FILED
MAR 17 2014
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 13-1079

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DELILAH STEPHENS, M.D.,

Petitioner/Defendant Below,

v.

CHARLES RAKES, personal representative
of the Estate of GARY RAKES,

Respondent/Plaintiff Below.

PETITIONER DELILAH STEPHENS, M.D.'S REPLY TO RESPONDENT'S BRIEF
FROM THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA
(Civil Action No. 11-C-76)

Submitted by:

Thomas P. Mannion (WV Bar #6994)
Andrew D. Byrd (WV Bar #11068)
Mannion & Gray Co., L.P.A.
707 Virginia Street East
Chase Tower Suite 260
Charleston, WV 25301
304-513-4242 – Phone
304-513-4243 – Fax
tmannion@manniongray.com
abyrd@manniongray.com
Counsel for Petitioner/Defendant Below
Delilah Stephens, M.D.

TABLE OF CONTENTS

I. STATEMENT OF THE CASE 4

II. ARGUMENT 6

A. The Circuit Court of Mercer County erred in Denying Petitioner's Motion for Summary Judgment on Respondent's Amended Complaint 6

B. The Circuit Court of Mercer County erred in Denying Petitioner's Motion for Summary Judgment on Respondent's Claim for Punitive Damages 9

C. The Circuit Court of Mercer County erred in Denying Petitioner's Renewed Motion for Judgment as a Matter of Law, or in the alternative, Motion for New Trial 10

A. Renewed Motion for Judgment as a Matter of Law 10

B. Motion for New Trial 12

1. Respondent's Counsels' Peremptory Strike of the Only African American Juror is Grounds for a New Trial 12

2. Respondent's Counsel's Comments were in Direct Violation of the Circuit Court's *in Limine* Rulings and Constitutes Grounds for a New Trial 15

3. Respondent's Counsel's Reference to the Protection of "Their Money" During Closing Argument, Among Other Comments, and that Petitioner was the Captain of the Ship, Inflamed, Prejudiced, and Misled the Jury and Warrants a New Trial 17

4. The Circuit Court's Denial of the Petitioner's Do Not Resuscitate Jury Instruction Was Error 19

III. CONCLUSION 21

TABLE OF AUTHORITIES

CASES **Page(s)**

Batson v. Kentucky, 476 U.S. 79 (1986) **12, 13, 14**

Foster v. Sakhai, 559 S.E.2d 53 (W.Va. 2001) **16, 17**

Jarvis v. Modern Woodmen of Am., 406 S.E.2d 736 (W.Va. 1991) **9**

Jopling v. Bluefield Water Works & Improvement Co., 74 S.E. 943 (W.Va. 1912). **9**

Mays v. Chang, 579 S.E.2d 561 (W.Va. 2003) **7, 8**

Parham v. Horace Mann Insurance Company, 490 S.E.2d 696 (W.Va. 1997) **13, 14**

State v. Kennedy, 249 S.E.2d 188 (W.Va. 1978) **19**

Tennant v. Marion Health Care Found., Inc, 459 S.E.2d 374 (1995) **19**

Thomas v. Raleigh General Hospital, 358 S.E.2d 222 (W.Va. 1987) **6, 7, 18**

STATUTES

W.Va. Code § 16-30C-7 ..... **19, 20**

W.Va. Code § 16-30C-9 ..... **20**

W.Va. Code § 55-7B-3 ..... **7, 8**

I. STATEMENT OF THE CASE

Notwithstanding the facts and arguments set forth in her initial brief, Petitioner directs this Honorable Court's attention to two mischaracterizations in Respondent's "Statement of the Case" section of his brief. On page two (2) of his response brief, Respondent argues that Petitioner chose not to give Gary Rakes any breathing treatments and that Mr. Rakes did not receive BiPAP even though he was heavily sedated. These statements are a mischaracterization of the actual facts in this case and have no bearing on the issues at hand related to Petitioner.

