

No. 33189

FILED

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 SUPREME COURT OF APPEALS
 OF WEST VIRGINIA

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,)

vs.)

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 corpora-)
 tion; POTOMAC VALLEY HOSPITAL OF W.VA.,)
 INC., a corporation; and ANITA M. RHEE,)
 Administratrix of the Estate of Russell)
 Rhee, M.D.,)
)
 Appellee.)

REPLY BRIEF ON BEHALF OF APPELLANTS

Appeal Granted September 20, 2006

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Statutes and Rules

W. Va. Code §55-7B-3.

W. Va. Code §55-7B-7.

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REPLY BRIEF ON BEHALF OF APPELLANTS

To: The Honorable Justices of the Supreme Court of Appeals of the State Of West Virginia:

I.

INTRODUCTION

Appellee's arguments are comprised of both misleading assertions and/or misinterpretations of the existing record. After appellants' liability expert, Dr. Dicke, specifically testified that defendant/appellee, Dr. Rhee, violated the standard of care, Dr. Rhee's own attorney acknowledged such testimony in his question when he summarized the previous testimony of appellants' expert by stating:

"Q. ...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." (Deposition of Jeffrey Michael Dicke, M.D., August 9, 2005, p. 10.)

When appellants initially filed their Complaint, there were multiple defendants. These defendants included five medical doctors and two hospitals. Numerous experts from different specialties were retained in order to render opinions as to whether the individual doctors and/or hospitals violated acceptable standards of care. These experts were from the specialties of obstetrics and gynecology, emergency room medicine and radiology.

The experts' opinions in this case, as in many cases, were based upon the medical records of the obstetrician, two hospitals and the ambulance transport. In addition, the expert opinions were based upon facts developed through testimony but for whatever reason not recorded in the medical records. These facts supplied through testimony were critical in the evaluation of the conduct of Dr. Rhee.

Despite numerous requests by appellants to take the deposition of the radiology technician, Marla Niland, it was represented to appellants' counsel by counsel for Potomac Valley Hospital that she no longer worked at the hospital and could not be located. After the completion of most, if not all, of the discovery in this case and shortly before the scheduled trial, counsel for Potomac Valley Hospital indicated that they had located Marla Niland and she was promptly scheduled for deposition. Prior to this deposition, various experts and defendants, including Dr. Schmitt, had testified that there was a delay in the radiology department when Ms. Fout-Iser had been sent for an ultrasound. Significantly the cause of the delay could not be identified because the hospital records did not provide any facts as to what happened during this period of time. Dr. Rhee had died and the only other

person who would have known these facts was Ms. Niland. Ms. Niland's deposition occurred on January 15, 2005, after appellants' liability expert, Dr. Dicke, had been deposed in November of 2004 and appellants' causation expert, Dr. McLaughlin, had been deposed in May of 2004.

Ms. Niland's shocking testimony supplied all of the facts which explained the inordinate delay in performing the ultrasound and also served as an indictment of the conduct of Dr. Rhee. The outrageous conduct of Dr. Rhee as described in Ms. Niland's testimony was not in any medical record and could not have been initially considered by any of the experts in the case, including appellants' liability expert, Dr. Dicke.

Prior to Niland's deposition, the parties and experts together criticized the delay in the ultrasound process at Potomac Hospital. The ultrasound had been ordered for Ms. Fout-Iser in the emergency room at 4:45 p.m. and she was transported to the x-ray department at 5:10 p.m. Ms. Niland remained in the x-ray department without the ultrasound being fully completed when the ambulance came to transport her from Potomac to Grant at approximately 7:00 p.m.

Ms. Niland's revelations which were not recorded in any records supplied the necessary facts to identify Dr. Rhee's conduct as the explanation for the delay in obtaining the ultrasound. Although the specific individual responsible for the delay in ultrasound had not been identified pre-Niland deposition, such delay had been criticized by both experts and defendants. For example, Dr. McLaughlin, appellants' causation expert, testified as follows:

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

"A. Would be 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." (Deposition of Richard McLaughlin, M.D., May 3, 2004, p. 50.) [Emphasis added.]

