

FILED
JAN 16 2007

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THE ESTATE OF ALEXIA RORY L. PERRY II, CLERK
SHEREE FOUT-ISER, By SUPREME COURT OF APPEALS
Maranda L. Fout-Iser, OF WEST VIRGINIA
Fiduciary, and MARANDA L.
FOUT-ISER, Individually, and
JERRY T. ISER, Individually,

RECEIVED
JAN 16 2007
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Appellants,

v.

Circuit Court of Mineral County
Civil Action No. 01-C-81 F
Supreme Court No. 33189

JOHN L. HAHN, M.D., and
HAHN MEDICAL PRACTICES, INC.;
THOMAS JOSEPH SCHMITT, M.D.;
BRUCE W. LESLIE, M.D.; MYUNG-SUP
KIM, M.D.; GRANT MEMORIAL
HOSPITAL REGIONAL HEALTH CARE
CENTER, a corporation; POTOMAC VALLEY
HOSPITAL OF W. VA., INC., a corporation; and
ANITA M. RHEE, Administratrix of the Estate of
RUSSELL RHEE, M.D.,

Appellees.

BRIEF ON BEHALF OF THE APPELLEE
ANITA M. RHEE, ADMINISTRATRIX OF THE ESTATE
OF RUSSELL RHEE, M.D.



THOMAS J. HURNEY, JR. (WVSB # 1833)
MATTHEW A. NELSON (WVSB # 9421)
JACKSON KELLY PLLC
1600 Laidley Tower
Charleston, West Virginia 25322
(304) 340-1000

TABLE OF CONTENTS

| | |
|------------------------------|----|
| INTRODUCTORY NOTE..... | 1 |
| SUMMARY OF THE CASE | 2 |
| STATEMENT OF THE FACTS | 3 |
| ISSUES | 11 |
| STANDARD OF REVIEW..... | 12 |
| ARGUMENT..... | 13 |
| CONCLUSION | 29 |

TABLE OF CONTENTS

INTRODUCTORY NOTE.....1

SUMMARY OF THE CASE2

STATEMENT OF THE FACTS3

ISSUES.....11

STANDARD OF REVIEW.....12

ARGUMENT.....13

CONCLUSION29

TABLE OF AUTHORITIES

Page

Cases

| | |
|------------------------------------------------------------------------------------------------------------|----------------|
| 10A Federal Practice and Procedure § 2726 at 30-31 (2d ed. Supp. 1994) | 22 |
| <i>Arbogast v. Mid-Ohio Valley Medical Corp.</i> , 214 W. Va. 356, 589 S.E.2d 498 (2003) | 24 |
| <i>Banfi v. American Hosp. for Rehab.</i> , 207 W. Va. 125, 529 S.E.2d 600 (2000) | 27 |
| <i>Farley v. Shook</i> , 218 W. Va. 680, 629 S.E.2d 739 (2006) | 12, 13, 14, 25 |
| <i>Goundry v. Wetzel-Saffle</i> , 211 W. Va. 698, 568 S.E.2d 5 (2002) | passim |
| <i>Kiser v. Caudill</i> , 215 W. Va. 403, 599 S.E.2d 826 (2004) | 14, 22 |
| <i>Mayhorn v. Logan Medical Foundation</i> , 193 W. Va. 42, 454 S.E.2d 87 (1994) | 18 |
| <i>McGraw v. St. Joseph's Hosp.</i> , 200 W. Va. 114, 488 S.E.2d 389 (1997) | 12, 25 |
| <i>Murphy v. Smallridge</i> , 196 W. Va. 35, 468 S.E.2d 167 (1996) | 12, 23 |
| <i>Painter v. Peavy</i> , 192 W. Va. 189, 451 S.E.2d 755 (1994) | 23 |
| <i>Sands v. Security Trust Co.</i> , 143 W. Va. 522, 102 S.E.2d 733 (1958) | 28 |
| <i>Short v. Appalacian OH-9</i> , 203 W. Va. 246, 507 S.E.2d 124 (1998) | 13, 19, 24, 25 |
| <i>State v. Lilly</i> , 194 W. Va. 595, 461 S.E.2d 101 (1995) | 28 |
| <i>Thomas v. Raleigh General Hosp.</i> , 178 W. Va. 138, 358 S.E.2d 222 (1987) | 21 |
| <i>Totten v. Adongay</i> , 175 W. Va. 634, 337 S.E.2d 2 (1985) | 26 |
| <i>Withrow v. West Virginia University Hospitals, Inc.</i> , 213 W. Va. 48, 576 S.E.2d 527 (2002) | 14, 16 |

Statutes

| | |
|------------------------------------|------------|
| W. Va. Code § 55-7B-1 | 2, 13, 25 |
| W. Va. Code § 55-7B-3 | passim |
| W. Va. Code § 55-7B-6 (2003) | 6, 25, 28 |
| W. Va. Code § 55-7B-7 (1986) | 12, 13, 25 |

Rules

| | |
|--------------------------------------------------------|----|
| West Virginia Rules of Civil Procedure Rule 56..... | 13 |
|--------------------------------------------------------|----|

Other

| | |
|--------------------------------------------------------------------------------|----|
| 10A Federal Practice and Procedure § 2726 at 30-31 (2d ed. Supp. 1994)..... | 22 |
|--------------------------------------------------------------------------------|----|

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THE ESTATE OF ALEXIA
SHEREE FOUT-ISER, By Maranda L.
Fout-Iser, Fiduciary, and MARANDA L.
FOUT-ISER, Individually, and
JEREMY T. ISER, Individually,

Appellants,

v.

Circuit Court of Mineral County
Civil Action No. 01-C-81 F
Supreme Court No. 33189

JOHN L. HAHN, M.D., and
HAHN MEDICAL PRACTICES, INC.;
THOMAS JOSEPH SCHMITT, M.D.;
BRUCE W. LESLIE, M.D.; MYUNG-SUP
KIM, M.D.; GRANT MEMORIAL
HOSPITAL REGIONAL HEALTH CARE
CENTER, a corporation; POTOMAC VALLEY
HOSPITAL OF W. VA., INC., a corporation; and
ANITA M. RHEE, Administratrix of the Estate of
RUSSELL RHEE, M.D.,

Appellees.

**BRIEF ON BEHALF OF THE APPELLEE
ANITA M. RHEE, ADMINISTRATRIX OF THE ESTATE
OF RUSSELL RHEE, M.D.**

I.

INTRODUCTORY NOTE

For the purpose of this appeal and brief, the Appellants, the Estate of Alexia Cheree Fout-Iser, by Maranda L. Fout-Iser, Fiduciary; Maranda L. Fout-Iser, individually, and Jeremy T. Iser, individually, shall be referred to as "Plaintiffs"; the Appellee, Anita M. Rhee, Administratrix of the Estate of Russell Rhee, M.D., shall be referred to as "Defendant."

II.

