

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2007 Term

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No. 33189  
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**FILED**

**May 21, 2007**

released at 10:00 a.m.  
RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

THE ESTATE OF ALEXIA SHEREE FOUT-ISER,  
BY MARANDA L. FOUT-ISER, FIDUCIARY; MARANDA L. FOUT-ISER,  
INDIVIDUALLY; AND JEREMY T. ISER, INDIVIDUALLY,  
Plaintiffs Below, Appellants

v.

JOHN L. HAHN, M.D.; THOMAS JOSEPH SCHMITT, M.D.;  
MYUNG-SUP KIM, M.D.; GRANT MEMORIAL HOSPITAL;  
REGIONAL HEALTHCARE CENTER; POTOMAC VALLEY HOSPITAL  
OF W.VA., INC., A CORPORATION; AND JOHN DOE, FIDUCIARY  
OF THE ESTATE OF RUSSELL RHEE, M.D.,  
Defendants Below, Appellees

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Appeal from the Circuit Court of Mineral County  
Honorable Andrew N. Frye, Jr., Judge  
Civil Action No. 01-C-81

**REVERSED AND REMANDED**

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Submitted: March 13, 2007

Filed: May 21, 2007

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JUSTICE MAYNARD delivered the Opinion of the Court.

CHIEF JUSTICE DAVIS dissents and reserves the right to file a dissenting opinion.

## SYLLABUS BY THE COURT

1. “A circuit court’s entry of summary judgment is reviewed *de novo*.” Syllabus Point 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).
2. “A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).
3. “Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.” Syllabus Point 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995).
4. “It is the general rule that in medical malpractice cases negligence or want of professional skill can be proved only by expert witnesses.” Syllabus Point 2, *Roberts v. Gale*, 149 W.Va. 166, 139 S.E.2d 272 (1964).
5. When a particular defendant’s failure to meet the standard of care is at issue in medical malpractice cases, the sufficiency and nature of proof required is governed by West Virginia Code § 55-7B-7(a) (2003), which specifically provides that: “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.”

6. Once it is established that a particular expert is to be used as a standard of care witness, the trial court must determine the qualifications of that expert witness pursuant to W.Va. Code § 55-7B-3(a)(1) (2003), which provides that a plaintiff in a medical malpractice action must show that: “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[.]”

7. “The circuit court’s function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial.” Syllabus Point 2, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

Maynard, Justice:

In this case, the Circuit Court of Mineral County entered a summary judgment

order dismissing a medical malpractice action filed by the Estate of Alexia Sheree Fout-Iser, by Maranda L. Fout-Iser as fiduciary and individually, and Jerry T. Iser, the appellants and plaintiffs below (hereinafter referred to as “the Isers”). The circuit court granted summary judgment to Anita M. Rhee, Administratrix of the Estate of Russell Rhee, appellee and defendant below, (hereinafter referred to as “Dr. Rhee”)<sup>1</sup> on the grounds that the Isers failed to produce a medical expert who would testify that Dr. Rhee breached the standard of care and proximately caused the death of Alexia Sheree Fout-Iser. In this appeal, the Isers contend that summary judgment was inappropriate because their medical experts provided opinions on the standard of care and causation. Alternatively, the Isers contend that no expert was needed to prove a breach of the standard of care or causation. After reviewing the facts of the case, the issues presented, and the relevant statutory and case law, we reverse the decision of the circuit court.

## **I.**

### **FACTS**

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<sup>1</sup>Dr. Russell Rhee was killed in an automobile accident prior to the filing of the lawsuit in this case.

At around 4:20 p.m. on July 30, 1999, Maranda L. Fout-Iser (hereinafter “Maranda”) went to the emergency room at Potomac Valley Hospital. At the time, Maranda was approximately eight months pregnant. Maranda complained of abdominal pain, fever, chills, shortness of breath, vomiting, blurred vision, inability to urinate, and diarrhea. At approximately 4:45 p.m., an emergency room physician, Dr. Thomas J. Schmitt, saw Maranda and ordered an abdominal sonogram. Maranda was then taken to the radiology department for the abdominal sonogram. At around 5:22 p.m., an x-ray technician, Marla Niland, began taking ultrasound images. Ms. Niland was able to produce eight ultrasound images.

