

No. 33189 - *The Estate of Alexia Sheree Fout-Iser, by Maranda L. Fout-Iser, Fiduciary; Maranda L. Fout-Iser, individually; and Jerry T. Iser, individually v. John L. Hahn, M.D.; Thomas Joseph Schmitt, M.D.; MyungSup 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.*

**FILED**

**May 21, 2007**

**released at 3:00 p.m.**

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

Davis, C.J., dissenting:

Hard cases make bad law, and the instant case is no exception to this adage. Simply stated, the facts of this case are horrific. The conduct of the physicians who treated Mrs. Fout-Iser and her unborn child was inexcusable, unprofessional, and unquestionably contributed to the death of the Isers' child. Nevertheless, even when a defendant's conduct is egregious beyond words, a plaintiff is not excused from adhering to the requirements of the West Virginia Rules of Civil Procedure when prosecuting a claim. The Rules of Civil Procedure are "administered to secure the just, speedy, and inexpensive determination of every action." W. Va. R. Civ. P. 1. Because the Isers' counsel did not follow the established rules regarding the designation of expert witnesses and because the majority of the Court has excused their failure to so comply as to Dr. Rhee, I respectfully dissent.

In a case seeking to establish medical malpractice, a plaintiff is required to prove two things regarding each defendant: (1) that the defendant's conduct deviated from

the applicable standard of care and (2) that such conduct proximately caused the plaintiff's injury. W. Va. Code § 55-7B-3 (1986)<sup>1</sup> (Repl. Vol. 2000) requires, as follows:

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:

(a) The health care provider failed to exercise the 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

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

*Accord* Syl. pt. 4, *Short v. Appalachian OH-9, Inc.*, 203 W. Va. 246, 507 S.E.2d 124 (1998)

("In a malpractice case, the plaintiff must not only prove negligence but must also show that such negligence was the proximate cause of the injury."). Thus, a plaintiff needs to present evidence regarding the standard of care and causation with respect to each defendant.

Additionally, a plaintiff must establish that a defendant has breached the applicable standard of care and that said breach is a proximate cause of the plaintiff's injury by expert testimony, where required by the court.<sup>2</sup> Specifically, W. Va. Code § 55-7B-7

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<sup>1</sup>Because the events giving rise to the instant lawsuit occurred in 1999, I will reference that version of the West Virginia Medical Professional Liability Act that was then in effect, *i.e.*, W. Va. Code § 55-7B-1, *et seq.* (1986) (Repl. Vol. 2000).

<sup>2</sup>Although counsel for the Isers in this case later disputed that expert testimony was necessary to prove their claims in this case, they did not challenge the trial court's initial determination that experts were needed to prove their claims of malpractice.

(1986) (Repl. Vol. 2000) requires, in pertinent part, that “[t]he applicable standard of care and a defendant’s failure to meet said 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.” We have also addressed the necessity of expert testimony to prove a claim of medical malpractice, and have specifically held 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).’ Syllabus point 1, *Farley v. Meadows*, 185 W. Va. 48, 404 S.E.2d 537 (1991).” Syl. pt. 3, *Farley v. Shook*, 218 W. Va. 680, 629 S.E.2d 739 (2006) (per curiam).

Finally, when a plaintiff intends to call an expert witness to testify at trial, the identity of such expert as well as the subject about which the expert is expected to testify, are discoverable. Rule 26(b)(4)(A)(i) of the West Virginia Rules of Civil Procedure directs that

[a] party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, *to state the subject matter on which the expert is expected to testify*, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(Emphasis added). Furthermore, when a party has disclosed the identity of an expert witness and the subject matter about which the expert is expected to testify, he/she is bound, also, to disclose any new information he/she acquires in this regard. In this regard, Rule 26(e)(1)(B)

of the West Virginia Rules of Civil Procedure requires that

(1) [a] party is under a duty seasonably to supplement that party's response with respect to any question directly addressed to:

....

(B) [t]he 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.

*Cf. Syl. pt. 3, Prager v. Meckling*, 172 W. Va. 785, 310 S.E.2d 852 (1983) ("Rule 26(e)(2) of the Rules of Civil Procedure imposes a continuing obligation to supplement responses previously made when, in light of subsequent information, the original response is incorrect.").