SUMMARY OF THE CASE

This medical professional liability action arises out of a complaint filed by the Estate of Alexia Cheree Fout-Iser, by Maranda L. Fout-Iser, Fiduciary; Maranda L. Fout-Iser, individually, and Jeremy T. Iser against John L. Hahn, M.D., Hahn Medical Practices, Inc., Thomas Joseph Schmitt, M.D., Bruce W. Leslie M.D., Myung-Sup Kim, M.D., Grant Memorial Hospital Regional Health Care Center, Potomac Valley Hospital of W. Va., Inc., and Anita M. Rhee, Administratrix of the Estate of Russell Rhee, M.D., under the provisions of West Virginia Code § 55-7B-1, *et seq.* Plaintiffs filed this action on July 30, 2001, in the Circuit Court of Mineral County, West Virginia.

After discovery was completed, defendant filed a motion for summary judgment. A hearing was held on defendant's motion on August 24, 2005. By Order entered on August 30, 2005, the Honorable Andrew N. Frye, Jr., Judge of the Circuit Court of Mineral County, granted summary judgment for defendant. The other defendants reached a settlement with the plaintiffs which was later approved by the Circuit Court on October 24, 2005.

This proceeding is plaintiffs' appeal from that Order. Appellee, Anita M. Rhee, Administratrix of the Estate of Russell Rhee, M.D., respectfully submits the Circuit Court's Order of August 24, 2005, should be affirmed.

III.

STATEMENT OF THE FACTS

This action arises from the death of a 31-week fetus that occurred as a result of a placental abruption on July 30, 1999. Prior to the filing of the lawsuit, Dr. Russell Rhee was killed in an automobile accident. Plaintiffs claim Dr. Rhee, a radiologist on call at Potomac Valley Hospital, failed to properly diagnose, manage and treat the medical condition of plaintiff Maranda L. Fout-Iser on July 30, 1999.

On February 2, 1999, Maranda L. Fout-Iser presented to Dr. John Hahn for obstetrical care, and continued under his care on eight more occasions. (February 9, March 23, April 24, May 11, May 24, June 8, July 6 and July 26, 1999). On July 26, 1999, Ms. Fout-Iser presented to Dr. Hahn complaining of headaches, vaginal discharge and cramps; she was thirty-one (31) weeks pregnant.

On July 30, 1999 at 4:20 p.m., Ms. Fout-Iser presented to Potomac Valley Hospital's emergency room, complaining of abdominal pain. She was seen by emergency physician Dr. Joseph Schmitt at 4:45 p.m. Dr. Schmitt reported that she was unable to urinate, was vomiting, and had blurred vision. She complained of abdominal pain in the left lower quadrant and denied fever, chills, shortness of breath or diarrhea. She also reported feeling fetal movements. Even though Potomac Valley Hospital did not have any obstetrical care capabilities, Dr. Schmitt ordered an abdominal sonogram.

At 5:15 p.m., Ms. Fout-Iser was taken to the radiology department for an abdominal sonogram. At 5:22 p.m., Marla Niland, the x-ray technician on-call at the hospital, attempted to take ultrasound images, recording eight images. The ultrasound machine's fetal doppler recorded a heart rate of 118 BPM. Ms. Niland testified that she could not find a fetal

heart rate. (Niland depo., p. 34.) At 5:53 p.m., the patient was still in radiology and requested pain medication.

At 5:53 p.m., fifteen minutes after completing the first set of ultrasound images, Ms. Niland sent the eight ultrasound images to Dr. Rhee via telaradiology. Dr. Rhee was the radiologist on-call at Potomac Valley Hospital.¹ Shortly after sending the images, Ms. Niland called Dr. Rhee at approximately 6:00 p.m. Dr. Rhee was immediately available to review the images, (Niland depo., at p. 206) and promptly answered Ms. Niland's telephone call. (Niland depo., p. 112.) The telephone conversation lasted several minutes. (Niland depo., pp. 206-07.) During the telephone conversation, Ms. Niland testified that Dr. Rhee was demonstrably upset as to the quality of the ultrasound images. (Niland depo., p. 206.) In response, Ms. Niland admitted to Dr. Rhee that she was having trouble obtaining adequate ultrasound images. (Niland depo., at p. 115.) Dr. Rhee informed Ms. Niland that the ultrasound images were in fact inadequate and more images needed to be taken. (Niland depo., at pp. 207-08.) Dr. Rhee told Ms. Niland to call Vanessa Miller, a certified ultrasound and x-ray technician, to help her obtain adequate ultrasound images and call him back immediately after speaking with Ms. Miller. (Niland depo., at pp. 123-24.) Dr. Rhee informed Ms. Niland that it would take him thirty-minutes to get to the hospital. (Niland depo., at p. 207.)

Ms. Niland proceeded to call Vanessa Miller about ten minutes after her first conversation with Dr. Rhee. Ms. Niland talked to Ms. Miller for 3 to 4 minutes. (Niland depo., at p. 209.)² During this period of time, Ms. Fout-Iser remained in the radiology department. She

¹ As the on-call radiologist, Dr. Rhee read x-ray films via a method termed "telaradiology" – whereby x-ray technicians sent still x-ray images to Dr. Rhee via the computer. Dr. Rhee would, in turn, read the x-rays from his home or another hospital, and be in telephonic contact with the x-ray technician to report his findings.

² Ms. Miller was not on-call on the day in question and was unable to come to the hospital.

was vomiting and diaphoretic – and all the while Dr. Schmitt was aware of the patient's condition.

From 6:25 p.m. to 6:35 p.m., Ms. Niland took fifty (50) additional ultrasound images of Ms. Fout-Iser. At 6:35 p.m., Dr. Rhee called the radiology department to inquire as to whether Ms. Niland had contacted Ms. Miller and as to the status of Ms. Fout-Iser. (Niland depo., pp. 141-42; 211; 212.) Ms. Niland ended the second ultrasound to answer Dr. Rhee's call. (Niland depo., at pp. 152; 211.) During the second phone conversation, Ms. Niland told Dr. Rhee that the hospital was transferring the patient out of radiology and transporting her to another hospital. (Niland depo., at pp. 148; 210; 213; 230-31.) In fact, during the second conversation between Dr. Rhee and Ms. Niland, Ms. Niland informed Dr. Rhee that nurses took Ms. Fout-Iser out of radiology. (Niland depo., at pp. 210-11.) Ms. Niland nonetheless transmitted the ultrasound images to Dr. Rhee. Shortly after the second telephone call and after Ms. Fout-Iser was taken out of radiology, Dr. Rhee issued a preliminary report which stated, "Live fetus, heartbeat present, no placenta previa."

Ms. Fout-Iser returned to the emergency room at 6:40 p.m. wherein Dr. Schmitt contacted Dr. Hahn who accepted the patient as a direct admit. Dr. Schmitt then proceeded to complete a physical assessment on Ms. Fout-Iser and certified the transfer. At 6:45 p.m., Valley Medical Transport received a call. At 6:55 p.m., Dr. Schmitt began urinalysis on Ms. Fout-Iser and she consented to the transfer.

