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IN THE

Supreme Court of Virginia

RECORD NO. 161230

KAYLA HOLT, an INFANT, by and through
her PARENT and NEXT FRIEND,
MICHELE HOLT,

Appellant,

v.

DIANA CHALMETA, *et al*.,

Appellees.

BRIEF OF APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 5

AUTHORITIES AND ARGUMENT 10

I. The trial court did not abuse its discretion by excluding Dr. Aboderin's testimony following voir dire which established that she did not meet the mandatory expert qualification requirements set forth in Virginia Code Section 8.01-581.20(A). (Appellant's Assignment of Error Number 1) 10

A. Standard of Review..... 10

B. Argument 11

i. Dr. Aboderin did not demonstrate the requisite active clinical practice mandated by Code Section 8.01-581.20(A). 13

a. Dr. Aboderin did not meet the active clinical practice requirement because she did not perform the procedures at issue within one year of the alleged negligence. 15

b. Precedential case law affirms that Dr. Aboderin did not meet the active clinical practice requirement. 19

ii. Dr. Aboderin did not demonstrate the requisite knowledge mandated by Code Section 8.01-581.20(A). 27

II. The trial court did not commit reversible error in granting summary judgment in favor of Dr. Chalmeta and Piedmont as Holt could not, as a matter of law, prove a prima facie case of medical malpractice action against them once the trial court properly found Holt's lone standard of care expert unqualified to testify. (Appellant's Assignment of Error Number 2) 34

A. Standard of Review..... 34

B. Argument..... 35

CONCLUSION..... 38

CERTIFICATION 40

TABLE OF AUTHORITIES

CASES

Blue Ridge Serv. Corp. v. Saxon Shoes, Inc., 271 Va. 206, 624 S.E.2d 55 (2006) 10

Bly v. Rhoads, 216 Va. 645, 222 S.E.2d 783 (1976) 35

Cheatham v. Gregory, 227 Va. 1, 313 S.E.2d 368 (1984) .. 36, 37

Claycomb v. Didawick, 256 Va. 332, 505 S.E.2d 202 (1998) 34

Commonwealth v. Larkin, 88 Va. 422, 13 S.E. 901 (1891) 29

Dickerson v. Fatehi, 253 Va. 324, 484 S.E.2d 880 (1997) 34

Fairfax Hosp. Sys., Inc. v. Curtis, 249 Va. 531, 457 S.E.2d 66 (1995) 12, 21

Griffin v. The Spacemaker Group, Inc., 254 Va. 141, 486 S.E.2d 541 (1997) 34

Grubb v. Hocker, 229 Va. 172, 326 S.E.2d 698 (1985) 30

Henning v. Thomas, 235 Va. 181, 366 S.E.2d 109 (1988) 10

Hinkley v. Kohler, 269 Va. 82, 606 S.E.2d 803 (2005) 13, 14, 19, 27

Jackson v. Qureshi, M.D., 277 Va. 114, 671 S.E.2d 163 (2009) 22, 23, 24, 25

John Crane, Inc. v. Jones, 274 Va. 581, 650 S.E.2d 851 (2007) 10

Landis v. Commonwealth, 218 Va. 797, 241 S.E.2d 749 (1978) 11

Landrum v. Chippenham & Johnston-Willis Hosp., Inc., 282 Va. 346, 717 S.E.2d 134 (2011) 10

Lawson v. Elkins, 252 Va. 352, 477 S.E.2d 510 (1996) 30

Lloyd v. Kime, 275 Va. 98, 654 S.E.2d 563 (2008) 21

Moates v. Hyslop, 253 Va. 45, 480 S.E.2d 109 (1997) 35

Noll v. Rahal, 219 Va. 795, 250 S.E.2d 741 (1979) 11, 12, 29, 30

Perdieu v. Blackstone Family Practice Center. Inc., 264 Va. 408, 568 S.E.2d 703 (Va. 2002) 12, 18, 19, 21

Raines v. Lutz, 231 Va. 110, 341 S.E.2d 194 (1986) 35, 36

Rogers v. Marrow, 243 Va. 162, 413 S.E.2d 344 (1992) 35

Sami v. Varn, 260 Va. 280, 535 S.E.2d 172 (2000) 19, 21, 23, 26

Swersky v. Higgins, 194 Va. 983, 76 S.E.2d 200 (1953) 11

Tarmac Mid-Atlantic, Inc. v. Smiley Block Co., 250 Va. 161, 458 S.E.2d 462 (1995) 10

Woodbury v. Courtney, 239 Va. 651, 391 S.E.2d 293 (1990) ... 35

Wright v. Kaye, 267 Va. 510, 593 S.E.2d 307 (2004) 25, 28

STATUTES

Va. Code §8.01-581.20(A) ..... *passim*

OTHER AUTHORITIES

https://medlineplus.gov/ency/article/001642.htm 6

https://medlineplus.gov/ency/article/007242.htm 7

V I R G I N I A:

IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

KAYLA HOLT, AN INFANT, BY	**)**	
AND THROUGH HER PARENT	**)**	
AND NEXT FRIEND,	**)**	
MICHELE HOLT,	**)**	
	)	
Appellant,	**)**	**RECORD NO. 161230**
	)	
v.	**)**	
	)	
DIANA CHALMETA, M.D., et. al.,	**)**	
	)	
Appellees.	**)**	

BRIEF OF APPELLEES

Appellees Diana Chalmeta, M.D. (hereinafter "Dr. Chalmeta") and Piedmont Pediatrics, PLC (hereinafter "Piedmont"), by and through counsel, respectfully submit that this appeal should be denied and the trial court's ruling and entry of judgment affirmed. The trial court did not abuse its discretion when it excluded the testimony of Kayla Holt's proffered expert after it was established through *voir dire* of the witness that she did not meet the mandatory expert witness qualification requirements set out in Virginia Code Section 8.01-581.20(A).