The defendant emergency room physician, Dr. Schmitt, testified that the delay in reporting the ultrasound result affected the needed medical action for Ms. Fout-Iser which was transfer to another hospital. (See Schmitt Depo., pp. 118-120.) More specifically, Dr. Schmitt testified that this ultrasound delay represented a violation of the standard of care.

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

"A. Yes, sir.

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

"A. Yes.

"Q. AND IN EXCESS OF AN HOUR AND 15 MINUTES LONGER THAN WHAT YOU CONSIDER THE STANDARD OF CARE FOR GETTING THOSE RESULTS BACK?"

"A. Yes." (Deposition of Thomas J. Schmitt, M.D., November 10, 2003, p. 113.)
[Emphasis added.]

Appellee Rhee's counsel successfully moved to continue the scheduled trial date as a result of the startling revelation of Ms. Niland and material facts which were never recorded in any medical record.

Marla Niland, a radiology technician and the only person who could explain why this significant delay occurred in the ultrasound, testified that appellee, Dr. Rhee, was the on-call radiologist when Ms. Fout-Iser was at Potomac Hospital. Ms. Niland, who had practically no experience in obstetrical

ultrasound, testified that this may have been the first obstetrical ultrasound that she had ever done by herself. (Deposition of Marla Niland, January 15, 2005, p. 43.) In addition, Ms. Niland testified that Maranda Fout-Iser was one of the most seriously ill patients she had ever encountered. (Niland Depo., pp. 134, 96, 97.) Ms. Niland's inexperience, coupled with the severity of Maranda Fout-Iser's illness created a dangerous condition for Maranda and her baby and prevented Ms. Niland from timely performing the ultrasound scan.

As would be expected, Ms. Niland immediately plead for help with the on-call physician and appellee, Dr. Rhee. When Tech Niland requested Dr. Rhee's help and advised him of her inexperience and inability to obtain an ultrasound in this seriously ill patient, he began using the "F" word and accused Ms. Niland of not being experienced enough to perform the ultrasound, "AND HE SAID I DON'T HAVE TIME TO COME TO KEYSER TO DO AN F'ING ULTRASOUND." (Niland Depo., pp. 118-122.)

[Emphasis added.] Ms. Niland actually received a call from the emergency room at some point asking her why the ultrasound was taking so long, to which she had responded that she was having trouble because she had a sick patient and was just having difficulty. (Niland Depo., pp. 143, 144.)

Following the continuance of the trial, Dr. Dicke was re-deposed by appellee's counsel and without question testified that Dr. Rhee violated the standard of care.

"Q. Okay. SO WHAT YOU HAVE STATED THUS FAR is your view, IS YOUR OPINION, rather, TO A REASONABLE MEDICAL PROBABILITY, THAT DR. RHEE, BY NOT DOING WHAT YOU SUGGESTED, VIOLATED SOME MEDICAL STANDARD OF CARE?

"A. Yes.

"Q. WELL, WHAT IS THE VIOLATION OF THE STANDARD OF CARE? I'm still not clear.

"A. DR. RHEE, IN HIS CAPACITY AS A RADIOLOGIST, WAS RESPONSIBLE FOR PROVIDING AN INTERPRETATION OF THE IMAGES. PER MS. NILAND'S TESTIMONY, DR. RHEE WAS NOT SATISFIED WITH THE QUALITY OF THE IMAGES HE WAS RECEIVING.

"SINCE HE IS THE ONE THAT'S RESPONSIBLE FOR RENDERING THAT INTERPRETATION, I WOULD CONSIDER IT HIS RESPONSIBILITY TO PROVIDE SOME ADDITIONAL EITHER GUIDANCE OR DIRECTION BY HIMSELF OR SOMEBODY ELSE THAT WOULD ALLOW HIM TO BE COMFORTABLE RENDERING AN INTERPRETATION OF THE PATIENT IN THE IMAGES THAT HE RECEIVED." (Deposition of Jeffrey Michael Dicke, M.D., August 9, 2005, pp. 10, 11.) [Emphasis added.]

Appellants' expert, Dr. Dicke, did, in fact, testify to a reasonable degree of medical probability that Dr. Rhee violated the standard of care. Dr. Schmitt, one of the defendant doctors who is also qualified to testify concerning standards

of care, also testified that the delay in the ultrasound process overseen by the on-call physician, Dr. Rhee, violated the standard of care. Appellants' causation expert, Dr. McLaughlin, testified that the delay, to a reasonable degree of medical probability, caused or contributed to the baby's death and the injuries and damages to the mom, Maranda Fout-Iser.