During the proceedings underlying the instant appeal, the trial court, in the course of its July 22, 2003, status conference, specifically required the parties to disclose their expert witnesses to each other. In response thereto, counsel for the Isers served upon the defendants a "Plaintiffs' Designation of Experts and Supplemental Answers to Interrogatories" on November 3, 2003, which they described as providing information about "a. [the] [i]dentity of the expert; b. [the] [s]ubject matter upon which the expert is expected to testify; c. [t]he substance of the opinions to which the expert is expected to testify; and d. [t]he basis for the opinions to which the expert is expected to testify." With respect to Dr. McLaughlin, the plaintiffs provided the following information:

(1) a. **Richard D. McLaughlin, M.D.**, Medical Arts Center, 1000 East Primrose, Suite 270, Springfield, Missouri, 65807.

b. Obstetrics and gynecology. See attached C.V. which is incorporated herein.

c. It is expected that Dr. McLaughlin will testify whether defendant John L. Hahn, M.D., and/or Hahn Medical Practices, Inc., deviated from acceptable standards of care and/or committed negligence in the overall care and treatment of Maranda Fout-Iser. It is further expected that Dr. McLaughlin will discuss the overall care and treatment of Maranda Fout-Iser as revealed in the medical records of Maranda Fout-Iser which have been provided to defense counsel and all of which are incorporated herein. It is further expected that Dr. McLaughlin will testify whether John L. Hahn, M.D., and/or Hahn Medical Practices, Inc., deviated from acceptable standards of care and/or carelessly and negligently failed to properly diagnosis [sic] and, thereafter, properly manage, and/or treat Maranda Fout-Iser for pre-eclampsia and/or eclampsia and/or placenta abruptio and/or DIC and/or HELLP Syndrome. It is further expected that Dr. McLaughlin will testify on the issues of causation and damages, including permanency and the death of Alexia Cheree Fout-Iser.

d. It is expected that Dr. McLaughlin's opinions will be based upon his knowledge, education, training, and experience, together with his review of the medical records of Maranda Fout-Iser. All medical records are incorporated in this disclosure and have been provided to defense counsel. In addition, Dr. McLaughlin may review the deposition testimony and discovery materials provided by parties to this litigation.

(Emphasis in original).

Consistent with the above-referenced disclosure, Dr. McLaughlin specifically stated at his deposition that his testimony was limited to the conduct of Dr. Hahn and Dr.

Schmidt and that he expressly was *not* providing testimony with respect to Dr. Rhee. During his deposition, Dr. McLaughlin testified as follows:

Q. [by Attorney Goundry (counsel for Dr. Rhee)] Dr. McLaughlin, this is Ed Goundry. I represent two physicians in this case, Dr. Rhee, who did the radiology ultrasound report, and Dr. Kim, who did the final ultrasound report later. Let me ask you, Doctor – and hopefully, I’ll just have this one question. I take it from your testimony that you are not going to be rendering any opinions as to either of those physicians. Is that correct?

A. [by Dr. McLaughlin] You take that correctly.

MR. GOUNDRY: All right. No other questions.

May 3, 2004, Dep. of Richard D. McLaughlin, M.D., at 62-63. No other reference to Dr. Rhee was made in Dr. McLaughlin’s deposition.

To summarize, then, in order for the Isers to be permitted to call Dr. McLaughlin to testify that Dr. Rhee had breached the applicable standard of care and that such breach was a proximate cause of their injuries, the Isers first had to either (1) designate Dr. McLaughlin as an expert testifying to these matters, pursuant to Rule 26(b)(4)(A)(i), or (2) supplement their expert disclosure to include such information, in accordance with Rule 26(e)(1)(B). The Isers, however, did neither, and, thus, the circuit court did not err by concluding that they had failed to present evidence as to causation vis-a-vis Dr. Rhee.

