

APPEAL NO. 34888

---

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

---

**JERRY GOLDIZEN and BILL GOLDIZEN**  
Co-administrators of the Estate of  
**ELVA LEE GOLDIZEN,**

Appellants,

v.

From the Circuit Court of  
Grant County, West Virginia  
**Civil Action No. 07-C-36**  
(Judge Philip B. Jordan, Jr.)

**GRANT COUNTY NURSING HOME,**

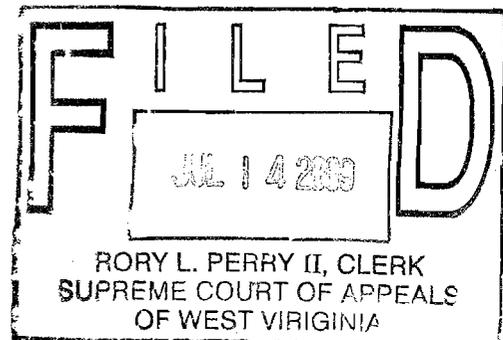
Appellee.

---

APPELLEE'S BRIEF

---

Rita Massie Biser (W.Va. State Bar ID No. 7195)  
Tonya P. Mullins (W. Va. State Bar ID No. 9699)  
MOORE & BISER PLLC  
317 Fifth Avenue  
South Charleston, West Virginia 25303  
304.414.2300  
304.414.4506 (fax)  
[rbiser@moorebiserlaw.com](mailto:rbiser@moorebiserlaw.com)



**COUNSEL FOR APPELLEE,**  
**GRANT COUNTY NURSING HOME**

## TABLE OF CONTENTS

I.	THE KIND OF PROCEEDING AND THE NATURE OF THE RULING IN THE LOWER COURT	Page 3
II.	RESPONSE TO ASSIGNMENT OF ERROR	Page 4
III.	STATEMENT OF FACTS	Page 5
IV.	PROCEDURAL HISTORY	Page 10
V.	TABLE OF POINTS AND AUTHORITIES RELIED UPON	Page 15
VI.	STANDARD OF REVIEW	Page 17
	A. Standard Applicable To Review Of Denial Of Motion To Vacate Scheduling Order.	Page 17
	B. Standard Of Review Applicable To Exclusion Of Expert Witness.	Page 18
	C. Standard Of Review Applicable To Summary Judgment.	Page 18
VII.	LAW AND ARGUMENT	Page 20
	A. The Circuit Court Properly Denied Appellants’ “Motion To Vacate The Scheduling Order And Request For Continuation of Trial Date.”	Page 20
	B. The Circuit Court Did Not Abuse Its Discretion In Excluding The Expert Witness Testimony Of Dr. Gaudet.	Page 24
	1. Gross Neglect Of The Scheduling Order And Discovery Requirements, Whether By Appellants And/Or Their Counsel, Warranted The Sanction Issued By The Circuit Court.	Page 33
	2. Defense Counsel Had A Trial Conflict Which Prevented Taking The “Evidentiary” Deposition Of Dr. Gaudet On The Eve of Trial.	Page 42
	C. The Circuit Court Correctly Granted Summary Judgment	Page 43
VIII.	CONCLUSION	Page 48

TO THE HONORABLE JUSTICES OF THE  
SUPREME COURT OF APPEALS OF WEST VIRGINIA

**I. KIND OF PROCEEDING AND NATURE OF RULING OF LOWER COURT**

The Appellants' claims having been previously dismissed for failure to comply with the pre-filing directives of the West Virginia Medical Professional Liability Act, West Virginia Code § 55-7B-1, *et seq.*, on May 9, 2007, Jerry Goldizen and Bill Goldizen, Co-Administrators of the Estate of Elva Goldizen, filed Civil Action No. 07-C-36 against Grant County Nursing Home (sometimes hereinafter referred to as "GCNH"). Appellants' claims of medical malpractice arise out of an incident which occurred while the decedent, Elva Goldizen, was a resident at Grant County Nursing Home. Specifically, on or about October 31, 2003, Ms. Goldizen suffered a medical emergency while eating her lunch at the facility and was transported to Grant Memorial Hospital where her condition continued to deteriorate and she subsequently died. The Appellants allege that Ms. Goldizen's death was caused by choking as a result of negligence on the part of employees of GCNH.

On October 6, 2008, the Circuit Court of Grant County, West Virginia entered an Order granting Defendant Grant County Nursing Home's Motion to Exclude the Deposition of Dr. Robert Gaudet and Defendant's Motion for Summary Judgment. Thereafter, on October 17, 2008, Appellants filed their Motion to Alter and Amend Judgment Order. The circuit court entered its "Order Denying Plaintiff's Motion to Alter and Amend Judgment" on October 30, 2008. It is from this Order that the Appellants now appeal.

## II. RESPONSE TO ASSIGNMENT OF ERRORS

(A) The circuit court correctly denied the Appellants' Motion to Vacate the Scheduling Order and Request to Continue Trial, finding that the Appellants had been provided more than nine (9) months during discovery, and some fifteen (15) months since the case was filed, to secure all necessary expert witness testimony.

(B) & (C) The circuit court properly excluded the expert witness testimony of Robert Gaudet, M.D. as the gross neglect of the scheduling order and discovery requirements, whether by Appellants or their counsel, warranted the sanction issued by the circuit court.

(D) The circuit court properly granted Defendant Grant County Nursing Home's Motion for Summary Judgment. The Appellants concede that they had failed to produce expert witness testimony to establish that Ms. Goldizen's death was proximately caused by an act and/or omission on the part of GCNH as required by West Virginia law and W.VA. CODE § 55-7B-7 (2008). Accordingly, summary judgment was appropriate as a matter of law.

The Order entered by the Honorable Phillip B Jordan, Jr., Judge of the 21<sup>st</sup> Judicial Circuit, Grant County, West Virginia, granting Defendant Grant County Nursing Home's Motion to Exclude the Deposition of Dr. Robert Gaudet and Defendant's Motion for Summary Judgment should be affirmed.

### III. STATEMENT OF FACTS

Elva Goldizen was a 77 year old resident at Grant County Nursing Home. She was admitted to the facility on January 10, 2002. Ms. Goldizen had the following medical conditions: Alzheimer's disease; Parkinson's disease; Type II diabetes; paralysis agitans; other disorders of neurohypophysis; hypertension; congestive heart failure, hyposmololity and/or hyponatremia; unspecified arthropathy; hypopotassemia; edema; and depressive disorder. She required 16 various medications.

Ms. Goldizen's quarterly review of 9/17/03 reported that "she now sometimes needs to be fed by staff - will add to approaches to 'assist w/ feeding as needed.'" Ms. Goldizen was then hospitalized from 9/20/03 to 9/25/03 for pneumonia and a urinary tract infection. At discharge, her primary diagnosis included congestive heart failure, her outlook was "guarded" and her prognosis and rehabilitation potential were documented as "poor." She was seen in the emergency department on 10/10/03 for fever and dehydration and then again the next day, 10/11/03, for fever. She was hospitalized again from 10/14/03 to 10/18/03 for a fever of unknown origin. Physician's notes during this visit indicate that Ms. Goldizen suffered from "end-stage Parkinson's" and the discharge summary noted that "her outlook is extremely guarded." Ms. Goldizen was discharged and returned to GCNH.

On October 22, 2003, Dr. Dewey Bensenhaver, Medical Director at Grant County Nursing Home, made the following dietary order for Ms. Goldizen: "add ground meats & soft fruits/vegs to diet." Thereafter, on October 31, 2003, according to the nursing notes, Ms. Goldizen ate well at breakfast and was fed by the staff. Ms. Goldizen was also reportedly ambulatory in the hall (with 2 assists). She then sat in a wheelchair at the

nurses' desk. At noon, Ms. Goldizen was being fed in the subdining room by a certified nursing assistant ("CNA"), Carla Hill. She was initially talking and eating her lunch which included a soft baked cod fillet which had been flaked by the CNA with a fork prior to serving Ms. Goldizen. (Carla Hill Depo. Tr. at 9-10,17). During the course of eating, Ms. Goldizen stiffened up and put her hands to her chest (Hill Depo. Tr. 21). At no time did Ms. Goldizen appear to be choking. (Hill Depo. Tr. at 40).

Becky Hinkle, LPN, was in the subdining room at that time and immediately came over to the resident and asked her if she was having chest pain. (Becky Hinkle Depo. Tr. at 11). Ms. Goldizen *verbally* responded "yes" she was having chest pain. (Hinkle Depo. Tr. at 11, 14-16). According to Nurse Hinkle, she thought Ms. Goldizen was having chest pain relating to a heart attack or a stroke. Staff immediately transported Ms. Goldizen back to her room. While transporting Mrs. Goldizen back to her room, she became nonresponsive and went limp in her wheelchair. (Hinkle Depo. Tr. at 41-42).

According to the medical records and testimony, the following occurred in Ms. Goldizen's room: at approximately 12:15 pm, Nurse Hinkle performed an assessment and checked Ms. Goldizen's vital signs. Mrs. Goldizen's dentures were removed and a few flakes of fish were then swabbed from her mouth. (Hinkle Depo. Tr. at 22). The Heimlich maneuver was performed by Nurse Hinkle and little more food was swabbed from her mouth. (Hinkle Depo. Tr. at 24-25). Oxygen was started. 12:20 pm - BP 22/112, pulse 110 and weak, breathing started to improve some and color improved; resident coughed some. (Hinkle Depo. Tr. at 44-45). Dr. Bensenhaver was contacted and ordered a transfer to hospital.