As such, there is no dispute that Petitioner ordered BiPAP to be administered to Gary Rakes on the night of September 4, 2010. Mr. Rakes lived through the entire night and morning of September 5, 2010 without the BiPAP; ultimately expiring around 7:00 a.m. on September 5, 2010. There is no dispute that the staff at Bluefield Regional Medical Center ("BRMC") failed to carryout Petitioner's order for BiPAP. Respondent's expert admitted at trial it was not Petitioner's fault that this order was not followed. (*See* pgs. 366 of "**Exhibit 30**" : SCT1668). Respondent's attempt to place blame on Petitioner for the BiPAP not being administered, when Respondent's own experts have testified that Mr. Rakes would have survived had it been carried out, is misplaced and contrary to the undisputed facts.

Also, beginning on page four (4) of his "Statement of the Case" section of his brief, Respondent claims that his counsel's rational for striking the only African American juror was based upon the fact that the Circuit Court had ruled *in limine* that evidence of Gary Rakes' non-compliance with the use of his BiPAP was precluded to show Gary Rakes was comparatively negligence in requiring medical treatment. (*See* pg. 4 of Respondent's Brief). Yet, this issue was decided prior to trial and has no bearing on the striking of the African American juror.

Counsel for the Respondent is correct in that he asked the entire jury panel whether any of them had heard of the medical condition COPD. The Circuit Court noted that almost everyone on the panel and in the audience raised their hand. In turn, the Circuit Court allowed Respondent's counsel to *voir dire* individuals as he chose due to the amount of jurors who raised their hands. (*See* pg. 4 of Respondent's Brief). However, Respondent strongly misstates the facts in asserting that Tracey Boyer, an African American juror, was the only member of the jury panel to display a direct connection between smoking and COPD. (*See* pgs. 4-5 of Respondent's Brief). To the contrary, Juror Boyer was the least likely, out of all the jurors questioned about COPD, to display a direct connection between smoking and COPD.[1]

Juror Boyer, when questioned by counsel for the Respondent regarding her understanding of COPD, simply stated that she knew COPD can come from smoking for many years and that you can catch emphysema with it. Importantly, Juror Boyer stated that her knowledge of COPD and smoking was based upon commercials she observed on television. Juror Boyer did not know anyone who was diagnosed with COPD due to smoking. (*See* pgs. 52-53 of "**Exhibit 30**" : SCT1547-SCT1548).

Juror William Vance, a white male, was also questioned by counsel for the Respondent. Juror Vance stated that he had emphysema. When asked how he was diagnosed with emphysema, Juror Vance stated "I was a firefighter in service. My lungs were burned. **And, of course, I smoked, too**."(*See* pg. 53 of "**Exhibit 30**" : SCT1548)(emphasis added). It is apparent that Juror Vance directly linked his own smoking to emphysema, which is a common type of COPD.

---

[1] Juror Tracey Boyer was also the least likely to show a direct understanding of COPD. Juror Carolyn Darago, a white female, stated during jury selection/*voir dire* that her husband has COPD. Juror Joyce Kessinger, a white female, stated that through working in the medical field and being around her friend with COPD, she knew about COPD. Juror Sandra Bish, a white female, stated that her father had COPD. (*See* pgs. 49-52 of "**Exhibit 30**" : SCT1547).

Juror Vance's knowledge of COPD and smoking was based upon his own personal and direct connection to it and was not based upon television commercials. Juror Boyer had no direct connection to COPD and smoking. Ms. Boyer's statements were simply based on what she observed on television, which the Circuit Court ultimately instructed the jury could not be an influence in the case. (*See* pgs. 131-132 of "**Exhibit 30**" – SCT1567). Respondent's claim that Juror Boyer was the only member of the jury panel to display a direct connection between smoking and COPD is incorrect and misplaced.

II. ARGUMENT

A. The Circuit Court of Mercer County Erred in Denying Petitioner's Motion for Summary Judgment on Respondent's Amended Complaint.

In the Amended Complaint, Respondent alleged that Gary Rakes died from chronic respiratory failure with hypercapnia that was proximately caused by an adverse drug reaction to Seroquel. Petitioner disputes that her treatment proximately caused the death of Mr. Rakes because she did not order the Seroquel. In his response, Respondent primarily argues that Petitioner was the "attending physician/hospitalist" that was in charge of Gary Rakes' treatment, and therefore, was responsible for the actions/inactions of other medical professionals who provided care to Mr. Rakes. (*See* pg. 12 of Respondent's Brief). Respondent's argument is contrary to well-established West Virginia law.