(See McLaughlin Depo., p. 72.)

II.

RESPONSE TO APPELLEE'S ARGUMENTS

A.

**Appellants' Liability Expert,
Jeffrey Michael Dicke, M.D.'s Qualifications**

Appellee asserts that Jeffrey Michael Dicke, M.D., is not qualified to render opinions on the standard of care for obstetrical ultrasounds. Such argument is without merit.

Obstetrical ultrasounds are typically read by specialists in the field of obstetrics and gynecology and more specifically within the subspecialty of maternal-fetal medicine. Radiologists also occasionally read obstetrical ultrasounds.

Dr. Jeffrey Michael Dicke is a graduate of Ohio State University College of Medicine, who then did a four-year residency in obstetrics and gynecology at Ohio State. He did a two-year fellowship in maternal-fetal medicine and is board certified in both obstetrics and gynecology and the subspecialty board of the Division of Maternal-Fetal Medicine. He serves as an associate professor in the Department of Obstetrics and Gynecology at the Washington University School

of Medicine in St. Louis, Missouri. (See Exhibit 1, Curriculum Vitae of Jeffrey M. Dicke, M.D., attached to the November 4, 2004, deposition of Dr. Dicke.) In addition to involvement in numerous professional groups and activities, Dr. Dicke was the Director of the Obstetric and Radiology Resident Ultrasound Genetic Rotation and has been since 1997 the Director of the Ultrasound Services, Division of Genetics Maternal-Fetal Medicine and Ultrasound at Barnes-Jewish Hospital, which is the teaching hospital of Washington University in St. Louis. (See Exhibit 1, attached to Dr. Dicke's deposition of November 4, 2004.)

Dr. Dicke has also written articles on obstetrical ultrasounds published in peer review journals and has written a chapter in a medical text with the title of "Diagnostic Ultrasound in Obstetrics." (See Dr. Dicke's C.V., Exhibit 1, Depo. of November 4, 2004.)

Dr. Dicke testified that in terms of what he would do in reading an obstetrical ultrasound and what a radiologist would do are similar. (Dicke Depo., November 4, 2004, p. 37.) Dr. Dicke further testified that he primarily does ultrasounds like in this case and "just like the radiologist did." (Dicke Depo., November 4, 2004, p. 38.) Seventy-five percent of Dr.

Dicke's practice involves reading obstetrical ultrasounds. (Dicke Depo., November 4, 2004, p. 38.) Dr. Dicke has further testified that 90 to 95 percent of his clinical activity involves ultrasound studies and that he is presently the Director of the Ultrasound Group at Washington University's teaching hospital. (Dicke Depo., November 4, 2004, pp. 9, 10.) Dr. Dicke further testified that he does obstetrical ultrasounds almost every day and does, in fact, review ultrasound images by teleradiology, which is transported from hospital to hospital. (Dicke Depo., November 4, 2004, pp. 39, 40, 48.) Dr. Dicke has also testified that he is the person responsible for training radiology residents in reading obstetrical ultrasounds. (Dicke Depo., November 4, 2004, p. 48.) Significantly, Dr. Dicke testified that the standard of care for radiologists and his subspecialty of maternal-fetal medicine in reading obstetrical ultrasounds is the same. (Dicke Depo., November 4, 2004, p. 63.)

Clearly Dr. Dicke is qualified to render opinions on the standard of care in performing obstetrical ultrasounds. Appellee's contention that Dr. Dicke is not qualified is absurd.

COMPETENCY

Appellee further alleges that Dr. Dicke was not familiar with the standard of care for radiologists performing teleradiology nor with the teleradiology system at Potomac Hospital. (See Appellee's Brief, p. 15.)

Teleradiology is merely a method in which films are transported from one location to another and has nothing to do with the interpretation or reading of the actual radiological film. This is a method to transport the films just like a messenger transporting films on foot or sending films in the mail. There's no difference. Nonetheless, Dr. Dicke testified that he does use teleradiology from hospital to hospital in his practice and reviews images by teleradiology. (See Dicke Depo., November 4, 2004, pp. 40, 48.)