The ambulance arrived at 12:30 pm. and Ms. Goldizen was transported to Grant Memorial Hospital arriving at 12:49 pm. During the ambulance ride, Ms. Goldizen is noted as responsive, following commands, fighting the bag valve mask and suction; some improvement is also noted. Yet, hospital records report that upon arrival Ms. Goldizen was unresponsive to verbal or painful stimuli, breathing was shallow, and her pulse was 41-44. The doctor's notes state that the airway was examined and they found "soft food (fish) in trachea." According to emergency department nurse Heather Wright Barger, use of the bag valve mask can cause regurgitation of food. (Barger Depo. Tr. at 38). Accordingly, Nurse Barger could not testify as to whether or not the fish particles obtained from Mrs. Goldizen were a result of her being on the bag valve mask versus those fish particles being an obstruction of her airway which pre-existed her admission to the hospital that day as is argued by the Appellants. (Barger Depo. Tr. at 45).

Unfortunately, Ms. Goldizen's condition continued to deteriorate at the hospital and she was pronounced dead at 1:34 pm. An autopsy was declined by the family.

On or about May 9, 2007, Appellants filed this wrongful death action against GCNH alleging that Ms. Goldizen's death resulted from acute aspiration as a consequence of negligence on the part of employees of GCNH in their medical care and treatment of Ms. Goldizen. Specifically, the Appellants asserted in their Complaint that: (1) Ms. Goldizen had been fed baked fish in violation of a dietary order issued by Dr. Bensenhaver which read as follows: "add ground meats & soft fruits/vegs to diet" and that this resulted in Ms. Goldizen choking and proximately caused her death (Complaint at ¶ VII); (2) Ms. Goldizen's choking condition was not timely treated inasmuch as she was transported to her room for assessment prior to being taken to the emergency

department at Grant Memorial Hospital, (Complaint at ¶ IX); and (3) while being transported to her room via wheelchair, Ms. Goldizen was negligently permitted to fall from her wheelchair to the floor. (Complaint at ¶ VIII).

On January 22, 2008, Appellants identified Michelle Winters, RN, as their expert witness in this matter. Just two (2) weeks later, on February 7, 2008, Appellants' counsel took the deposition of Dr. Dewey Bensenhaver, the Medical Director at Grant County Nursing Home. Although Ms. Goldizen was not treated by Dr. Bensenhaver during her admission to Grant Memorial Hospital on October 31, 2003, and he was not fully advised as to the facts and circumstances surrounding Ms. Goldizen's treatment and ultimate death, Dr. Bensenhaver was required to sign the Death Certificate. In preparing the Death Certificate, Dr. Bensenhaver indicated that the immediate cause of death was "acute aspiration" and he based this finding upon "secondhand" information he had received from a physician who was neither present at the time, nor involved in the treatment of Ms. Goldizen in the ER. (Bensenhaver Depo. Tr. at 21-22).

At his deposition, Dr. Bensenhaver testified that after having had the opportunity to review Ms. Goldizen's medical records from Grant County Nursing Home, the EMS run report, and the emergency department records from Grant Memorial Hospital for the date in question, he was of the opinion that Ms. Goldizen's death was not caused by acute aspiration and that the finding on the Death Certificate was incorrect. (Bensenhaver Depo. Tr. at 20-24). Rather, Dr. Bensenhaver opined that Mrs. Goldizen's death was caused by cardiac arrest. (Bensenhaver Depo. Tr. at 26, 28). Based upon the description of Ms. Goldizen's condition and actions, as contained in the nursing home records and the EMT transport records, Dr. Bensenhaver believed that Ms. Goldizen had likely

suffered cardiac arrest while eating. (Bensenhaver Depo. Tr. at 26, 30). Dr. Bensenhaver further testified that the baked fish fed to Ms. Goldizen was not a violation of his dietary order. (Bensenhaver Depo. Tr. at 12-13).

On March 14, 2008, Grant County Nursing Home filed “Defendant’s Disclosure of Expert Witnesses” wherein the Appellee designated Dr. Bensenhaver as an expert witness in this matter and stated that he “is expected to provide expert opinions as set forth in his deposition testimony of February 7, 2008.” At no time during the course of discovery did the Appellants seek leave of Court to secure additional expert testimony to establish the cause of Ms. Goldizen’s death.

On July 16, 2008, counsel for the Appellee took the deposition of Appellants’ expert, Michelle Winters, RN. During her deposition, Ms. Winters testified, consistent with Dr. Bensenhaver’s testimony, that serving Ms. Goldizen baked fish was **not** a violation of Dr. Bensenhaver’s dietary order as she had earlier opined. (Michelle Winters, RN, Depo Tr. at 43-44). Rather, Ms. Winters changed the opinion set forth in her report to state that it was the manner in which she believed the fish was fed to Ms. Goldizen which was a violation of the standard of care and not the meal itself. (Winters Depo. Tr. at 43-44). Ms. Winters also agreed that she was not more qualified than Dr. Bensenhaver to testify regarding what does or does not constitute a violation of his dietary order than the doctor himself and that, as a nurse, she is not allowed to issue such a dietary order. (Winters Depo. Tr. at 39).

Similarly, Ms. Winters, as a registered nurse, agreed that she was not permitted to testify regarding the cause of Ms. Goldizen’s death. Accordingly, despite having signed the “Certificate of Merit” wherein she opined that “the nursing staff failed to follow Dr.

Bensenhaver's order and fed her chunks of fish thereby causing her to aspirate the chunks of fish she could not properly chew thereby proximately causing her death[,]” Ms. Winters conceded that it was beyond the scope of her nursing practice to determine the cause of Ms. Goldizen's death. (Winters Depo. Tr. at 49). As a result, Ms. Winters testified that she could not offer an opinion, to a reasonable degree of medical probability, as to the cause of Ms. Goldizen's death. (Winters Depo. Tr. at 51). Interestingly, Ms. Winters testified at her deposition that she had never been provided with a copy of the deposition transcript of Dr. Bensenhaver taken many months before. (Winters Depo. Tr. at 38). Thus, she was not aware that Dr. Bensenhaver had testified that Ms. Goldizen's death was the proximate result of cardiac arrest and not acute aspiration. (Winters Depo. Tr. at 50-51).

#### IV. PROCEDURAL HISTORY

A Scheduling Order was entered by the Circuit Court of Grant County on October 11, 2007, establishing the following deadlines: Appellants' expert witnesses and “any reports or opinions therefrom” to be disclosed by February 1, 2008; Appellee's expert witnesses and any reports or opinions therefrom to be disclosed by March 14, 2008; all parties fact witnesses to be disclosed by March 14, 2008; and all discovery “**must**” be completed by July 25, 2008.

On January 22, 2008, Appellants filed their disclosure of expert witnesses wherein they disclosed on Michelle Winters, RN. Robert Gaudet, M.D., a physician who treated Mrs. Goldizen at Grant Memorial Hospital emergency department, was **not** disclosed as an expert witness. On March 28, 2008, Appellants filed a second and

untimely expert witness disclosure, along with a belated disclosure of fact witnesses. This time, Dr. Robert Gaudet was identified as both a fact witness and an expert witness but no reports or opinions were provided with regard to the proposed testimony to be offered by Dr. Gaudet. Moreover, in "Plaintiffs' Responses to Defendant's First Set of Interrogatories and Requests for Production of Documents," Appellants **did not** identify Dr. Gaudet as an expert witness nor did they provide the requested information regarding the proposed opinions of Dr. Gaudet to be offered at the trial of this matter. (See "Plaintiffs' Responses to Defendant's First Set of Interrogatories and Requests for Production of Documents," Answer to Interrogatory No. 4). Similarly, Appellants did not provide a summary of the facts and information possessed by Dr. Gaudet as a fact witness in response to Appellee's interrogatories requesting that information.

On January 24, 2008, GCNH served "Defendant's Second Set of Requests for Production of Documents to Plaintiff" wherein the Appellee sought information relating to Appellants' experts witnesses and expert opinions to be offered by those witnesses at the trial of this matter. On April 28, 2008, Appellants belatedly filed "Plaintiff's Response to Defendant's Second Set of Requests for Production of Documents" wherein they failed to make a single reference to Dr. Gaudet testifying as an expert witness in this matter and/or to provide any documents regarding the proposed opinions of Dr. Gaudet. And, just as before, Appellants made no effort to supplement their discovery responses with regard to the purported opinions of Dr. Robert Gaudet.

After the close of discovery, the parties participated in mediation on August 1, 2008. During the course of mediation, defense counsel advised counsel for the Appellants that they had failed to produce expert testimony to establish the proximate

cause of Ms. Goldizen's death. Appellee further advised that it intended to file for summary judgment on or before September 23, 2008, in accordance with the Scheduling Order entered by the Court. Shortly thereafter the Appellants concluded the mediation and, less than a week later, on August 7, 2008, Appellants' filed their "Motion to Vacate Scheduling Order and Request for Continuation of Trial Date." In their motion, Appellants sought a continuance based on (1) Dr. Bensenhaver having "changed his opinion" such that they were "now required to secure additional expert testimony relative to causation"; and (2) "for the last eight months counsel for the plaintiff has been attempting to locate Dr. Robert Gaudet . . . without success to arrange a date and time for his discovery deposition." (Plaintiffs' Motion to Vacate Scheduling Order and Request for Continuation of Trial Date at §§ 3-5).

Interestingly, Appellants' motion for a continuance was not filed until six (6) months after learning of Dr. Bensenhaver's "changed" opinions. At no time during those six months did the Appellants seek leave of court to secure additional expert testimony to establish the cause of Ms. Goldizen's death, despite having ample opportunity to do so. Appellants' purported eight month long attempt to locate Dr. Gaudet was similarly disingenuous given that Dr. Gaudet was easily located by the Judge's own law clerk within a matter of minutes. And, again, at no time prior to expiration of the discovery deadline did the Appellants seek additional time to locate Dr. Gaudet or leave of Court to obtain additional expert witness testimony. Consequently, by Order entered August 21, 2008, the circuit court denied Plaintiffs' Motion to Vacate Scheduling Order and Request for Continuation of Trial Date.