In rendering their decision in this case, the majority of the Court completely

ignores the failure of the Isers' counsel to designate Dr. McLaughlin as an expert to testify as to standard of care and causation with respect to Dr. Rhee. Rather than recognizing the Isers' failure to comply with the West Virginia Rules of Civil Procedure, the majority instead compounds this error by specifically finding that "the appellants' expert witness, Dr. Richard D. McLaughlin, . . . offered testimony with regard to causation." Majority op. at 10. The parties do not dispute that Dr. McLaughlin is qualified to testify as an expert in this case,<sup>3</sup> and, as such, he is perfectly capable of rendering an opinion with regard to causation as it relates to the *other* defendants about whom he has been designated to testify. Dr. McLaughlin could not, however, provide testimony with respect to causation as it related to Dr. Rhee because the Isers neither designated him as an expert in this regard<sup>4</sup> nor supplemented their original expert disclosure list to indicate that Dr. McLaughlin's testimony also would include an evaluation of Dr. Rhee's conduct. More importantly, though, the record clearly evidences that Dr. McLaughlin did *not* provide testimony regarding Dr. Rhee. Dr. McLaughlin's deposition testimony quite explicitly stated that he would not be testifying as to Dr. Rhee's conduct and whether or not it contributed to the Isers' injuries. In fact,

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<sup>3</sup>There is no dispute that Dr. McLaughlin is qualified to testify as an expert in this case with respect to those matters about which he has been designated to testify. His qualifications to testify in that regard are not at issue in this proceeding. *See generally* W. Va. R. Evid. 702 (addressing "[t]estimony by experts"); *Watson v. Inco Alloys Int'l, Inc.*, 209 W. Va. 234, 545 S.E.2d 294 (2001) (discussing qualification of expert witness).

<sup>4</sup>In fact, the *only* expert the Isers designated in their "Plaintiffs' Designation of Experts and Supplemental Answers to Interrogatories" to provide testimony as to Dr. Rhee was Jeffrey M. Dicke, M.D.

nothing in the record submitted for appellate consideration would lead to the conclusion that Dr. McLaughlin had been designated as an expert to testify regarding Dr. Rhee.

The instant proceeding was appealed to this Court upon the lower court's grant of summary judgment in favor of Dr. Rhee. As such, this Court, when reviewing the lower court's summary judgment order, must view all evidence in light most favorable to nonmoving party. *See, e.g.*, Syl. pt. 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995) ("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."); Syl. pt. 4, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994) (same). *See also Williams*, 194 W. Va. at 59-60, 459 S.E.2d at 336-37 (commenting that when reviewing a motion for summary judgment, "the underlying facts and all inferences are viewed in the light most favorable to the nonmoving party"); *Painter*, 192 W. Va. at 192, 451 S.E.2d at 758 (recognizing that court considering a motion for summary judgment "must draw any permissible inference from the underlying facts in the light most favorable to the party opposing the motion" (citations omitted)). In other words, this Court, in reviewing the circuit court's summary judgment order, must construe the evidence presented below in the light most favorable to the Isers.

To find in favor of the Isers in this case, the majority determined that the Isers



had provided sufficient causation evidence against Dr. Rhee through Dr. McLaughlin's testimony.<sup>5</sup> However, where the Isers failed to amend their witness disclosure list to include

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<sup>5</sup>In support of its ruling in this regard, the majority quotes from that portion of Dr. McLaughlin's deposition in which he provided causation evidence by indicating that delays in Mrs. Fout-Iser's treatment contributed to the Isers' injuries. The context of this testimony, with those portions quoted by the Majority opinion at page 10 appearing in italics, is as follows:

Q. [by Attorney Fields (counsel for Dr. Schmitt)] Dr. McLaughlin, we're back on the record. As I introduced myself earlier, I'm Dan Fields, and I represent Dr. Schmitt in this action.

You characterized your expert designation as incomplete because it did not contain any criticisms of Dr. Schmitt. Have you had those criticisms since you first reviewed all of the material that you referenced earlier?

A. [by Dr. McLaughlin] Yes, sir.

Q. And had you not seen that expert designation before it was published to the parties in this action?

A. Not that I know of.

Q. You do – you weren't asked to add criticisms of Dr. Schmitt to your expert designation. Is that a correct statement?

A. That would be a correct statement.

Q. I want to go back through those in a little bit of – in a little bit of detail and see if we can flesh out – flesh out those criticisms. Would you please, just for the record one more time – I think I have two criticisms of Dr. Schmitt. I don't want this to be criticisms of Potomac Valley Hospital, although, to an extent, that can be somewhat indistinguishable, but just those of Dr. Schmitt, if you would, please.

