dep’t v. O’Farrell*, 83 P.3d 931, 935 (Or. Ct. App. 2004) (inferring causation of temporality and sequentiality “is prohibited by the laws of logic (the *post hoc ergo propter hoc* fallacy) as well as case law.”), it appears to be a “universal” rule

that “[t]he unwholesome character of food is not established, nor is a prima faxie [sic] case made, merely by showing that the plaintiff became sick after eating it.” *Minder*, 136 Cal. Rptr. at 918 (quoting *Stewart v. Martin*, 181 S.W.2d 657, 658 (Mo. 1944)). See generally *Am. L. Prod. Liab.* § 4.41 at 69 (3d ed. 2001) (footnotes omitted) (“Circumstantial evidence consisting of proof that a user of a product suffered injury is generally considered insufficient, in and of itself, to satisfy the requirement of proof of proximate causation. This is true even with respect to food . . . .”); cf. 2 David L. Faigman, et al., *Modern Scientific Evidence* § 20-1.4.2 at 553 (2002) (footnote omitted) (“Most cases that have discussed the issue have stated that temporal order alone is insufficient to support an expert’s opinion that substance X caused injury Y.”).

Because of the rule against *post hoc, ergo propter*, and because “lay speculations on medical causality, however plausible, are a perilous basis for inferring causality[.]” *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 318 (7<sup>th</sup> Cir. 1996), food poisoning cases normally require expert testimony. See, e.g., *Ide v. Foreign Candy Co., Inc.*, 2006 WL 3361525, \*4 (Mass. Ct. App.) (“*Ide* argues that because the Warheads tasted overly tart to him and seemed different from those he had eaten on other occasions, his case should be judged by the standards applicable to cases alleging injury from food which looked or smelled bad. Even in such cases, however, expert medical testimony was required to link that allegedly bad food with the plaintiff’s injuries and to permit the case to go forward[.]”); *Rucker v. Jewel Food Store*, 691 N.W.2d 926 (Wis. Ct. App. 2004) (unpublished) (text available at 2004 WL 2792013) (“However, while it is true that Rucker was convinced that his illness was food poisoning, that alone is insufficient. Rucker was required to present expert medical evidence demonstrating to a reasonable degree of medical certainty that his illness was a

result of food poisoning caused by the consumption of the turkey.”); *Marzocco v. Taco Bell Corp.*, 2000 WL 20879, \*2-3 (Ohio Ct. App.) (“[B]ecause the ‘foodborne illness’ that Plaintiffs allege is a medical condition, expert medical opinion is required to prove that the symptoms the two women suffered were caused by that particular illness.”). Consequently, “[a]t the hearing below, the [San Franciscos’] counsel conceded that without the expert testimony, he had no proof of causation and that the defendants would be entitled to a directed verdict if the case were to go to trial. In the absence of evidence of causation, the trial court correctly entered judgment in favor of the defendants.” *Poulin v. Fleming*, 782 So.2d 452, 457-58 (Fla. Dist. App. 2001).

**B. Expert witnesses and their dangers.**

“The law of evidence has long been viewed as the product of the jury system, i.e., the need to shelter untrained citizens from the temptation to accept uncritically that which may be unreliable and of doubtful credibility.” 1 Franklin D. Cleckley, *Handbook on Evidence for West Virginia Lawyers*, 1-9 (2d ed. 2000). Thus, “expert witnesses merit special attention because their testimony can be powerful and simultaneously very ‘misleading because of the difficulty in evaluating it.’” Douglas R. Richmond, *Regulating Expert Testimony*, 62 Mo. L. Rev. 485, 487 (1997) (citation omitted). Jurors, drawn from every walk of life, tend to give “expert” testimony particular credence, Honorable Charles R. Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word “Expert” under the Federal Rules Evidence in Civil and Criminal Jury Trials*, 154 F.R.D. 537, 544 (1994), so that “experts enjoy an aura of reliability and trustworthiness[.]” *Rotthund Co. v. Pinnacle Corp.*, 452 F.3d 726, 733 (8<sup>th</sup> Cir. 2006); *United States v. Newman*, 34 M.J. 1100, 1102 (A.C.M.R. 1992) (noting “the aura that often surrounds the testimony of expert witnesses.”),

because of which “the basis of that opinion testimony must be carefully scrutinized by the trial court judge.” *Cella v. United States*, 998 F.2d 418, 423 (7<sup>th</sup> Cir. 1993). In short, maintaining standards on the admissibility of expert testimony “is particularly important considering the aura of authority experts often exude, which can lead juries to give more weight to their testimony.” *Elsayed Mukhtar v. California State Univ.*, 299 F.3d 1053, 1063 -64 (9<sup>th</sup> Cir. 2002).

**C. Expert witnesses under West Virginia and Federal Rules of Evidence 702.**

West Virginia Rule of Evidence “702 is the critical evidentiary base for all expert testimony.” Richmond, *supra*, at 493. West Virginia Rule of Evidence 702 provides, “[i]f 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.” In *Wilt v. Buracker*, 191 W. Va. 39, 46, 443 S.E.2d 196, 203 (1993), this Court “concluded that *Daubert* [*v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)]’s, analysis of Federal Rule 702 should be followed in analyzing the admissibility of expert testimony under Rule 702 of the West Virginia Rules of Evidence.” West Virginia decisional law is thus in accord with the 2000 amendment to the Federal Rules of Evidence which now incorporates *Daubert* into the Rules. Therefore, there is no major distinction between “old” Federal Rule 702 (identical to West Virginia Rule 702) at issue in *Daubert* and “new” Federal Rule 702 incorporating *Daubert*. See, e.g., *Celebrity Cruises Inc. v. Essef Corp.*, 434 F. Supp.2d 169, 176 n.6 (S.D.N.Y. 2006) (“The *Daubert* Court was interpreting an earlier version of Rule 702, and, in fact, the rule was later amended partly in response to

*Daubert*. However, the differences between the current version and that considered in *Daubert* are immaterial for present purposes.”<sup>2</sup>

Because “[t]he law must seek decisions that fall within the boundaries of scientifically sound knowledge,” Honorable Stephen Bryer, *Introduction to Reference Manual on Scientific Evidence* 4 (2d ed. 2000), *Daubert* imposed a gatekeeping function for trial courts to ensure that only relevant and reliable scientific evidence reaches the jury. “Rule of Evidence 702 imposes a special obligation upon a trial judge to ‘ensure that any and all scientific testimony . . . is not only relevant, but reliable.’” *Kumho Tire Co., Ltd. v.*

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<sup>2</sup>The first part of New Federal Rule 702 is identical with West Virginia Rule 702:

Federal Rule 702

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, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

West Virginia Rule 702

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.

Mr. San Francisco contends that the Court should exercise care in applying federal cases under amended Federal Rule 702 because West Virginia Rule of Evidence does not include the following language—“if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.” Appellants’ Br. at 7. It is not clear what Mr. San Francisco means by this since, as noted above, this criteria is an non-exhaustive list of criteria adopted in *Daubert* and approved by this Court in *Wilt*. Certainly Mr. San Francisco cannot mean to suggest that testimony based upon *insufficient* facts or data, or testimony produced from *unreliable* principles and methods, or testimony from a witness who has *unreliably* applied the principles and methods to the facts of the case should be deemed worthy of admissibility in the courts of this State.