Thereafter, and within days of the circuit court denying the Appellants' request for a continuance, Appellants' counsel was able to locate Dr. Gaudet. By letter dated September 9, 2008, Appellants' counsel advised that he had located Dr. Gaudet and that he wanted to schedule the "evidentiary deposition" of Dr. Gaudet. Counsel for GCNH immediately objected to the deposition as untimely (whether indicated to be for "evidentiary" purposes or otherwise) inasmuch as the discovery deadline had passed on July 25, 2008. Defense counsel further advised that due to another matter which was set for trial on September 29, 2008, in the Circuit Court of Kanawha County, Civil Action No. 06-C-872, previously scheduled depositions and extensive preparations needed for the trial of this case, defense counsel did not have sufficient dates available to travel to and from Clintwood, Virginia, to take the deposition of Dr. Gaudet. Moreover, defense counsel advised that the Appellants would need to seek leave of court to schedule the deposition of Dr. Gaudet outside of the discovery deadline.

Without leave of court, Appellants' counsel unilaterally scheduled and noticed the "Video-Taped Evidentiary Deposition of Robert Gaudet, M.D" for September 30, 2008, in Clintwood, Virginia. Based upon expiration of the discovery deadline and a previously scheduled trial on the same date, Appellee filed "Defendant Grant County Nursing Home's Motion for Protective Order and Motion to Exclude." Appellee's request for a Protective Order precluding the deposition of Dr. Gaudet from going forward on September 30, 2008, was granted by the circuit court based upon the trial conflict and unavailability of defense counsel. Thereafter, at the Pretrial Conference on October 1, 2008, the circuit court heard Defendant's Motion to Exclude Dr. Gaudet, as well as Defendant's Motion for Summary Judgment.

By Order entered October 6, 2008, the court granted Appellee's motions. In so doing, the circuit court found, *inter alia*, that the Appellants had not made a timely or "significant" effort to locate Dr. Gaudet within the discovery period, that they were clearly in violation of the court's scheduling order, and that substantial inconvenience and prejudice would result to the Appellee if the deposition were allowed to be taken. As a consequence, the court further held that "in granting such Motion to Exclude, this Court must GRANT Summary Judgment to the Defendant as Plaintiff is without expert testimony to establish causation" as required by West Virginia § 55-7B-7 (2008). Importantly, the Appellants never provided the court with any information, via affidavit or otherwise, that Dr. Gaudet was going to provide the causation testimony necessary to sustain their case. In fact, the Appellants had no idea what testimony, if any, Dr. Gaudet would give regarding the cause of Ms. Goldizen's death.

Thereafter, on October 17, 2008, Appellants' filed their Motion to Alter and Amend Judgment Order. The Court entered its "Order Denying Plaintiff's Motion to Alter and Amend Judgment" on October 30, 2008. It is from this Order that the Appellants now appeal.

V. TABLE OF POINTS AND AUTHORITIES RELIED UPON

CASES

- Adalman v. Baker, Watts & Co., 807 F.2d (4th Cir. 1986)  
Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York,  
Syl Pt. 133 S.E.2d (W. Va. 1963)  
AKEVA L.L.C. v. Mizuno Corp., 212 F.R.D. (M.D.N.C. 2002)  
Anderson v. Kunduru, 600 S.E.2d (W. Va. 2004)  
Anderson v. Liberty Lobby, Inc., 477 U.S. (1986)  
Arnold v. Krause, Inc., 232 F.R.D. (W.D.N.Y. 2004)  
Baker v. Speedway Motorsports, Inc., 618 S.E.2d 796 (N.C. Ct. App. 2005)  
Bartles v. Hinkle, 472 S.E.2d (W. Va. 1996)  
Beattie v. Firmschild, 394 N.W.2d (Mich. Ct. App. 1986)  
Bell v. Inland Mut. Ins. Co., 332 S.E.2d (W. Va. 1985)  
Carr v. Norstock Bldg. Sys., Inc., 767 S.W.2d (Tex. App. 1989)  
Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d  
(2d Cir. 1979)  
Clarke v. Jones, 518 A.2d (Me. 1986)  
Consolidated Coal Co. v. Boston Old Colony Ins. Co.,  
508 S.E.2d (W. Va. 1998)  
Corchado v. Puerto Rico Marine Management, Inc., 665 F.2d (1st Cir. 1981)  
Cox v. Jones, 470 N.W.2d (Iowa 1991)  
Dilmer Oil Co. v. Federated Mut. Ins. Co., 986 F. Supp. (D.S.C. 1997)  
Dion v. Graduate Hosp. of Univ. of Pennsylvania, 520 A.2d (Pa. Super. Ct. 1987)  
Dunn v. Bank-Tec South, 134 S.W.3d (Tex. App. 2003)  
Estate of Brock ex rel. Yadon v. Rist, 63 S.W.3d (Tenn. Ct. App. 2001)  
Farley v. Shook, 629 S.E.2d (W. Va. 2006)  
Gentry v. Magnum, 466 S.E.2d (W. Va. 1995)  
Goede v. Aerojet General Corp., 143 S.W.3d (Mo. Ct. App. 2004)  
Hansen v. Universal Health Servs. of Nevada, Inc., 974 P.2d (Nev. 1999)  
Jenkins v. CSX Transportation, Inc., 649 S.E.2d (W. Va. 2007)  
Kemock v. Mark II, 404 N.E.2d (Oh. Ct. App. 1978)  
Kincaid v. Southern W. Va. Clinic, Inc., 475 S.E.2d (W. Va. 1996)  
Kiser v. Caudill, 557 S.E.2d (W. Va. 2001)  
Koffler v. City of Huntington, 469 S.E.2d (W. Va. 1996)  
Levy v. Scottish Union and National Ins. Co., 52 S.E. (W. Va. 1905)  
Link v. Wabash Railroad Co., 370 U.S. (1962)  
McDougal v. McCammon, 455 S.E.2d (W. Va. 1995)  
McVerry v. Charash, 901 A.2d (Conn. 2006)  
Murphy v. Sobel, 238 N.W.2d (Mich. Ct. App. 1975)  
Northern Trust Co. v. Louis A. Weiss Mem. Hosp., 493 N.E.2d (Ill. App. Ct. 1986)  
Painter v. Peavy, 451 S.E.2d (W. Va. 1994)  
Palmer v. Volkswagen of America, Inc., 904 So. 2d (Miss. 2005)  
Perdue v. Hess, 484 S.E.2d (W. Va. 1997)  
Quill v. Trans World Airlines, Inc., 361 N.W.2d (Minn. Ct. App. 1985)

Redden v. Comer, 488 S.E.2d (W. Va. 1997)  
Rouse v. Farmers State Bank, 866 F. Supp. (N.D. Iowa 1994)  
Sheely v. Pinion, 490 S.E.2d (W. Va. 1997)  
Short v. Appalachian OH-9, Inc., 507 S.E.2d (W. Va. 1998)  
Shroades v. Food Lion, Inc., 530 S.E.2d (W. Va. 1999)  
Smith v. Ayer, 101 U.S. 320 (1880)  
State v. Bush, 255 S.E.2d (W. Va. 1979)  
State ex rel. State Farm Fire v. Madden, 451 S.E.2d (W. Va. 1994)  
Walter Kidde Portable Equipment, Inc. v. Universal Security Instruments, Inc., 2005 U.S.  
Dist. LEXIS 46201 (M.D.N.C. 2005)  
Walton v. Given, 215 S.E.2d (W. Va. 1975)  
Williams v. Precision Coil, Inc., 459 S.E.2d (W. Va. 1995)  
Wood v. Accordia of W. Va, Inc., 618 S.E.2d (W. Va. 2005)  
Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co., 170 F.3d (10th Cir. 1999)  
Woolwine v. Raleigh General Hosp., 460 S.E.2d (W. Va. 1995)

## **STATUTES**

West Virginia Code § 55-7B-1, *et. seq.* (2008)  
West Virginia Code § 55-7B-3 (2008)  
West Virginia Code § 55-7B-7 (2008)

## **RULES**

FED. R. CIV. P. 37(c) (2009)  
FED. R. CIV. P. 37(c) Advisory Committee Note (1993)  
W. VA. R. APP. P. 3 (2009)  
W. VA. R. CIV. P. 16(e) (2008)  
W. VA. R. CIV. P. 16(f) (2008)  
W. VA. R. CIV. P., 37(b)(2)(B) (2008)  
W. Va. R. CIV. P. 56(c) (2008)  
West Virginia Trial Court Rule 5.02(d)

## VI. STANDARD OF REVIEW

### A. **Standard Applicable to Review of Circuit Court's Denial of Motion To Vacate Scheduling Order.**

The Supreme Court of Appeals of West Virginia has long held that the decision to grant or deny a continuance is within the sound discretion of the circuit court: “It is well settled as a general rule that the question of continuance is in the sound discretion of the circuit court, which will not be reviewed by the appellate court, except in case it clearly appears that such discretion has been abused.” Shroades v. Food Lion, Inc., 530 S.E.2d 456 (W. Va. 1999) (quoting Levy v. Scottish Union and National Ins. Co., 52 S.E. 449, syl. pt. 1 (W. Va. 1905)). Accordingly, “[a] motion for continuance is addressed to the sound discretion of the circuit court, and its ruling will not be disturbed on appeal unless there is a showing that there has been an abuse of discretion.” State v. Bush, 255 S.E.2d 539, syl. pt. 2 (W. Va. 1979). This Court has further explained that “whether there has been an abuse of discretion in denying a continuance must be decided on a case-by-case basis in light of the factual circumstances presented, particularly the reasons for the continuance that were presented to the circuit court at the time the request was denied.” Id. at syl. pt. 3. Finally, in McDougal v. McCammon, this Court held:

The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence and the appropriateness of a particular sanction for discovery violations are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard.