Although West Virginia has adopted a national standard of care as opposed to the local standard of care in 1986 [Paintiff v. The City of Parkersburg, et al., 176 W. Va. 469, 345 S.E.2d 564 (1986)], nonetheless, appellee's counsel attempted to play games with the standard of care applicable in this malpractice case. Appellee asserts that Dr. Dicke somehow should be disqualified as an expert because he was not familiar

specifically with Potomac Hospital, never performed teleradiology support for a rural community hospital and was not specifically familiar with the standard at Potomac Hospital. (See appellee's brief, p. 15.) The locality rule has not existed in medical malpractice cases in this state at least since 1986 when this Court decided Paintiff, and lack of familiarity with a specific hospital is irrelevant in a medical malpractice case.

B.

Standard Of Care - Liability

Appellee asserts that Dr. Dicke did not testify that Dr. Rhee breached the standard of care. The following passage totally refutes appellee's assertion because it is clear that Dr. Dicke DID testify that Dr. Rhee violated the standard of care. The passage also demonstrates that appellee's counsel not only recognized this during the deposition but acknowledged it in his questioning:

BY DR. RHEE'S COUNSEL:

"Q. Okay. So WHAT YOU HAVE STATED THUS FAR is your view, is YOUR OPINION, rather, TO A REASONABLE MEDICAL PROBABILITY, that DR. RHEE, BY NOT DOING WHAT YOU SUGGESTED, VIOLATED SOME MEDICAL STANDARD OF CARE?

"A. YES.

"Q. Well, WHAT IS THE VIOLATION OF THE STANDARD OF CARE? I'm still not clear.

"A. DR. RHEE, in his capacity as a radiologist, was RESPONSIBLE FOR PROVIDING AN INTERPRETATION OF THE IMAGES. Per Ms. Niland's testimony, Dr. Rhee was not satisfied with the quality of the images he was receiving. Since he is the one that's responsible for rendering that interpretation, I would CONSIDER IT HIS RESPONSIBILITY TO PROVIDE SOME ADDITIONAL EITHER GUIDANCE OR DIRECTION BY HIMSELF OR SOMEBODY ELSE THAT WOULD ALLOW HIM TO BE COMFORTABLE RENDERING AN INTERPRETATION OF THE PATIENT IN THE IMAGES THAT HE RECEIVED."

(Deposition of Jeffrey Michael Dicke, M.D., August 9, 2005, pp. 10-11.) [Emphasis added.]

If one examines the continuation of the deposition, after this clear assertion of a breach of a standard of care by Dr. Rhee, one will find that counsel for Dr. Rhee didn't really ask any questions that would seriously probe the opinion that Rhee did, in fact, breach the standard of care.

It must be kept in mind that much of the basis for the opinion against Dr. Rhee was the testimony of Marla Niland which was not part of the record. Nonetheless, testimonial facts are just as strong and persuasive, and maybe even more so in some situations, than facts set forth in a medical record.

As one can see from many of the questions asked of Dr. Dicke in his November 4, 2004, deposition, they were prefaced and/or conditioned upon opinions based upon facts set forth in the medical records. This is significant because no one knew about the devastating testimony given by Marla Niland in January of 2005, some two months after Dr. Dicke's initial deposition in November of 2004.

In addition, Dr. Dicke testified that Dr. Rhee violated acceptable standards of care by not mentioning the level of amniotic fluid. The following is the testimony evidencing that breach of the standard of care:

"Q. Okay. Well, but can you say to a reasonable degree of medical certainty for a radiologist doing teleradiology that not mentioning the level of amniotic fluid constitutes a violation of the standard of care?

"Q. You can answer, Doctor.

"A. Well, in fact, I think the -- I mean, I think that that should have been mentioned, even if it was on the teleradiology report.

"Q. But is it something that for a radiologist constitutes a breach of the standard of care?

"A. I WOULD CONSIDER IT A BREACH." (Dicke Depo., November 4, 2004, pp. 84, 85.) [Emphasis added.]

Once again, keeping in mind that Marla Niland's testimony had not been given at the time of the November, 2004, deposition of Dr. Dicke, the following testimony was elicited from Dr. Dicke, which certainly was a precursor to the opinion of the breach of the standard of care later given in August of 2005:

"Q. All right. But based on the RECORDS and what is in front of you, would you agree with me that there's nothing to indicate that Dr. Rhee violated the standard of care?