Dr. Rhee's conduct as a matter upon which Dr. McLaughlin was expected to testify and where Dr. McLaughlin, himself, clearly stated that he would not testify with respect to Dr. Rhee and did *not* testify regarding Dr. Rhee,<sup>6</sup> I can reach no other conclusion but that Dr. McLaughlin did not establish causation regarding Dr. Rhee. Thus, in the absence of other

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First criticism is failure to recognize – and I believe this was your term – a catastrophic obstetrical event?

A. Potential catastrophic.

Q. Potential catastrophic. Would you explain that, please?

A. Yes. I think anybody that undertakes the care of a pregnant patient, especially one that is in advanced pregnancy – and 32 weeks would be advanced pregnancy – must realize that these women can get extremely ill for various reasons, one of which is a bleeding problem associated with abruptio placenta. This particular patient really presented with some of the classic symptoms of abruptio placenta, and these were not appreciated by Dr. Schmitt.

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.*

May 3, 2004, Dep. of Richard D. McLaughlin, M.D., at 48-50 (emphasis added to highlight deposition testimony quoted by Majority opinion). It is evident, then, that Dr. McLaughlin attributed the delay in obtaining an ultrasound, and the damages resulting therefrom, to Dr. Schmitt, and not to Dr. Rhee.

<sup>6</sup>See *supra* note 5.

causation evidence linking Dr. Rhee's conduct to the injuries sustained by the Isers,<sup>7</sup> I

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<sup>7</sup>The Isers designated only one expert, Jeffrey M. Dicke, M.D., to provide expert testimony with respect to Dr. Rhee. *See supra* note 4. However, the testimony of Dr. Dicke failed to establish that Dr. Rhee's actions had caused the Isers' injuries. In his deposition of November 4, 2004, Dr. Dicke testified that Dr. Rhee's omission from his teleradiology report of information pertaining to the levels of Mrs. Fout-Iser's amniotic fluid constituted a breach of the standard of care for a radiologist. However, Dr. Dicke could not say that this omission had caused the Isers' injuries:

Q: [by Attorney Goundry (counsel for Dr. Rhee)] But would you agree with me that you cannot say that it would have changed the outcome in this case?

A: [by Dr. Dicke] That's correct.

Nov. 4, 2004, Dep. of Jeffrey Dicke, M.D., at 85. Likewise, Dr. Dicke stated that he did not believe that Dr. Rhee had contributed to the delay in treating Mrs. Fout-Iser:

Q: [by Attorney Goundry] Well, is there anything in the medical records [sic] that Dr. Rhee had anything to do with the what you referred to as the time lapse?

A: [by Dr. Dicke] Not that I saw.

*Id.*, at 54. Furthermore, in a subsequent deposition held on August 9, 2005, Dr. Dicke reiterated his opinion that Dr. Rhee's conduct had not caused the Isers' injuries:

Q. [by Attorney Varner (counsel for the defendants)] Okay. And I assume that you can't say that even if Dr. Rhee had come in when he first was called that it would have made any difference in the outcome of this either?

A. [by Dr. Dicke] No.

Aug. 9, 2005, Dep. of Jeffrey Michael Dicke, M.D., at 18. Insofar as the Isers designated only one expert to testify as to causation with respect to Dr. Rhee and that one expert, Dr. Dicke, failed to provide evidence that Dr. Rhee's conduct was a proximate cause of the Isers' injuries, the Isers have not sustained their burden of proof on causation as it relates to Dr. Rhee. *See* W. Va. Code § 55-7B-3 (1986) (Repl. Vol. 2000) ("The following are necessary

respectfully disagree with the majority's decision to the contrary.

This Court previously has recognized that “one of the purposes of the discovery process under our Rules of Civil Procedure is to eliminate surprise. Trial by ambush is not contemplated by the Rules of Civil Procedure.” *McDougal v. McCammon*, 193 W. Va. 229, 236-37, 455 S.E.2d 788, 795-96 (1995). To this end, this Court also has cautioned that

[t]he fairness and integrity of the fact-finding process is of great concern to this Court; and, when a party fails to acknowledge the existence of evidence that is favorable or adverse to a requesting party, it impedes that process. . . . As a general rule, wrongfully secreting relevant discovery materials makes it inequitable for the withholder to retain the benefit of a favorable verdict.