*Carmichael*, 526 U.S. 137, 147 (1999) (quoting *Daubert*, 509 U.S. at 589).<sup>3</sup> Consequently, there is a two part inquiry under Rule 702, (1) is the witness an expert; and, if so, (2) is the testimony relevant and reliable?

First, “[i]n determining who is an expert, a circuit court should conduct a two-step inquiry. First, a circuit court 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, a circuit court must determine that the expert’s area of expertise covers the particular opinion as to which the expert seeks to testify.” Syl. Pt. 5, *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171 (1995).

Second, “[w]hen scientific evidence is proffered, a circuit court in its ‘gatekeeper’ role under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1993), 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.” Syl. Pt. 4, *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171 (1995). The approach under the second part of the 702 test was articulated by this Court in Syllabus Point 2 of *Wilt*,

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

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<sup>3</sup>It is an open question whether this Court will ultimately adopt *Kumho Tire* which dealt with the application of Rule 702/*Daubert* to non-scientific evidence—although both decisions of this Court and academic literature support such an extension. See *State v. Leep*, 212 W. Va. 57, 67 n. 21, 569 S.E.2d 133, 143 n.21 (2002). In any event, *Kumho Tire*’s discussion of *Daubert* in general is relevant to the discussion at issue here dealing with what both parties and the circuit court found to be scientific evidence.

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.

This approach clearly does not create an insurmountable hurdle, for as a "review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule[.]" Fed. R. Evid. 702, 2000 adv. comm. note—but it does impose an "exacting standard[.] of reliability[.]" *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000) (Ginsburg, J., for a unanimous court).

**D. The circuit court did not abuse its discretion in excluding Dr. Gregor because (1) he is not qualified as an expert to render an expert opinion on the cause of gastroenteritis; and, (2) his opinion on causation is not reliable.**

**1. Dr. Gregor is not qualified as an expert on the causes of food poisoning.**

The most compelling basis for the exclusion of Dr. Gregor from being an expert witness in this case is that Dr. Gregor *admitted* he was not an expert in an area relevant to this case:

A. . . . *And I'm not an expert on etiology of foodborne illness, nor do I claim to be one today.*

Q. Okay. Would you then defer to the opinions of a qualified gastroenterologist or infectious disease expert on those issues regarding etiology?

A. As regards to organism?

Q. Right. Organism or causation.

A. Yes.

Gregor Depo. at 23 (emphasis added).

Dr. Gregor's admission is supported by the law as well as the facts of this case. Dr. Gregor is board certified in cardiology. Gregor Depo. at 4. He is not, though, a gastroenterologist, infectious disease physician, public health physician, or epidemiologist—all of which are the medical fields that Dr. Gregor testified actually deal with foodborne illness. Gregor Depo. at 11. Additionally, Dr. Gregor never offered opinions regarding foodborne illness prior to this case, Gregor Depo. at 40, nor had he conducted research or studies in this field, Gregor Depo. at 13, nor had he performed work in the fields of epidemiology or public health. Gregor Depo at 14.

While this Court has said that a medical expert need not be a board certified specialist in a particular field to qualify as an expert, *see, e.g., Mayhorn v. Logan Med. Found.*, 193 W. Va. 42, 49-50, 454 S.E.2d 87, 94-95 (1994), it has also reiterated that neither may “a medical expert . . . testify about any medical subject without limitation . . .” *Id.* at 49, 454 S.E.2d at 94 (quoting *Gilman v. Choi*, 185 W. Va. 177, 181, 406 S.E.2d 200, 204 (1990)). *Accord Kiser v. Caudill*, 210 W. Va. 191, 195, 557 S.E.2d 245, 249 (2001) (per curiam); *Fortney v. Al-Hajj*, 188 W. Va. 588, 594, 425 S.E.2d 264, 270 (1992) (per curiam). “Federal courts have reached similar results in decisions interpreting Federal Rule of Evidence 702[.]” *Broders v. Heise*, 924 S.W.2d 148, 153 (Tex. 1996), that “a medical degree “alone does not qualify [an expert] to give an opinion on every conceivable medical question.”” *Grant v. Chemrex, Inc.*, 1997 WL 223071, \*10 (N.D. Ill.) (quoting *O'Connor v. Commonwealth Edison Co.*, 807 F. Supp. 1376, 1390 (C.D. Ill.1992) (citation omitted),

*aff'd*, 13 F.3d 1090 (7th Cir.1994)).<sup>4</sup> “Moreover, a number of other states have reached similar results in cases governed by similar evidentiary rules.” *Broders*, 924 S.W.2d at 153.<sup>5</sup>

The factors that render a medical doctor qualified to testify as an expert are the same factors governing whether any expert is qualified—whether the purported expert has “knowledge, skill, experience, training, or education” that “will assist the trier of fact to understand the evidence or to determine a fact in issue[.]” *Mayhorn*, 139 W. Va. at 50, 454 S.E.2d at 94. That is, “[i]s the witness—because of his specialized knowledge, skill, experience, training, or education in the relevant field—qualified to express an expert opinion on the topic at issue?” *Christophersen*, 939 F.2d at 1110. “If the judge is not persuaded that a so-called expert has genuine knowledge that can be genuinely helpful to the jury, he should not let him testify.” *Wilson v. City of Chicago*, 6 F.3d 1233, 1238-39 (7<sup>th</sup> Cir. 1993). The circuit court in this case was not persuaded that Dr. Gregor met the threshold of expertise and properly was within his discretion in excluding Dr. Gregor from testifying in this case.

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<sup>4</sup>See also *Christophersen v. Allied-Signal Corp.*, 939 F.2d 1106, 1112-13 (5th Cir. 1991) (“We caution, however, that although credentials can be significant, they alone are not necessarily determinative. The questions, for example, do not stop if the expert has an M.D. degree. That alone is not enough to qualify him to give an opinion on every conceivable medical question.”), *overruled on other grounds by Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)); *Porter v. Whitehall Labs., Inc.*, 9 F.3d 607, 615 (7th Cir. 1993) (excluding the causation testimony of medical expert who admitted his conclusion was outside his area of expertise); *Whiting v. Boston Edison Co.*, 891 F. Supp. 12, 24 (D. Mass.1995) (“Just as a lawyer is not by general education and experience qualified to give an expert opinion on every subject of the law, so too a scientist or medical doctor is not presumed to have expert knowledge about every conceivable scientific principle or disease.”).

<sup>5</sup>See also *Levesque v. Regional Med. Ctr. Bd.*, 612 So.2d 445, 449 (Ala.1993) (obstetrician without knowledge of the causes of a condition could not testify regarding causation); *Hilbun*, 466 So.2d 856, 875 (Miss.1985) (“Our trial judges are admonished to ascertain that the witness really is an expert in the particular field at issue. Not every M.D. is a qualified expert in every malpractice case.”).

At the outset of his argument, Mr. San Francisco attempts to characterize Dr. Gregor as a “treating physician,” in an effort to avoid the requirements of Rule 702.<sup>6</sup> Appellants’ Br. at 16. However, the law and Dr. Gregor’s own testimony refute this characterization.