"A. I CAN'T SAY THAT. IF I WAS PRESENTED WITH THESE IMAGES AND THIS CLINICAL HISTORY, I WOULD FEEL THAT I NEED TO GO IN AND EITHER SCAN THE PATIENT MYSELF OR RELAY MY FINDINGS PERSONALLY TO THE REFERRING PHYSICIAN."

(Dicke Depo., November 4, 2004, pp. 52, 53.)
[Emphasis added.]

Appellee's assertion that Dr. Dicke did not testify that Dr. Rhee breached the standard of care (Appellee's Brief, pp. 16, 17) is without merit.

The testimony is clear that Dr. Dicke clearly testified that Dr. Rhee breached the standard of care. In addition, Defendant Dr. Schmitt testified that there was a breach of the standard of care as to the delay in the radiology department, which according to Marla Niland was caused in large part as a

result of Dr. Rhee's refusal to assist the technician who was inexperienced and caring for a severely ill patient. Dr. Schmitt, as a co-defendant, was totally qualified to testify that the standard of care was breached in the performance of the ultrasound over which Dr. Rhee controlled as the on-call physician.

1. DR. MCLAUGHLIN'S EXPERT TESTIMONY ON CAUSATION

Dr. McLaughlin is a practicing obstetrician/gynecologist, who graduated from the University of Kansas Medical School, is board certified by the American College of Obstetrics and Gynecology and served as a staff obstetrician and gynecologist with the United States Air Force.

It should be kept in mind that Dr. Dicke was appellants' liability expert against Dr. Rhee and Dr. McLaughlin was appellants' causation expert. Dr. McLaughlin was never requested nor asked to render any opinions concerning Dr. Rhee's breach of the standard of care, and likewise Dr. Dicke was not asked to render opinions concerning causation.

Therefore, appellee's assertion that Dr. Dicke (liability expert) could not say that the delay had any effect on the

outcome and that he could not opine on causation (Appellee's Brief, pp. 18, 19) is totally meaningless and irrelevant. Likewise, appellee's assertion that Dr. McLaughlin (causation expert) had no testimony about Dr. Rhee because he was not skilled in reading ultrasounds (see Appellee's Brief, p. 19) is equally meaningless and irrelevant.

Dr. Dicke's testimony is that Dr. Rhee's behavior caused a delay in the ultrasound and that was a breach of the standard of care. Dr. McLaughlin's testimony is that the delay in the ultrasound caused and/or contributed to the death of the baby and injuries to Maranda Fout-Iser. Specifically, Dr. McLaughlin testified that the delay in the ultrasound was a contributing cause of the damages.

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

"A. Would be 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." (Deposition of Richard McLaughlin, May 3, 2004, p. 50.) [Emphasis added.]

Dr. McLaughlin further testified that a 32-week fetus has a greater than 90 percent chance of survival and the delays caused the death of the baby. (McLaughlin Depo., p. 72.)

There is absolutely no case authority or statute that requires a single expert on causation and liability in a medical malpractice case. Quite to the contrary, it is commonplace to have one expert testify to the standard of care (liability) and a separate and distinct expert testify to causation (damages and injuries). In this case, Dr. Dicke testified on the standard of care and Dr. McLaughlin testified on causation.

2. GAMES PLAYING

Much of appellee's arguments are grounded upon facts which are irrelevant or utilize questioning not in conformance with the laws of this state. A prime example of this is appellee's attempt to argue responses that could best be classified as relating to the old "locality rule." (See previous argument in reference to knowledge about specific standards at Potomac Valley Hospital.)

One must assume that appellee's counsel knew and knows that West Virginia has utilized the national standard of care and not the locality rule. Paintiff v. The City of Parkersburg, et al., 176 W. Va. 469, 345 S.E.2d 564 (1986). It is purely a waste of time to even try an address arguments that are clearly irrelevant in a medical malpractice case today and demonstrate appellee's attempt to misdirect the true focus of the correct law.