455 S.E.2d 788, syl. pt. 1 (W. Va. 1995).

### **B. Standard of Review Applicable to Exclusion of Expert Witnesses.**

The Supreme Court of Appeals of West Virginia “affords broad discretion in the use of sanctions under the West Virginia Rules of Civil Procedure so that circuit judges may run their courtrooms effectively and efficiently manage their dockets.” Jenkins v. CSX Transportation, Inc., 649 S.E.2d 294 (W. Va. 2007). “The imposition of sanctions by a circuit court for failure of a part to obey the court’s scheduling order is within the sound discretion of the court and will not be disturbed upon appeal unless there has been an abuse of that discretion.” Kincaid v. Southern West Virginia Clinic, Inc., 475 S.E.2d 145, syl. pt. 1 (W. Va. 1996) (quoting Bell v. Inland Mut. Ins. Co., 332 S.E.2d 127, syl. pt. 1 (W. Va. 1985)).

As was cited by the circuit court in its “Order Denying Plaintiff’s Motion to Alter and Amend Judgment,” an abuse of discretion occurs when: (1) a material factor deserving significant weight is ignored; (2) when an improper fact is relied upon; or (3) when all proper and no improper factors are assessed but the circuit court makes a serious mistake weighing them. Gentry v. Magnum, 466 S.E.2d 176, n.6 (W. Va. 1995).

### **C. Standard of Review Applicable to Summary Judgment.**

It is well established that “upon appeal, the entry of a summary judgment is reviewed by the Supreme Court of Appeals of West Virginia *de novo*.” Wood v. Accordia of W. Va, Inc., 618 S.E.2d 415, 420 (W. Va. 2005); Redden v. Comer, 488 S.E.2d 484, 486 (W. Va. 1997); syl. pt. 1, Koffler v. City of Huntington, 469 S.E.2d 645, syl. pt. 1 (W. Va. 1996); Painter v. Peavy, 451 S.E.2d 755, syl. pt 1 (W. Va. 1994). Rule 56 of the West Virginia Rules of Civil Procedure governs the standard by which the

granting of a motion for summary judgment shall be determined. Rule 56(c) provides, in pertinent part, as follows:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The well settled rule is that a motion for summary judgment may be granted only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

W. Va. R. Civ. P. 56(c) (2008). Pursuant to Rule 56, “summary judgment is required when the record shows that there is ‘no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’” Consolidated Coal Co. v. Boston Old Colony Ins. Co., 508 S.E.2d 102, 107 (W. Va. 1998).

The Supreme Court of Appeals of West Virginia has reiterated that Rule 56 was “‘designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial,’” where there is essentially “‘no real dispute as to salient facts’ or if it only involves a question of law.” Williams v. Precision Coil, Inc., 459 S.E.2d 329, 335 (W.Va. 1995) (quoting Painter v. Peavy, 451 S.E.2d 755, 758 n.5 (W.Va. 1994)). This Court has further stated that a motion for summary judgment should be granted when it is clear that there is no genuine issue of fact to be tried and “‘inquiry concerning the facts is not desirable to clarify the application of the law.’” Id. at 336 (quoting Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York, 133 S.E.2d 770 at syl pt. 3 (W.Va. 1963)).

Although the initial burden of production and persuasion is on the moving party, if it can show by affirmative evidence that there is no genuine issue of material fact, the burden switches to the nonmoving party. Williams, 459 S.E.2d at 335-36. The

nonmoving party then has the burden of production and must satisfy this burden by offering more than “a mere ‘scintilla of evidence’ and must produce evidence sufficient for a reasonable jury to find in the nonmoving party’s favor.” *Id.* at 337 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986)). Evidence illustrating the factual controversy cannot be mere conjecture and must contradict the showing of the moving party by pointing to specific facts demonstrating a ““trialworthy”” issue. *Id.*

The record in this matter reveals that there is no genuine issue as to any material fact with regard to Appellants’ claims against Appellee, Grant County Nursing Home, as the Appellants have admittedly failed to produce the required expert witness testimony to establish that Ms. Goldizen’s death was proximately caused by some act and/or omission on the part of GCNH. Accordingly, summary judgment was appropriate as a matter of law and the Petition for Appeal should be denied.

## VII. LAW AND ARGUMENT

### A. **The Circuit Court Properly Denied Appellants’ “Motion to Vacate The Scheduling Order and Request to Continuation of Trial Date.”**

The Honorable Phillip B Jordan, Jr., Judge of the 21<sup>st</sup> Judicial Circuit, Grant County, West Virginia, correctly denied the Appellants’ request for a continuance, finding that the Appellants had been provided ample time during discovery, over nine (9) months, to secure all necessary expert testimony and/or to locate Dr. Robert Gaudet. A motion for continuance is addressed to the sound discretion of the circuit court, and its ruling will not be disturbed on appeal unless there is a showing that there has been an abuse of discretion. Shroades v. Food Lion, Inc., 530 S.E.2d 456 (W. Va. 1999). In determining whether there has been an abuse of discretion in denying a continuance, such

matters are reviewed on a case-by-case basis “in light of the factual circumstances presented, particularly the reasons for the continuance that were presented to the circuit court at the time the request was denied.” *Id.* at 458.

In the present case, after the close of discovery on July 25, 2008, the parties participated in mediation on August 1, 2008. During the course of mediation, Appellee’s counsel advised counsel for the Appellants that the Appellants had failed to designate and/or otherwise produce the requisite expert witness testimony establishing the cause of Ms. Goldizen’s death as mandated by the West Virginia Medical Professional Liability Act, West Virginia Code § 55-7B-1, *et seq.* Appellee further advised that, as a consequence of this failure, counsel intended to file for summary judgment on or before September 23, 2008, in accordance with the Scheduling Order entered by the Court. Shortly thereafter, the Appellants abruptly concluded the mediation. Importantly, at no time during the discovery period or prior to mediation (or really prior to the statements by Appellee’s counsel), had the Appellants had made any genuine effort to retain an appropriate expert witness, locate Dr. Gaudet, or to comply with discovery relating to Dr. Gaudet in this matter. Yet, immediately thereafter, on August 7, 2008, Appellants filed their “Motion to Vacate Scheduling Order and Request for Continuation of Trial Date.”

In their Motion, Appellants asserted two basis for requesting a continuance of the trial: (1) Dr. Bensenhaver had “changed his opinion” and they were “now required to secure additional expert testimony relative to causation”; and (2) “for the last eight months counsel for the plaintiff has been attempting to locate Dr. Robert Gaudet . . . without success to arrange a date and time for his discovery deposition.” (Plaintiffs’

Motion to Vacate Scheduling Order and Request for Continuation of Trial Date at §§ 3-5).

As an initial matter, Appellants' motion for a continuance was not filed until **six (6) months after** learning of Dr. Bensenhaver's opinions. Appellants' counsel took the deposition of Dr. Dewey Bensenhaver on February 7, 2008. At his deposition, Dr. Bensenhaver testified that after having had the opportunity to review Ms. Goldizen's medical records from Grant County Nursing Home, the EMS run report, and the emergency department records from Grant Memorial Hospital for the date in question, he was of the opinion that Ms. Goldizen's death was not caused by acute aspiration and that the finding on the Death Certificate was incorrect. (Bensenhaver Depo. Tr. at 20-24). On March 14, 2008, Grant County Nursing Home filed "Defendant's Disclosure of Expert Witnesses" wherein the Appellee designated Dr. Bensenhaver as an expert witness in this matter and stated that he "is expected to provide expert opinions as set forth in his deposition testimony of February 7, 2008." At no time during the six months following the deposition of Dr. Bensenhaver on February 7, 2008, did the Appellants seek leave of court to secure additional expert testimony to establish the cause of Ms. Goldizen's death, despite having ample opportunity to do so.

As a final argument, Appellants asserted that a continuance was warranted because they had been unable to locate Dr. Robert Gaudet, the emergency department physician who treated Ms. Goldizen, despite having looked for him for eight (8) months. Yet, at no time prior to expiration of the discovery deadline did the Appellants seek additional time to locate Dr. Gaudet or leave of Court to obtain additional expert witness testimony.

In an effort to convince the circuit court that the Appellants had made a timely effort to locate Dr. Gaudet, they eventually provided what appeared to be a timeline of their activities in this regard entitled “Attempts to Reach Robert Gaudet, M.D.” A review of this document quickly reveals that information regarding the current location of Dr. Gaudet in Clintwood, Virginia was known to the Appellants no later than March 12, 2008. Moreover, it is interesting to note that by the Appellants’ own admission they undertook **no efforts** to locate Dr. Gaudet from April 11, 2008, until August 7, 2008, the same date on which Appellants filed their “Motion to Vacate Scheduling Order and Request for Continuation of Trial Date” wherein they incorrectly represented to the circuit court that they had been attempting for eight (8) months to locate Dr. Gaudet. In reality, the Appellants made very little effort from February to April to locate Dr. Gaudet, no efforts from April to August, and then began their actual effort in August, 2008 wherein they were able to locate him within one (1) month’s time.

In fact, it was not until the parties engaged in mediation on August 1, 2008, and counsel for the Appellee pointed out that the Appellants had insufficient expert testimony to establish the proximate cause of Ms. Goldizen’s death that the Appellants even raised the issue of locating Dr. Gaudet and/or that they sought to have the trial of this matter continued in order to obtain his testimony. Nonetheless, Appellants had been fully aware of the opinions of Dr. Bensenhaver throughout the course of discovery in this matter and knowingly failed to make a timely effort to obtain expert witness testimony to refute those opinions at any time prior to the close of discovery and/or the eve of trial.

Pursuant to Rule 16(e) of the West Virginia Rules of Civil Procedure, it is within the circuit court’s discretion to deny a party’s request for modification of the Scheduling

Order and/or a continuance of the trial. W. VA. R. CIV. P. 16(e) (2008). In denying Appellants' Motion, the circuit court determined that the Appellants were aware, for six (6) months, of Dr. Bensenhaver's testimony and opinions in this matter and yet made no effort during that time to secure additional expert testimony to establish the cause of Ms. Goldizen's death and/or to rebut the testimony of Dr. Bensenhaver. Accordingly, it was the opinion of the circuit court that "the Plaintiff has had ample opportunity over the last six months to secure additional expert testimony. Therefore, the Motion for Continuance on this ground is not well taken." (Order entered August 21, 2008, p.2). Moreover, the circuit court was equally unconvinced by Appellants' assertion that they could not locate Dr. Gaudet "in the Information Age of today" and that doing so "was not an insurmountable task." (Order entered August 21, 2008, p.2).