At around 5:53 p.m. Ms. Niland sent the eight ultrasound images to the home of Dr. Rhee via teleradiology.<sup>2</sup> At the time, Dr. Rhee was the on-call radiologist for the Hospital. After sending the ultrasound images, Ms. Niland called Dr. Rhee at around 6:00 p.m. According to Ms. Niland, Dr. Rhee voiced strong objections during the conversation by shouting profanities with regard to the poor quality of the images. Dr. Rhee also explained to Ms. Niland that more images needed to be taken. Ms. Niland testified that due to Maranda’s condition she was seeking direction from Dr. Rhee. She also explained to Dr. Rhee that she needed his assistance because she had only participated in approximately five

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<sup>2</sup>The term “teleradiology” is defined as a method “used to digitize data from a medium such as x-ray film or ultrasound and to transmit those data [on a computer] to a remote unit for purposes of medical review and diagnosis.” *Dunbar Medical Systems Inc. v. Gammex Inc.*, 216 F.3d 441, 445 (5<sup>th</sup> Cir. 2000).

previous ultrasounds, all or most of which had occurred during her training period.

According to Ms. Niland, she said during her telephone conversation with Dr. Rhee: “Look, I need help here. I’ve never – I’ve not seen this before, and I need help, and he said – I said we don’t do that many OB ultrasounds, and I’ve not seen this before, and he told me that it was my job to know what to do.” Ms. Niland then said that Dr. Rhee told her that he “didn’t have time to come to Keyser to do a f\*\*\*ing ultrasound.” She also said that Dr. Rhee told her to contact Vanessa Miller, a certified ultrasound technician, to help her in obtaining adequate images. Ms. Miller, who was not on call on that day, was unable to come to the hospital.

After speaking with Ms. Miller, Ms. Niland proceeded to take fifty additional ultrasound images. At around 6:35 p.m., as Ms. Niland was completing the ultrasound, she received a call from Dr. Rhee. He called the radiology department to find out if Ms. Niland had contacted Ms. Miller. Ms. Niland spoke with Dr. Rhee and informed him that a decision had been made to transfer Maranda to another hospital.<sup>3</sup> Even so, Ms. Niland transmitted the ultrasound images to Dr. Rhee. Subsequently, Dr. Rhee issued a report indicating the presence of a live fetus.

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<sup>3</sup>The record indicates that Potomac Valley Hospital did not have obstetrical care capabilities.

At around 7:15 p.m., Valley Medical Transport arrived and took Maranda to Grant Memorial Hospital. After Maranda arrived at Grant Memorial, at about 8:00 p.m., it was determined that she required a C-section. At 9:59 p.m. the baby was delivered, but it had already died as a result of placental abruption.<sup>4</sup>

In July of 2001, the Isers filed the instant medical malpractice action against Dr. Rhee.<sup>5</sup> After a lengthy period of discovery, Dr. Rhee moved for summary judgment. The circuit court conducted hearings on the motion and, on August 30, 2005, issued an order granting Dr. Rhee summary judgment. In doing so, the circuit court found that the Isers failed to produce a medical expert who would testify as to the standard of care and causation. This appeal followed.

## II.

### STANDARD OF REVIEW

We have been called upon to determine whether the circuit court correctly granted summary judgment in favor of Dr. Rhee. In Syllabus Point 1 of *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994), this Court held that: “A circuit court’s entry of

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<sup>4</sup>It appears that the baby was given the name Alexia Sheree Fout-Iser.