Appellee further attempts to divert attention from the proper standards by listing things that Dr. Rhee did properly, which is irrelevant. This is a common tactic where a negligent physician uses other aspects of his or her practice to obtain positive assertions that he or she did some things correctly. Such tactic is attempted by appellee on page 17 of his brief in talking about whether the report was accurate and within standards. (Appellee's Brief, p. 17.) In most medical procedures, there are multiple actions taken by a doctor, and even with negligence many of the other actions are within the standard of care. Such affirmative statements are meant only to attempt to divert one's attention from the actual breach of the standard.

In this case, appellants agree with Dr. Rhee's diagnosis that this was a viable baby while at Potomac Hospital thereby corroborating the opinion of Dr. McLaughlin that the baby died as a result of the delay at Potomac.

3. MARLA NILAND

Marla Niland's testimony unequivocally indicates that Maranda Fout-Iser spent over two hours in obtaining an ultrasound at Potomac Hospital. Dr. Schmitt has testified that the standard of care was to have it performed within 45 minutes at the latest and that the delay in radiology was in excess of an hour and 15 minutes. (Deposition of Thomas J. Schmitt, M.D., November 10, 2003, p. 113.) This delay is further evidenced by the actual times in the medical records.

It is most significant that what happened in radiology during the performance of the ultrasound is totally absent from any medical record. Only Dr. Rhee, Marla Niland and the patient, Maranda Fout-Iser, and her husband Jeremy, knew what happened and appellants only knew from a layperson's perspective in that they were not privy to the disgusting conduct of Dr. Rhee. Even personnel from the emergency room felt that the ultrasound was taking far too long and called the

radiology department to make inquiry as to what was taking so long. (Marla Niland Deposition, pp. 143, 144.) It was not until the deposition of Marla Niland on January 15, 2005, that the facts of this inordinate delay were discovered.

As indicated in appellants' initial brief, Marla Niland's testimony revealed that Dr. Rhee arrogantly refused to provide any assistance or help to a struggling and inexperienced radiological technician who was incapable of performing a proper obstetrical ultrasound. Furthermore, his conduct toward this tech was mean and his conduct toward the patient, Maranda, and her baby was despicable. Only Marla Niland remains as a witness to Dr. Rhee's conduct because the medical records for obvious reasons don't evidence the true facts that occurred that evening. The only other corroboration is the time records for the ultrasound and for the ambulance transport, all of which are totally consistent with the facts testified to by Marla Niland.

According to the records, the transport ambulance was not called until 6:45 p.m., ten minutes after the last ultrasound was performed. (Niland Depo., p. 235.) The records further indicate that the ambulance didn't arrive at the hospital until approximately 7:00 p.m. (Niland Depo., p. 238.) Ms. Niland

further testified that Dr. Rhee had more than one hour to appear at the scene after his first phone call with Ms. Niland. (Niland Depo., p. 240.)

Clearly it is not without design that appellee fails to mention in any way the actual substance of the conversations between Ms. Niland and Dr. Rhee. The reason for this silence is because such actions cannot be defended and in and of themselves represent liability even without the assistance or aid of expert testimony as will be discussed hereinafter.

4. THOMAS SCHMITT, M.D., AS AN EXPERT

Dr. Thomas Schmitt, who was the attending emergency room physician, was a defendant and as such was clearly permitted to testify in his own behalf as an expert. As previously indicated, Dr. Schmitt testified that there was an inordinate delay in radiology while performing the ultrasound and that such delay was in excess of an hour and 15 minutes. Dr. Schmitt also testified that this delay violated the standard of care for the performance of an ultrasound. (Dr. Schmitt Depo., p. 113.)

Once again, appellee has failed to address the testimony of Dr. Schmitt, which indicates a breach of the standard of care for the delay in the x-ray department; and based upon Marla Niland's testimony which was given after Dr. Schmitt testified, it is clear that the delay in radiology, if one believes Marla Niland, was principally the responsibility of Dr. Rhee, who refused to provide assistance and help despite being specifically requested.

5. REQUIREMENT OF AN EXPERT ON LIABILITY

Appellee correctly indicates that appellants' designation of experts originally included fourteen experts. Appellee fails to advise the Court that seven of those experts were listed as treating physicians and two related to vocational/economic damages. That left five experts related to the various specialties of the defendant doctors and causation. After all of the other physicians and hospitals settled, there was only a need to retain one expert on liability, namely, Dr. Dicke, and Dr. McLaughlin on causation. These experts had been designated long before Marla Niland provided her testimony against Dr. Rhee.