Importantly, once the circuit court denied Appellants' motion to continue the trial of this matter, Appellants' counsel was quickly able to locate Dr. Gaudet. (See Order entered October 6, 2008, p.2) ("By finding Dr. Gaudet so quickly after the Court denied Plaintiff's Motion to Continue, Plaintiff has demonstrated to this Court that had such efforts been put forth beforehand, Dr. Gaudet could have been located within the agreed parameters of the case."). Accordingly, "Plaintiffs' Motion to Vacate Scheduling Order and Request for Continuation of Trial Date" was properly denied.

**B. The Circuit Court Did Not Abuse Its Discretion In Excluding The Expert Witness Testimony of Dr. Gaudet.**

The circuit court correctly excluded the purported expert witness testimony of Robert Gaudet, M.D. from the trial of this matter. The Supreme Court of Appeals of West Virginia has clearly established that a circuit court's exclusion of the testimony of

an expert witness is “certainly within the range of permissible sanctions under Rule 37.” Jenkins v. CSX Transportation, Inc., 649 S.E.2d 294 (W. Va. 2007). In so holding, this Court has recognized that “the failure to timely disclose an expert witness is serious conduct that may warrant the exclusion of that expert’s testimony and ultimately lead to dismissal of the case.” Kiser v. Caudill, 557 S.E.2d 245 (W. Va. 2001) (citing Kincaid v. Southern West Virginia Clinic, Inc., 475 S.E.2d 145 (W. Va. 1996); Sheely v. Pinion, 490 S.E.2d 291 (W. Va. 1997); Woolwine v. Raleigh General Hosp., 460 S.E.2d 457 (W. Va. 1995)).

Compliance with orders of the court is mandated by Rule 16(e) of the West Virginia Rules of Civil Procedure which provides as follows:

*Pretrial orders.* -- After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

W. VA. R. CIV. P. 16(e) (2008). A failure to comply with the Court’s pretrial order can result in sanctions, as provided by Rule 16(f):

*Sanctions.* – If a party or party’s attorney fails to obey a scheduling or pretrial order... the judge, upon motion or the judge’s own initiative, may make such order with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), and (D). In lieu of or in addition to any other sanction, the judge may require the party or attorney representing the party or both to pay reasonable expenses incurred because of any noncompliance with this rule, including attorney’s fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

W. VA. R. CIV. P. 16(f) (2008).

Rule 37(b)(2)(B) states that the court may make an order “prohibiting that party from introducing designated matters into evidence.” W. VA. R. CIV. P. 37(b)(2)(B)

(2008). Thus, it was within the circuit court's discretion to preclude the plaintiff from conducting additional depositions, and then using that deposition at trial, after the expiration of the deadlines established in the scheduling order. See, e.g., Sheely v. Pinion, 490 S.E.2d 291, 294-95 (W. Va. 1997); State ex rel. State Farm Fire v. Madden, 451 S.E.2d 721, 727 (W. Va. 1994). The imposition of sanctions by a circuit court under Rule 37(b) of the West Virginia Rules of Civil Procedure, for the failure of a party to obey the court's order and/or to provide or permit discovery, is within the sound discretion of the court and will not be disturbed upon appeal unless there has been an abuse of that discretion. Bell v. Inland Mut. Ins. Co., 332 S.E.2d 127, syl. pt. 1 (W. Va. 1985).

To determine what will constitute an appropriate sanction, the court may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case. Kiser v. Caudill, 557 S.E.2d 245 (W. Va. 2001). As a general rule, the party seeking exclusion of a witness has the burden of proving noncompliance with a discovery order. Sheely, 490 S.E.2d at 295. Once established, the burden of proof shifts to the noncompliant party to "demonstrate either that it was unable to comply or that special circumstances exist which make the imposition of sanctions unjust. If it is demonstrated that a noncompliant party intentionally or with gross negligence failed to obey a court order, the full range of sanctions . . . is available to the court." Id. (quoting Bartles v. Hinkle, 472 S.E.2d 827, 836 (W. Va. 1996)).

The Supreme Court of Appeals of West Virginia has upheld the exclusion of expert witness testimony based on a party's failure to comply with deadlines established in the scheduling order. See, e.g., Sheely v. Pinion, 490 S.E.2d 291 (W. Va. 1997); Kincaid v. Southern West Virginia Clinic, Inc., 475 S.E.2d 145 (W. Va. 1996) (affirming dismissal of action for failing to identify experts); Woolwine v. Raleigh General Hosp., 460 S.E.2d 457 (W. Va. 1995) (affirming dismissal for failing to identify experts). "This Court affords broad discretion in the use of sanctions under the Rules of Civil Procedure so that circuit judges may run their courtrooms effectively and efficiently manage their dockets." Jenkins, 649 S.E.2d at 302. Moreover, where the record discloses "a pattern of gross, if not willful, neglect of the circuit court's orders," preclusion of the expert witness is not too harsh a sanction. Sheely, 490 S.E.2d at 296.

In the present case, Appellants have demonstrated just such a pattern of gross neglect of the court's scheduling order and discovery requirements:

- Appellants were required by the Scheduling Order to disclose their expert witnesses by February 1, 2008. On January 22, 2008, Appellants filed their disclosure of expert witnesses identifying only Michelle Winters, RN, as a proposed expert witness. Dr. Robert Gaudet was **not** disclosed as an expert witness. On March 28, 2008, after expiration of their expert witness deadlines, Appellants filed a second and untimely expert witness disclosure. This time, Appellants identified Ms. Winters as a proposed expert witness, and further stated that Mrs. Goldizen treating physicians, Dr. Dewey Bensenhaver, Dr. Steve Thompson and Dr. Robert Gaudet, may be called as expert witnesses.
- Despite the Scheduling Order's requirement that reports from and/or opinions of the experts be provided, no reports or opinions were

provided with regard to the proposed testimony to be offered by Dr. Gaudet.

- All fact witnesses were required to be disclosed on or before March 14, 2008. Yet again, Appellants did not file their disclosure of fact witnesses until after expiration of the applicable deadline.
  
- Appellants failed to file their discovery responses in a timely manner. On June 19, 2007, Appellee filed “Defendant Grant County Nursing Home’s First Set of Interrogatories and Requests for Production of Documents to Plaintiff.” Responses to these discovery requests were due no later than July 23, 2007. Appellants’ answers to these discovery requests were not filed, however, until August 14, 2007, following a letter from Appellee’s counsel reminding that the same were overdue and no extension had ever been requested.
  
- Appellants failed to supplement their discovery responses, at any time, to include information regarding the purported opinions of Dr. Robert Gaudet. For example, “Plaintiffs’ Answers to Defendant Grant County Nursing Home’s First Set of Interrogatories and Requests for Production of Documents” contained the following Interrogatory and Appellants’ answer:

Interrogatory No 4. As to each expert witness that plaintiff intends to call to give expert testimony at the trial in this matter, please provide the following information:

- a. The identity of each expert;
- b. All Rule 26(b)(4) information on each expert;
- c. A current copy of each expert’s *curriculum vitae*.
- d. A complete listing of all testimony the expert has given, as well as the style of each case, the person on whose behalf the

expert testified, the name and address of the attorney who retained the expert, and, whether the expert testimony was given in deposition, trial, or both, and the amount the expert was paid for services rendered in the entire case; and

e. The rate at which plaintiff's expert will be compensated in this case, for reviewing the case, giving deposition testimony, and testifying at trial.

ANSWER: Michelle Winters, RN  
Alexi Medical Consulting, LLC  
105 Jamestown Road  
Nitro, WV 25143

See attached curriculum vitae of Michelle Winters.

At no time after filing this discovery response did the Appellants supplement their answer, as required by Rule 26 of the West Virginia Rules of Civil Procedure, to reflect that they intended to call Dr. Robert Gaudet as an expert witness in this matter or to provide the requested information with regard to Dr. Gaudet's proposed opinions.

- Appellants failed to answer Appellee's second set of discovery requests in a timely manner. On January 24, 2008, GCNH served "Defendant's Second Set of Requests for Production of Documents to Plaintiff." Appellants did not file their responses until April 28, 2008.
- Appellants failed to provide any information regarding Dr. Gaudet and/or his opinions in response to Appellee's second set of discovery requests. On January 24, 2008, GCNH served "Defendant's Second Set of Requests for Production of Documents to Plaintiff" wherein the Appellee sought information relating to the experts witnesses and expert opinions to be offered by the Appellants at the trial of this matter. On April 28, 2008, Appellants belatedly filed "Plaintiff's Response to Defendant's Second Set of Requests for Production of Documents" wherein they failed to make a single reference to Dr. Gaudet testifying as an expert witness in this matter

and/or to provide any documents regarding the proposed opinions of Dr. Gaudet. And finally, following the filing of Appellants' responses to Appellee's second set of discovery, Appellants did not supplement those responses with regard to any information on the purported expert opinions of Dr. Robert Gaudet.

- Appellants did not notify the circuit court that they were having any difficulties locating Dr. Gaudet or seek a continuance until after the close of discovery and more than six (6) months after learning of Dr. Bensenhaver's opinions.

- By the Appellants' own admission they undertook no efforts to locate Dr. Gaudet from April 11, 2008, until August 7, 2008, the same date on which Appellants filed their "Motion to Vacate Scheduling Order and Request for Continuation of Trial Date" wherein they incorrectly represented to the circuit court that they had been attempting for eight (8) months to locate Dr. Gaudet. In actuality, the Appellants made very little effort from February to April to locate Dr. Gaudet, no efforts from April to August, and then began their actual effort in August, 2008 wherein they were able to locate him within one (1) month's time.