Likewise, the trial court did not commit reversible error in granting summary judgment in favor of Dr. Chalmeta and Piedmont as Kayla Holt could not, as a matter of law, prove a *prima facie* case of medical malpractice action against them once her lone standard of care expert had properly been found unqualified to testify. Absent expert witness standard of care testimony, the case could not proceed and judgment was therefore properly entered in Dr. Chalmeta and Piedmont's favor.

STATEMENT OF THE CASE

This is a medical malpractice action in which Kayla Holt (hereinafter "Holt") contends that Dr. Chalmeta and other healthcare providers at Fauquier Hospital negligently rendered or failed to render appropriate medical care to her allegedly resulting in brain injury. (Revised Amended Complaint at ¶ 87; App. at 208-09).[1] Holt claims that Piedmont is vicariously liable to her for Dr. Chalmeta's alleged negligence. (Id. at ¶¶ 82-85; App. at 208).

[1] After the trial court granted summary judgment in favor of Dr. Chalmeta and Piedmont, the remaining defendants and Holt reached a compromise settlement, which was approved by the trial court June 28, 2016.

Prior to trial, Holt identified a single witness, Funlola Aboderin, M.D., to testify that Dr. Chalmeta failed to comply with applicable standards of medical care. Specifically, Holt designated Dr. Aboderin to testify as follows:

> When Dr. Chalmeta was presented with an infant in respiratory distress and was unable to pass the catheter through either nares at approximately 2:40 am, she had a duty to secure an airway for Kayla, either through intubation or use of a mouth guard. She failed to do either. Since Fauquier Hospital was not equipped to care for Kayla's nasal stenosis, the standard of care required Dr. Chalmeta to immediately transfer Kayla to another facility right away after securing her airway. She breached that duty. Infants are obligate nose breathers, and it was a breach of the standard of care to allow Kayla, who was in obvious respiratory distress to remain without a secure airway throughout Dr. Chalmeta's care of her. Use of an oxyhood did not alleviate the requirement to secure an airway in the presence of nasal stenosis and respiratory distress and to transport her to a facility equipped to deal with her condition.

(Designation of Expert Witnesses at 12-13; App. at 95-96). Through her Designation, Holt thus framed the allegations of negligence against Dr. Chalmeta as follows: (1) failing to secure an oral airway after being unable to pass a catheter through the infant's nostrils; (2) failing to timely transfer the infant to another facility because Fauquier Hospital was not equipped to care for

her nasal stenosis; and (3) allowing the infant to remain under an oxyhood.

At trial, Holt offered Dr. Aboderin as an expert witness "in the field of pediatric care to opine with regard to the standard of care for Dr. Chalmeta and her care and treatment of the newborn[.]" (Transcript of Excerpt of Trial Proceedings ("TR") at 15; App. at 317:5-10). Dr. Chalmeta and Piedmont objected and moved to exclude Dr. Aboderin's testimony on grounds that she failed to meet the mandatory requirements of Code Section 8.01-581.20(A). (Tr. at 37-46, 52-55; App. at 339-348). After extensive questioning of the witness and argument by counsel, the trial court granted the motion, stating:

> I'm going to sustain the objection that's been made. I don't think she's qualified for the reasons stated, and I won't take the time to go through all the reasons that have been stated by Ms. Mitchell in the course and conclusion of the Hinkley versus Koehler case, 2005, 269 Virginia 82, but I think for the reasons stated in that case as well as what's been argued here today that your proposed expert does not meet that qualification.· Therefore, the Court will grant -- or sustain the objection … that the doctor does not qualify as an expert in this case.

(Tr. at p. 56; App. at 358).

Thereafter, Dr. Chalmeta and Piedmont moved for summary judgment on grounds that without qualified expert testimony, Holt could not, as a matter of law, prove her *prima facie* case of medical malpractice against them. (Tr. at 56; App. at 358). The trial court granted the motion and entered summary judgment in favor of Dr. Chalmeta and Piedmont. (Tr. at 60-61; App. at 362-63).

Holt now asks this Court to overturn the trial court's ruling and entry of judgment, asserting that the trial court abused its discretion when it excluded Dr. Aboderin's testimony and erred in granting summary judgment in favor of Dr. Chalmeta and Piedmont. Dr. Chalmeta and Piedmont respectfully request that this Court deny Holt's appeal and affirm the trial court's ruling and entry of judgment as the record does not establish that the trial court abused its discretion or committed reversible error.

STATEMENT OF FACTS

In 2006, Fauquier Hospital did not have a neonatal or pediatric intensive care unit ("NICU", "PICU"). On May 6, 2006, at 1:02 a.m., Kayla Holt was born at Fauquier Hospital. (Exhibit

4 to Holt's Petition for Appeal; R. at 1587). As of 1:12 a.m., Holt had stopped breathing. (Id.). In response to nursing interventions, Holt began breathing again. (Id.). At approximately 2:00 a.m., Holt was taken from the delivery room to the newborn nursery at Fauquier Hospital. (Id.; R. at 1588).