<sup>5</sup>Other defendants were named in the lawsuit. Some of those defendants settled with the plaintiffs and the others were dismissed outright.

summary judgment is reviewed *de novo*.” We have also held that, “A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963). In Syllabus Point 2 of *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995), this Court explained that,

Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.

We also pointed out in *Neary v. Charleston Area Medical Center, Inc.*, 194 W.Va. 329, 334, 460 S.E.2d 464, 469 (1995) that “[w]hen the principles of summary judgment are applied in a medical malpractice case, one of the threshold questions is the existence of expert witnesses opining the alleged negligence.” With these principles in mind, we now consider the parties’ arguments.

### III.

#### DISCUSSION

One of the reasons given by the circuit court for granting summary judgment to Dr. Rhee was that the Isers failed to present a medical expert who would testify that Dr.

Rhee violated the applicable standard of care.<sup>6</sup> “It is the general rule that in medical malpractice cases negligence or want of professional skill can be proved only by expert witnesses.” Syllabus Point 2, *Roberts v. Gale*, 149 W.Va. 166, 139 S.E.2d 272 (1964).

Moreover, when a particular defendant’s failure to meet the standard of care is at issue in medical malpractice cases, the sufficiency and nature of proof required is governed by West Virginia Code § 55-7B-7(a) (2003), which specifically provides that: “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.”<sup>7</sup> Once it is established that a particular expert is to be used as a standard of care witness, the trial court must determine the qualifications of that expert witness pursuant to W.Va. Code § 55-7B-3(a)(1) (2003), which provides that a plaintiff in a medical malpractice action must show that: “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[.]”

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<sup>6</sup>The Isers contend that because the circuit court’s order required them to show that the breach of the standard of care was “the” cause of their injuries, a higher standard was imposed. We find no merit to this argument. Nothing in the circuit court’s order suggests that the Isers had to show that the “exclusive” cause of their injuries was Dr. Rhee’s purported violation of the standard of care.

<sup>7</sup>This statute was amended subsequent to the filing of the Isers’ complaint. However, the changes do not affect the relevant matters in this case.

Proof of a violation of the standard of care must be “with reasonable medical probability[.]”<sup>8</sup>  
W.Va. Code § 55-7B-7(a)(2).

The Isers designated Dr. Jeffrey Dicke as their expert on the standard of care. Dr. Dicke’s deposition was taken twice. During the first deposition on November 4, 2004, Dr. Dicke was unable to testify that Dr. Rhee had breached the standard of care. At that point in time, however, the whereabouts of Ms. Niland, whose testimony was critical in the evaluation of the conduct of Dr. Rhee, were unknown to the Isers. The Isers had requested numerous times to take Ms. Niland’s deposition; however, Potomac Valley Hospital stated that she no longer worked at the hospital and that she could not be located. It was not until completion of most, if not all, of the discovery and shortly before the scheduled trial, that counsel for Potomac Valley Hospital indicated that it had located Ms. Niland. Thereafter, on January 15, 2005, Ms. Niland’s deposition occurred.

Following Ms. Niland’s deposition, on August 9, 2005, Dr. Dicke was deposed

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<sup>8</sup>The Isers contend that the circuit court imposed a higher standard on their expert than is required by statute. The circuit court’s order stated that the Isers’ expert “could not say to a reasonable degree of medical certainty” that the standard of care was violated. The Isers point out that the statute requires the expert testify “with reasonable medical probability.” We find no merit to this issue. While proof by “medical certainty” is not required, it is clear from the deposition testimony that the Isers’ expert was being questioned as to “medical probability.” See *Torrence v. Kusminsky*, 185 W.Va. 734, 746, 408 S.E.2d 684, 696 (1991) (expert erroneously, but harmlessly, being asked to give opinion with medical certainty). We find the circuit court’s use of the phrase “medical certainty” to be merely a misnomer.

for a second time. During that deposition, in response to questions by counsel for Dr. Rhee, Dr. Dicke stated the following regarding the standard of care:

Q. Okay. So what you have stated thus far is your view, is your opinion, rather, to a reasonable medical probability, that Dr. Rhee, by not doing what you suggested, violated some medical standard of care?