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<sup>6</sup>Mr. San Francisco relies on footnote 2 of *State ex rel. Wiseman v. Henning*, 212 W. Va. 128, 133, 569 S.E.2d 204, 209 (2002) (per curiam)—but footnotes are generally dicta. *State ex rel. Medical Assurance of West Virginia, Inc. v. Recht*, 213 W. Va. 457, 471, 583 S.E.2d 80, 94 (2003). And, as Justice Maynard observed in *Toppings v. Meritech Mortgage Serv., Inc.*, 212 W. Va. 73, 74, 569 S.E.2d 149, 150 (2002) (per curiam) (Maynard, J., dissenting), “[u]ndoubtedly, language in a footnote is mere dicta, or less, and it should not form the basis of an opinion of this Court in another case absent a complete discussion of the applicable law[,]” a point is especially appropriate here.

*Wiseman* relied on *Logerquist v. McVey*, 1 P.3d 113, 123 (Ariz. 2000). The Arizona Superior Court has noted its extreme reservation about having to follow *Logerquist*.

The non-application of a ...review to expert testimony based on the witness’ own observations and experiences has been especially criticized. For example, Professor David L. Faigman explained that *Logerquist*’s distinction constituted a fundamental misunderstanding of the scientific process which “involves a constant ebb and flow between the collecting of facts and the describing of theory that will give order and meaning to those facts.” *Embracing the Darkness: Logerquist v. McVey and the Doctrine of Ignorance of Science is an Excuse*, 33 Ariz. St. L.J. 87, 90-93 (2001). According to Faigman, “[t]here is no division in knowledge acquisition between inductive and deductive reasoning. They are both integral parts of the scientific method.” *Id.* at 93. Moreover, the history of science is replete with active charlatans who were all too eager to demonstrate their latest single-handed “discovery” to an attentive crowd. As the above criticism indicates, far from preventing the inefficiency that it viewed as inherent in judicial gatekeeping, *Logerquist* arguably exacerbated the problem by foisting the task upon juries.

*Lohmeier v. Hammer*, 148 P.3d 101, 115 (Ariz. Ct. App., Dec. 12 2006).

Finally, if there exists a problem with applying two separate tests to expert witness, i.e., scientific and non-scientific, see Honorable Robin Jean Davis, *Admitting Expert Testimony in Federal Courts and Its Impact on West Virginia Jurisprudence*, 104 W. Va. L. Rev. 485 (2002), then *Logerquist* only exacerbates the problem because it draws a distinction between scientific evidence and medical evidence. “The *Logerquist* majority further distanced itself from *Daubert/Kumho* by virtually endorsing the line of authority in California that distinguishes between medical opinion and scientific evidence in applying *Frye*.” *State ex rel. Romley v. Fields*, 35 P.3d 82, 88 (Ariz. Ct. App. 2001).

Dr. Gregor consulted about Mr. San Francisco's case one time in order to rule out involvement of Mr. San Francisco's heart in his illness. Gregor Depo. at 21.<sup>7</sup> Dr. Gregor testified in his deposition that he was only a consulting physician. Gregor Depo. at 27 ("My job as a consultant is to give an opinion, which the attending physician can take or reject or amend."). This is consistent with the legal definition of consulting physician. "[T]he primary duty of a consulting physician is to advise and make recommendations to the treating physician himself who may, then, with full knowledge of the patient's history and other conditions" decide what action to take. *O'Neal v. Hammer*, 953 P.2d 561, 568 (Haw. 1998) (quoting *Prooth v. Wallash*, 432 N.Y.S.2d 663, 666 (Sup. Ct. 1980)). Dr. Gregor under the law and by his own admission is not a treating physician; he does not fall under the dicta in *Wiseman*.

Pointing out Dr. Gregor's testimony that he was not a treating physician nor an expert in the causes of food poisoning is not to denigrate him, but it is to observe that Dr. Gregor falls within those many cases with similar testimony and evidence that excluded expert testimony. For example, in *Rohrbough by Rohrbough v. Wyeth Laboratories, Inc.*, 719 F. Supp. 470 (N.D. W. Va. 1989) (admittedly a non-food poisoning case), the question was whether an expert witness in pathology had the expertise in the pertinent field of neurology. The Court concluded that there was insufficient expert opinion when "[i]n his deposition, [t]he [physician] admit[ed] that he is not an expert in pediatric neurology, and state[d] that he would defer to a pediatric neurologist concerning the diagnosis of the minor plaintiff's ailment." The deposition testimony of Dr. Gregor also almost mirrors that of a

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<sup>7</sup>Dr. Gregor's complete deposition is attached as Exhibit C to Defendant's Memorandum of Law in Support of its Motion for Summary Judgment which begins on page 65 of the Record.

physician that the federal court in *Porter v. Whitehall Laboratories, Inc.* 9 F.3d 607 (7<sup>th</sup> Cir. 1993) found to a valid basis for excluding the medical testimony:

Mr. Cohen: Do you claim any expertise in the field of nephrology?

Dr. Benjamin: Well, I have some expertise in all of these areas, but not sufficient to hold myself out as a freestanding expert in any of these disciplines.

*Porter*, 9 F.3d at 616 n.10. See also *Bennet v. Schuberth Werk GmbH & Co.*, 2002 WL 32153356, \*7 (D. Mont.) (witness excluded, *inter alia*, because he “does not consider himself to be an expert [in the subject area]” and witness “testified that he would defer to a biomechanics expert[.]”).

Even more compelling is *Etienne v. United Corp.*, 2001 WL 1568598 (Terr. V.I.), a case practically identical to this one. In *Etienne*, the plaintiff alleged that she suffered food poisoning from souse and sued the delicatessen that had prepared the souse. The plaintiff attempted to produce causation testimony from Dr. Ingham, her treating physician. *Id.* at\* 1. Applying the unamended version of Federal Rule of Evidence 702 and positing that the qualification criteria be liberally construed, the district court still found Dr. Ingham unqualified. *Id.* at \*5.

The district court observed that Dr. Ingham’s practical experience, study, research, and general background of twenty seven years was in cardiology and that he never had any specialized training in epidemiology. *Id.* at \*4. In fact, similar to Dr. Gregor in this case, Dr. Ingham testified he was not an infectious disease specialist and that when questioned about the source of the alleged poisoning, his testimony was “you will have to defer to somebody who is an expert in this . . . .” *Id.*

The district court observed that Dr. Ingham would certainly be an expert in the field of cardiology and would be a qualified expert in the field of general medical principles—thus entitling him to testify as to the indications, diagnosis, and treatment of food poisoning. *Id.* at \* 5. The court went on though to hold that “in order to testify on the *causation* of an infectious disease, especially to boldly state that cause ‘to a reasonable degree of medical certainty,’ a proposed expert needs some kind of specialized knowledge on the subject,” knowledge that Dr. Ingham—like Dr. Gregor here—admitted he did not have. *Id.* (emphasis added). *See also Boren v. Bullen*, 972 S.W.2d 863, 865 (Tex. App. 1998) (physician licensed in state and Board certified in general orthopedic practice for twenty six years not qualified as an expert in treating infectious diseases). Furthermore, the very purpose of “*Daubert’s* gatekeeping requirement . . . . is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *Kumho Tire Co., Ltd.*, 526 U.S. at 152. Here, Dr. Gregor testified that he did not perform the kind of medical history that an expert in the field of food borne illness would conduct and repeatedly testified that he would defer to the medical judgments of gastroenterologists or infectious disease experts.