Dr. Chalmeta first was contacted about Holt at 2:08 a.m. by pager. (Id.). By 2:10 a.m., Dr. Chalmeta had responded to the nursing page, advised that she was coming to the hospital to evaluate the infant, and had ordered certain medical and nursing interventions. (Id.). By 2:40 a.m., Dr. Chalmeta was at Holt's crib, providing additional care. (Id.). At 3:05 a.m., Dr. Chalmeta attempted to pass a catheter through each of Holt's nostrils but was unsuccessful. (Id.). Dr. Chalmeta's assessment was that the infant had respiratory distress, possibly due to partial choanal atresia,[2] and had laboratory results concerning for sepsis. In

[2] Choanal atresia is a congenital condition in which the nasal airway is narrowed or blocked. Congenital bilateral pyriform stenosis, with which Holt subsequently was diagnosed, (Revised Amended Complaint at ¶ 40; App. at 72), can clinically mimic choanal atresia. See https://medlineplus.gov/ency/article/001642.htm

light of the resources available to her at Fauquier Hospital in May 2006, Dr. Chalmeta ordered that Holt receive supplemental oxygen via an oxyhood[3] and antibiotics to address the possible sepsis. (Exhibit 5 to Holt's Petition for Appeal; R. at 1591-92). Holt remained under the oxyhood until approximately 9:30 a.m. (Exhibit 4 to Holt's Petition for Appeal; R. at 1587-90).

At approximately 8:00 a.m., Dr. Chalmeta again attempted to pass a catheter through the nostrils, but was unsuccessful. (Id.; R. at 1590). Following this, Dr. Chalmeta spoke with a physician at the University of Virginia and Holt was thereafter transferred to UVA for more intensive care that could not be provided at Fauquier Hospital. (See Id.). Prior to transport, Dr. Chalmeta determined that Holt required intubation and the infant was intubated and placed on a respirator by approximately 9:25 a.m. (Id.). At 10:00 a.m., the UVA transport team arrived and Holt was transferred to the PICU at UVA. (Id.).

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[3] An oxyhood is a plastic dome placed over an infant's head that delivers oxygen to infants who can breathe on their own but need extra oxygen.
See https://medlineplus.gov/ency/article/007242.htm.

At trial, Dr. Aboderin testified on direct examination as to her education, training, experience, and knowledge. Although admitting that she had never worked in a small community hospital without a NICU or PICU, such as Fauquier Hospital in 2006, Dr. Aboderin nevertheless professed familiarity with the standard of care applicable to Dr. Chalmeta at Fauquier Hospital in May 2006.

Dr. Aboderin also represented, on direct examination, that she had an active clinical practice in a hospital such as Fauquier Hospital in 2006 and, notably, that this practice included securing an oral airway in newborns in the year 2006. (Tr. at 10, 13; App. at 312, 315). However, Dr. Aboderin was impeached on this point during cross-examination and was forced to admit that she had **not** secured an oral airway in any newborn at any time in 2005, 2006 or 2007. (Tr. at 16-18, 26-27; App. at 318-320, 328-29). In fact, Dr. Aboderin conceded that she had secured an oral airway for a newborn only in the year 2004 and then later in 2013, which puts her experience far outside the time period

mandated for her qualification under Code Section 8.01-581.20(A). (Tr. at 16-18, 26-27; App. at 318-320, 328-29).

Dr. Aboderin further conceded on cross-examination that she had not, during the years 2005, 2006 or 2007, made the decision to transfer a newborn to a facility with a higher level of care. (Tr. at 30-31; App. at 332-33). In fact, Dr. Aboderin testified that she has never been faced with making such a decision because she has only worked in hospitals that have an in-house NICU. (Tr. at 30-31; App. at 332-33).

Finally, Dr. Aboderin acknowledged that she had not managed the care of any baby under an oxyhood in the years 2005, 2006 or 2007. (Tr. at 28-30; App. at 330-332).

Dr. Aboderin's testimony established that, with regard to the procedures for which she had been designated to criticize Dr. Chalmeta, she had not performed any such procedure within the applicable time frame required by Code Section 8.01-581.20(A).

AUTHORITIES AND ARGUMENT

I. The trial court did not abuse its discretion by excluding Dr. Aboderin's testimony following voir dire which established that she did not meet the mandatory expert qualification requirements set forth in Virginia Code Section 8.01-581.20(A). (Appellant's Assignment of Error Number 1)

A. Standard of Review

"The question whether an expert is qualified rests largely within the sound discretion of the trial court." Henning v. Thomas, 235 Va. 181, 186, 366 S.E.2d 109, 112 (1988). A trial court's decision to permit expert testimony is reviewed under an abuse of discretion standard. John Crane, Inc. v. Jones, 274 Va. 581, 591, 650 S.E.2d 851, 856 (2007); Blue Ridge Serv. Corp. v. Saxon Shoes, Inc., 271 Va. 206, 212, 624 S.E.2d 55, 58 (2006) (citing Tarmac Mid–Atlantic, Inc. v. Smiley Block Co., 250 Va. 161, 166, 458 S.E.2d 462, 465 (1995)). "Abuse of discretion" means that the trial court "has a range of choice, and that its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law." Landrum v. Chippenham & Johnston-Willis Hosp., Inc., 282 Va. 346, 352, 717 S.E.2d 134, 137 (2011) (internal citations omitted).

B. Argument

This Court must allow the trial court's ruling to stand unless "it appears **clearly** that [Dr. Aboderin] was qualified." See Noll v. Rahal, 219 Va. 795, 800, 250 S.E.2d 741, 744 (1979) (emphasis added) (citing Swersky v. Higgins, 194 Va. 983, 985, 76 S.E.2d 200, 202 (1953); Landis v. Commonwealth, 218 Va. 797, 800, 241 S.E.2d 749, 751 (1978)). Merely because reasonable minds might differ as to whether Dr. Aboderin met the mandatory statutory expert witness qualification requirements does not suffice to warrant reversal of the trial court's ruling to exclude her testimony. Indeed, even if some justices on this very Court determine that they would have permitted Dr. Aboderin's testimony, this is not dispositive. In fact, as previously noted by this Court, it is irrelevant to the analysis:

> [W]e cannot say as a matter of law in this case that there has been an abuse of discretion by the court below and that it *appears clearly* that [the expert] was qualified. We agree with the defendants' observations that reasonable trial judges could properly disagree … and that probably some members of this court, had they presided at the trial, may have admitted [the expert]'s testimony. But, as defendants correctly urge, such considerations are irrelevant and, if employed,

> violate the appellate criteria, which are fixed in our law … for examining a trial court's discretion.