A. Yes.

Q. Well, what is the violation of the standard of care? I'm still not clear.

A. Dr. Rhee, in his capacity as a radiologist, was responsible for providing an interpretation of the images. Per Ms. Niland's testimony, Dr. Rhee was not satisfied with the quality of the images he was receiving. Since he is the one that's responsible for rendering that interpretation, I would consider it his responsibility to provide some additional either guidance or direction by himself or somebody else that would allow him to be comfortable rendering an interpretation of the patient and the images that he received.

We find that Dr. Dicke's testimony regarding Dr. Rhee's deviation in the standard of care was adequate to defeat Dr. Rhee's motion for summary judgment with regard to that issue. While the entire transcript of Dr. Dicke's second deposition is not in the record before us, there is no dispute with regard to the accuracy of the aforementioned quote.<sup>9</sup> It has been quoted verbatim by both parties in countless pleadings before this Court as well as in the circuit court. And, while Dr. Rhee argues that the complete transcript shows that Dr. Dicke testified that Dr. Rhee did not violate the standard of care with regard to some

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<sup>9</sup>At the time the case was argued and submitted for decision, the record on appeal was incomplete. The complete record as designated by the parties was later obtained by this Court.

of the specific actions he performed, it is equally clear to us that Dr. Dicke did, in fact, testify that Dr. Rhee violated the standard of care within a reasonable medical probability with regard to some of his actions.

In consideration of all of the above, it is possible that a jury may find from Dr. Dicke's testimony that it was ultimately Dr. Rhee's responsibility to make sure that readable images of Maranda were completed to ensure proper diagnosis and treatment. A jury may also reasonably find that Dr. Rhee was the doctor on call that day, while Ms. Niland was the x-ray technician dealing with a very sick patient. Also, Ms. Niland openly explained to Dr. Rhee her concerns surrounding Maranda as well as making it quite clear to him that she needed immediate assistance. Thus, given all the underlying circumstances it seems reasonable that a jury could conclude that simply instructing Ms. Niland to call another ultrasound technician for assistance was an inadequate response. A jury may further reasonably find that the other x-ray technician was not a doctor, was not on call, and lived a significant distance from the hospital. And, that jury may conclude that even if another x-ray technician would have made it to the hospital that day this would have led to even more delay in treating Maranda, who was eight months pregnant and was vomiting, sweating, experiencing severe abdominal pain, fever, chills, shortness of breath, blurred vision, inability to urinate, and diarrhea.

We further find that the circuit court erred by concluding that the Isers failed

to present evidence of causation. In that regard, the deposition testimony before the circuit court demonstrated that the delay in treatment of Maranda was significant. This problem is highlighted by the appellants' expert witness, Dr. Richard D. McLaughlin, who offered testimony with regard to causation. Dr. McLaughlin, an obstetrician/gynecologist, in response to questions from counsel for the Isers, testified as follows:

Q. And your second criticism, if you would, please?

A. Would be that the *overall time delay* while she was at Potomac Valley, contributed, in part, by failing to order laboratory tests on a stat or on an emergency basis; *a delay in ultrasound*; and a delay in reporting the presence of this patient to Dr. Hahn, along with the information that had been collected on her.

(Emphasis added). Dr. McLaughlin further testified:

Q. Doctor, in your earlier testimony, you were critical of the time that Mrs. Iser spent in ultrasound. Am I correct?

A. Yes.

Q. Do you have any understanding as to what happened in ultrasound that may have caused any delay?

A. No.

....

Q. Doctor, do you know that the outcome of the fetus would have been any different, in your opinion?

A. Well, the outcome of the fetus as it stands is a dead baby. The baby was alive in your emergency room [Potomac Valley Hospital], and earlier treatment with a rescue C-section could have saved the life of the baby.