Indeed, in Thomas v. Raleigh General Hosp., this Honorable Court affirmed the trial court's dismissal on summary judgment of a medical malpractice claim against a surgeon who had no control over the acts of other medical professionals that caused the plaintiff's alleged injuries. 358 S.E.2d 222 (W.Va. 1987). In attempting to overturn the trial court's dismissal, the plaintiff argued on appeal the "captain of the ship" doctrine, under which a surgeon has a duty to control everything going on in the surgery room. In examining the doctrine, this Court noted

"liability is imposed by virtue of the surgeon's status and without any showing of actual control by the surgeon." Id. at 224. After considering the history of the doctrine, this Court rejected the captain of the ship doctrine. It explained that there are situations where surgeons do not always have the right to control all personnel within the operating room. Id. at 225. Accordingly, because the plaintiff failed to produce any evidence at the summary judgment stage to dispute the fact the surgeon did not have control of the acts that proximately caused the plaintiff's injuries, summary judgment was affirmed on appeal.

Similarly, in this case, Respondent has attempted to place liability on Petitioner by virtue of her status as "attending physician/hospitalist." To this end, based upon an argument analogous to the captain of the ship doctrine, Respondent ignores the undisputed fact that Petitioner did not order Seroquel. Rather, Dr. Toni Muncy gave the order to nurse Laura Potter for 100 mg of Seroquel to be administered to Mr. Rakes. Dr. Muncy was not part of the team that Petitioner worked with at BRMC, and thus, she did not consult with Petitioner before giving the order. Moreover, Dr. Razzaq placed the order to nurse Larry Rose for 25 mg of Seroquel to be administered to Mr. Rakes on September 4, 2010. Dr. Razzaq likewise did not consult with Petitioner before having this dosage administered. Accordingly, because the captain of the ship doctrine has been rejected under West Virginia law, Petitioner cannot be held liable for the conduct of other medical professionals that she had no duty to control regarding the administration of Seroquel to Mr. Rakes.

Likewise, because Petitioner did not order the Seroquel that allegedly caused the chronic respiratory failure with hypercapnia, Respondent was unable to satisfy his burden at the summary judgment stage to produce any evidence that the actions of Petitioner proximately caused the death of Mr. Rakes. Indeed, in Mays v. Chang, this Honorable Court stated that "the

phrase "a proximate cause" in W.Va. Code 55-7B-3 "must be understood to be that cause which in actual sequence, unbroken by any independent cause, produced the wrong complained of, without which the wrong would not have occurred. The proximate cause of an injury is the last negligent act contributing to the injury and without which the injury would not have occurred." 579 S.E.2d 561, 566 (W.Va. 2003)(internal citations omitted). Therefore, the Circuit Court erred in denying summary judgment against Respondent.

Nonetheless, to avoid reversal on appeal, Respondent argues that Petitioner proximately caused the death of Mr. Rakes by failing to order "appropriate" BiPAP therapy. In making such an argument, Respondent attempts to spin the testimony of his own expert, Dr. Schwartz, who stated to a reasonable degree of medical certainty that if BiPAP was administered at 9:00 p.m. or 10:00 p.m. on September 4, 2010, as ordered by Dr. Stephens, Mr. Rakes would have survived. (*See* pg. 30 of "**Exhibit 12**" : SCT0491). In spinning the testimony, Respondent takes the position that Dr. Schwartz did not testify to a reasonable degree of medical certainty that Gary Rakes would have survived if he would have gotten appropriate BiPAP therapy at 9:00 or 10:00 p.m. on September 4, 2010.

However, not only did Dr. Schwartz testify once that Mr. Rakes would have survived if Petitioner's BiPAP order was followed, he confirmed a second time during his deposition that Mr. Rakes would have survived if he had received BiPAP beginning the night of September 4, 2010. (*See* pg. 60 of "**Exhibit 12**" : SCT0521). Moreover, even though Respondent argues that Petitioner did not order the correct BiPAP settings, Dr. Schwartz stated that BiPAP adjustments and carbon dioxide measurements would have been a "follow-up" step after the administration of the BiPAP. Id. Ultimately, Respondent has failed to produce any evidence that the

actions/inactions of Petitioner were the proximate result of Mr. Rakes' death. To the contrary, it is clear that had Petitioner's BiPAP order been followed, Mr. Rakes would have survived.