Q. Would you agree that that analysis and those questions are better directed toward a gastroenterologist or an infectious disease expert?

A. Yes, ma’am, I do.

Gregor Depo. at 54.

Q. How do you rule out Mr. San Francisco having picked up a bacteria or virus from another individual versus [sic] from a surface of some sort?

- A. Well, as a cardiologist, I don't really think I would go there. I would be deferring that to a gastroenterologist or infectious disease specialist.

Gregor Depo. at 30.

- Q. Do you know if that is in fact the methodology employed by gastroenterologists or infectious disease experts in terms of determining what food is likely the cause of a foodborne illness?

- A. I am certain that those two specialists would take a far more extensive food history and environmental history than I would, just as they would defer to me on a cardiovascular history.

Gregor Depo. at 36.

Dr. Gregor had no practical experience with respect to the specific disciplines pertinent to foodborne illness. Any encounter Dr. Gregor had with suspected foodborne illness was incidental to his work as a consulting cardiologist:

- Q. Okay. And aside from your one- to two-month rotation in gastroenterology and a month or less in infectious disease, is it fair to say that you spent no additional internship, residency, or fellowship with the disciplines of gastroenterology or infectious disease?

- A. I think that's a fair statement, except when we were consulting on the cardiac aspects of people with all sorts of diseases and would have certainly come across patients with gastroenteritis, dehydration subsequent to that, and so forth.

- Q. And when you were consulting on those patients, is it fair to say that your primary focus, concern, *and expertise was with respect to diagnosing and treating any cardiovascular part of their illnesses?*

- A. That's correct. . . .

Gregor Depo at 11-12 (emphasis added). Dr. Gregor also testified that while at Logan General Hospital he was "doing strictly cardiology[.]" Gregor Depo. at 5. As Dr. Gregor testified, when he consulted about patients with gastroenteritis and dehydration, he did so

only as an expert in cardiology and *not* as an expert in gastroenterology or infectious diseases. Dr. Gregor's experience is not in an area relevant to this litigation.

Equally, Dr. Gregor's training is equally lacking. Dr. Gregor's formal training in gastroenterology and infectious diseases came in 1976, Dr. Gregor when he completed a one to two month rotation in gastroenterology and less than a one month rotation in infectious diseases. Gregor Depo at 8. The mere fact that a physician did a short rotation in a particular medical field falls short of qualifying that physician as an expert. *See, e.g., Kroha v. LaMonica*, 2002 WL 2031361, \*7 (Conn. Super. Ct.) ("That medical students rotating through the Ob-Gyn service are necessarily taught obstetrics under that standard does not make them experts in obstetrics, any more than Dr. Moritz's rotation through the internal medicine service while he was in medical school made him an expert in internal medicine."); *Hubbard v. Sherman Hosp.*, 685 N.E.2d 648, 652-53 (Ill. Ct. App. 1997) ("Dr. Malachinski testified that he dealt with appendicitis patients as an attending physician and not as a surgeon. He also mentioned that he had completed a one-month rotation as an intern in general surgery and that he occasionally had assisted in surgeries. Again, Dr. Malachinski did not testify to sufficient experience to qualify him as a surgical expert.").

Last, Dr. Gregor's review of medical literature evidences a lack of pertinent expertise. Dr. Gregor testified that the most useful resources as an internet search that led him to the Centers for Disease Control Website containing the *Morbidity and Mortality Weekly Report*. Gregor Depo. at 14, 17. Indeed, Dr. Gregor testified that he reviewed some additional literature to which he was directed by a colleague who was a gastroenterologist. Gregor Depo. at 15. It "is hardly the hallmark of expertise to conduct a survey of medical literature just before testifying and to rely on articles up to then unknown or unread by the

expert. It is a task that almost anyone with a bit of computer facility could easily perform.” *Diaz v. Johnson Matthey, Inc.*, 893 F. Supp. 358, 363 n.7 (D.N.J. 1995). The circuit court did not abuse its discretion in excluding Dr. Gregor as lacking expertise in this case.

## **2. Dr. Gregor’s opinion lacks Relevance and Reliability.**

Dr. Gregor’s lack of pertinent qualifications itself casts considerable doubt on the reliability of Dr. Gregor’s opinions. *Colon v. Abbott Lab.*, 397 F. Supp.2d 405, 414 (E.D.N.Y. 2005) (“Defendant repeatedly emphasizes that Dr. Newman is neither an epidemiologist nor an immunologist and therefore does not have the education or experience to support his opinions. This observation alone is sufficient to cast considerable doubt on the reliability of Dr. Newman’s opinions.”). But, even assuming Dr. Gregor was an “expert,” his testimony is still unreliable.

Even if Dr. Gregor would be competent to testify that Mr. San Francisco ate a hamburger and a short time later Mr. San Francisco exhibited gastroenteritis consistent with food poisoning (although his failure to exclude a viral cause of the illness certainly even negates that testimony), such testimony would still be insufficient. In order for Dr. Gregor’s testimony to be relevant, it must go toward establishing that the hamburger was the *cause* of the illness. Dr. Gregor’s testimony, though, is “a bit like saying that if a person has a scratchy throat, runny nose, and a nasty cough, that person has a cold; if, on the other hand, that person has a scratchy throat, runny nose, nasty cough, and wears a watch, they have a watch-induced cold. Such reasoning is extremely suspect, which has prompted other courts to reject it as unscientific in the absence of convincing epidemiology evidence.” *Kelley v. American Heyer-Schulte Corp.*, 957 F. Supp. 873, 882 (W.D. Tex. 1997).

Mr. San Francisco tries to refute this point asserting that Dr. Gregor performed a differential diagnosis and that a differential diagnosis is a well accepted methodology in the medical community. Mr. San Francisco cites *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 262 (4<sup>th</sup> Cir. 1999) arguing that it recognized that a differential diagnosis, or differential etiology, is a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated sufficient to meet the requirement of Rule 702. However, the terms differential diagnosis and differential etiology are two separate concepts—a differential diagnosis being a medical process and differential etiology being a legal concept.

“Differential diagnosis involves ‘the determination of which one of two or more diseases or conditions a patient is suffering from, by systematically comparing and contrasting their clinical findings.’” *McClain v. Metabolife Intern., Inc.*, 401 F.3d 1233, 1252 (11<sup>th</sup> Cir. 2005) (quoting *Dorland’s Illustrated Medical Dictionary* 240 (Douglas M. Anderson et al. ed., 29th ed.2000)). “This leads to the diagnosis of the patient’s condition, not necessarily the cause of that condition. The more precise but rarely used term is differential etiology, which is ‘a term used on occasion by expert witnesses or courts to describe the investigation and reasoning that leads to the determination of external causation, sometimes more specifically described by the witness or court as a process of identifying external causes by a process of elimination.’” *Id.* (quoting Mary Sue Henifin et al., *Reference Guide on Medical Testimony, in Reference Manual on Scientific Evidence* 439, 481 (Fed. Jud. Ctr. 2d ed.2000)).