Noll at 801-02, 250 S.E.2d at 745 (emphasis in original).

The trial court correctly held, following *voir dire*, that Dr. Aboderin did not meet the expert witness qualification requirements contained in Code Section 8.01-581.20(A). Compliance with these provisions is mandatory.[4] Therefore, the trial court's exclusion of Dr. Aboderin for failing to demonstrate fulfillment of these prerequisites was appropriate.

Code Section 8.01-581.20(A) provides, in relevant part, that in an action for medical malpractice:

> ... A witness shall be qualified to testify as an expert on the standard of care if he demonstrates expert knowledge of the standards of the defendant's specialty and of what conduct conforms or fails to conform to those standards **and** if he has had active clinical practice in either the defendant's specialty or a related field of medicine within one year of the date of the alleged act or omission forming the basis of the action.

(Emphasis added). A witness proffered as an expert will not qualify to render expert testimony on the standard of care and

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[4] See, e.g., Perdieu v. Blackstone Family Practice Center. Inc., 264 Va. 408, 419, 568 S.E.2d 703, 709 (Va. 2002) (citing Fairfax Hosp. Sys., Inc. v. Curtis, 249 Va. 531, 536, 457 S.E.2d 66, 70 (1995)).

any alleged violation of that standard unless she meets both the "knowledge" requirement and the "active clinical practice" requirement. See, e.g., Hinkley v. Kohler, 269 Va. 82, 88, 606 S.E.2d 803, 806 (2005). Accordingly, unless this Court finds from the record that Dr. Aboderin was "clearly" qualified under both the "knowledge" requirement and the "active clinical practice requirement," it must deny this appeal and affirm the lower court's ruling.

The trial court did not specifically state whether it found Dr. Aboderin unqualified as an expert under the "knowledge" requirement, the "active clinical practice" requirement, or under both requirements. Dr. Chalmeta and Piedmont argued for her exclusion under both prongs and hereby submit that the trial court record demonstrates her failure to fulfill both requirements, although failure to fulfill either one is fatal to her qualification.

i. Dr. Aboderin did not demonstrate the requisite active clinical practice mandated by Code Section 8.01-581.20(A).

Contrary to Holt's presumed assertion, the fact that Dr. Aboderin and Dr. Chalmeta share a specialty practice area, i.e.

pediatrics, is not dispositive of the issue regarding Dr. Aboderin's expert qualification. The determination of whether an expert meets the "active clinical practice" requirement must be made by analyzing the actual medical procedure at issue in the case and "must be read in the context of the actions by which the defendant is alleged to have deviated from the standard of care." Hinkley at 89, 606 S.E.2d at 807. In other words, to qualify under the "active clinical practice" requirement, an expert must have performed those acts she intends to criticize the defendant physician's performance of, and she must have done so within one year of the alleged negligence at issue in the case.

Dr. Aboderin expressed criticism of Dr. Chalmeta's care and treatment of Holt in three (3) primary respects:

1. Failing to secure an airway after being unable to pass a catheter through the infant's nostrils;

2. Failing to timely transfer the infant to a facility equipped with a NICU; and

3. Managing the infant under an oxyhood.

(Designation of Expert Witnesses at 12-13; App. at 95-96). In order to demonstrate active clinical practice in compliance with

Code Section 8.01-581.20(A), Dr. Aboderin was required to satisfy the trial court that she had performed each of these procedures within one year of the alleged negligence at issue in the case. Here, the alleged negligence occurred in May 2006. Accordingly, the applicable timeframe is May 2005 through May 2007.

a. Dr. Aboderin did not meet the active clinical practice requirement because she did not perform the procedures at issue within one year of the alleged negligence.

Dr. Aboderin's trial testimony unequivocally establishes that she did not meet the active clinical practice requirement of Code Section 8.01-581.20(A):

1. Dr. Aboderin did not place an oral airway for a newborn in 2005, 2006 or 2007. (Tr. at 16-18, 26-27; App. at 318-320, 328-29).

2. Dr. Aboderin did not transfer a newborn to a facility with a higher level of care in 2005, 2006 or 2007. (Tr. at 30-31; App. at 332-33).

3. Dr. Aboderin did not manage a newborn under an oxyhood in 2005, 2006 or 2007. (Tr. at 28-30; App. at 330-332).

Because these are the very acts with respect to which Dr. Aboderin was designated to criticize Dr. Chalmeta, and because she did not perform these acts herself within one year of the alleged negligence at issue in the case,[5] the trial court correctly found that she was precluded as a matter of law under Code Section 8.01-581.20(A) from offering these criticisms against Dr. Chalmeta at trial. Its ruling to exclude her testimony was not an abuse of discretion and should be affirmed.

Holt contends that the trial court excluded Dr. Aboderin on the sole basis that she practiced at a facility equipped with a NICU and disregarded her other areas of active clinical practice. See Opening Brief, p. 11. However, the record is devoid of any fact in support of this proposition. The trial court did not state or otherwise imply that it found Dr. Aboderin unqualified solely on this basis. (Tr. at 56; App. at 358). Moreover, by this argument, Holt overlooks the fact that Dr. Aboderin did not have an active clinical practice in the pertinent time frame in regard to the

[5] Holt appears to either misunderstand or to simply dismiss the requirement of Code Section 8.01-581.20(A) that the proposed expert's performance of the procedures at issue must have occurred within one year of the alleged negligence.

procedures at issue in this case, i.e. (1) placing an oral airway in a newborn; (2) transferring a newborn to a facility with a higher level of care; and (3) managing a baby under an oxyhood. (Tr. at 16-18, 26-31; App. at 318-20, 328-33).