Q. Doctor, are you certain within a reasonable degree of medical certainty that the outcome for the fetus would have been different, assuming that the fetus presented as a live, viable fetus?

A. A 32-week fetus has a greater than 90 percent chance of surviving, so yes.

Dr. Rhee maintains that Dr. McLaughlin did not specifically testify that a breach of the standard of care by Dr. Rhee was a cause of the Isers' injuries. He further states that Dr. McLaughlin's testimony surrounded the conduct of other doctors and not Dr. Rhee. It has been recognized by this Court that "[i]n a malpractice case, the plaintiff must not only prove negligence but must also show that such negligence was the proximate cause of the injury." Syllabus Point 4, *Short v. Appalachian OH-9, Inc.*, 203 W.Va. 246, 507 S.E.2d 124 (1998).

In this case, Dr. McLaughlin testified that the delay in transporting caused the death of the baby and injuries. His testimony was given on May 3, 2004, more than eight months prior to the Isers' locating Ms. Niland. As discussed above, Ms Niland testified that she had experienced significant problems in obtaining proper films and called Dr. Rhee for help. Then, according to Ms. Niland, instead of coming to the hospital to assist her, Dr. Rhee became verbally abusive. While Dr. McLaughlin testified that he did not know the cause of the delay in radiology, he nonetheless clearly testified that the delay was a cause of the death of the baby. Thus, Dr. McLaughlin's testimony, along with Dr. Dicke's testimony that Dr. Rhee violated the standard of care surrounding Maranda's sonogram, are necessarily connected. When read together they constitute evidence that the Isers can present to a jury demonstrating that Dr. Rhee violated the standard of care and that such violation was a cause of the Isers' injury. Conversely, Dr. Rhee's counsel will have equal opportunity to dispute that evidence through cross-examination as well as by presentation of his own expert

witnesses during a trial.

In addition, Dr. Schmitt, the emergency room physician that day, testified that the delay in reporting the ultrasound result affected the needed medical action for Maranda. Dr. Schmitt testified that such delay resulted in a violation of the standard of care for getting the results of the sonogram. This is demonstrated by the following excerpt from his testimony:

Q. And with an abdominal sonogram in a patient like Ms. Iser on July 30, 1999, would the standard of care have been to get those – have the sonogram done by the hospital, sent out and interpreted within approximately 45 minutes?

A. Yes, sir

....

Q. And the results of this appear to have been in excess of two hours; is that correct?

A. Yes.

Q. Before it was conveyed back to you?

A. Yes.

Q. And in excess of an hour and 15 minutes longer than what you consider the standard of care for getting those results back?

A. Yes.

Dr. Schmitt even testified that he called three different times trying to find out why there was a delay in giving him the results of the sonogram.

This Court has held that “[t]he circuit court’s function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial.” Syllabus Point 3, *Painter, supra*.

Having reviewed the record in this case, we believe that genuine issues of material fact exist with regard to whether Dr. Rhee violated the applicable standard of care and whether that violation of the standard of care was the cause of injury. As such, the order of the circuit court of Mineral County is reversed, and this case is remanded for further proceedings consistent with this opinion.<sup>10</sup>

#### IV.

### CONCLUSION

Accordingly, for the reasons set forth above, the final order of the Circuit Court of Mineral County entered on August 30, 2005, is reversed and this case is remanded for further proceedings consistent with this opinion.

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<sup>10</sup>We summarily reject the Isers' contention that their claim against Dr. Rhee did not require expert testimony. This Court has held that "[a] trial court is vested with discretion under W.Va. Code § 55-7B-7 [2003] to require expert testimony in medical professional liability cases, and absent an abuse of that discretion, a trial court's decision will not be disturbed on appeal." Syllabus Point 8, *McGraw v. St. Joseph's Hosp.*, 200 W.Va. 114, 488 S.E.2d 389 (1997). We do not find that the circuit court abused its discretion by requiring expert testimony in this case.

Reversed and Remanded.