“At one level, the confusion in terminology is only semantic . . . [h]owever, at another level the confusion can mislead.” 2 Faigman, *Modern Scientific Evidence* at § 20-

1.1 at 541. The danger is that, in conflating these two concepts, a physician could be permitted to testify beyond his or her areas of expertise. “It is often said that physicians are well trained in the process of differential diagnosis and they devote considerable attention in medical school to learning clinical reasoning.” *Id.* (footnote omitted). “But training in the process of *deducing disease* based on a set of symptoms and laboratory tests and deducing the *cause* of an ailment are not the same thing. Many physicians have far less training in the latter task.” *Id.*

First and foremost, there is a fundamental distinction between [the putative expert physician’s] ability to render a medical diagnosis based on clinical experience and her ability to render an opinion on causation of . . . injuries. [Defendant] apparently does not dispute, and the Court does not question, that [the expert] is an experienced physician, qualified to diagnose medical conditions and treat patients. The ability to diagnose medical conditions is not remotely the same, however, as the ability to deduce, delineate, and describe, in a scientifically reliable manner, the causes of those medical conditions.

*Wynacht v. Beckman Instruments, Inc.*, 113 F. Supp.2d 1205, 1209 (E.D. Tenn. 2000).

*Accord Munafo v. Metropolitan Transp. Auth.*, 2003 WL 21799913, \*20 (E.D.N.Y.).

Consequently, a differential diagnosis is not relevant to a determination of causation. In fact, Dr. Gregor himself testified that as a consulting physician it was within his purview to “speculate” on causation. Gregor Depo. at 27 (emphasis added). But, even if such a diagnosis were somehow relevant to causation, Dr. Gregor’s results would still be inadmissible.

A court must not take a witness’s testimony at face value that he engaged in a methodology that is scientifically valid—the methodology may be valid, but the expert may not have applied the method correctly. In order for a methodology to be valid in a particular case, each and every step in the actual application of that process must be

properly applied. “When a step in an otherwise valid methodology is performed incorrectly, we fail to see how the expert’s results can be any more reliable than if the methodology itself had been wholly invalid. Accordingly, we hold that it is not enough for the trial court to determine that an expert’s methodology is valid in the abstract. The trial court must also determine if the witness has applied the methodology in a reliable manner.” *Carlson v. Okerstrom*, 675 N.W.2d 89, 105 (Neb. 2004). “Even using a reliable methodology, it is axiomatic that if the facts applied to that methodology are suspect, then the conclusion is unreliable.” *Eitenne*, 2001 WL 156998 at \* 6.

The very purpose of *Daubert*, “is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *Kumho Tire Co., Ltd.*, 526 U.S. at 152. Here, Dr. Gregor was “certain” that experts in the fields of gastroenterology and infectious—fields Dr. Gregor admitted were ones actually pertinent to the case—“would take a far more extensive food history and environmental history than [he] would[.]” This is critical for it renders Dr. Gregor’s conclusions, based on a truncated one time only consultation as a cardiologist, outside the realm of a reliable diagnosis that would be reached by an expert in a pertinent field.<sup>8</sup>

Indeed, Dr. Gregor did not rule out that the more obvious culprits of Mr. San Francisco’s illness were the food Mr. San Francisco had consumed within the week

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<sup>8</sup>Additionally, the United States Centers for Disease Control observes that “[t]he symptoms produced depend greatly on the type of microbe. Numerous organisms cause similar symptoms, especially diarrhea, abdominal cramps, and nausea. There is so much overlap that it is rarely possible to say which microbe is likely to be causing a given illness unless laboratory tests are done to identify the microbe, or unless the illness is part of a recognized outbreak.” [www.cdc.gov/ncidod/dbmd/diseaseinfo/foodborneinfections\\_g.htm#mostcommon](http://www.cdc.gov/ncidod/dbmd/diseaseinfo/foodborneinfections_g.htm#mostcommon).

proceeding his eating the hamburger (allowing for an incubation period consistent with the general state of medical knowledge concerning the length of time it takes for tainted food to cause food poisoning), consumption which included—a ham, home cooked chicken strips, homemade beef stew, pork chops, potato salad, and other items, San Francisco Depo. at 26-29,<sup>9</sup> all foods that Dr. Gregor was unaware of. Gregor Depo. at 33.

In fact, even though Dr. Gregor testified that the onset of symptoms is a factor in determining the etiology of a food borne illness, Gregor Depo. at 38-39, he testified that neither at the time of his consultation nor at the time of his testimony, did he know how long it was from the time that Mr. San Francisco ate the hamburger portion until he became ill. Gregor Depo. at 37, 53. Indeed, Dr. Gregor's consultation note stated that it was "shortly thereafter [eating the hamburger]" that Mr. San Francisco became ill—and "shortly thereafter," according to Dr. Gregor, "usually means a few hours," Gregor Depo. at 37, 53, a period well in excess of the less than one hour that Mr. San Francisco testified to.

Moreover, there is no evidence that Dr. Gregor considered if other patrons at Wendy's on May 1, 2004 became ill and, in fact, no other patrons reported any illness—including Mr. San Francisco's wife who testified to eating a portion of her own allegedly underdone hamburger. *See China Doll Restaurant, Inc. v. MacDonald*, 180 A.2d 503, 505 (D.C. Mun. Ct. App. 1962) ("The only scintilla of evidence that the won ton soup may have been tainted [sic] and responsible for appellee's illness was her testimony that 'it didn't taste good.' Nor does the testimony of appellee's physician fortify her position. It is not without significance that although the same soup was consumed by appellee's

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<sup>9</sup>Mr. San Francisco's deposition is Exhibit A to the Defendant's Memorandum of Law in Support of its Motion for Summary Judgment.

companion and by others on the same day, there was no evidence that any other customer complained of having become ill from it.”). This is an important point because even when the food is not available for analysis, statistical evidence of a number of patrons becoming sick from eating at the same restaurant on the same evening would be evidence to infer the unwholesomeness of the food. *Daubert v. Merrill Dow Pharm., Inc.*, 43 F.3d 1311, 1314 (9<sup>th</sup> Cir. 1995), *on remand from* 509 U.S. 79 (1993).

Finally, Dr. Gregor testified the reason he focused in on the hamburger was that (1) Mr. San Francisco said it tasted bad; (2) shortly after consuming it he started to feel sick; and, (3) Mr. San Francisco was “telling [Dr. Gregor] the thing that made him sick was the hamburger[.]” Gregor Depo. at 32. But, “a plaintiff’s own speculation is insufficient to establish the necessary inference of causation in order to provide a basis for recovery, and must be discounted as surmise and conjecture.” *Etienne v. United Corp.*, 2001 WL 1568598, \*6 (Terr. V.I.). *See also Henry v. A/S Ocean*, 512 F.2d 401, 408 (2d Cir. 1975) (“lay testimony to the medical fact beyond the witness’s knowledge would be entitled to no weight.”); *Frazier v. Indiana Dep’t of Labor*, 2003 WL 21254567,\*3 (S.D. Ind.) (Plaintiff cannot testify to his opinion about cause of his depression); *Bloching v. Albertson’s, Inc.*, 934 P.2d 17, 19 (Idaho 1997) (“a court should disregard lay opinion testimony relating to the cause of a medical condition, as a lay witness is not competent to testify to such matters.”); 31A Am. Jur.2d *Expert and Opinion Evidence* § 314 (2002) (footnote omitted) (“testimony offered by a lay person relating to the cause of a medical condition should be disregarded.”).<sup>10</sup>

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<sup>10</sup>Any reliance by Mr. San Francisco on *Bussey v. E.S.C. Restaurants, Inc.*, 620 S.E.2d 768 (continued...)