Further, it is undisputed that the administration of Haldol alone did not proximately cause Mr. Rakes' death. Respondent's expert, Dr. Scissors, opined in his report that the proximate cause of Mr. Rakes' death was the administration of both Haldol and Seroquel. At his deposition, Dr. Scissors testified he does not believe the Haldol had a sedative effect on Mr. Rakes, and that it was the combination of Haldol and Seroquel (not Haldol alone) that led to Gary Rakes' death. Further, Dr. Scissors testified that Haldol would not have a major impact or a clinically significant impact on his respiratory function if it was not causing sedation.

Ultimately, at the summary judgment stage, Respondent failed to present evidence that Petitioner's actions or inactions were the last act or sequence that proximately caused the death of Gary Rakes. Accordingly, the Circuit Court erred when it denied summary judgment.

B. The Circuit Court of Mercer County Erred in Denying Petitioner's Motion for Summary Judgment on Respondent's Claim for Punitive Damages.

In Jarvis v. Modern Woodmen of Am., this Honorable Court stated "[t]o sustain a claim for **punitive damages**, the wrongful act must have been done maliciously, wantonly, mischievously, or with criminal indifference to civil obligations. A wrongful act, done under a bona fide claim of right, **and without malice in any form, constitutes no basis for such damages**." 406 S.E.2d 736, 742 (W.Va. 1991)(*citing* Syl. Pt. 3, Jopling v. Bluefield Water Works & Improvement Co., 74 S.E. 943 (W.Va. 1912))(emphasis added). In the present case, the undisputed facts can only be based on negligence, not malice or willfulness. Indeed, Petitioner ordered BiPAP therapy that could have saved Mr. Rakes' life. Although Respondent disagrees with the adequacy of the scope of care provided to Mr. Rakes, he failed to meet his heavy burden to sustain a claim for punitive damages.

Nonetheless, Respondent argues that the Circuit Court properly denied Petitioner's Motion for Summary Judgment on the claim for the punitive damages. Respondent claims that evidence has been submitted to show that Petitioner deviated from the standard of care and that said deviation was grossly negligent, willful and reckless. Respondent states that Dr. Schwartz testified that Petitioner did not do anything to assist with CO2 levels, treat Gary Rakes' COPD, and order BiPAP. Yet, Respondent fails to consider the expert opinions of his other expert, Dr. Jeffrey Scissors. Indeed, Dr. Scissors testified that Mr. Rakes did not need BiPAP when he was admitted to BRMC. Instead, Dr. Scissors stated that Mr. Rakes only needed BiPAP for his sleep apnea. (*See* pg. 172 of "**Exhibit 11**" : SCT0424). Moreover, Dr. Scissors testified that there was no indication that Mr. Rakes was experiencing extreme difficulty in breathing on his own. (*See* pgs. 66-67 of "**Exhibit 11**" : SCT0398).

Further, as set forth above, Dr. Schwartz testified twice that had the BiPAP order by Petitioner occurred, Mr. Rakes would have survived. It is also undisputed that Petitioner did not order Seroquel to be administered to Mr. Rakes. In summary, Respondent failed to offer any evidence at the summary judgment stage that Petitioner's actions were malicious or willful. Therefore, the Circuit Court erred by denying the Motion for Summary Judgment on the claims for punitive damages.

C. The Circuit Court of Mercer County Erred in Denying Petitioner's Renewed Motion for Judgment as a Matter of Law, or in the alternative, Motion for New Trial.

A. Renewed Motion for Judgment as a Matter of Law.

Respondent argues that he presented sufficient evidence through expert witness testimony that Petitioner deviated from the standard of care, and that said deviations were a proximate cause of Gary Rakes' death. In support of proximate cause, Respondent first relies on the trial

testimony of his expert, Dr. Jeffrey Schwartz on pgs. 330-31 of "**Exhibit 30**" : SCT1659-SCT1660). However, as this Honorable Court will note, Dr. Schwartz testified that it was the staff at BRMC that ignored Mr. Rakes and that all of his issues were related to the absence of any respiratory treatment. (*See* pg. 331 of "**Exhibit 30**" : SCT1660).

