

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2005 Term

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No. 32526

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**FILED**

**November 17, 2005**

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SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

BARBARA CALHOUN, INDIVIDUALLY  
AND AS THE EXECUTRIX OF  
THE ESTATE OF ROBERT L. CALHOUN,  
Plaintiff Below, Appellant

v.

JACK R. TRAYLOR, JR., M.D., AN INDIVIDUAL;  
TRI-STATE SURGICAL GROUP, A PARTNERSHIP;  
ROBERT E. TURNER, M.D., AN INDIVIDUAL;  
ULTIMATE HEALTH SERVICES, INC.,  
A WEST VIRGINIA CORPORATION,  
D/B/A HUNTINGTON INTERNAL MEDICINE GROUP;  
DENISE CHAMBERS, AN INDIVIDUAL;  
AND RIVER CITIES ANESTHESIA, INC.,  
A WEST VIRGINIA CORPORATION,  
Defendants Below, Appellees

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Appeal from the Circuit Court of Cabell County  
The Honorable David M. Pancake, Judge  
Case No. 99-C-0349

**AFFIRMED**

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Submitted: September 7, 2005  
Filed: November 17, 2005

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The Opinion of the Court was delivered PER CURIAM.

JUSTICE DAVIS concurs and reserves the right to file a concurring opinion.

JUSTICES STARCHER AND MAYNARD concur in part, and dissent in part, and reserve the right to file separate opinions.

## SYLLABUS BY THE COURT

1. “A circuit court’s entry of summary judgment is reviewed *de novo*.” Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

2. “The question to be decided on a motion for summary judgment is whether there is a genuine issue of fact and not how that issue should be determined.” Syl. Pt. 5, *Aetna Cas. & Sur. Co. v. Federal Ins. Co.*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

3. “A trial court is vested with discretion under W.Va.Code § 55-7B-7 (1986) 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.” Syl. Pt. 8, *McGraw v. St. Joseph’s Hosp.*, 200 W.Va. 114, 488 S.E.2d 389 (1997).

4. “““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 Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).’ Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992).” Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995).

5.. “It is the general rule that in medical malpractice cases negligence or want of professional skill can be proved only by expert witnesses.” Syl. Pt. 2, *Roberts v. Gale*, 149 W.Va. 166, 139 S.E.2d 272 (1964).

6. “To defeat summary judgment, an affidavit that directly contradicts prior deposition testimony is generally insufficient to create a genuine issue of fact for trial, unless the contradiction is adequately explained. To determine whether the witness’s explanation for the contradictory affidavit is adequate, the circuit court should examine: (1) Whether the deposition afforded the opportunity for direct and cross-examination of the witness; (2) whether the witness had access to pertinent evidence or information prior to or at the time of his or her deposition, or whether the affidavit was based upon newly discovered evidence not known or available at the time of the deposition; and (3) whether the earlier deposition testimony reflects confusion, lack of recollection or other legitimate lack of clarity that the affidavit justifiably attempts to explain.” Syl. Pt. 4, *Kiser v. Caudill*, 215 W.Va. 403, 599 S.E.2d 826 (2004).

Per Curiam:

This is an appeal by Barbara Calhoun (hereinafter “Appellant”), individually and as executrix of the estate of her deceased husband, Robert Calhoun, from an order of the Circuit Court of Cabell County granting partial summary judgment in favor of the Appellees/defendants in the underlying medical malpractice action.<sup>1</sup> The lower court premised the partial summary judgment upon its finding that a supplemental report submitted by one of the Appellant’s experts, Dr. Paul vonRyll Gryska, did not satisfy the requirement that the Appellants must present expert testimony stating that the standard of care had been breached in the post-surgical care of the decedent. The Appellant maintains that the lower court erred by refusing to consider Dr. Gryska’s affidavit and by granting partial summary judgment in favor of the Appellees. Having thoroughly reviewed the record, briefs, and applicable precedent, this Court affirms the decision of the lower court.