Additionally, Mr. San Francisco visited his grandson in the hospital in the days before his illness. San Francisco Depo. at 15-16. The Centers for Disease Control observes that “[t]he presentation of a patient with a food borne illness is often only slightly different from that of a patient who presents with a viral syndrome.” Centers for Disease Control, *Diagnosis and Management of Foodborne Illness: A Primer for Physicians and Other Health Care Professionals*, 53 Morbidity and Mortality Weekly Report at 4 (April 16, 2004).<sup>11</sup> When asked, “[h]ow do you rule out Mr. San Francisco having picked up a bacteria or virus from another individual versus [sic] from a surface of some sort?” Dr. Gregor answered, “[w]ell, as a cardiologist, I don’t think I would go there. I would be deferring that to a gastroenterologist or infectious disease specialist.” Gregor Depo at 30. *Compare cf. Bussey v. E.S.C. Restaurants., Inc.*, 620 S.E.2d 764, 767 (Va. 2005) (physician testified that symptoms could not have been caused by casual hand contact with dirty hands).

Undoubtedly Dr. Gregor is an extremely well qualified, vastly experienced, and imminent cardiologist—one that any patient suffering from heart problems would be

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<sup>10</sup>(...continued)

(Va. 2005) is misplaced in this case. In *Bussey* lay witness testimony was afforded a prominent spot. *Id.* at 768. Virginia, though, has not adopted the Federal Rules of Evidence (as has West Virginia), *Gent v. Commonwealth*, 2003 WL 282304, \*3 (Va. Ct. App.) (“In Virginia, we have not adopted the federal rules of evidence, nor have we chosen to codify our rules of evidence.”), so this case is not persuasive. *See State v. Satterfield*, 193 W. Va. 503, 511 n.1, 457 S.E.2d 440, 448 n.1 (1995) (finding unhelpful cases from states that had not adopted the Federal Rules of Evidence). On the contrary, decisions actually interpreting the federal rules or state rules based on the federal rules (such as those cited here), although not binding, are particularly persuasive. *Hardwood Group v. Larocco*, \_\_\_ W. Va. \_\_\_, \_\_\_, n.6 631 S.E.2d 614, 619 n.6 (2006).

<sup>11</sup>Produced collaboratively by the American Medical Association, American Nurses Association-American Nurses Foundation, Food and Drug Administration’s Center for Food Safety and Applied Nutrition, Department of Agriculture’s Food Safety and Inspection Service, and Centers for Disease Control and Prevention. CDC, *Diagnosis and Management of Foodborne Illness*, at 1. This is the publication Dr. Gregor considered most useful in preparing for his testimony. Gregor Depo. at 14.

fortunate to have as a physician. But, Dr. Gregor's expertise extends to *cardiology* and *not* to gastroenterology, epidemiology, infectious diseases, or public health—all fields that Dr. Gregor testified dealt with food poisoning. To say that he is not qualified to render an opinion on causation in this food poisoning case is not to denigrate Dr. Gregor's undoubted professional competence as a physician and cardiologist—but it is to recognize that “given the increasingly specialized and technical nature of medicine, there is no validity, if there ever was, to the notion that every licensed medical doctor should be automatically qualified to testify as an expert on every medical question.” *Broders*, 924 S.W.2d at 152. Dr. Gregor is not qualified to render an opinion and the opinion he did venture is simply not reliable. Thus, the circuit court should be affirmed.

**E. Dr. Todd's testimony is not relevant or reliable.**

“Since *Daubert* . . . parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet.” 528 U.S. at 455. “[W]hen scientists testify in court they adhere to the same standards of intellectual rigor that are demanded in their professional work. If they do, their evidence (provided of course that it is relevant to some issue in the case) is admissible even if the particular methods they have used in arriving at their opinion are not yet accepted as canonical in their branch of the scientific community. If they do not, their evidence is inadmissible no matter how imposing their credentials.” *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 318-19 (7<sup>th</sup> Cir. 1996). “*Daubert* commands that in court, science must do the speaking, not merely the scientist.” *Cavallo v. Star Enter.*, 892 F. Supp. 756, 761 (E.D. Va. 1995), *aff'd in relevant part, rev'd in part by Cavallo v. Star Enterprise*, 100 F.3d 1150 (4<sup>th</sup> Cir. 1996). Even when a witness qualifies as an expert, the witness does not possess a *carte blanche* to express any opinion falling

within the area of expertise. *Edmonds v. State*, \_\_\_ So.2d \_\_\_, \_\_\_, 2007 WL 14808, \*2 (Miss.) (“While Dr. Hayne is qualified to proffer expert opinions in forensic pathology, a court should not give such an expert carte blanche to proffer any opinion he chooses.”); *Jennings v. Palomar Pomerado Health Systems, Inc.*, 8 Cal. Rptr.3d 363, 368 (Ct. App. 2003) (“even when the witness qualifies as an expert, he or she does not possess a carte blanche to express any opinion within the area of expertise.”).

While the Supreme Court said in *Daubert*, that the “focus, of course, must be solely on principles and methodology, not on the conclusions that they generate[,]” 509 U.S. at 595, it subsequently explained that this language did not create a strict dichotomy between methods and conclusions because “conclusions and methodology are not entirely distinct from one another.” *Joiner*, 522 U.S. at 146. The Court continued that “nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.” *Id.* “In other words, trial courts may focus on the conclusions of the experts in determining whether the data actually supports the conclusion.” Dick Thornburgh, *Junk Science—the Lawyer’s Ethical Responsibilities*, 25 Fordham Urb. L.J. 449, 459 (1998).<sup>12</sup> Here, the

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<sup>12</sup>A tongue in cheek story told in many high school science classes emphasizes the point—the story that frogs without legs can’t hear. A student is told to study the jumping ability of frogs. So, he obtains a frog, tells the frog to “jump” and it jumps four feet. The student yells “jump” again and the result is identical—four feet. The student then cuts off one of the frog’s legs and says “jump” and the frog jumps three feet. The student reiterates the experiment to provide valid statistical data with the same result of three feet. The student cuts off another leg and says “jump” and the frog jumps two feet. Again the student is diligent in measuring and recording the data after a second iteration of the experiment. The student removes the next leg and says “jump” and the frog jumps only one foot. Conscientiously the student repeats and records the height the frog jumped. Finally, the student removes the last leg and says “jump” and the frog remains motionless. After repeated  
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conclusion drawn by Dr. Todd is not supported by the data (i.e., the facts) generated during discovery.