At 7:00 p.m., Valley Medical Transport arrived at Potomac Valley Hospital and at 7:10 p.m. Dr. Schmitt completed the urinalysis. At 7:15 p.m., Valley Medical Transport picked up Ms. Fout-Iser in the emergency room at Potomac Valley Hospital and arrived at the emergency room at Grant Memorial Hospital at 8:00 p.m. At 8:05 p.m., Ms. Fout-Iser was

admitted at Grant Memorial Hospital. Upon admission to Grant Memorial Hospital, she was complaining of blurred vision and decreased abdominal pain.

At 9:00 p.m., Dr. Hahn administered packed red blood cells to Ms. Fout-Iser. At 9:10 p.m., Dr. Hahn decided to conduct a C-section. At 9:20 p.m., she consented to the C-section and at 9:47 p.m. she was taken to the operating room and anesthesia was administered. At 9:57 p.m., surgery began. At 9:59 p.m., a nonviable fetus was delivered. At 10:14 p.m., surgery ended.

Plaintiffs filed this action on or about July 30, 2001 in the Circuit Court of Mineral County, West Virginia. On July 2, 2003, a Notice of Status Conference, as required under W. Va. Code § 55-7B-6 (2003), was filed by counsel for Dr. Thomas Schmitt. The circuit court held the status conference on July 22, 2003 with counsel for plaintiffs, Jenna P. Wood and Robert P. Fitzsimmons, and counsel for defendants, Stephen R. Brooks, Dino S. Colombo, Dan R. Fields, Paul K. Vey, Timothy R. Smith and Frederick W. Goundry, III, in attendance. The parties addressed the disclosure of experts and set cut-off dates for plaintiffs and defendants to disclose experts. Plaintiffs did not object to the Court's scheduling of expert disclosures.

On November 3, 2003, plaintiffs disclosed fourteen (14) experts and the anticipated substance of each expert's opinions. Plaintiffs designated Dr. Jeffrey Dicke (an OBGYN who practices in St. Louis) as the only expert who would opine that Dr. Rhee violated the standard of care, and that Dr. Rhee's violation caused plaintiff's injuries.

Dr. Jeffrey Dicke was deposed on November 4, 2004, and again on August 9, 2005. In his first deposition, Dr. Dicke stated he was not a radiologist, and had never done a residency in radiology. (11/4/2004 Dr. Dicke depo., p. 37.) In addition, Dr. Dicke stated he was not familiar with the standard of care applicable to Dr. Rhee as he was not familiar with the

degree of care expected of Dr. Rhee acting in the same or similar circumstances as presented on July 30, 1999. (11/4/2004 Dr. Dicke depo., p. 51.) Indeed, Dr. Dicke never defined the standard of care to which Dr. Rhee was held.

Dr. Dicke testified that his opinions were confined to what occurred at Potomac Valley Hospital on July 30, 1999 and to Dr. Rhee's interpretation of the x-rays. (11/4/2004 Dr. Dicke depo., p. 18.) Dr. Dicke testified that Dr. Rhee's interpretation of the images was within the standard of care and never testified that Dr. Rhee's care and treatment violated any standard of care. (11/4/2004 Dr. Dicke depo., pp. 31; 32; 40; 50; 52; 53; 59-60.) Dr. Dicke specifically testified that he had no opinion as to whether Dr. Rhee violated the standard of care regarding whether Dr. Rhee inquired as to any indications of Ms. Fout-Iser. (11/4/2004 Dr. Dicke depo., pp. 32; 52-53.)

Although Dr. Dicke testified that he believed there was a problem with the time lapse between the first and second ultrasound images, Dr. Dicke testified that there was no indication Dr. Rhee had any involvement in the time lapse and, thus, held no opinion as to whether Dr. Rhee caused the time lapse. (11/4/2004 Dr. Dicke depo., pp. 34; 54.)

Dr. Dicke also failed to offer any testimony that Dr. Rhee caused any injury to plaintiffs. Dr. Dicke testified that he had no opinion as to whether the lapse of time in between the ultrasound images (of which Dr. Dicke did not attribute to any violation of the standard of care on the part of Dr. Rhee) had any causative effect on the outcome of the fetus or the mother. (11/4/2004 Dr. Dicke depo., pp. 59-60; 77.) Dr. Dicke also stated he could not testify whether Dr. Rhee's failure to comment on the amniotic fluid (of which he could not testify was a breach of the standard of care) had any causative effect on the outcome of the fetus or the mother. (11/4/2004 Dr. Dicke depo., p. 83.)

In Dr. Dicke's second deposition, he failed to testify that Dr. Rhee violated any standard of care in this case, nor did he define or describe the standard of care violated by Dr. Rhee.³ Indeed, Dr. Dicke testified Dr. Rhee fulfilled all of the responsibilities of an on-call radiologist performing telaradiology:

... Since he [Dr. Rhee] is the one that's responsible for rendering that interpretation (of the images of the ultrasound), I would consider it his responsibility to provide some additional 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.

(8/9/2005 Dr. Dicke depo., pp. 10-11.)

Dr. Dicke agreed that if Dr. Rhee told the technician, Marla Niland, to call in another more experienced and licensed technician to obtain an adequate sonogram study, the request was reasonable and within the standard of care. (8/9/2005 Dr. Dicke depo., pp. 11-12.) Dr. Dicke further testified that if, during the second conversation between Ms. Niland and Dr. Rhee, Ms. Niland advised him she was unable to obtain another technician to come obtain an adequate sonogram, it was reasonable for Dr. Rhee to agree to come to the hospital and he therefore complied with the standard of care by so agreeing. (8/9/2005 Dr. Dicke depo., pp. 16-17.)

Dr. Dicke never testified (nor did anyone else) that an earlier sonogram or any action or inaction by Dr. Rhee was a proximate cause of the injuries alleged by plaintiffs. (8/9/2005 Dr. Dicke depo., pp. 16-17.)

³ Plaintiffs cite one passage of Dr. Dicke's testimony during his second deposition in which plaintiffs solely rely to argue that Dr. Dicke testified that Dr. Rhee violated the standard of care.

Dr. Richard McLaughlin, plaintiff's obstetrical expert, did not (despite plaintiffs' claim) testify that a breach of the standard of care by Dr. Rhee was a cause of plaintiffs' injuries. When specifically asked whether he was rendering any opinions as to Dr. Rhee, Dr. McLaughlin testified he was *not*. (Dr. McLaughlin depo., pp. 62-63.) Instead, Dr. McLaughlin (as stated in plaintiffs' expert witness disclosure) was identified as an expert in obstetrics and gynecology. He testified in deposition that Dr. Hahn and Dr. Schmitt deviated from the standard of care and proximately caused plaintiffs' injuries. (Dr. McLaughlin depo., pp. 62-63.) Dr. McLaughlin was not identified nor qualified to testify as to Dr. Rhee's treatment and care of the plaintiff. He therefore could not testify Dr. Rhee breached the standard of care or caused plaintiffs' injuries; in fact, he never testified Dr. Rhee violated any standard of care or caused plaintiffs' injuries.