### I. Factual and Procedural History

On May 12, 1997, Mr. Robert Calhoun was evaluated by Dr. Jack Traylor regarding possible hernia surgery. Previously undiagnosed hypertension was discovered, and blood pressure medication was initiated. On May 27, 1997, laparoscopic hernia surgery was

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<sup>1</sup>The Appellees include Jack Traylor, M.D.; Tri-State Surgical Group; Robert E. Turner, M.D.; Ultimate Health Services, Inc., d/b/a Huntington Internal Medicine Group; Denise Chambers; and River Cities Anesthesia, Inc.

performed, despite the existence of continued high blood pressure. On May 29, 1997, Mr. Calhoun suffered a stroke, paralyzing his speech and the left side of his body.

By late June 1997, Mr. Calhoun's wife, Appellant Barbara Calhoun, contacted another physician, Dr. David Denning, to examine Mr. Calhoun in an effort to determine the source of his continuing medical difficulties. Dr. Denning discovered that Mr. Calhoun had suffered a bowel perforation that had previously been undiagnosed. Emergency bowel surgery was performed by Dr. Denning, and a colostomy and feeding tube were installed.

On May 12, 1999, Mr. and Mrs. Calhoun filed a medical malpractice civil action against the Appellees, alleging (1) negligence in the performance of surgery despite elevated blood pressure; and (2) failure to diagnose and treat the perforated bowel during post-stroke hospitalization. On July 5, 2000, Mr. Calhoun died, and a wrongful death claim was thereafter added to the civil action. The Amended Complaint alleged medical malpractice in the treatment of Mr. Calhoun prior to the surgery, during the surgery, and the post-surgical care by failing to timely diagnose and treat resulting infections.

The deposition of Dr. Gryska was taken on December 16, 2003. In that deposition, Dr. Gryska indicated that there had been a deviation from standard of care in the initial decision to perform surgery. However, Dr. Gryska would not say that there was a deviation from the standard of care in the post-surgical treatment of Mr. Calhoun. Motions

for partial summary judgment were thereafter filed by the Appellees based upon the absence of expert testimony that there was a deviation from the standard of care in the post-surgical period.

Dr. Denning, the physician who had performed the bowel surgery, was deposed on February 10, 2004. In his deposition, Dr. Denning explained the necessity for the abdominal surgery, indicating that tests had shown the presence of free air in the abdomen and ruptured diverticula. Dr. Denning declined to state that there had been a deviation from the standard of care in the post-surgical treatment. By supplemental affidavit dated February 29, 2004, and based upon Dr. Denning's explanations, Dr. Gryska altered his original position and asserted that indeed there had been a deviation from the standard of care in the post-surgical care, regarding the abdominal complications and the requirement for bowel surgery.

In assessing the partial summary judgment motions, the lower court refused to consider the supplemental affidavit of Dr. Gryska and granted partial summary judgment to the Appellees, finding that the Appellant had failed to present expert testimony that there had been a deviation from the standard of care by any of the Appellees in the post-surgical treatment of Mr. Calhoun. The lower court disregarded Dr. Gryska's supplemental affidavit based upon the guidance of the Fourth Circuit Court of Appeals in *Rohrbaugh v. Wyeth*

*Laboratories, Inc.*, 916 F.2d 970 (4<sup>th</sup> Cir. 1990), discussed in detail below. The Appellant now appeals to this Court.

## II. Standard of Review

This Court has consistently held that “[a] circuit court’s entry of summary judgment is reviewed *de novo*.” Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). In syllabus point five of *Aetna Casualty & Surety Co. v. Federal Insurance Co.*, 148 W.Va. 160, 133 S.E.2d 770 (1963), this Court stated that “[t]he question to be decided on a motion for summary judgment is whether there is a genuine issue of fact and not how that issue should be determined.” With specific emphasis on medical malpractice issues, this Court has also stated that “[a] trial court is vested with discretion under W.Va. Code § 55-7B-7 (1986) 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.” Syl. Pt. 8, *McGraw v. St. Joseph’s Hosp.*, 200 W.Va. 114, 488 S.E.2d 389 (1997). This Court also pointed out in *Neary v. Charleston Area Medical Center, Inc.*, 194 W.Va. 329, 460 S.E.2d 464 (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.” 194 W.Va. at 334, 460 S.E.2d at 469.