While Dr. Aboderin testified that she had an active clinical practice in the May 2005 through May 2007 timeframe with regard to transfer of newborns to higher care facilities, this was in the context of taking phone calls from pediatricians at lower-level hospitals, such as Dr. Chalmeta, who wanted to transfer a newborn to Dr. Aboderin's facility. (Tr. at 8; App. at 310). The case law is clear that merely consulting with others in regard to a procedure at issue in the case does not qualify as having an active clinical practice. See, e.g., Hinkley at 91, 606 S.E.2d at 808 ("In the context of the alleged negligence at issue, [the expert's] work as a teacher and consultant did not satisfy the active clinical practice requirement set forth in Code 8.01-581.20(A)."). As the accepting neonatologist, Dr. Aboderin's role differed from that of Dr. Chalmeta, the transferring pediatrician. It is the transferring pediatrician at the lower level facility with

her eyes on the baby who ultimately makes the decision regarding transfer. While she may make this decision after consultation with a neonatologist at the higher level care facility, this consultation does not even come to pass unless and until the pediatrician, such as Dr. Chalmeta, determines transfer may be indicated and picks up the phone to contact the higher level hospital. Dr. Aboderin does not have to decide whether transfer is indicated and whether a call inquiring as to a potential transfer should be made. She simply accepts calls as they come in to her at the hospital. As Dr. Aboderin verified during cross-examination, she "ha[s] never found herself in the position of Dr. Chalmeta, being the physician to be the transferring physician." (Tr. at 31; App. at 333). Yet she was offered to testify at trial regarding Dr. Chalmeta's decision-making with respect to whether and when to transfer Holt to a NICU hospital. This is the precise scenario the General Assembly sought to avoid by enacting Code Section 8.01-581.20(A). See, e.g., Perdieu at 419, 568 S.E.2d at 710 ("the purpose of the requirements in Code § 8.01-581.20(A) is 'to prevent testimony by an individual

who has not recently engaged in the actual performance of the procedures at issue in a case.'") (citing Sami v. Varn, 260 Va. 280, 285, 535 S.E.2d 172, 175 (2000)).

b. Precedential case law affirms that Dr. Aboderin did not meet the active clinical practice requirement.

Holt correctly notes that the Court in Hinkley properly excluded the challenged expert because "the proffered expert did not actively practice the very actions claimed negligent." Opening Brief, p. 12. This is the exact point raised by Dr. Chalmeta and Piedmont. During the applicable timeframe mandated by Code Section 8.01-581.20(A), Dr. Aboderin did not perform, i.e. actively practice, the very actions she now contends Dr. Chalmeta performed in a negligent fashion. Thus, the trial court's ruling that Dr. Aboderin was not qualified to testify as an expert in this matter is on point and in harmony with this Court's ruling in Hinkley.

The trial court's ruling also is in line with the holding of this Court in Perdieu, in which the plaintiff sued the defendants for negligently diagnosing and treating a hip fracture suffered by

plaintiff's decedent at her nursing home. Perdieu designated Dr. Martin, Dr. Leidelmeyer and Nurse Corrigan to testify regarding the defendants' various breaches of the standard of care. Defendants moved to exclude the testimony of each on grounds that none met the requirements of Section 8.01-581.20(A). The trial court agreed, finding that because Dr. Leidelmeyer and Dr. Martin, within one year of the date of the alleged negligence, did not diagnose or treat fractures and did not treat nursing home patients, they did not meet the requirements of the statute. The trial court also found that Nurse Corrigan did not meet the statutory requirements because although she had rendered care to elderly patients in a hospital setting within one year of the alleged negligence, including patients transferred to the hospital from a nursing home, Corrigan had never worked in a nursing home or long-term care facility and had never been called upon to make treatment decisions or devise care plans for residents of such facilities. This Court affirmed each ruling of the trial court, finding no abuse of discretion in the exclusion of the three witnesses. In so finding, the Court focused on the setting in

which the defendants rendered the medical care at issue and emphasized that because none of the witnesses had "recently engaged in the performance of the procedures at issue," the trial court properly excluded their testimony. Id. at 419, S.E.2d at 710 (quoting Sami at 285, 535 S.E.2d at 175).

In the present case, Dr. Aboderin had not, within one year of May 2006, performed the procedures that are at issue in this case and that were put at issue in this case by her own stated criticisms of Dr. Chalmeta. Consequently, like the court in Perdieu, the trial court did not abuse its discretion in refusing to qualify her as an expert on the applicable standard of care. See also Curtis, 249 Va. 531, 457 S.E.2d 66 (affirming trial court's refusal to qualify as an expert a professor of pediatrics and former medical director of a PICU to testify as to the defendant hospital's standard of care because, within one year of the date of the alleged negligence, the expert was the director of a medical helicopter transport service and did not have an active clinical practice within the defendant hospital's specialty); and Lloyd v. Kime, 275 Va. 98, 654 S.E.2d 563 (2008) (affirming trial court's

exclusion of expert testimony regarding intraoperative standard of care as expert had not performed surgery at issue within one year of the alleged negligence, but reversing trial court's decision with regard to postoperative standard of care, as the expert demonstrated overlap between his and defendant's postoperative practices and defendant did not show that the expert lacked an active clinical practice caring for postoperative patients).