In this regard, Plaintiffs cite testimony from Dr. McLaughlin's deposition about his criticism of the "delay in ultrasound." (5/3/2004 McLaughlin depo., p. 50.) However, neither Dr. Dicke, Dr. McLaughlin, nor anyone else testified the delay in ultrasound was caused in any way by Dr. Rhee.

Importantly, Dr. Schmitt, the emergency room physician who attended Ms. Fout-Iser at Potomac Valley Hospital, testified he already made the decision to transport the patient to Grant Memorial Hospital before he received the sonogram results from Dr. Rhee – "regardless of what is showed." (Dr. Schmitt depo., p. 114.) Dr. Hahn, the obstetrician who delivered the stillborn fetus at Grant Memorial Hospital, testified he made the decision to do a stat C-section without any knowledge of the results of the sonogram as reported by Dr. Rhee. (Dr. Hahn Depo., pp. 11; 122.)

After discovery was completed, defendant Dr. Rhee moved for summary judgment. On August 15, 2005 and August 24, 2005, the circuit court held hearings on

defendant Dr. Rhee's motion for summary judgment. At the hearing, Judge Frye held "I am required to grant a summary judgment in this case and say that based upon the depositions that I read and the briefs that I read and the supporting history that I read in the briefs that the experts as designated, Dr. Dickie (sic) and Dr. McLaughlin, do not place Dr. Mr. Rhee (sic) in a breach (sic) of standard of care or that that breach (sic) caused the injury." (August 24, 2005, Hearing Transcript, Circuit Court of Mineral County).

On August 30, 2005, the circuit court issued an Order granting summary judgment in favor of defendant Dr. Rhee. Plaintiffs filed a petition for this Honorable Court to review the Circuit Court's Order. On September 20, 2006, this Court granted the plaintiffs' Petition for Review. This proceeding is the plaintiffs' appeal. For the reasons stated herein, Anita M. Rhee, Administratrix of the Estate of Russell Rhee, M.D., respectfully submits that the Circuit Court's rulings of August 24, 2005 and August 30, 2005, should be affirmed.

IV.

ISSUES

A. The Circuit Court properly granted defendant Dr. Rhee's motion for summary judgment because the plaintiffs' experts failed to testify that Dr. Rhee breached the standard of care, and that such breach of the standard of care was a proximate cause of plaintiffs' alleged injuries and damages.

1. Dr. Dicke is neither competent nor qualified to testify as an expert witness on the standard of care.
2. Dr. Dicke failed to testify to the standard of care expected of a reasonable radiologist performing telaradiology.
3. Dr. Dicke did not testify that Dr. Rhee breached the standard of care.
4. Plaintiffs' experts failed to testify that any breach of the standard of care by Dr. Rhee proximately caused plaintiffs' injuries.

a. Counsel's factual arguments not supported in the record brief cannot defeat summary judgment.

b. Plaintiffs' reliance on Dr. McLaughlin is akin to a sham affidavit.

B. This Court should affirm summary judgment.

C. This case required expert testimony.

1. The trial court did not abuse its discretion requiring plaintiffs to produce expert witnesses to testify to the applicable standard of care and a breach thereof.
2. Plaintiffs' objection to the trial courts' ruling that expert discovery was required in this case was not preserved for review.

V.

STANDARD OF REVIEW

“A circuit court’s entry of summary judgment is reviewed *de novo*.” Syllabus Pt. 1, *Farley v. Shook*, 218 W. Va. 680, 629 S.E.2d 739 (2006). In its review, “this Court is not limited to the legal grounds relied upon by the circuit court, and may affirm or reverse a decision on any independently sufficient ground.” *Murphy v. Smallridge*, 196 W. Va. 35, 36-37, 468 S.E.2d 167, 168 (1996). In addition, “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.” Syllabus Pt. 8, *McGraw v. St. Joseph’s Hosp.*, 200 W. Va. 114, 488 S.E.2d 389 (1997),

VI.

ARGUMENT

A. The Circuit Court properly granted Dr. Rhee's motion for summary judgment because the plaintiffs' experts failed to testify that Dr. Rhee breached the standard of care, and that such breach of the standard of care was a proximate cause of plaintiffs' alleged injuries and damages.

This medical professional liability action is governed by W. Va. Code § 55-7B-1, *et seq.* Plaintiffs were statutorily required to prove the defendant Dr. Rhee breached the standard of care and that the breach of that standard caused plaintiffs' injuries and damages. *Short v. Appalacian OH-9*, 203 W.Va. 246, 507 S.E.2d 124 (1998). W. Va. Code § 55-7B-3 states:

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. (1986, c. 106.)

The nature of this medical professional liability action required the plaintiffs to prove, if they could, the statutory elements regarding standard of care and causation through the testimony of appropriate and qualified experts. "Negligence or want of professional skill can be proved only by expert witnesses." Syllabus Point 2, *Farley v. Shook*, 218 W. Va. 680, 629 S.E.2d 739 (2006).⁴ In this regard, W. Va. Code § 55-7B-7 (1986) provides, in pertinent part,

⁴ Defendant Dr. Rhee acknowledges that under certain circumstances failure to present expert testimony on the accepted standard of care and degree of skill is not fatal to a plaintiff's prima facie case of negligence. See *Totten v. Adongay*, 175 W. Va. 634, 337 S.E.2d 2 (1985). However, in the instant case, defendant Dr. Rhee asserts this case does not come close to satisfying the special circumstances discussed in *Totten*. The issue as to whether experts were required in this case, and plaintiffs' failure to preserve this issue for appeal, is discussed *infra* at page 26.

"[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." Consequently, if a plaintiff is unable to produce an expert witness to testify to the applicable standard of care and a breach thereof, he or she cannot establish a *prima facie* case of medical negligence and summary judgment is proper. See *Withrow v. West Virginia University Hospitals, Inc.*, 213 W. Va. 48, 576 S.E.2d 527 (2002); *Goundry v. Wetzel-Saffle*, 211 W. Va. 698, 700-01, 568 S.E.2d 5, 8-9 (2002).

Plaintiffs designated Dr. Jeffrey Dicke as the only expert who would opine that Dr. Rhee violated the standard of care, and that those violations caused injury to plaintiffs. Dr. Dicke was deposed on November 4, 2004 and again on August 9, 2005.

1. Dr. Dicke is neither competent nor qualified to testify as an expert witness on the standard of care.

"To qualify a witness as an expert on [the] standard of care, the party offering the witness must establish that the witness has more than a casual familiarity with the standard of care and treatment commonly practiced by physicians engaged in the defendant's specialty." *Kiser v. Caudill*, 215 W. Va. 403, 411, 599 S.E.2d 826, 834 (2004). See also *Farley v. Shook*, 218 W. Va. 680, 629 S.E.2d 739 (2006) (finding plaintiffs' expert lacked the knowledge or skill to testify as to the applicable standard of care as it would apply to a physician in the field of the defendant.)