Under the circumstances, excluding the testimony of Dr. Gaudet was warranted just as it was in Kiser v. Caudill, where the circuit court excluded plaintiff's expert witness prior to trial as a sanction for failure to comply with the expert disclosure deadline in the court's scheduling order. 557 S.E.2d 245 (W. Va. 2001). In that case, December 12, 1996, the court entered a scheduling order setting the trial of the case for August 4, 1997, with a discovery cut-off date of July 15, 1997. In addition, the plaintiff was ordered to identify all fact and expert witnesses by January 10, 1997. The plaintiff failed, however, to disclose one of her expert witnesses within the time period set by the

court. Id. at 250. The plaintiff claimed that her counsel verbally informed defense counsel of her intent to use the expert five weeks after the disclosure deadline. Counsel for the defendant maintained that he did not learn of the proposed expert until he filed a motion for summary judgment in June 1997. Id. at 250, fn3. The matter was subsequently continued but the circuit court refused to allow the testimony of plaintiff's belatedly disclosed expert even after the continuance was granted.

On appeal, the Supreme Court determined that the circuit court's initial ruling on July 28, 1997, prohibiting the expert from testifying was proper. Id. at 251. The trial was scheduled to begin on August 4, 1997, and yet the plaintiff had never presented a motion to the court requesting that the doctor be permitted to testify as an expert witness despite him having been disclosed after the scheduling order deadline had expired. The Supreme Court held that "the late disclosure, combined with the plaintiff's failure to file such a motion warranted the circuit court's initial ruling excluding the doctor's testimony." Id. at 251.

Likewise, in State ex rel. State Farm Fire v. Madden, 451 S.E.2d 721, 727 (W. Va. 1994), the Supreme Court of Appeals of West Virginia upheld the exclusion of an expert witness for failure to comply with the scheduling order. In that case, the defendant disclosed an expert witness after the deadline set by the circuit court had passed, and the circuit court prohibited the defendant from using that expert. Id. at 727. The defendant sought a writ of prohibition, arguing that it should have been allowed to designate experts because it changed counsel. Id. The West Virginia Supreme Court rejected that argument holding that "the mere fact of retaining new counsel, in the absence of incompetent prior representation, does not constitute 'manifest injustice' under Rule 16,

WVRCP, such that it entitles [the defendant] to relief from the court's previously uncontested deadlines." The Court further held that "the circuit court was acting within his discretion . . . by refusing to allow [the defendant] to designate experts after the expiration of the deadlines established in the scheduling order." *Id.*; see also, Sheely, 490 S.E.2d at 297.

Here, the Appellants failed to timely disclose Dr. Gaudet as an expert witness as required by the Scheduling Order. Then, during the nine (9) month discovery period, the Appellants undertook virtually no efforts to locate Dr. Gaudet and/or to procure his opinions in this case. Moreover, the Appellants failed to provide both information mandated by the circuit court for the disclosure of expert witnesses, as well as information requested in discovery by the Appellee with regard to Appellants' expert witnesses to be called at trial. Only after the close of discovery in this case, and after being advised that they had failed to produce necessary expert witness testimony such that summary judgment would be sought, did the Appellants locate Dr. Gaudet and attempt to schedule his deposition (without leave of the circuit court and/or the agreement of the Appellee to do so). Consequently, the exclusion of Dr. Gaudet's testimony from the trial of this matter was appropriate as the Appellants offered no justification for their blatant disregard of the scheduling order or their failure to provide information regarding the proposed opinions of the expert witness as required by both the court's order and the West Virginia Rules of Civil Procedure.

1. Gross neglect of the circuit court's order and discovery requirements, whether by Appellants and/or their counsel, warranted the sanction issued by the circuit court.

In their Brief, the Appellants argue that no sanction was appropriate let alone exclusion of their expert witness. Instead, the Appellants assert that the misconduct, if any, was the sole result of their former counsel's acts and/or omissions and, as such, "the offending attorney should suffer for his actions, not the litigants." In so arguing, the Appellants rely upon this Court's ruling in Anderson v. Kunduru, 600 S.E.2d 196 (W. Va. 2004), seemingly for the proposition that it is an abuse of the circuit court's discretion to enter a sanction which adversely affects the litigant where "the fault rests solely with Appellants' counsel and not Appellants." (Appellants' Brief at p. 26).

On the contrary, courts in general, and this Court in particular, have recognized that "the acts and omissions of counsel are normally wholly attributable to the client." Arnold v. Krause, Inc., 232 F.R.D. 58, 68 (W.D. N.Y. 2004); see also, Bell v. Inland Mutual Insurance Co., 332 S.E.2d 127, 135 (W. Va. 1985) (quoting Corchado v. Puerto Rico Marine Management, Inc., 665 F.2d 410, 413 (1<sup>st</sup> Cir. 1981) "'We realize that we are visiting the sins of the attorneys upon the client, but this is an unavoidable side effect of the adversary system.'").

As was articulated by Justice McHugh in Bell v. Inland Marine Management, Inc., "where a party's counsel intentionally or with gross negligence fails to obey an order of a circuit court to provide or permit discovery, the full range of sanctions under W. Va. R. Civ. P. 37(b) are available to the court **and the party represented by that counsel must bear the consequences of counsel's actions.**" Bell v. Inland Mutual Insurance Co., 332 S.E.2d 127, 136 (W. Va. 1985) (emphasis added). Moreover, the

United States Supreme Court has expressly dispelled the notion that a sanction, or even dismissal of a case, is inappropriate because it seemingly “punishes” the client and not the lawyer:

there is certainly no merit to the contention that dismissal of petitioner’s claim because of his counsel’s unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system or representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have ‘notice of all facts, notice of which can be charged upon the attorney.’

Link v. Wabash Railroad, Co., 370 U.S. 626, 633-34 (1962) (quoting Smith v. Ayer, 101 U.S. 320 (1880)) Furthermore, “keeping [a] suit alive merely because plaintiff should not be penalized for the omissions of his own attorney would be visiting the sins of plaintiff’s lawyer upon the *defendant*.” Link, 370 U.S. at 634 (emphasis in original).

Accordingly, state and federal courts have continually recognized that preclusion of expert testimony is an appropriate sanction under Rules 16 and 37 of the Rules of Civil Procedure. See, e.g., Cine Forty-Second St. Theatre Corp. v. Allied Artists Pictures Corp., 602 F.2d 1062, 1064 (2d Cir. 1979) (“unless Rule 37 is perceived as a credible deterrent rather than a ‘paper tiger,’ the pretrial quagmire threatens to engulf the entire litigative process.”) (*cited with approval* in Bell v. Inland Mutual Insurance Co., 332 S.E.2d 127 (W. Va. 1985)); McVerry v. Charash, 901 A.2d 69 (Conn. 2006) (plaintiff’s expert witnesses were properly excluded in a medical malpractice action when disclosed beyond the court’s deadline and thirteen weeks before trial, and affirmed resultant entry of summary judgment in favor of defendant); Northern Trust Co. v. Louis A. Weiss Mem. Hosp., 493 N.E.2d 6 (Ill. App. Ct. 1986) (court properly excluded defendant’s

previously undisclosed expert witness in a medical negligence case, despite defendant's assertions that the expert was a treating physician, as defendant intended to offer the witness as an expert on causation); Cox v. Jones, 470 N.W.2d 23 (Iowa 1991) (court properly excluded testimony of plaintiff's untimely disclosed expert witness in a medical malpractice case, and thus granted summary judgment to the defendant, notwithstanding the lack of prejudice to the defendant); Clarke v. Jones, 518 A.2d 713 (Me. 1986) (court excluded plaintiff's expert witness and granted defendant summary judgment in a medical malpractice claim, based on plaintiff's failure to timely identify her expert in both interrogatory responses and court-mandated disclosures); Murphy v. Sobel, 238 N.W.2d 547 (Mich. Ct. App. 1975) (court properly excluded plaintiff's belatedly disclosed expert witness and granted judgment in favor of the defendant in a medical malpractice action where plaintiff's counsel had not diligently sought and obtained a medical expert to establish the required standard of care); Beattie v. Firnschild, 394 N.W.2d 107 (Mich. Ct. App. 1986) (court properly precluded plaintiffs from calling defendant as an expert witness in legal malpractice case as plaintiffs had not identified defendant as an expert prior to trial, and therefore defendant was entitled to summary judgment); Quill v. Trans World Airlines, Inc., 361 N.W.2d 438 (Minn. Ct. App. 1985) (court did not abuse its discretion in excluding an untimely disclosed expert and rejected the defendant's argument that it did not realize the need for expert testimony following failed settlement negotiations); Palmer v. Volkswagen of America, Inc., 904 So. 2d 1077 (Miss. 2005) (court properly excluded plaintiff's expert witnesses in a wrongful death case, even though timely identified, where plaintiff failed to provide sufficient Rule 26 information as required by the court's scheduling order and similarly failed to supplement

interrogatory responses regarding expert testimony); Goede v. Aerojet General Corp., 143 S.W.3d 14 (Mo. Ct. App. 2004) (court held it was within the discretion of the court to exclude plaintiff's proffered expert witness from trial for failure to identify the same in conjunction with the court's order, despite the fact that the expert was identified by other parties prior to trial and the plaintiff identified the expert on his pretrial submission); Hansen v. Universal Health Servs. of Nevada, Inc., 974 P.2d 1158 (Nev. 1999) (it was not an abuse of discretion in a medical malpractice claim for court to exclude testimony of additional expert witnesses identified by plaintiff in a supplemental disclosure filed after the court's deadline, even though several months remained before trial); Baker v. Speedway Motorsports, Inc., 618 S.E.2d 796 (N.C. Ct. App. 2005) (court held it was not an abuse of discretion for trial court to exclude plaintiff's medical expert who was disclosed only two weeks after the deadline set forth in the scheduling order and nearly two years prior to trial, despite plaintiff's argument that the disclosure was caused by the inadvertence of her counsel); Kemock v. Mark II, 404 N.E.2d 766 (Oh. Ct. App. 1978) (where the court refused to permit the plaintiff to call the coroner in a wrongful death case because plaintiff had failed to identify the coroner as an expert witness in response to defendant's interrogatories and failed to provide a report as required by the court's rules); Dion v. Graduate Hosp. of Univ. of Pennsylvania, 520 A.2d 876 (Pa. Super. Ct. 1987) (court properly excluded plaintiff's expert witnesses in a medical negligence action, despite the harshness of the sanction and the ultimate dismissal of plaintiff's claims for failure to proffer expert testimony, in light of plaintiff's repeated failure to identify her experts); Estate of Brock ex rel. Yadon v. Rist, 63 S.W.3d 729 (Tenn. Ct. App. 2001) (court excluded the testimony of two physicians who were belatedly

disclosed as expert witnesses in supplemental disclosures by the plaintiff in a medical malpractice claim, despite their prior identification as fact witnesses); Carr v. Norstock Bldg. Sys., Inc., 767 S.W.2d 936 (Tex. App. 1989) (failure to designate expert witnesses in response to an interrogatory required automatic exclusion of any expert testimony or evidence offered by the violating party); Dunn v. Bank-Tec South, 134 S.W.3d 315 (Tex. App. 2003) (court upheld exclusion of plaintiff's expert witness when expert's identity was not disclosed via timely supplementation to interrogatory responses).