Holt's reliance on Jackson v. Qureshi, M.D., 277 Va. 114, 671 S.E.2d 163 (2009) is misplaced. The holding in Jackson actually illustrates why the trial court's ruling in this case was correct and should be affirmed.

In Jackson, the Court analyzed the "active clinical practice" requirement of Code Section 8.01-581.20(A) and held that to qualify as an expert witness, the proposed expert needed to have an active clinical practice in either the defendant physician's specialty or a related field of medicine within one year of the date of the alleged negligence. Id. at 124, 671 S.E.2d at 168. With respect to the "related field of medicine" inquiry, the Court noted that "it is sufficient if in the expert witness' clinical practice the

expert performs the procedure at issue and the standard of care for performing the procedure is the same." Id. (citing Sami at 285, 535 S.E.2d at 175). The only "procedure" at issue in Jackson was whether the infant should have been admitted to the hospital after presenting to the emergency room with signs of respiratory distress. Jackson at 124, 671 S.E.2d at 169. While the subject expert "admitted that he had not treated a patient presenting with pertussis in an emergency room during the relevant time frame, he testified that he had treated such patients in the urgent care clinic." Id. at 124-25, 671 S.E.2d at 169. The expert testified that "the urgent care clinic where he saw those patients and an emergency room are 'very similar' clinical settings." Id. at 125, 671 S.E.2d at 169. On the basis of this testimony, the Court found that the expert met the active clinical practice requirement contained in Code Section 8.01-581.20(A). Id.

Both this case and Jackson involve the issue of whether a patient should have been transferred elsewhere in order to receive a higher level of care. Here, Holt has alleged that Dr.

Chalmeta was negligent in failing to timely transfer her to a facility equipped with a NICU. The plaintiff in Jackson alleged that the defendant physician was negligent in failing to admit the patient to the hospital for inpatient treatment. Thus, the procedure at issue in both cases is that of making the decision to transfer the patient. Critically, in this case unlike in Jackson, the proffered expert, Dr. Aboderin, had no active clinical practice during the applicable time period with respect to making determinations regarding newborn transfers because she has only worked in hospitals with in-house NICUs and has therefore never faced this decision. In Jackson, the challenged expert testified to having treated children with pertussis in an urgent care clinic setting, which necessarily includes the ability to transfer any such child to the hospital for inpatient treatment if indicated. Thus, the expert in Jackson demonstrated experience performing the procedure at issue in the case, i.e. deciding when to transfer a child with signs of pertussis to the hospital for inpatient care. Here, Dr. Aboderin did not, and could not, demonstrate experience with transferring newborns to higher level care

facilities because she simply does not make these decisions in the course of her clinical practice.

Holt's reliance on Wright v. Kaye, 267 Va. 510, 593 S.E.2d 307 (2004) is similarly misplaced. As with Jackson, the holding in Wright illustrates why the trial court's ruling in this case was correct and should be affirmed.

With respect to Wright, Holt states:

> Because the specific negligence alleged was the failure to protect the bladder during laproscopic [sic] surgery and had nothing to do with the type of cyst removed, the Supreme Court held that plaintiff's proffered experts, all of whom had an active clinical practice protecting the bladder during other types of laproscopic [sic] surgery were qualified to testify under Code §8.01-581.20.

Opening Brief, p. 13. Holt thus agrees that the Wright Court found the proffered experts qualified on the basis that they had each performed the act at issue, i.e protecting the bladder during surgery, within the relevant statutory time period.

By contrast, Dr. Aboderin did not perform the acts at issue in this case within the relevant statutory time period. The specific allegations of negligence directed against Dr. Chalmeta are her alleged failure to place an oral airway, her alleged failure

to timely transfer the patient, and her management of the patient under an oxyhood. (Designation of Expert Witnesses at 12-13; App. at 95-96). Dr. Aboderin did not perform any of these medical activities in 2005, 2006 or 2007 as is required for her qualification under Code Section 8.01-581.20(A). Accordingly, the Wright holding supports the trial court's ruling and does not compel the result advocated for by Holt.

The same can be said for Holt's citation to Sami, 260 Va. 280, 535 S.E.2d 172. As Holt points out, the Court in Sami held that the challenged expert could satisfy the "active clinical practice" requirement by showing that he or she "perform[s] the same procedure at issue." Opening Brief, p. 13. Holt subsequently states: "In this case, the procedure at issue was securing Kayla's airway, either through intubation or use of an oral airway. Dr. Aboderin testified that she had secured [an] infant's airway through intubation and oral airway in 2006." Opening Brief, pp. 13-14. While Holt cites to page 315 of the Appendix, which does reflect testimony by Dr. Aboderin that she placed oral airways for newborns in 2006, Holt fails to mention

that this testimony was inaccurate and that Dr. Aboderin was impeached on this point by counsel for Dr. Chalmeta and Piedmont. When confronted on cross-examination, Dr. Aboderin was forced to admit that her earlier testimony on direct examination was incorrect and that she, in fact, had **not** placed an oral airway for an infant between 2005 and 2007. (Tr. at 16-18; App. at 318-320). Therefore, because Holt agrees that the procedure at issue in this case is the placement of an oral airway for a newborn and because Dr. Aboderin did not place any such airway during the applicable time frame mandated by Code Section 8.01-581.20(A), Dr. Aboderin could not have qualified as an expert in this case and the trial court was correct in excluding her testimony.

ii. Dr. Aboderin did not demonstrate the requisite knowledge mandated by Code Section 8.01-581.20(A).

Because Dr. Aboderin did not meet the active clinical practice requirement of Code Section 8.01-581.20(A), she could not qualify as an expert witness under the statute, regardless of whether she met the knowledge requirement. See Hinkley at 88,

606 S.E.2d at 806 ("both [the knowledge and active clinical practice] requirements must be satisfied before an expert can testify as to the standard of care.")(citing Wright at 518, 593 S.E.2d at 311). Nevertheless, Dr. Aboderin's trial testimony demonstrated that she also failed to meet the knowledge requirement of Code Section 8.01-581.20(A).