This Court has also expressed that under Rule 56(c) of the West Virginia Rules of Civil Procedure, ““[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 Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).’ Syllabus Point 1, *Andrick v. Town of Buckhannon*, 187 W.Va. 706, 421 S.E.2d 247 (1992).” Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995). In order to prevail on a motion for summary judgment, the movant must demonstrate that there is no evidence to support the non-movant’s case and “that the evidence is so one-sided that the movant must prevail as a matter of law.” *Tolliver v. Kroger Co.*, 201 W.Va. 509, 513, 498 S.E.2d 702, 706 (1997).

### III. Discussion

#### A. Sham Affidavit Rule: *Kiser v. Caudill*

The lower court granted partial summary judgment to the Appellees based upon the Appellant’s failure to produce a medical expert to testify that there had been a deviation from the standard of care in the post-surgical treatment of Mr. Calhoun. This Court has consistently emphasized that “[i]t is the general rule that in medical malpractice cases negligence or want of professional skill can be proved only by expert witnesses.” Syl. Pt. 2, *Roberts v. Gale*, 149 W.Va. 166, 139 S.E.2d 272 (1964). West Virginia Code § 55-7B-7 (2003) (Supp. 2005), expressly provides, in pertinent part, that “[t]he applicable standard of care and a defendant’s failure to meet the standard, 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>2</sup> As explained above, the circuit court has discretion to resolve the issue of requiring an expert witness, and that discretion will not ordinarily be disturbed. *See Short v. Appalachian OH-9, Inc.*, 203 W.Va. 246, 253, 507 S.E.2d 124, 131 (1998).<sup>3</sup>

In finding that the Appellant had failed to produce expert testimony that the standard of care had been breached by any of the Appellees in post-surgical care, the lower court utilized the reasoning of the Fourth Circuit Court of Appeals in *Rohrbaugh* to evaluate the supplemental affidavit of Dr. Gryska offered by the Appellant. In *Rohrbaugh*, a

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<sup>2</sup>Further, West Virginia Code § 55-7B-3 (2003) (Supp. 2005) provides that a plaintiff in a medical malpractice action must prove that a health care provider deviated from the applicable standard of care and that this deviation was the proximate cause of injury to the plaintiff. Specifically, the statute provides, in pertinent part, as follows:

(a) The following are necessary elements of proof that an injury or death resulted from the failure of a health care provider to follow the accepted standard of care:

(1) The health care provider failed to exercise that degree of care, skill and learning required or expected of a reasonable, prudent health care provider in the profession or class to which the health care provider belongs acting in the same or similar circumstances; and

(2) Such failure was a proximate cause of the injury or death.

<sup>3</sup>The lower court noted that the “Plaintiff concedes that expert testimony is required in this case as shown by the multiple expert disclosure she has made with respect to the same.”

plaintiffs' expert had initially refused to state that there was a causal link between a vaccine and a child's seizure disorder. 916 F.2d at 975. When confronted with a motion for summary judgment, however, the expert had submitted an affidavit asserting that the vaccine had indeed caused the injuries in question. *Id.* The Fourth Circuit declared in *Rohrbaugh* that "[a] genuine issue of material fact is not created where the only issue of fact is to determine which of the two conflicting versions of the plaintiff's testimony is correct." *Id.* (quoting *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4<sup>th</sup> Cir. 1984)).

After the lower court's partial summary judgment order was entered in the present case, this Court specifically validated the *Rohrbaugh* approach in *Kiser v. Caudill*, 215 W.Va. 403, 599 S.E.2d 826 (2004). In *Kiser*, this Court addressed attempts to utilize supplemental affidavits contradicting prior testimony to defeat a motion for summary judgment and held as follows at syllabus point four:

To defeat summary judgment, an affidavit that directly contradicts prior deposition testimony is generally insufficient to create a genuine issue of fact for trial, unless the contradiction is adequately explained. To determine whether the witness's explanation for the contradictory affidavit is adequate, the circuit court should examine: (1) Whether the deposition afforded the opportunity for direct and cross-examination of the witness; (2) whether the witness had access to pertinent evidence or information prior to or at the time of his or her deposition, or whether the affidavit was based upon newly discovered evidence not known or available at the time of the deposition; and (3) whether the earlier deposition testimony reflects confusion, lack of recollection or other legitimate lack of clarity that the affidavit justifiably attempts to explain.

