No. 32526 - Barbara Calhoun, Individually and as the Executrix of the Estate of Robert L. Calhoun 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

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OF WEST VIRGINIA

Davis, J., concurring:

The majority opinion in this case found that, in granting a partial summary judgment in favor of the defendants below, the circuit court correctly rejected, as a sham affidavit, a supplemental report submitted by one of the plaintiff's experts in response to the motion for partial summary judgment. I concur completely in this resolution of the instant action. I write separately in order to further discuss the sham affidavit rule, and to clarify its *proper* use, and to elaborate on its application in this case.

I feel it is important to emphasize that the sham affidavit rule is not intended, and should not be used, to prevent expert witnesses from clarifying, or even changing, their opinions.[1] Indeed, Rule 26(e)(1)(B) of the West Virginia Rules of Civil Procedure

[1]For example, we approved of an affidavit reflecting a change in an expert's opinion in *State ex rel. Krivchenia v. Karl*, 215 W.Va. 603, 600 S.E.2d 315 (2004) (per (continued...)

anticipates that the substance of an expert's expected testimony may change and requires the supplementation of discovery responses in that event:

> [a] party is under a duty seasonably to supplement that party's response with respect to any question directly addressed to: (B) The identity of each person expected to be called as an expert witness at trial, the subject matter on which the expert is expected to testify, *and the substance of the expert's testimony*.

(Emphasis added).

As opposed to precluding an expert from clarifying or changing his or her opinion, the true purpose of the sham affidavit rule is to prevent a party from resisting

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[1](...continued)
curiam). In *Krivchenia*, this Court found that the circuit court had erred in granting, in part, a motion in limine to prevent a defense expert from testifying regarding the applicable standard of care. This Court's finding was based on an affidavit in which the expert expressed a view he had previously declined to express. The affidavit was attached to the plaintiff's motion asking the circuit court to reconsider its ruling on the motion in limine. With respect to the affidavit, this Court explained that the expert

> stated during his deposition that he did not understand the legal definition of standard of care and, therefore, that he would not render an opinion on the standard of care. However, during the motion for reconsideration, [the expert] submitted an affidavit indicating that, "I have been advised that standard of care in West Virginia for a physician is 'what a reasonably prudent physician in the same or similar circumstances would do.'" The affidavit stated further that "having been informed of the legal definition of standard of care as it applies to [the defendant doctor], I am of the opinion, as I always have been, that [the defendant] did not deviate from the standard of care in regards to his care and treatment of Jamison Piatt."

Id. at ___, 600 S.E.2d at 319-20 (footnote omitted).

summary judgment by filing an affidavit that directly contradicts earlier deposition testimony when there is no satisfactory explanation for the change of opinion.[2] *See Kiser v. Caudill*, 215 W. Va. 403, 409, 599 S.E.2d 826, 832 (2004) ("Basically, the 'sham affidavit' rule 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."); *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 60 n.12, 459 S.E.2d 329, 337 n.12 (1995) ("[W]hen a party has given clear answers to unambiguous questions during a deposition or in answers to interrogatories, he does not create a trialworthy issue and defeat a motion for summary judgment by filing an affidavit that clearly is contradictory, where the party does not give a satisfactory explanation of why the testimony has changed."). *See also Tolly v. Carboline*

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[2]This purpose is clearly demonstrated by Syllabus point 4 of *Kiser v. Caudill*, which holds that,

> [t]o 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.

215 W. Va. 403, 599 S.E.2d 826 (2004).

Co., 217 W. Va. 158, ___, 617 S.E.2d 508, 515 (2005) (per curiam) ("[I]f a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issue of fact." (quoting *Kiser*, 215 W. Va. 403, 409, 599 S.E. 2d 826, 831 (additional quotations and citations omitted)).

In order to demonstrate that the instant case falls squarely within this rule, I will provide additional factual details, that were omitted from the majority opinion, regarding the opinion of Dr. Paul vonRyll Gryska, the plaintiff's expert witness.

Dr. Gryska prepared an expert disclosure dated November 23, 2003. In the disclosure, Dr. Gryska expressly states:

> At your request, I have studied the extensive records for Mr. Robert Calhoun beginning in May 1997. These records include the St. Mary's Hospital admissions on May 27 and again two days later on May 29 as well as office records of Dr. Jack Traylor, Jr. and Dr. Robert Turner.