In *Kiser*, this Court affirmed the circuit court's order granting summary judgment to the defendant on the basis that the plaintiff's expert was incompetent to testify. 215 W. Va. at 599 S.E.2d at 834. This Court determined that the plaintiff's expert was not qualified to testify because his deposition testimony showed that he had no more than a casual familiarity with the standard of care, that he was not an expert in the subject procedure (tethering spinal cords), and

that he was not familiar with the standard of care regarding the subject procedure at any hospital other than the one in which he worked. *Id.*

In this case, Dr. Dicke testified that he was not familiar with the standard of care applicable to Dr. Rhee as he was not familiar with the degree of care expected of a radiologist performing telaradiology nor was he familiar with the telaradiology system at Potomac Valley Hospital. (11/4/2004 Dr. Dicke depo., pp. 51; 48.) Dr. Dicke testified that he was not familiar with Potomac Valley Hospital. (11/4/2004 Dr. Dicke depo., p. 51.) He further testified that he had never performed telaradiology support for a rural community hospital lacking any obstetrical care capabilities like Potomac Valley Hospital. (11/4/2004 Dr. Dicke depo., p. 51.) Instead, Dr. Dicke testified that he practices at a large tertiary care center whose telaradiology system and care capabilities are not similar in any way to those used by Potomac Valley Hospital and Dr. Rhee. (11/4/2004 Dr. Dicke depo., pp. 48; 49.) In addition, Dr. Dicke is neither certified in radiology nor trained in radiology. (11/4/2004 Dr. Dicke depo., p. 37.)

Dr. Dicke's testimony clearly shows he is not familiar with the standard of care at issue here. Dr. Dicke, in fact, admitted that he was not familiar with the standard of care regarding telaradiology at a hospital such as Potomac Valley. He further admitted he was neither familiar with the telaradiology system at Potomac Valley nor Potomac Valley Hospital's obstetrical care capabilities. Thus, Dr. Dicke was not qualified to testify as an expert regarding the applicable standard of care in this case.

2. Plaintiffs' expert, Dr. Dicke, failed to testify to the standard of care expected of a reasonable radiologist performing telaradiology.

This Court has stated 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." *Neary v. Charleston Area Medical Center, Inc.*, 194

W. Va. 329, 334, 460 S.E.2d 464, 469 (1995). If the plaintiff "is unable to produce an expert witness to testify to the applicable standard of care, . . . he or she cannot establish a prima facie case of medical negligence." *Withrow*, 213 W. Va. at 52, 576 S.E.2d at 531. *See also Goundry v. Wetzel-Saffle*, 211 W. Va. 698, 568 S.E.2d 5 (2002) (holding patient's failure to present expert testimony as to what the standard of care required doctor to do precluded medical malpractice action against doctor.) As such, and pursuant to West Virginia Code §§ 55-7B-3 and 7, plaintiffs must prove, through knowledgeable and competent expert testimony, that Dr. Rhee failed to exercise the degree of skill, care and learning required and expected of a reasonable, prudent radiologist performing telaradiology.

Not only is Dr. Dicke incompetent to testify as to the standard of care and any breach thereof (by his own admission) but he utterly failed to testify to the standard of care Dr. Rhee allegedly breached. Despite multiple opportunities over two days of deposition, to describe the standard of care required and expected of a radiologist performing telaradiology, Dr. Dicke failed to do so. Indeed, plaintiffs utterly failed to establish the first and perhaps most important element of a medical professional liability case – the standard of care the defendant allegedly breached.

3. Dr. Dicke did not testify that Dr. Rhee breached a standard of care.

A plaintiff in a medical professional liability action cannot establish a *prima facie* case of medical negligence if the plaintiff's expert fails to testify that the defendant breached the standard of care. W. Va. Code § 55-7B-3(a); *Withrow*, 213 W. Va. at 52, 576 S.E.2d at 531. Plaintiffs designated Dr. Dicke as the only expert who would opine that Dr. Rhee violated the standard of care. However, neither during his deposition on November 4, 2004 nor his

deposition on August 9, 2005 could Dr. Dicke testify that Dr. Rhee breached any standard of care.

In his first deposition, Dr. Dicke was questioned extensively about his opinions regarding the care, treatment and skill of Dr. Rhee. Dr. Dicke repeatedly testified that Dr. Rhee's telaradiology report was accurate and within the standard of care. (8/9/04 Dr. Dicke depo., pp. 30-31; 40; 50; 52-53; 59-60.) Moreover, Dr. Dicke specifically testified that Dr. Rhee's conduct, care and treatment fell within the standard of care over five (5) times. (8/9/04 Dr. Dicke depo., pp. 30-31; 32; 50; 52-53; 59-60.) Although Dr. Dicke testified that he had a problem with the overall time that elapsed while Ms. Fout-Iser was in ultrasound, Dr. Dicke agreed there was nothing in the record that indicated Dr. Rhee had anything to do with the alleged time lapse. (8/9/04 Dr. Dicke depo., pp. 53-54.)

Similarly, in his second deposition, Dr. Dicke failed to testify that Dr. Dicke violated any standard of care. As a result, out of two days of deposition testimony, plaintiffs cite one incomplete passage out of Dr. Dicke's testimony that they assert creates some genuine issue of material fact. Plaintiffs here attempt to rely upon the following excerpt of Dr. Dicke's testimony:

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 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.

(8/9/05 Dr. Dicke depo., pp. 10-11.)

Immediately following the conclusory testimony cited by plaintiffs, Dr. Dicke was questioned regarding the specific actions Dr. Rhee undertook, and testified that Dr. Rhee's actions were reasonable and within the standard of care. First, Dr. Dicke testified that when Dr. Rhee asked the technician Ms. Niland to call in another technician for the purpose of obtaining a more adequate sonogram study due to Ms. Niland's difficulty obtaining one, that request was reasonable and within the standard of care. (8/9/05 Dr. Dicke depo., pp. 11-12.) Second, Dr. Dicke testified that when during the subsequent phone conversation between Dr. Rhee and Ms. Niland, she advised him that, despite her efforts, she was unable to obtain another technician to come into the hospital, it was reasonable for Dr. Rhee to agree to come to the hospital and he complied with the standard of care by so agreeing. (8/9/05 Dr. Dicke depo., pp. 16-17.) Dr. Dicke additionally testified that Dr. Rhee's interpretation of the images was accurate. (8/9/05 Dr. Dicke depo., p. 50.) Dr. Dicke utterly failed to testify that any action or inaction of Dr. Rhee was a violation of any standard of care. Just saying "I think he was negligent," without any factual basis, is simply not enough to satisfy the requirements of § 55-7B-3. *Mayhorn v. Logan Medical Foundation*, 193 W.Va. 42, 454 S.E.2d 87 (1994).

4. Plaintiffs' experts failed to testify that any breach of the standard of care by Dr. Rhee caused plaintiffs' injuries.