In so holding, courts have acknowledged that “although the imposition of a remedy as strong as precluding a plaintiff's expert testimony ‘can lead to extinction of [the plaintiff's] claim’ based on plaintiff's counsel's disregard of his professional responsibilities, ‘[a] litigant chooses counsel at his peril.’” See, e.g., Arnold v. Krause, Inc., 232 F.R.D. 58, 68 (W.D. N.Y. 2004) (quoting Cine Forty-Second St. Theatre Corp., 602 F.2d 1062 (2d Cir. 1979)). “And, if an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice.” Link, 370 U.S. at 634.

In fact, it is often the case in litigation that the rights and claims of the individual parties are adversely affected by the actions and choices of their counsel. As the United States Supreme Court noted in Link v. Wabash Railroad Co., “this Court's own practice is in keeping with this general principle. For example, if counsel files a petition for certiorari out of time, we attribute the delay to the petitioner and do not request an explanation from the petitioner before acting on the petition.” 370 U.S. at 634. This Court has a similar practice of rejecting untimely petitions for appeal as provided for in Rule 3 of the West Virginia Rules of Appellate Procedure. W. VA. R. APP. P. 3 (2009).

Undoubtedly, the timeliness of a petition for appeal is largely, if not entirely, the result of counsel's actions and/or inaction. Nevertheless, his or her client's petition for appeal can be summarily rejected when filed out of time and their claim extinguished as a consequence of counsel's conduct.

Similarly, the case law in West Virginia is replete with instances where an attorney failed to file his client's claim in accordance with the applicable statute of limitations and, thus, the claim was barred. See., e.g., Perdue v. Hess, 484 S.E.2d 182 (W. Va. 1997) (“[a]n attorney's failure to file a personal injury cause of action within the two-year statute of limitations . . . regardless of whether such failure constitutes excusable neglect, does not toll the statutory filing period. . . .”). In such instances, this Court has yet to hold that the claim should be allowed, and the lawyer merely sanctioned, so as not to unnecessarily punish the individual party for the inaction of his or her counsel.

Such is also the case where a claim is dismissed because of inartful and/or insufficient pleadings, failure to comply with the pre-suit requirements of the West Virginia Medical Professional Liability Act or where counsel retains an expert which is not qualified to testify in a specific area and the claim fails as a result. In all these situations, it is undoubtedly the actions and choices of counsel which are at issue but, nevertheless, it is the litigant's claim which is adversely affected and, sometimes, dismissed in its entirety.

Moreover, the Federal Rules of Civil Procedure continue to acknowledge the appropriateness of testimony preclusion as a sanction by specifically providing for such as an available sanction for failure to comply with the scheduling order or discovery

requirements. In fact, Rule 37(c)(1) of the Federal Rules of Civil Procedure provides that “if a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless.” FED. R. CIV. P. 37(c) (2009). The Rule 37(c) advisory committee notes emphasize that the “automatic sanction” of exclusion “provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence.” FED. R. CIV. P. 37(c) Advisory Committee Note (1993). This is required because expert witnesses are often the centerpiece of discovery in litigation. A party that fails to provide expert witness information unfairly inhibits its opponent’s ability to properly prepare, unnecessarily prolongs litigation, and undermines the court’s management of the case.

Pursuant to the Federal Rules of Civil Procedure, “the first question is whether the party can show good cause for its failure to timely disclose.” Walter Kidde Portable Equipment, Inc. v. Universal Security Instruments, Inc., 2005 U.S. Dist. LEXIS 46201 (M.D.N.C. 2005) (citing AKEVA L.L.C. v. Mizuno Corp., 212 F.R.D. 306 (M.D.N.C. 2002)); Dilmar Oil Co. v. Federated Mut. Ins. Co., 986 F.Supp. 959, 980 (D.S.C. 1997) (“carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief.”). “If the party cannot show good cause, then in determining appropriate sanctions the court may consider (1) the party’s explanation for the failure to obey the order, (2) the importance of the expert opinion, (3) the prejudice to the opposing party by allowing the disclosures, and (4) the availability of alternative or lesser sanctions.” Id. at 8; see also, Adalman v. Baker, Watts & Co., 807 F.2d 359 (4<sup>th</sup> Cir. 1986); Woodworker’s Supply, Inc. v. Principal Mut. Life Ins. Co., 170 F.3d 985 (10<sup>th</sup> Cir. 1999).

In the present case, even applying the standard announced under the Federal Rules of Civil Procedure, the circuit court did not abuse its discretion in excluding the testimony of Dr. Gaudet. As an initial matter, the Appellants did not demonstrate a substantial justification for their failure to comply with the Scheduling Order or the discovery requirements. Once the circuit court denied Appellants' motion to continue the trial of this matter, Appellants' counsel was quickly able to locate Dr. Gaudet. "By finding Dr. Gaudet so quickly after the Court denied Plaintiff's Motion to Continue, Plaintiff has demonstrated to this Court that had such efforts been put forth beforehand, Dr. Gaudet could have been located within the agreed parameters of the case." (See Order entered October 6, 2008, p.2). On this basis alone, the circuit court had sufficient reason to preclude the testimony of Dr. Gaudet.

Nevertheless, additional factors weighed in favor of excluding the doctor's testimony. At the time of the hearing before the circuit court, the importance of Dr. Gaudet's testimony was not established inasmuch as the Appellants were unable to articulate what his opinions were and/or what opinions he would purportedly offer if permitted to testify. While it appears that the Appellants 'hoped' Dr. Gaudet would testify that Mrs. Goldizen's death was the result of acute aspiration caused by some act and/or omission by Grant County Nursing Home, there were no affidavits or even representations to the Court as to what his actual testimony would be.

Additionally, the prejudice to the Appellee in admitting the untimely expert opinions of Dr. Gaudet is clear. Appellee's relied upon the Appellants' failure to provide timely disclosure in framing its defense to Appellant's case. To allow the Appellants yet "another bite at the apple" would prejudice Appellee given the significant investment

made in pursuing its defense of the action in accordance with the reasonable deadlines established at the parties' behest. For these same reasons, a continuance at such a late date in the proceedings, because of the Appellants' tardy disclosure, would be prejudicial to the Appellee and would substantially interfere with the Court's management of its docket. Furthermore, permitting Appellants to avoid preclusion under the circumstances would render the court's scheduling order of hollow import and severely undermine the court's duty to manage its docket by commanding compliance with orders issued pursuant to Rule 16(b). See, e.g., Rouse v. Farmers State Bank, 866 F. Supp. 1191, 1198-99 (N.D. Iowa 1994) ("adherence to reasonable deadlines is . . . critical to maintaining integrity in court proceedings" and that pretrial scheduling orders are "the essential mechanism for cases becoming trial-ready in an efficient, just and certain manner.").

In the present case, the circuit court was well within its discretion to exclude the testimony of Dr. Gaudet as a result of Appellants' demonstrated pattern of gross neglect of the scheduling order and discovery process. Moreover, it is this pattern of gross neglect and/or intentional disregard of the discovery process in general, and the court's scheduling order in particular, that distinguishes the facts in this case from the inadvertent and isolated incident in Anderson v. Kunduru, 600 S.E.2d 196 (W. Va. 2004), which the Appellants rely upon for this appeal. Accordingly, the sanction imposed by the circuit court and its exclusion of the testimony of Dr. Gaudet was warranted under the facts of this case.

2. Defense counsel had a trial conflict which prevented taking the “evidentiary” deposition of Dr. Gaudet on the eve of trial.

In Appellants’ Brief, the Appellants cast various aspersion regarding defense counsel’s purported “refusal” to participate in the scheduling of Dr. Gaudet’s deposition. In reality, defense counsel immediately voiced her objection to the untimely deposition and advised that leave of court would be necessary to conduct the deposition. Appellants’ counsel, however, chose simply to ignore these facts and to unilaterally proceed with scheduling the deposition.

By letter dated September 9, 2008, Appellants’ counsel advised that he had located Dr. Gaudet and that he wanted to schedule the “evidentiary deposition” of Dr. Gaudet. Despite Appellants’ blatantly false statements to the contrary, counsel for GCNH immediately objected to the deposition as untimely (whether indicated to be for “evidentiary” purposes or otherwise) inasmuch as the discovery deadline had passed on July 25, 2008. Appellee’s counsel further advised that due to another matter which was set for trial on September 29, 2008, in the Circuit Court of Kanawha County, Civil Action No. 06-C-872, previously scheduled depositions and extensive preparations needed for the trial of this case, defense counsel did not have sufficient dates available to travel to and from Clintwood, Virginia, to take the deposition of Dr. Gaudet. Accordingly, defense counsel advised that the Appellants would need to seek leave of court to schedule the deposition of Dr. Gaudet under the circumstances.