With respect to Mr. Calhoun's post-operative care, the disclosure states, in pertinent part,

> Most of the events that followed hospitalization on May 29, 1997 were related to his stroke either directly or indirectly. During the several days after hospitalization, he developed a fever and evaluation of the abdomen found free air in the abdomen. Repeat x-ray four days later again found free air. *This was a change from admission where a chest xray was normal* (abdominal air is assessed on chest x-ray; often called free air under the diaphragm) and his white blood cell count was normal. Dr. Traylor was consulted to assess the Patient's

> abdomen in the face of worsening sepsis. He concluded that the abdominal air was a residual finding from surgery now nine days previously. This was an incorrect assessment and not compatible with the physiology of laparoscopic insufflation
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> The process of inflating the abdominal cavity or preperitoneal space as was the case with Mr. Calhoun (the abdomen was never actually entered) uses carbon dioxide or CO2. This is removed from the body in a matter or hours after surgery not days and certainly not nine days. It is my understanding from reading the records that Dr. Traylor failed to recognize the abdominal catastrophe developing in Mr. Calhoun's abdomen.
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> In the face of recent stroke there are many sources for infection and many physiologic changes that are directly related to the stroke and many are a consequence of the immobilization and catheterization and altered physiology indirectly related to the stroke. . . .

(Emphasis added). As the foregoing disclosure demonstrates, Dr. Gryska was aware of the normal x-ray that was taken at the time of Mr. Calhoun's admission, and of the fact that free air was subsequently discovered in Mr. Calhoun's abdomen. He further opined that Dr. Traylor "failed to recognize the abdominal catastrophe developing in Mr. Calhoun's abdomen." However, Dr. Gryska did not conclude that this particular failure on the part of Dr. Traylor was below the proper standard of care. Instead, Dr. Gryska indicates that, due to Mr. Calhoun's stroke, there were many potential sources for the complications Mr. Calhoun was experiencing and it was not below the standard of care for Dr. Traylor to specifically identify their exact cause.

Dr. Gryska's opinion that Dr. Traylor did not fall below the appropriate

standard of care by failing to recognize the true nature of Mr. Calhoun's post-operative complications was expressed more clearly when he was deposed by the defense on December 16, 2003. During that deposition, Dr. Gryska testified that he could not state that Dr. Traylor had deviated from the standard of care in his post-operative treatment of Mr. Calhoun, and even went so far as to say that Dr. Traylor had not been negligent. Again, Dr. Gryska relied on the fact that, due to Mr. Calhoun's stroke, there were many potential causes for the adverse symptoms Mr. Calhoun was experiencing:

> Q Okay. For instance, let's talk about the postoperative care that you reference in your report. Tell me, do you have any opinions that the postoperative care that was rendered by Dr. Traylor somehow deviated from the standard of care?
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> A. No.
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> Q. Just so I'm clear then, it is not your intent to come to trial and testify that Dr. Traylor deviated from the standard of care in the manner in which he treated this Patient from a postoperative perspective?
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> A. Well, this was an unusual postoperative perspective and unusual postoperative course. *I believe Dr. Traylor was wrong in his review of the x-rays and assessment of the Patient. The problem comes in that there's a lot of explanations sometimes after a patient has had a stroke. There's so many physiologic changes that occur, there are too many explanations and too many variables to describe, to ascribe, to state with certainty, that there is a standard of care.* I believe Dr. Traylor made an error when assessing the Patient. It is a lot harder to call that a violation of the standard of care.
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> Q. So we are clear, you do not intend to render any opinions at trial that Dr. Traylor was negligent or breaching the

standard of care in his management of the Patient during the postoperative period, is that correct?

A. Correct.

Q. Do you have any other opinions with respect to Doctor Traylor's treatment in this matter?

A. Yes. I think he failed to recognize the severity of a new problem inside Mr. Calhoun's tummy, but again I told you that was – there were so many other explanations that I do not believe it was a violation of the standard of care. It was not negligence.

Deposition of Dr. Paul vonRyll Gryska, December 16, 2003, at 80-82.

At the outset of his deposition, Dr. Gryska described the extensive records he was given to review in connection with this case:

> I was provided with all of the records at one time which includes many of the rehab records and the chronic facility records that Mr. Calhoun evolved while he was going through the next year or so. I don't think I have every single thing from the time of his surgery through his death, but I have many of the post hospital records.
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> The ones I have here today include the original medical records from his operation, his day surgical procedure in May of 1997, his readmission to the hospital on May 29th, 1997, and his hospitalization for the next month. I also have deposition s here for Mrs. Calhoun, Doctor Traylor, Doctor Stone, and Doctor Turner.

Deposition of Dr. Paul vonRyll Gryska, December 16, 2003, at 5-6.