At trial, Dr. Aboderin proclaimed that she knew the standard of care applicable to Dr. Chalmeta at Fauquier Hospital in 2006. (Tr. at 8; App. at 310). She offered no factual foundation for this assertion. While admitting that she has never worked in a facility of the type in which Dr. Chalmeta worked during the applicable time period, she repeatedly affirmed her familiarity with and knowledge of the standard of care for a pediatrician at such facility in response to leading questions on direct examination. Despite the undisputed fact that the entirety of her experience has been in a different type of facility, Dr. Aboderin said the standard of care is the same for both her NICU-equipped hospital and a non-NICU hospital such as Fauquier Hospital. (Tr. at 28; App. at 330). She did not offer how she knows this, nor was she

asked by Holt's counsel to explain the basis for her supposed knowledge in this regard. As was pointed out at argument before the trial court, Dr. Aboderin's testimony on this point is

> the very essence of an uninformed opinion that's lacking in foundation. I could stand before you and say 'I don't practice wills, trusts and estates, but I'm going to get on the stand as an expert. I believe it's the same standard of care as what I do.' I can say it, but it shouldn't carry any sway with the Court. It shouldn't have credibility with the Court because the very exercise is does this witness have an actual factual knowledge of this case to say what Dr. Chalmeta should or shouldn't do. And all of this parroting back of the standard of care is the same standard of care is really lacking in foundation and irrelevant…

(Tr. at 45-46; App. at 347-48).

Without the requisite supporting context or foundation, Dr. Aboderin's expressed belief that she knew the applicable standard of care did not automatically warrant her qualification. See, e.g., Noll at 800, 250 at 744 ("…the expressed belief of a witness that he is an expert does not [i]pso facto require his qualification.") (citing Commonwealth v. Larkin, 88 Va. 422, 424, 13 S.E. 901, 902 (1891)). The law requires more than a gratuitous and self-serving statement of expertise; it requires facts showing that the expert "possesses sufficient knowledge, skill or experience to

make him competent to testify as an expert on the subject matter of the inquiry." Grubb v. Hocker, 229 Va. 172, 176, 326 S.E.2d 698, 700 (1985) (quoting Noll at 800, 250 S.E.2d at 744; Lawson v. Elkins, 252 Va. 352, 354-55, 477 S.E.2d 510, 511 (1996)).

Although Dr. Aboderin claimed to know the standard of care applicable to a pediatrician working in a facility such as Fauquier Hospital in 2006, she readily admitted having never practiced in any such facility. (Tr. at 20, 28; App. at 322, 330). This begs the question how Dr. Aboderin could possibly know the standard of care for a pediatrician practicing in a facility, the type of which she has never stepped foot in as a treating provider.

Dr. Aboderin has never had an office-based pediatrician practice, as does Dr. Chalmeta. (Tr. at 20; App. at 322). Dr. Aboderin has never found herself as an office-based pediatrician taking call at home from a hospital without a NICU, as does Dr. Chalmeta. (Tr. at 20; App. at 322). Dr. Aboderin has never worked at a hospital without a NICU, specifically including during the 2005 to 2007 timeframe, as does Dr. Chalmeta. (Tr. at 20; App. at 322). Dr. Aboderin has never held privileges to practice

within a hospital without a NICU, such as Fauquier Hospital in 2006, as does Dr. Chalmeta. (Tr. at 24; App. at 326). Dr. Aboderin does not know what resources Fauquier Hospital had in place in 2006 with regard to its well-baby nursery. (Tr. at 24-25; App. at 326-27). She does not know what Fauquier Hospital had in place in 2006 with regard to practitioners capable of intubating babies. (Tr. at 25; App. at 327). She does not know what resources Fauquier Hospital had in place in 2006 with regard to placement of an oral airway in a newborn. (Tr. at 25; App. at 327).

Given her admitted lack of information, Dr. Aboderin necessarily failed to demonstrate that she is sufficiently knowledgeable regarding the standard of care applicable to Dr. Chalmeta under the facts and circumstances presenting to her at Fauquier Hospital in May 2006, and of what conduct conforms or fails to conform to that standard.

In response to leading questions on direct examination, Dr. Aboderin testified that she knows the applicable non-NICU facility standard of care because she consults by phone with pediatricians

at non-NICU facilities who want to transfer newborns to her facility.[6] This does nothing to demonstrate her knowledge of the standard of care for a pediatrician in such a setting. The pediatrician at the non-NICU facility is assessing the newborn to determine whether the baby needs a level of care higher than can be provided at the non-NICU facility. Thus, the non-NICU pediatrician's concern is whether the newborn in question truly needs to be transferred out of the hospital in which he or she was born. Dr. Aboderin does not face these types of decisions because she only practices in hospitals equipped with in-house NICUs. (Tr. at 28, 31; App. at 330, 333).

While Dr. Aboderin is critical of Dr. Chalmeta for failing to timely transfer Holt to a hospital equipped with a NICU, this is her opinion from the perspective of a neonatologist receiving the newborn at her facility. Having never stood in Dr. Chalmeta's shoes, Dr. Aboderin has no experience giving consideration to the various factors that may have gone into Dr. Chalmeta's decision-making as to the timing of the transfer and, therefore, is not

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(Tr. at 8; App. at 310).

equipped to say whether such considerations were reasonable under the circumstances. Only a practitioner who has stood in Dr. Chalmeta's shoes would be able to give an informed expert opinion as to the appropriateness of transfer, including the timing of such a transfer. For this reason, the actions of Dr. Chalmeta must be judged by a fellow practitioner who has stood in her shoes and made decisions under similar circumstances. Dr. Aboderin should not be permitted to impose a higher standard of care on Dr. Chalmeta who practices only as a pediatrician in a non-NICU facility.