In the present case, the lower court utilized the type of analysis adopted in *Kiser* and found that Dr. Gyska's supplemental affidavit directly contradicts his earlier deposition testimony and actually relies upon evidence Dr. Gyska admittedly reviewed in preparation for his original deposition. The only additional item reviewed by Dr. Gyska for his supplemental affidavit was Dr. Denning's testimony concerning the medical evidence previously reviewed by Dr. Gyska. The lower court did not consider that testimony to be newly discovered evidence not known at the time of Dr. Gyska's original deposition. Specifically, *Kiser* "precludes a party from creating an issue of fact to prevent summary judgment by submitting an affidavit that directly contradicts previous deposition testimony of the affiant." 215 W.Va. at 409, 599 S.E.2d at 832. Thus, the lower court refused to consider Dr. Gyska's supplemental affidavit as support for the Appellant's contention that Dr. Traylor deviated from the standard of care in the post-surgical procedures. The lower court properly analyzed the issues regarding the supplemental affidavit and properly concluded that it should not be considered. We therefore find no error in the lower court's refusal to consider Dr. Gyska's supplemental affidavit.

#### B. Appropriateness of Partial Summary Judgment

Based upon what this Court has deemed a proper analysis of the supplemental affidavit issue, the lower court disregarded Dr. Gyska's supplemental affidavit in its determination of the appropriateness of the Appellees' motions for partial summary

judgment. Thus, the lower court properly concluded that although the Appellant had presented expert testimony regarding the deviation from the standard of care with regard to the initial decision to perform surgery, preserving that issue for further proceedings against the Appellees, the Appellant had failed to present expert testimony that any post-surgical deviation from the standard of care had been committed by any Appellee. As the lower court stated, “there can be no question of fact where plaintiff’s standard of care expert does not establish that there was a deviation from an applicable standard of care by the physician.”

In light of such absence of necessary expert testimony, we find that it was appropriate to utilize partial summary judgment as a method of narrowing the triable issues<sup>4</sup> to only those acts of alleged negligence upon which the Appellant had presented expert testimony that a deviation from the standard of care had occurred. Specifically, the lower court protected the Appellant’s right to receive a complete evaluation of her allegations of medical malpractice in Mr. Calhoun’s pre-surgical and surgical care, properly supported by expert testimony of deviation from the standard of care.<sup>5</sup> The lower court’s grant of partial

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<sup>4</sup>*See Bakker v. First Fed. Sav. & Loan Assn.*, 575 So.2d 222, 224 (Fla. App. 3 Dist. 1991) (“[T]he purpose of the partial summary judgment procedure is to narrow the issues in a case so as to limit the matters genuinely in dispute which must be taken to trial”).

<sup>5</sup>The order granting partial summary judgment expressly provides as follows:

The movants do not contend that the plaintiff failed to  
(continued...)

summary judgment does not prevent the Appellant from asserting that medical malpractice was committed with regard to the decision to proceed with Mr. Calhoun's hernia repair surgery despite the presence of hypertension. Nor does it prevent the Appellant from presenting evidence that such malpractice caused or contributed to the resulting events, including the course of post-surgical care and recovery leading to and including Mr. Calhoun's death.<sup>6</sup> Such issues remain for determination by the trier of fact and are not defeated by the partial summary judgment granted by the lower court with regard to only that portion of the allegations for which the Appellant has not presented the necessary expert testimony. Based upon the foregoing, this Court affirms the decision of the Circuit Court of Cabell County.

Affirmed.

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<sup>5</sup>(...continued)

meet the threshold requirement for expert testimony to create a jury issue with respect to the performance of the inguinal hernia repair surgery. The movants advised the court that they are prepared to present competent expert testimony contra to plaintiff's claims in that regard and that there are jury issues as to the same.

<sup>6</sup>As this opinion has made clear, this does not entitle the Appellant to treat the course of post-operative care as an additional event of malpractice.