*McDougal*, 193 W. Va. at 238, 455 S.E.2d at 797. When a party, such as in the case *sub judice*, fails to disclose information, or to amend previously disclosed information, that the party is required to disclose, or amend, this Court has found sanctions to be appropriate. *See, e.g.*, Syl. pt. 5, *Prager v. Meckling*, 172 W. Va. 785, 310 S.E.2d 852 (“Factors to be considered in determining whether the failure to supplement discovery requests under Rule 26(e)(2) of the Rules of Civil Procedure should require exclusion of evidence related to the supplementary material include: (1) the prejudice or surprise in fact of the party against

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elements of proof that an injury or death resulted from the failure of a health care provider to follow the accepted standard of care: (a) The health care provider failed to exercise the 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 (b) *Such failure was a proximate cause of the injury or death.*” (emphasis added)).

whom the evidence is to be admitted; (2) the ability of that party to cure the prejudice; (3) the bad faith or willfulness of the party who failed to supplement discovery requests; and (4) the practical importance of the evidence excluded.”).

Most recently, this Court upheld the imposition of such sanctions in *Jenkins v. CSX Transportation, Inc.*, \_\_\_ W. Va. \_\_\_, \_\_\_ S.E.2d \_\_\_ (No. 33179 May 17, 2007) (per curiam), by affirming the trial court’s exclusion of the plaintiff’s sole evidence on causation. In *Jenkins*, the plaintiff had disclosed his expert witnesses to the defendant and informed the defendant of the matters about which said experts would testify. During the deposition of one of the plaintiff’s experts, Dr. Ducatman, the expert was asked whether he had reviewed the neuropsychological test results of a Dr. Phifer. Dr. Ducatman testified that, “I do not recall seeing a report from Dr. Pfeiffer [sic] relating to this patient. It does not mean that I haven’t seen one.” *Jenkins*, \_\_\_ W. Va. at \_\_\_, \_\_\_ S.E.2d at \_\_\_, Slip op. at 3. At the conclusion of this testimony, counsel for the defendant reserved the right to re-depose Dr. Ducatman if he were to review Dr. Phifer’s report. *See* Nov. 19, 2004, Dep. of Alan Ducatman, M.D., at 39. Dr. Ducatman was not re-deposed.

During the trial, however, counsel for the plaintiff called Dr. Ducatman as an expert witness and asked him to testify with respect to his review of Dr. Phifer’s report. Because the plaintiff had neglected to supplement his expert disclosure to inform the defendant that the scope of Dr. Ducatman’s testimony had changed, and because the

defendant had no warning that Dr. Ducatman would be called to testify as to Dr. Phifer's report, the trial court determined that the plaintiff's failure to earlier disclose this information to the defendant precluded him from presenting such evidence at trial. This Court affirmed that ruling. In the instant case, though, the majority, on extraordinarily similar facts, reaches a completely opposite conclusion by not only ruling in favor of the party who failed to disclose the allegedly expanded nature of the expert's testimony<sup>8</sup> but by also relying upon such non-disclosed testimony to support its decision in that party's favor. I cannot subscribe to this inconsistency.

In conclusion, I wish to make it abundantly clear that I appreciate the very tragic facts of this case, and I emphatically do not condone the utter lack of professionalism inherent therein. Be that as it may, I am nevertheless bound to follow the law of this State, and in accordance therewith I believe that the Isers failed to follow the West Virginia Rules of Civil Procedure by not amending their expert witness disclosure and that the circuit court properly determined that the Isers had not sustained their burden of proof in this case as to Dr. Rhee. Because the majority apparently condones this disregard for the West Virginia Rules of Civil Procedure, I respectfully dissent.

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<sup>8</sup>I continue to disagree, though, with the majority's conclusion that Dr. McLaughlin's testimony establishes that Dr. Rhee's conduct caused the Isers' injuries insofar there is no record evidence to suggest that Dr. McLaughlin's testimony has been expanded to include an assessment of Dr. Rhee.