“[N]othing in the Rules appears to have been intended to permit experts to speculate in fashions unsupported by . . . the uncontroverted evidence.” *Gentry*, 195 W. Va. at 527, 466 S.E.2d at 186 (quoting *Newman v. Hy-Way Heat Systems, Inc.*, 789 F.2d 269, 270 (4th Cir.1986)). “The value or weight of the opinion of the expert is dependent on, and is no stronger than, the facts on which it is predicated, and the opinion has no probative force or value if such facts do not exist in the case . . . .” 32A C.J.S. *Evidence* § 731 at 88 (1996) (footnote omitted). Thus, an expert may not render an opinion unless the factual basis of the opinion is shown to actually exist. See, e.g., *Barnett v. State Workmen’s Comp. Comm’r*, 153 W. Va. 796, 810, 172 S.E.2d 698, 706 (1970); *Schroeder v. Adkins*, 149 W. Va. 400, 412, 141 S.E.2d 352, 359 (1965). In other words, “[a]n expert’s testimony will not support a verdict if it lacks an adequate foundation in the facts of the case.” *Genmoora Corp. v. Moore Business Forms, Inc.*, 939 F.2d 1149, 1157 (5<sup>th</sup> Cir. 1991).<sup>13</sup> In short, “[a]n

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<sup>12</sup>(...continued)

orders to jump, the frog still remains motionless. The student repeats his experiment with other frogs and obtains identical results. After pondering his studies, the student confidently concludes that a frog without any legs can’t hear.

<sup>13</sup>See also *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 757 (8<sup>th</sup> Cir. 2006) (“Expert testimony is inadmissible if it is . . . unsupported by sufficient facts . . . .”); *Damon v. Sun Co., Inc.*, 87 F.3d 1467, 1474 (1<sup>st</sup> Cir. 1996) (quoting *In re Salvatore*, 46 B.R. 247, 253 (Bankr.D.R.I.1984)) (“It is fundamental that [e]xpert testimony must be predicated on facts legally sufficient to provide a basis for the expert’s opinion.”); *City of Lincoln v. Realty Trust Grp., Inc.*, 705 N.W.2d 432, 440 (Neb. 2005) (“We recognize that expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him or her to express a reasonably accurate conclusion, as distinguished from a mere guess or conjecture.”); *Swallow v. Emergency Med.*, 67 P.3d 68, 71 (Idaho 1993) (“An expert opinion that is . . . unsubstantiated by facts in the record is inadmissible because it would not assist the trier of fact to understand the evidence or determine a fact that is at issue.”); *Marathon Corp. v. Pitzner*, 106 S.W.3d 724, 729 (Tex. 2003) (footnote omitted) (“Expert opinions must be supported by facts in evidence, not conjecture.”); *Erbstein v.* (continued...)

expert's opinion should be excluded when it is based on assumptions which are speculative and are not supported by the record.” *Talley v. Danek Med., Inc.*, 179 F.3d 154, 162 (4<sup>th</sup> Cir. 1999) (quoting *Tyger Const. Co. Inc. v. Pensacola Constr. Co.*, 29 F.3d 137, 142 (4<sup>th</sup> Cir.1994)). There are no predicate facts that have been shown in this case to legitimize Dr. Todd's theory and the circuit court was well within its discretion to exclude Dr. Todd's speculative and conjectural testimony.

Dr. Todd testified that bacteria on food is not the direct cause of food poisoning. Rather, normally, once a person eats food contaminated with a bacteria, the bacteria must travel through the stomach to the intestine where it attaches to the intestine walls and begins to create a toxin--the toxin being the direct cause of the illness. Todd Depo. at 51. The period between ingesting contaminated food and the manifestation of symptoms is the incubation period.<sup>14</sup>

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<sup>13</sup>(...continued)

*Savasatit*, 711 N.Y.S.2d 458 (App. Div. 2000) (citations omitted) (“It is well settled that an expert's opinion must be based on facts in the record or personally known to the witness, and that the expert may not assume facts not supported by the evidence in order to reach his or her conclusion[.]”).

<sup>14</sup>As the United States Department of Health and Human Services' Centers for Disease Control explains once a microbe is swallowed, “there is a delay, called the incubation period, before the symptoms of illness begin. This delay may range from hours to days, depending on the organism, and on how many of them were swallowed. During the incubation period, the microbes pass through the stomach into the intestine, attach to the cells lining the intestinal walls, and begin to multiply there. Some types of microbes stay in the intestine, some produce a toxin that is absorbed into the bloodstream, and some can directly invade the deeper body tissues.” [www.cdc.gov/ncidod/dbmd/diseaseinfo/foodborneinfections\\_g.htm#mostcommon](http://www.cdc.gov/ncidod/dbmd/diseaseinfo/foodborneinfections_g.htm#mostcommon). In a food toxemia situation, the bacteria has already formed the toxin and the need for the microbes to colonize is unnecessary.

CDC also explains that “[t]he symptoms produced depend greatly on the type of microbe. Numerous organisms cause similar symptoms, especially diarrhea, abdominal cramps, and nausea. There is so much overlap that it is rarely possible to say which microbe is likely to be causing a given illness unless laboratory tests are done to identify the microbe, or unless the illness is part of a recognized outbreak.” *Id.*

Q. And what's the quickest onset of symptoms for a toxin that you're aware of?

A. Well, I think—

Q. In terms of the literature?

A. And we, both of us, have mentioned *Staph aureus* toxin and *Bacillus cereus* toxin. . . . These happen pretty quickly; the *Staph aureus* may be two to four hours, and the *Bacillus cereus* toxin may be 30 minutes to two hours, so we're seeing a very rapid onset for these, both these toxins.

Q. Is there any indication that this was *Bacillus cereus* or *staph aureus* toxin [in the hamburger]?

A. No . . . .

Q. Okay. So those are the two most quick-onset toxins that you're aware of, and neither of those you believe to be present in the ground beef?

A. In the foodborne situation, yeah, that's right.

Todd Depo. at 84.

Dr. Todd therefore theorized that Mr. San Francisco became ill from a "preformed toxin" known as verotoxin, which is produced by *e coli* bacteria. Todd Depo. at 51-52. In other words, Dr. Todd surmised that, rather than the hamburger containing solely *e coli* bacteria,<sup>15</sup> the *e coli* had already produced a toxin (a verotoxin), which did not require as quick an incubation period as if the toxin had to be created in the body.

The fatal flaw in Dr. Todd's testimony is that Dr. Todd admitted that verotoxin is not formed in the absence of "abusive" manufacturing conditions and that there was no evidence in this case of such conditions:

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<sup>15</sup>The *e coli* bacteria itself could not have been the cause of the illness as Dr. Todd testified that according to the medical literature, *e coli* bacteria usually require incubation of three to seven days from the ingestion of the bacteria to produce symptoms, Todd Depo. at 49, although possibly as early as six hours. Todd Depo at 49.

A. . . . [Y]ou would not expect to find a – good manufacturing conditions you would not expect to find verotoxin or – they called it verotoxin in this study – present in the beef. So it would have to have been an abusive situation.