Nevertheless, and without leave of court, Appellants’ counsel unilaterally scheduled and noticed the “Video-Taped Evidentiary Deposition of Robert Gaudet, M.D.” The deposition was scheduled by the Appellants for September 30, 2008, in

Clintwood, Virginia. As set forth above, Appellee's counsel was set to (and did in fact) begin trial on September 29, 2008, in the Circuit Court of Kanawha County, West Virginia before Judge Charles E. King in the matter of Ruth McCallister v. P.J.L. Enterprises d/b/a Golden Corral of Cross Lanes, Civil Action No. 06-C-872. The trial continued through September 30, 2008, the date Appellants had scheduled the deposition of Dr. Gaudet. Consequently, counsel for the Appellee was not available on the date selected by the Appellants for the deposition due to her participation at the trial of another matter.

In accordance with Rule 5.02(d) of the West Virginia Trial Court Rules, the circuit court correctly ruled that Appellee's counsel's previously scheduled trial prevailed over the unilaterally scheduled deposition noticed by the Appellants. Moreover, Appellants were properly precluded from taking the deposition of Dr. Gaudet because the discovery deadline had expired and, as such, the deposition was untimely whether it be for evidentiary purposes or otherwise. As the circuit court ultimately determined, and as was demonstrated by the ease with which the Appellants were able to locate Dr. Gaudet once they decided to look for him, finding Dr. Gaudet and taking his "evidentiary" deposition could have been accomplished during the nine (9) months that discovery was ongoing in this matter.

**C. The Circuit Court's Grant Of The Defendant's Motion for Summary Judgment Was Appropriate.**

The Appellants have acknowledged that they were required to produce competent expert testimony establishing the proximate cause of Elva Goldizen's death. (See Plaintiffs' Response to Defendant's Motion for Summary Judgment at ¶ 2; see also, Short v. Appalachian OH-9, Inc., 507 S.E.2d 124 (W. Va. 1998); Farley v. Shook, 629 S.E.2d

739 (W. Va. 2006); W.VA. CODE § 55-7B-7 (2008)). The Appellants likewise admitted that without sufficient testimony from Dr. Robert Gaudet they would be unable to meet this burden of proof. (See Plaintiffs' Response to Defendant's Motion for Summary Judgment at ¶ 3). It is important to note, however, that the Appellants never proffered to the circuit court what the purported testimony of Dr. Gaudet would, in fact, be on the issue of causation and/or provide the court with an affidavit from Dr. Gaudet setting forth his expert opinions in this case. Consequently, the Appellants failed to establish that even with the testimony of Dr. Gaudet that they would be able to meet their burden of proof on an essential element of their claim.

This is a medical malpractice action for the alleged wrongful death of Elva Goldizen brought in accordance with the provisions of the Medical Professional Liability Act, West Virginia § 55-7B-1 *et. seq.* (2008). At the scheduling conference held in this matter on October 11, 2007, the parties agreed that expert witness testimony was necessary with regard to the issues raised in this case. The Appellants, however, failed to produce expert witness testimony to establish that Ms. Goldizen's death was a result of any act and/or omission on the part of Grant County Nursing Home. On the contrary, the only expert witness to testify as to the cause of Ms. Goldizen's death has opined that she died as a result of cardiac arrest, a natural disease process. West Virginia law requires that the plaintiff in a medical malpractice action prove, by expert witness testimony, that the injuries and damages of which she complains were the proximate result of the defendant healthcare provider's deviation from the standard of care. The Medical Professional Liability Act, West Virginia Code § 55-7B-1 *et seq.* (2008), provides, in pertinent part, 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 that degree of care, skill and learning required or expected of a reasonable, prudent health care provider in the profession or class to which the health care provider belongs acting in the same or similar circumstances; and

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

W.VA. CODE §55-7B-3 (2008).

Thus, the burden was on the Appellants to prove by a preponderance of the evidence that the GCNH was negligent and that such negligence was the proximate cause of the injury.” Walton v. Given, 215 S.E.2d 647, syl pt. 2 (W. Va. 1975). Moreover, both Supreme Court of Appeals of West Virginia and the MPLA require that the plaintiff prove such allegations by the testimony of one or more knowledgeable and competent expert witnesses. See Short v. Appalachian OH-9, Inc., 507 S.E.2d 124 (W. Va. 1998) (holding that summary judgment in favor of the defendant was proper where the plaintiff failed to obtain a physician who, as an expert witness, could link the decedent’s death to the actions of the defendant); Farley v. Shook, 629 S.E.2d 739 (W. Va. 2006) (holding that expert witness testimony was required to establish any breach of the standard of care and any causal connection to the plaintiff’s injuries); W.VA. CODE § 55-7B-7 (2008).

In the present case, Appellants failed to present an expert who could opine as to the proximate cause of Ms. Goldizen’s death. In fact, the expert designated by Ms. Goldizen, Michelle Winters, RN, clearly testified that she was not qualified to offer such an opinion:

Q. [R. Biser]: That's beyond the scope of your practice as a registered professional nurse to determine the cause of Ms. Goldizen's death?

A. [M. Winters, RN]: Correct.

Q. And you're not permitted to opine as to the cause of death, are you?

A. Meaning?

Q. You can't formulate an independent opinion as to the cause of Ms. Goldizen's death in this matter?

A. No.

\* \* \* \*

Q. Okay. So having not read Dr. Bensenhaver's deposition, you are not aware that he does not now believe, despite what's indicated on the death certificate, that she died of acute aspiration?

A. No.

\* \* \* \*

Q. Okay. Are you in a position to disagree with Dr. Bensenhaver's testimony that she died of cardiac arrest?

A. I do not see any documentation in the chart regarding that. I mean, that will be his – that is not a decision that we as nurses make.

Q. That's beyond the scope of your practice?

A. Yes, ma'am.

Q. So you cannot offer an opinion to a reasonable degree of medical probability as to the cause of Ms. Goldizen's death?

A. No, ma'am.

(Winters Depo. Tr. 49-51).

West Virginia law mandates that plaintiffs in a medical malpractice action must prove their allegations by the testimony of one or more knowledgeable and competent expert witnesses. W.VA. CODE § 55-7B-7 (2008). Thus, plaintiffs are required to prove, by expert testimony, not only that there was a deviation from the standard of care but also that such deviation was the proximate cause of the decedent's death. Appellants' expert, as a registered professional nurse, was not qualified to opine as to the issue of the medical causation of Ms. Goldizen's death.

Moreover, as is evidenced by the undisputed testimony of Dr. Bensenhaver, Ms. Goldizen did not die of acute aspiration but rather suffered cardiac arrest while eating and died as a result thereof. (Bensenhaver Depo. Tr. at 26). Appellants have not, and cannot, produce expert witness testimony to dispute the opinion of Dr. Bensenhaver that Ms. Goldizen died of cardiac arrest.

The West Virginia Supreme Court of Appeals has reiterated that Rule 56 was “designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial,” where there is essentially “no real dispute as to salient facts’ or if it only involves a question of law.” Williams v. Precision Coil, Inc., 459 S.E.2d 329, 335 (W.Va. 1995) (quoting Painter v. Peavy, 451 S.E.2d 755, 758 n.5 (W.Va. 1994)). The Court further stated 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. Id. at syl pt. 2. The pleadings, discovery, and Appellants' own admissions in this matter revealed that there was no genuine issue as to any material fact with regard to Appellants' claims against

Appellee, Grant County Nursing Home. The Appellants conceded that they had failed to produce the required expert witness testimony to establish that Ms. Goldizen's death was proximately caused by some act and/or omission on the part of GCNH. Accordingly, summary judgment was appropriate as a matter of law.

Based on the foregoing reasons, the circuit court's granting of Grant County Nursing Home's Motion for Summary Judgment was appropriate and should be affirmed by this Court.

### VIII. CONCLUSION

Based on the facts, arguments and authorities presented above, the Appellants have failed to establish that the circuit court abused his discretion in granting Defendant Grant County Nursing Home's Motion to Exclude the testimony of Dr. Robert Gaudet or in denying Plaintiff's Motion to Alter and Amend Judgment. Moreover, GCNH was entitled to summary judgment as a matter of law and the rulings of the circuit court below should be affirmed.

**GRANT COUNTY NURSING HOME,**  
By counsel,

  
Rita Massie Biser (WVSB #7195)  
Tonya P. Mullins (WVSB #9699)  
**MOORE & BISER PLLC**  
317 Fifth Avenue  
South Charleston, WV 25303  
304.414.2300

---

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

---

**JERRY GOLDIZEN and BILL GOLDIZEN**  
Co-administrators of the Estate of  
**ELVA LEE GOLDIZEN,**

Appellants,

v.

From the Circuit Court of  
Grant County, West Virginia  
**Civil Action No. 07-C-36**  
(Judge Philip B. Jordan, Jr.)

**GRANT COUNTY NURSING HOME,**

Appellee.

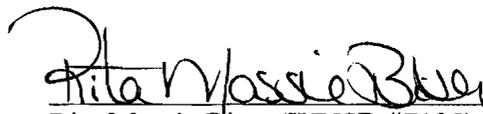
---

CERTIFICATE OF SERVICE

---

I, Rita Massie Biser, do hereby certify that I have served the foregoing  
“**APPELLEE’S BRIEF**” upon counsel of record by depositing true and accurate copies  
thereof in the U.S. Mail, postage paid, this 14<sup>th</sup> day of July, 2009, addressed as follows:

J. David Cecil, Esq.  
Barth & Thompson  
202 Berkley Street  
Charleston, WV 25302



Rita Massie Biser (WVSB #7195)

**MOORE & BISER PLLC**

317 Fifth Avenue

South Charleston, WV 25303

304.414.2300