Irrespective of whether experts were or were not designated, the facts as testified to by Marla Niland demonstrated a "want of skill which was so gross as to be apparent" and the refusal to respond to requests for help related to a non-complex matter of diagnosis and treatment that was well within the general understanding of lay jurors by resorting to common knowledge and experience. See Totten v. Adongay, 175 W. Va. 634, 337 S.E.2d 2 (1985). Also see Banfi v. American Hosp. for Rehabilitation, 207 W. Va. 135, 529 S.E.2d 600 (2000).

Appellee argues that appellants never preserved this issue. This is a question of law and one to be decided based upon the facts as presented at the trial.

Keeping in mind that appellants' designation of experts was filed on November 3, 2003, and Ms. Niland never testified until January of 2005, it is clear that the issue never was enjoined, let alone argued. Nonetheless, the facts in this case support plaintiffs/appellants' right not to have to designate an expert on Dr. Rhee's liability issue.

Appellee argues that this issue was not filed by appellants until the day of the hearing when it was faxed to

the court, which is true. However, appellee fails to advise the Court that that pleading was filed in response to appellee's reply and third supplemental filing which had been filed August 23, 2005, at 11:14 a.m. This means that appellee is criticizing appellants for filing a document in response to its pleading filed less than one day before. It can hardly be said that appellants somehow were late when it was appellee who had filed a pleading the day before the summary judgment hearing on August 24, 2005.

6. REASONABLE DEGREE OF MEDICAL PROBABILITY

The Circuit Court's Order granting summary judgment, specifically Finding No. 4, requiring liability to be proven to a "reasonable degree of medical certainty," is wrong and contrary to W. Va. Code §55-7B-7 as is more fully addressed in appellants' brief.

It should be noted that many of the questions of defense counsel in the depositions of appellants' experts also utilized this incorrect standard of proof thereby rendering all such testimony irrelevant.

**7. STANDARD OF PROOF OF
CAUSATION IN A MEDICAL MALPRACTICE CLAIM**

The trial court further erred in its standard of proof for causation in a medical malpractice case in Finding No. 6 of the order granting summary judgment entered August 30, 2005, when it held that the standard of care was "the" cause of injury. Once again, this standard utilized by the court was clearly wrong and contrary to W. Va. Code §55-7B-3 as is more fully set forth in appellants' brief.

III.

CONCLUSION

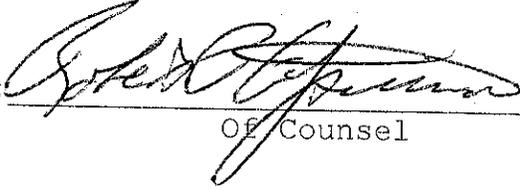
The deplorable nature of Dr. Rhee's actions, as testified to by the radiological technician, Marla Niland, are so gross as to be understood by lay jurors and the negligence evidenced thereby (standard of care violation) is one of common knowledge. Without doubt, anyone would say that Dr. Rhee's refusal as the on-call radiologist to come to the aid of an inexperienced technician who was having problems because of the significant illness of her patient is anything less than negligent and a breach of the standard of care.

In addition, appellants' expert, Dr. Dicke, testified that appellee, Defendant Rhee, to a reasonable degree of medical probability violated the standard of care and that this violation caused a delay according to appellants' expert, Dr. McLaughlin, which caused or contributed to the injuries and damages to Maranda Fout-Iser and the death of her baby, Alexia. Further, a defendant, Dr. Schmitt, testified that the delay in the ultrasound was a breach of the standard of care. The record further indicates that the trial judge utilized improper standards in a medical malpractice case for both liability and causation.

The Circuit Court's Order granting summary judgment should be reversed and this matter should be remanded back to the Circuit Court of Mineral County for further proceedings, including a trial on the merits.

Respectfully submitted,

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

By: 

OF Counsel

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CERTIFICATE OF SERVICE

Service of the foregoing **REPLY BRIEF ON BEHALF OF APPELLANTS** was made upon the appellee by mailing a true copy thereof by United States mail, postage prepaid, to its attorney on the 2nd day of February, 2007, as follows:

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

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and

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