Q. Do you have any evidence that that abusive situation existed with respect to the ground beef that Mr. San Francisco ingested?

A. We don't have any – any evidence directly that the beef was abused, but it's still a possibility that that occurred.

Todd Depo. at 53. *See Jennings*, 8 Cal. Rptr.3d at 368 (expert's opinion cannot be based on assumption of fact without evidentiary support). *See also Rolan v. Hansen Beverage Co.*, 193 Fed. Appx. 468, 474 (6<sup>th</sup> Cir. 2006) (expert struck because his testimony that juice box product caused the food poisoning was flawed, *inter alia*, because “by his own admission Dr. Houston knew nothing about Hansen’s Juice Blast, including how or with what it was made.”).

Even aside from this, Dr. Todd's testimony also fails all the explicit factors from *Wilt*: (1) whether the scientific theory and its conclusion can be and have been tested; (2) whether the scientific theory has been subjected to peer review and publication; (3) whether the scientific theory's actual or potential rate of error is known; and (4) whether the scientific theory is generally accepted within the scientific community.

The only publication Dr. Todd presented even remotely addressing his theory is a nearly 15-year-old study where *e. coli* was added to ground beef and held for four days at a temperature of 98.6°. A single study is usually scientifically insignificant. *See Michael D. Green, et al., Reference Guide on Epidemiology, in Reference Manual on Scientific Evidence* 377 (2000) (footnote omitted) (“Rarely, if ever, does a single study demonstrate a cause-effect relationship.”). And, here, the test results do not even provide relevant data.

While the meat formed verotoxin, the study contained (1) no information regarding whether the ingestion of verotoxin in humans causes illness, and, if so, what amount of verotoxin must be ingested, (2) what symptoms verotoxin ingestion causes, and (3) what incubation exists between ingestion and onset of symptoms. Exhibit 4 to Todd Depo. See *General Elec. Co. v. Joiner*, 522 U.S. 136, 144 (1997) (study where infant mice had massive doses of PCB's injected directly into their peritoneums or stomachs and developed cancer properly excluded as evidence of causation because plaintiff was an adult human being whose alleged exposure to PCB's was far less than the exposure in the animal studies and the cancer that these mice developed was alveogenic adenomas and plaintiff developed small-cell carcinomas).

Dr. Todd agreed that he had no knowledge of any studies performed to establish how quickly people intoxicated with verotoxin demonstrated symptoms. Todd Depo. at 57. He surmised that animal studies could be done, but cited no studies or their results. Todd Depo. at 57. Dr. Todd did not explain why *he* did not perform such experimentation. "An expert's failure to test the hypothesis to which he is testifying is considered an extremely negative factor after *Daubert*." Daniel J. Capra, *The Daubert Puzzle*, 32 Ga. L. Rev. 699, 728 (1998). *Accord Downs v. Perstorp Components, Inc.*, 126 F. Supp.2d 1090, 1127 (E.D. Tenn. 1999). See also *Clark v. Takata Corp.*, 192 F.3d 750, 758 (7<sup>th</sup> Cir. 1999) (expert properly excluded, *inter alia*, when he did no experiments to justify his opinions); *Cabrera v. Cordis Corp.*, 945 F. Supp. 209, 213 (D. Nev. 1996) ("Dr. Vojdani also conceded that he has conducted no research to determine the chemical composition of the Cordis brain shunt implanted in Cabrera, nor has he tested his blood test procedure with any other ventriculoperitoneal shunt materials.").

Moreover, Dr. Todd published no peer reviewed articles on his theory. While “publication is [not] a prerequisite for scientific reliability in every case, . . . courts must be ‘especially skeptical’ of scientific evidence that has not been published or subjected to peer review.” *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 727 (Tex.1997) (quoting *Brock v. Merrell Dow Pharms., Inc.*, 874 F.2d 307, 313 (5th Cir.), as modified on reh’g, 884 F.2d 166 (5th Cir.1989)). “Publication and peer review allow an opportunity for the relevant scientific community to comment on findings and conclusions and to attempt to replicate the reported results using different populations and different study designs.” *Id.*

In *Wynacht v. Beckman Instruments, Inc.*, 113 F. Supp.2d 1205 (E.D. Tenn. 2000), a plaintiff attempted to introduce expert testimony from Dr. Ziem. In rejecting this testimony, the court said in language applicable here:

Reviewing Dr. Ziem’s reasoning through the lens of the *Daubert* factors . . . solidifies the Court’s conclusion that she is incapable of rendering a reliable opinion on causation. Not only has Dr. Ziem not personally undertaken any testing that would support her conclusion that the wastewater ingredients caused Wynacht’s ailments, but she also states that she is unaware of any testing of these chemicals by others. Additionally, Dr. Ziem stated in her deposition that she is not familiar with studies of the effects of these chemicals. Such biochemical testing, Dr. Ziem concedes, would be possible, helpful, and illustrative. Dr. Ziem has also stated that she does not know of any other scientific or medical literature in support of her causation opinion. Consequently, there has been neither verification through testing of Dr. Ziem’s conclusions, nor have they been subject to peer review, nor has Dr. Ziem identified any rate of error. Without testing data or support in scientific or medical literature, the Court cannot say with any confidence whether her reasoning would have any acceptance in the medical or scientific communities.

*Id.* at 1210-11 (citations deleted).

Dr. Todd’s theory “express[es] what may be an insightful, even an inspired, hunch,” *Rosen v. Ciba-Geigy Corp.* 78 F.3d 316, 319 (7<sup>th</sup> Cir. 1996) and “may indicate the need for

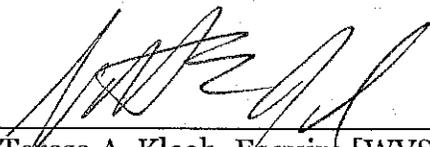
further research and be important in the scientific and regulatory contexts, [but] tort law requires a 'higher standard' of causation." *Newton v. Roche Laboratories, Inc.*, 243 F. Supp.2d 672, 677 (W.D. Tex. 2002) (citation omitted). "The courtroom is not the place for scientific guesswork, even of the inspired sort. Law lags science; it does not lead it." *Rosen*, 78 F.3d at 319. As this Court has said, "[i]n practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for particularized resolution of legal disputes." *Wilt*, 191 W. Va. at 45, 443 S.E.2d at 202 (quoting *Daubert*, 509 U.S. at 597 (footnote omitted)).

#### V. CONCLUSION

For the above reasons, the decision of the circuit court should be affirmed.

WENDY'S INTERNATIONAL, INC.

By Counsel



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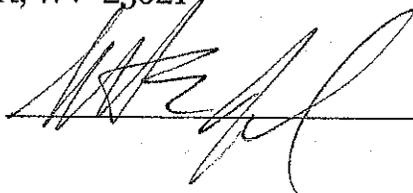
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## CERTIFICATE OF SERVICE

I, Scott E. Johnson, counsel for Appellee Wendy's International, Inc., certify that on the ~~12<sup>th</sup>~~ day of March, 2007, I served the foregoing *Brief of Appellee* upon counsel for the Petitioner by placing a true and correct copy thereof in the United States Mail, First Class Postage Pre-Paid addressed as follows:

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