West Virginia Code § 55-7B-3(b) requires plaintiffs to prove that a breach of the standard of care was a proximate cause of plaintiffs' injuries. In a medical professional liability action, the plaintiff must not only prove negligence but must also show that such negligence was

the proximate cause of the injury. *Short v. Appalachian* OH-9, 203 W. Va. 246, 507 S.E.2d 124 (1998).

Dr. Dicke failed to offer any testimony that would establish proximate causation against Dr. Rhee. Dr. Dicke admitted that nothing Dr. Rhee did or failed to do “changed the outcome in this case.” (11/4/04 Dr. Dicke depo., p. 85.) Dr. Dicke specifically testified he could not attribute any alleged time delay in the radiology department to Dr. Rhee, nor could he state whether the lapse of time in the radiology department had any effect on either the fetus or the mother. (11/4/04 Dr. Dicke depo., pp. 54; 77.)

Assuming Dr. Dicke testified Dr. Rhee violated the standard of care by not providing guidance or doing something else to obtain an adequate sonogram study (as plaintiffs argue, but Dr. Dicke’s testimony clearly refutes), Dr. Dicke never testified Dr. Rhee’s failure to provide guidance or do something else caused plaintiffs’ injuries. Instead, Dr. Dicke testified even if Dr. Rhee had come to the hospital earlier that day, or another technician had completed the sonogram earlier that day, he could not opine that an earlier sonogram would have changed the outcome or prevented the injuries alleged by plaintiffs. (08/09/05 Dr. Dicke depo., p. 18.)

Since Dr. Dicke, the expert plaintiffs designated to testify against Dr. Rhee on liability and causation, failed to provide any causative testimony, plaintiffs try to rely on the testimony of another expert – Dr. Richard McLaughlin.⁵ However, Dr. McLaughlin specifically testified that he would not be rendering any opinions as to Dr. Rhee. (Dr. McLaughlin depo., pp. 62-63.) To that end, Dr. McLaughlin testified he was “not skilled at reading ultrasound” nor was he qualified to provide any expert testimony as to Dr. Rhee. (Dr. McLaughlin depo., pp. 57-58.)

⁵ Plaintiffs designated Dr. Richard McLaughlin, an obstetrician and gynecologist, and stated he would testify against Dr. John L. Hahn and/or Hahn Medical Practices. The substance of his testimony, as designated by plaintiffs, was that Dr. Hahn and/or Hahn Medical Practices violated the standard of care in its treatment of plaintiffs as Maranda Fout-Iser’s obstetrician and that such breach was a cause of plaintiffs’ injuries.

Dr. McLaughlin never even reviewed the ultrasounds. (Dr. McLaughlin depo., pp. 57-58.) With regard to causation, he opined that “she probably shouldn’t have had the ultrasound in the first place.” (Dr. McLaughlin depo., p. 23.) He testified that the ultrasound, which was ordered by Dr. Schmitt, “was not necessary for the care of the lady, given the fact that there’s no care to be offered to her at Potomac Valley.” (Dr. McLaughlin depo., p. 24.)

Despite Dr. McLaughlin’s statement that he neither intended nor was able to offer any testimony against Dr. Rhee, plaintiffs now assert he can somehow establish Dr. Rhee’s breach of the standard of care was a proximate cause of plaintiffs’ injuries. Plaintiffs rely on Dr. McLaughlin’s testimony in which he stated that “a delay in ultrasound” was a cause of plaintiffs’ injuries. However, Dr. McLaughlin admitted, as plaintiffs admit in their Petition to this Court, that he has no understanding or belief as to the cause of any alleged delay in the ultrasound. (Dr. McLaughlin depo., pp. 66-67.) Moreover, Dr. McLaughlin never testified the alleged delay in ultrasound was caused by Dr. Rhee (nor did any other expert or witness) or that the lack of any delay in ultrasound would have changed the outcome of this case. Instead, he simply testified, with respect to his criticism of Dr. Schmitt, that “earlier treatment with rescue C-section could have saved the life of the baby.” (Dr. McLaughlin depo., p. 72.)

Moreover, the testimony of Dr. McLaughlin, as well as the other treating physicians, makes clear that any delay in ultrasound did not affect the timing of the C-section. No expert or fact witness attributed any delay in the ultrasound to any action or inaction of Dr. Rhee.

Ms. Niland, the ultrasound technician, testified Dr. Rhee could not have come to the hospital more quickly to perform the ultrasound because the patient was transferred before he could have gotten to the hospital even if he left immediately following the first phone

conversation. (M. Niland depo., p. 213.) Ms. Niland testified Dr. Rhee did not cause any delay in obtaining or interpreting the ultrasound. (M. Niland depo., pp. 205; 234.)

Dr. Schmitt, the emergency room physician who attended Ms. Fout-Iser at Potomac Valley Hospital, testified he had already made the decision to transfer her before he received Dr. Rhee's reading of the sonogram – "regardless of what it showed." (Dr. Schmitt depo., p. 114.) Moreover, Potomac Valley Hospital lacked any capabilities to perform a C-section – Ms. Fout-Iser had to be transferred to another facility to have a C-section. Dr. Hahn, the obstetrician who delivered the stillborn fetus, testified he made the decision to do a stat C-section without any knowledge of the results of the sonogram as reported by Dr. Rhee. (Dr. Hahn depo., pp. 11; 122.)

a. Counsel's factual arguments not supported in the record cannot defeat summary judgment.

Summary judgment cannot be defeated on the basis of factual arguments not supported in the record contained in the brief of the party opposing a motion for summary judgment. Syllabus Pt. 1, *Thomas v. Raleigh General Hosp.*, 178 W.Va. 138, 358 S.E.2d 222 (1987). Plaintiffs' assertion that Dr. McLaughlin provides testimony that somehow satisfies their burden of establishing proximate causation in their claims against Dr. Rhee directly contradicts Dr. McLaughlin's sworn testimony. Plaintiffs' factual assertions do not and cannot be considered to meet plaintiffs' burden to prove Dr. Rhee's breach of the standard of care was a proximate cause of plaintiffs' injuries.

b. Plaintiffs' reliance on Dr. McLaughlin is akin to a sham affidavit.

Indeed, plaintiffs' reliance upon Dr. McLaughlin's testimony and assertion that he attributes the cause of plaintiffs' injuries to any act or inaction of Dr. Rhee is akin to the use of a sham affidavit. 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.” *Kiser v. Caudill*, 215 W. Va. 403, 409, 599 S.E.2d 826, 832 (2004). Consistent with its ruling in *Kiser*, this Court noted in *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 60 n.12, 459 S.E.2d 329, 337 n.12 (1995) that:

A conflict in the evidence does not create a “genuine issue of fact” if it unilaterally is induced. For example, when 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. 10A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2726 at 30-31 (2d ed. Supp. 1994).

In this case, Dr. McLaughlin was asked whether he had any criticism or opinion with regard to Dr. Rhee. His answer to this unambiguous and direct question was “No.”