The trial court correctly found Dr. Aboderin unqualified to render testimony against Dr. Chalmeta on the standard of care. Its ruling should be affirmed.

II. The trial court did not commit reversible error in granting summary judgment in favor of Dr. Chalmeta and Piedmont as Holt could not, as a matter of law, prove a *prima facie* case of medical malpractice action against them once the trial court properly found Holt's lone standard of care expert unqualified to testify.

(Appellant's Assignment of Error Number 2)

A. Standard of Review

"When summary judgment is based upon the granting of a motion to strike a party's evidence, we view the evidence and the inferences reasonably raised thereby in the light most favorable to the party whose evidence has been stricken." Claycomb v. Didawick, 256 Va. 332, 333, 505 S.E.2d 202, 203 (1998) (quoting Griffin v. The Spacemaker Group, Inc., 254 Va. 141, 142, 486 S.E.2d 541, 542 (1997)). Neither this Court nor the trial court is bound to make inferences which are strained or contrary to logic. See, e.g., Dickerson v. Fatehi, 253 Va. 324, 484 S.E.2d 880 (1997).

B. Argument

In a medical malpractice action, a plaintiff is required to show, through qualified medical expert testimony, that a defendant health care provider breached the applicable standard and that, as a result, the plaintiff was injured. See, e.g., Bly v. Rhoads, 216 Va. 645, 222 S.E.2d 783 (1976); Raines v. Lutz, 231 Va. 110, 341 S.E.2d 194 (1986); Rogers v. Marrow, 243 Va. 162, 413 S.E.2d 344 (1992); Moates v. Hyslop, 253 Va. 45, 480 S.E.2d 109 (1997). Where a plaintiff fails to produce qualified expert testimony on the issues of standard of care, proximate cause, and damages, summary judgment in favor of the defendant is appropriate. Moates at 49, 480 S.E.2d at 112 (affirming grant of summary judgment in favor of the defendant where the plaintiff failed to produce qualified expert witness testimony on the issue of informed consent); Bly at 653, 222 S.E.2d at 789 (affirming entry of summary judgment in favor of the defendant where the plaintiff failed to produce qualified expert testimony on the issue of informed consent); see also Woodbury v. Courtney, 239 Va. 651, 391 S.E.2d 293 (1990)

(summary judgment appropriate where plaintiff failed to timely identify experts, those experts were excluded from testifying at trial and, as a result, plaintiff could not, as a matter of law, prove her *prima facie* case of medical negligence).

Once the trial court correctly found Holt's lone standard of care expert unqualified to render expert testimony, it had no choice but to grant summary judgment in favor of Dr. Chalmeta and Piedmont. "[T]he jury must make an objective determination, based upon evidence and not upon speculation, whether the appropriate standard of care has been followed. The jury cannot make such a determination without evidence of what the standard was." Raines at 115, 341 S.E.2d at 197. Without qualified expert testimony in this case, where the medical care of a newborn infant is beyond the knowledge of lay jurors, Holt could not, as a matter of law, establish the applicable standard of care or a deviation from that standard by Dr. Chalmeta.

Holt relies on Cheatham v. Gregory, 227 Va. 1, 4, 313 S.E.2d 368, 370 (1984) for her argument that it was error for the trial court to ignore Dr. Aboderin's "uncontradicted expert witness

testimony…" in holding her unqualified under Code Section 8.01-581.20(A). Opening Brief, p. 18. This Court actually held in Cheatham as follows: "A trier of fact … may not arbitrarily disregard uncontradicted evidence of **unimpeached** witnesses which is not inherently incredible and not inconsistent with the facts in the record, even though such witnesses are interested in the outcome of the case." Id. at 3, 313 S.E.2d at 370 (emphasis added).

Dr. Aboderin was impeached on the very point Holt urges this Court to accept as uncontradicted testimony, i.e. whether she had placed an oral airway for a newborn during the years 2005, 2006 and 2007. Dr. Aboderin's testimony on cross-examination unequivocally established that she had not done so, and the trial court was correct to disregard her direct examination testimony on this point given that it had been contradicted through impeachment.

The trial court did not err in granting summary judgment in favor of Dr. Chalmeta and Piedmont after correctly finding Holt's lone standard of care expert unqualified under the mandatory

qualification requirements of Code Section 8.01-581.20(A). The trial court's entry of judgment in favor of Dr. Chalmeta and Piedmont should be affirmed.

CONCLUSION

Plaintiff's lone standard of care expert, Dr. Aboderin, failed to demonstrate compliance with the mandatory provisions of Code Section 8.01-581.20(A), and the trial court properly excluded her expert testimony on this basis. Once Dr. Aboderin's testimony had been excluded, Holt could not, as a matter of law, prove her *prima facie* case, and the trial court, therefore, properly granted summary judgment in favor of Dr. Chalmeta and Piedmont.

Accordingly, there being no reversible error committed by the trial court, Appellees Diana Chalmeta, M.D. and Piedmont Pediatrics, PLC respectfully request that this honorable Court deny Holt's appeal and affirm the lower court's ruling and entry of judgment.

Respectfully submitted,

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CERTIFICATION

Pursuant to Rule 5:26(e) of the Rules of the Supreme Court of Virginia, I hereby certify that on this 24th day of February 2017, ten (10) copies of this Responsive Brief were filed with the clerk of the Supreme Court of Virginia, an electronic copy was filed through VACES, and one (1) copy was delivered via email to:

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