Based upon the foregoing details of Dr. Gryska's expert disclosure and

deposition testimony, it is clear that in reaching his ultimate conclusion that he was unable to state that Dr. Traylor had fallen below the standard of care with respect to Mr. Calhoun's post-operative treatment, Dr. Gryska had reviewed Mr. Calhoun's extensive medical records, had known of the absence of free air in Mr. Calhoun's abdomen upon his post-stroke admission to the hospital on May 29, 1997, and had also known of the presence of free air a few days later.

Nevertheless, after the defendants filed a motion for partial summary judgment on the issue of Mr. Calhoun's post operative medical treatment, which cited the absence of expert testimony stating that Dr. Traylor had breached the standard of care as grounds for summary judgment on this issue, Dr. Gryska filed a supplemental report reversing his opinion on this issue. Contrary to his earlier statements, in his supplemental report Dr. Gryska opined that Dr. Traylor's failure to recognize that Mr. Calhoun had developed a new problem and his failure to properly advise the medical team and conduct further investigation of the problem "was indeed beneath [the] standard of care." Dr. Gryska pointed to the newly obtained deposition testimony of Dr. David Denning, the physician who diagnosed and performed surgery on Mr. Calhoun's bowel perforation, as the foundation of his changed opinion. However, a careful reading of Dr. Gryska's supplemental report reveals that the medical data relied upon therein was the same data he had discussed in his expert disclosure and deposition testimony:

Dr. Denning reiterates the findings on the chart, both radiologic

> and clinical and points out clearly that admission chest x-ray found no free air and that a change in clinical status prompted further x-rays which found free air on June 4, 1997. Dr. Traylor was consulted to assess the patient's abdomen in the face of worsening sepsis. His note, dated June 5, indicates that there was free air present on admission yet this was not the case. The x-ray report suggests that this new free air was from a perforated viscus.
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> Given new symptoms, fever, somnolence, and worsening sepsis, the finding of free air on chest x-ray when it was not there before mandates further evaluation. At the very minimum more radiologic evaluation should have been recommended and ordered. This would have answered the question of a perforated viscus and/or free air. Surgical intervention at this time would have dramatically shortened this hospital admission and possibly avoided much of his physiologic injury and prolonged convalescence.

Plainly, Dr. Gryska's revised opinion was based upon the initial absence and subsequent presence of free-air in Mr. Calhoun's abdomen, in combination with other symptoms from which Mr. Calhoun was suffering. As I demonstrate above, Dr. Gryska had all of this information at the time he rendered his initial report and gave his deposition testimony. Both in his expert disclosure and in his deposition testimony, Dr. Gryska stated that he had reviewed all of Mr. Calhoun's hospital records. In addition, the expert disclosure made specific references to the absence and subsequent presence of free air in Mr. Calhoun's abdomen. Accordingly, it is without question that Dr. Gryska's supplemental report was properly rejected as a sham affidavit in that it (1) directly contradicted his earlier statements; (2) was filed in response to a motion for summary judgment, and (3) was based upon medical data that had been reviewed by Dr. Gryska prior to his earlier statements. Moreover, Dr.

Gryska testified thoroughly during his deposition and he did not experience any confusion, lack of recollection or other legitimate lack of clarity at that time that would justify the supplemental report. *See* Syl. pt. 4, *Kiser*, 215 W. Va. 403, 599 S.E.2d 826.[3]

In conclusion, I reflect on the comments of Justice Starcher in his concurring opinion in *Kiser*,

> An expert witness's understanding of a case, and testimony on a legal opinion, can change with time. An expert witness, who is unfamiliar with a particular issue in a deposition, can become familiar with the issue after a deposition by doing additional research or testing. An expert brings experience to the courtroom, and uses that experience to assist the jury in understanding the facts. If the expert's experience changes, resulting in a change in the expert's opinion or other deposition testimony, then the party offering the expert is entitled to amend the expert's testimony through use of an affidavit. But that affidavit had also better list some pretty good reasons for the change in the expert's testimony.

Kiser, 215 W. Va. at 411-12, 599 S.E.2d at 834-35. In this case, there simply was no good reason for Dr. Gryska's change in opinion, and the rejection of his supplemental report as a sham affidavit was proper.

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[3]Likewise, in *Kiser v. Caudill*, 215 W. Va. 403, 599 S.E.2d 826, there was simply no justification for the expert's change in opinion. The expert in *Kiser* had testified during his deposition that "he only knew the standard of care with regard to tethered spinal cords at the hospital where he was working in 1973, which was the Children's Hospital in Columbus, Ohio." 215 W. Va. at 408, 599 S.E.2d at 831. Upon repeated questioning, the expert maintained that he did not possess knowledge of the standard of care at other places during that period of time. *Id.* Following a motion for summary judgement, however, the expert tendered an affidavit that "completely contradicted his deposition testimony without any explanation." *Id.*