Plaintiffs simply failed to make a *prima facie* case of medical professional liability against Dr. Rhee. Dr. Dicke was neither competent nor qualified to testify to the standard of care. Plaintiffs’ experts failed to set forth the standard of care, failed to testify that Dr. Rhee breached any standard of care and failed to testify that the breach was a proximate cause of plaintiffs’ injuries. Plaintiffs utterly failed to produce a scintilla of evidence to support their claims against Dr. Rhee. As such, plaintiffs’ claims fail and summary judgment was proper.

B. This Court should affirm summary judgment.

“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 Pt. 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995). “When 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.” *Neary v. Charleston Area Med. Ctr., Inc.*, 194 W. Va. 329, 334, 460 S.E.2d 464, 469 (1995). Despite plaintiffs’ arguments, there is simply no evidence Dr. Rhee violated any standard of care or that any violation was a proximate cause of plaintiffs’ injuries.

This Court’s review of summary judgment is de novo. Syllabus Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). However, “this Court is not limited to the legal grounds relied upon by the circuit court, and may affirm or reverse a decision on any independently sufficient ground.” *Murphy v. Smallridge*, 196 W. Va. 35, 36-37, 468 S.E.2d 167, 168 (1996).

Plaintiffs argue the trial court “committed error by utilizing the standard of reasonable medical ‘certainty’ rather than the required standard of reasonable medical ‘probability.’” (Brief on Behalf of Appellants, p. 26.) Plaintiffs’ assertion is neither accurate nor relevant to this case. While the trial court used the word “certainty” in its order, as opposed to the correct term “probability,” in doing so the trial court cited numerous pages of Dr. Dicke’s testimony to support its findings. Each and every passage of Dr. Dicke’s testimony cited by the trial court (pp. 31, 52-53, and 57 of Dr. Dicke’s November 4, 2004 deposition) unquestionably reflects that Dr. Dicke was specifically asked whether he could say “to a reasonable degree of medical probability” that Dr. Rhee breached the standard of care. Dr. Dicke’s testimony was “No” in each instance.

Clearly, the trial court’s insertion of the word “certainty” was inadvertent and does not accurately reflect the authority on which it based its findings. Dr. Dicke simply failed to testify that Dr. Rhee violated any standard of care, period. As such, this Court should find that the trial court was correct in finding that plaintiffs failed to produce any evidence Dr. Rhee

violated any standard of care and affirm the trial court's ruling notwithstanding its inadvertent use of the word "certainty" in light of the clear evidence that the correct standard was in fact used.

Plaintiffs further allege the trial court "erred in its findings and conclusions of law requiring that the plaintiffs must prove that the violation of the standard of care was 'the' cause of injury. (Brief on Behalf of Appellants, p. 28.) In its order, the trial court relied on this Court's interpretation and application of West Virginia Code § 55-7B-3 wherein this Court has repeatedly held "[i]n a medical malpractice case, the plaintiff must not only prove negligence but must also show that such negligence was *the* proximate cause of the injury." *Arbogast v. Mid-Ohio Valley Medical Corp.*, 214 W. Va. 356, 361, 589 S.E.2d 498, 503 (2003) (emphasis added); *Short v. Appalachian OH-9, Inc.*, 203 W. Va. 246, 252, 507 S.E.2d 124, 130 (1998) (emphasis added).

Plaintiffs, instead, rely on a case in which this Court held a party need not prove a defendant's negligence was the "sole" cause in a tort action to assert the trial court's conclusion of law is "clearly erroneous." Plaintiffs' cursory analysis of the trial court's "error" is not only misguided but also harmless given the testimony, or lack thereof, in this case. First, the trial court did not require nor does its order state that plaintiffs had to prove Dr. Rhee's alleged breach of the standard of care was the "sole" cause of plaintiffs' injuries. The one case on which plaintiffs rely does not even support their contention that the trial court committed reversible error. Second, notwithstanding plaintiffs' alleged error, neither Dr. Dicke nor any other expert witness testified that any breach of the standard of care was a cause of the plaintiffs' injuries.

Despite plaintiffs' efforts to attack the trial court's order granting summary judgment in favor of defendant Dr. Rhee, the testimony and facts of this case – when one goes

beyond the simple words in the order – makes clear that plaintiffs failed to produce any evidence that Dr. Rhee breached the standard of care or that the breach was a cause of plaintiffs’ injuries. This Court should thus affirm summary judgment on behalf of defendant Dr. Rhee because plaintiffs failed to produce a genuine issue of material fact that Dr. Rhee violated the standard of care and that the violation was a proximate cause of plaintiffs’ injuries.

C. This case required expert testimony.

“Negligence or want of skill can be proved only by expert witnesses.” Syllabus Pt. 2, *Farley v. Shook*, 218 W. Va. 680, 629 S.E.2d 779 (2006). In this regard, W. Va. Code § 55-7B-7 (1986) provides, in pertinent part, “[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.”

On July 2, 2003, a Notice of Status Conference, as required under W. Va. Code § 55-7B-6, was filed by counsel for Dr. Thomas Schmitt. The Court held the status conference on July 22, 2003, with all counsel present. The Court’s order demonstrates that expert testimony was addressed and established cut-off dates for plaintiffs and defendants to disclose experts. Plaintiffs did not object to the Court’s scheduling of expert disclosures. On November 3, 2003, plaintiffs designated expert witnesses within the deadline established by the Court.

1. The trial court did not abuse its discretion requiring plaintiffs to produce expert witnesses to testify to the applicable standard of care and a breach thereof.

The trial court is vested with discretion under W. Va. Code § 55-7B-7 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 Pt. 8, *McGraw v. St. Joseph’s Hospital*, 200 W. Va. 114, 488 S.E.2d 389 (1997). See also *Short*, 203 W. Va. at 253, 507

S.E.2d at 131. In this case, the circuit court correctly determined expert testimony was necessary because the issues related to the defendants were complex medical issues. *Goundry*, 211 W.Va. 648, 703, 568 S.E.2d 5, 9. Indeed, the plaintiffs complied, without objection, with the Court's order, and its deadlines, by timely identifying fourteen (14) experts.

Only now do plaintiffs try to rely on *Totten v. Adongay*, 175 W. Va. 634, 337 S.E.2d 2 (1985), and claim expert testimony was not necessary. In *Totten*, this Court recognized a common-knowledge exception to the general rule requiring medical expert testimony in medical professional liability actions. This Court held:

In medical malpractice cases where lack of care or want of skill is so gross, so as to be apparent, or the alleged breach relates to noncomplex matters of diagnosis and treatment within the understanding of lay jurors by resort to common knowledge and experience, failure to present expert testimony on the accepted standard of care and degree of skill under such circumstances is not fatal to a plaintiff's prima facie showing of negligence.

Id. at Syllabus Pt. 4. This Court opined in *Totten* that plaintiff needed no medical expert witness because the evidence "would permit a jury to conclude that failure to detect a fracture admittedly shown on an x-ray of the injured area was the result of a breach of due care or lack of minimum degree of skill commensurate with the circumstances." *Id.* at 638.

Here, plaintiffs designated fourteen (14) experts. In particular, plaintiffs designated Dr. Jeffrey Dicke to testify that Dr. Rhee violated the standard of care, and that said violation was a cause of plaintiffs' injuries. Over the course of two days, Dr. Dicke not only failed to articulate the standard of care to which Dr. Rhee was expected to meet, but also failed to testify he violated or breached any standard of care, or that the breach was a proximate cause of plaintiffs' injuries.

This case does not present a "noncomplex" matter within the common knowledge and experience of lay jurors. Plaintiffs' claims require the establishment of the standard of care

expected of a radiologist performing telaradiology of ultrasounds of a pregnant patient at a rural hospital which lacked any obstetrical care capabilities. Whether Dr. Rhee breached this standard of care plainly involves complex medical issues requiring expert testimony. *See Goundry*, 211 W. Va. at 703, 568 S.E.2d at 9 (holding that whether or not a pregnancy test is given to a patient who has denied the possibility of pregnancy is a standard that is not simplistic and not straightforward and one that must be established by an expert and is not within the common knowledge of a lay juror).

The plaintiffs' own expert could not testify Dr. Rhee breached the standard of care. How can plaintiffs assert Dr. Rhee's lack of care or want of skill was so gross, so as to be apparent, such that expert testimony was not required? The trial court's determination that expert testimony was required was not an abuse of discretion. As such, this Court should find no abuse of discretion in requiring plaintiffs to produce a medical expert. *Banfi v. American Hosp. for Rehab.*, 207 W. Va. 125, 529 S.E.2d 600 (2000) (finding circuit court did not abuse its discretion in requiring plaintiffs to present expert testimony and affirming summary judgment for defendants where the plaintiff failed to present expert testimony in support of its claims that defendants were negligence by failing to restrain the patient and by allegedly misdiagnosing her injuries after her fall).

2. Plaintiffs' objection to the trial courts' ruling that expert discovery was required in this case was not preserved for review.

Plaintiffs assert expert testimony was not required in this case. However, plaintiffs failed to properly preserve this issue for appeal. Plaintiffs' only mention of this theory came in a cursory comment in their "Supplemental Response to Defendant Rhee's Third Supplemental Motion for Summary Judgment and Memorandum in Support," which was faxed

to the trial court on the day of the August 24, 2005 hearing, but was not seen by Judge Frye prior to the hearing on the Motion for Summary Judgment.

Plaintiffs' response was not timely served under Rule 6 of the West Virginia Rules of Civil Procedure. Rule 6(d)(2) requires any response to a written motion, including any supporting briefs, to be served at least 4 days before the hearing if served by mail and at least 2 days before the hearing if served by fax. Plaintiffs' fax on the day of the hearing was untimely and was neither properly served on defendants nor filed with the circuit court.

Moreover, two years prior to the August 24, 2005 hearing, on July 22, 2003, the trial court held a status conference as required under W. Va. Code § 55-7B-6 to set a scheduling order in this case, to discuss experts and to schedule dates for expert witness disclosures. There is no evidence that during the July 22, 2003 status conference, the plaintiffs argued that expert testimony was not required. Plaintiffs never objected to the trial court's order scheduling the disclosure of experts in this case; indeed, they complied with the order by identifying experts. Plaintiffs' counsel also did not argue the "no expert" position at either the August 15, 2005 hearing or the August 24, 2005 hearing on defendant's motion for summary judgment. It was not until plaintiffs realized their experts did not and could not testify Dr. Rhee breached the standard of care and that the breach caused plaintiffs' injuries did plaintiffs resort to this theory.

Plaintiffs simply did not preserve this issue for appeal. *State v. Lilly*, 194 W. Va. 595, 606 n.16, 461 S.E.2d 101, 111 n.16 (1995). Where the record confirms a failure to preserve an issue for appeal, this Court has stated many times that it "will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance." Syllabus Pt. 2, *Sands v. Security Trust Co.*, 143 W. Va. 522, 102 S.E.2d 733 (1958). This Court thus must decline to address this issue for the first time on appeal.

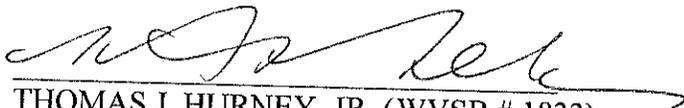
VII.

CONCLUSION

WHEREFORE, for the foregoing reasons, Defendant Anita M. Rhee, Administratrix of the Estate of Russell Rhee, M.D., respectfully requests this Court to affirm summary judgment in favor of it and against Appellants, the Estate of Alexia Cheree Fout-Iser, by Maranda L. Fout-Iser, Fiduciary; Mranda L. Fout-Iser, individually, and Jeremy T. Iser.

Anita M. Rhee, Administratrix of the Estate of
Russell Rhee, M.D.

By Counsel



THOMAS J. HURNEY, JR. (WVSB # 1833)

MATTHEW A. NELSON (WVSB # 9421)

JACKSON KELLY PLLC

1600 Laidley Tower

Charleston, West Virginia 25322

(304) 340-1000

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THE ESTATE OF ALEXIA
SHEREE FOUT-ISER, By
Maranda L. Fout-Iser,
Fiduciary, and MARANDA L.
FOUT-ISER, Individually, and
JERRY T. ISER, Individually,

Appellants,

v.

Circuit Court of Mineral County
Civil Action No. 01-C-81 F
Supreme Court No. 33189

JOHN L. HAHN, M.D., and
HAHN MEDICAL PRACTICES, INC.;
THOMAS JOSEPH SCHMITT, M.D.;
BRUCE W. LESLIE, M.D.; MYUNG-SUP
KIM, M.D.; GRANT MEMORIAL
HOSPITAL REGIONAL HEALTH CARE
CENTER, a corporation; POTOMAC VALLEY
HOSPITAL OF W. VA., INC., a corporation; and
ANITA M. RHEE, Administratrix of the Estate of
RUSSELL RHEE, M.D.,

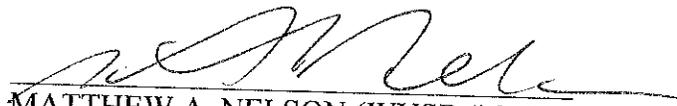
Appellees.

CERTIFICATE OF SERVICE

I, Matthew H. Nelson, counsel for Anita M. Rhee, Administratrix of the Estate of Russell Rhee, M.D., do hereby certify service of the foregoing **Brief of Behalf of the Appellee Anita M. Rhee, Administratrix of the Estate of Russell Rhee, M.D.** was made upon the following parties by causing a true and exact copy thereof to be mailed by United States mail, postage prepaid to:

Robert P. Fitzsimmons (WVSB No. 1212)
Robert J. Fitzsimmons (WVSB No. 9656)
Fitzsimmons Law Offices
1609 Warwood Avenue
Wheeling, West Virginia 26003
Counsel for Appellants

this 16th day of January, 2007.


MATTHEW A. NELSON (WVSB # 9421)