Petitioner ordered respiratory treatment for Mr. Rakes. Respondent attempts to argue that Petitioner misstates the testimony of Dr. Schwartz related to Petitioner's order for BiPAP therapy. Yet, the record is clear. Dr. Schwartz testified at trial that had Petitioner's order for BiPAP therapy been carried out, Mr. Rakes may have survived. Dr. Schwartz admitted that the fact Petitioner's BiPAP order was not carried out was not Petitioner's fault. (*See* pgs. 366 of "**Exhibit 30**" : SCT1668). Thus, Respondent's proximate cause argument is unpersuasive.

Respondent attempts to also rely on the testimony of his expert, Dr. Kenneth Scissors, in support of proximate causation. (*See* pgs. 236-240 of "**Exhibit 30**" : SCT1593-1594). However, Dr. Scissors' outburst of potential issues that allegedly led to Mr. Rakes' death was not his opinion on proximate cause. Dr. Scissors' opinion on proximate cause can be found in his expert report ("**Exhibit 13**" : SCT0598) and his testimony at trial (pg. 285 of "**Exhibit 30**" : SCT1606), which was: "Mr. Rakes died of ventilator failure, as a result of excessive administration of the sedatives Haldol and Seroquel in the setting of underlying chronic lung disease."

Dr. Scissors testified at trial that Petitioner did not order the Seroquel and that Petitioner emphasized in the medical records that Seroquel was not to be given. (*See* pgs. 279-80 of "**Exhibit 30**" : SCT1604). Moreover, Dr. Scissors testified at trial that Gary Rakes did not have a reaction to the Haldol and it did not interfere with his respiratory function. (*See* pgs. 276-77 of "**Exhibit 30**" : SCT1603-SCT1604). As such, Respondent's argument that proximate cause was established by his retained experts is not supported by the evidence at trial.

Furthermore, Respondent argues that a punitive damage instruction to the jury was proper. Respondent relies on the fact that one of his experts, Dr. Kenneth Scissors, testified at trial that Petitioner's care for Mr. Rakes was "reckless" and "dangerous." (*See* pg. 26 of Respondent's Brief). An assessment of whether a punitive damages instruction is proper does not turn on a simple personal opinion or verbiage used by an expert. An expert in a medical malpractice case is to offer opinions on the standard of care and proximate cause under the West Virginia Medical Professional Liability Act.

Moreover, Dr. Scissors' characterization was related to the alleged notion that Petitioner left Mr. Rakes without any ventilator support on September 4, 2010, while his CO2 was rising. However, Dr. Scissors testified at trial that Mr. Rakes needed ventilator support during his sleep because Mr. Rakes had sleep apnea. Without the BiPAP, his carbon dioxide levels would go up. (*See* pgs. 261-62 of "**Exhibit 30**" : SCT1600).[2] Petitioner ordered BiPAP for this condition, but the BRMC staff did not administer it. Thus, any recklessness would be attributed to the actions of the BRMC staff, not Petitioner.

B. Motion for New Trial.

1. Respondent's Counsels' Peremptory Strike of the Only African American Juror is Grounds for a New Trial.

Respondent argues that the Circuit Court properly overruled Petitioner's Batson v. Kentucky, 476 U.S. 79 (1986) challenge at trial because Respondent's counsel explained his non-discriminatory reason for making the strike. Respondent argues to this Honorable Court that Juror Tracey Boyer made a strong connection that smoking caused COPD. Respondent further argues that on its face, Respondent counsel's explanation for the strike of Juror Boyer was

[2] Dr. Scissors is simply confirming his deposition testimony wherein he stated that Mr. Rakes only needed BiPAP for his sleep apnea. (*See* pg. 172 of "Exhibit 11" : SCT0424).

sufficient under Batson. (*See* pgs. 29-30 of Respondent's Brief). Petitioner respectfully disagrees.

As noted in Syllabus Point 1 in Parham v. Horace Mann Ins. Co., "[t]o prove a violation of equal protection, the analytical framework established in the U.S. Supreme Court case of Batson v. Kentucky, 476 U.S. 79 (1986) controls and involves three steps. *First*, there must be a prima facie case of improper discrimination. *Second*, if a prima facie case is shown, the striking party must offer a neutral explanation for making the strike. *Third*, if a neutral explanation is given, the trial court must determine whether the opponent of the strike has proved purposeful discrimination. So long as the reasons given in step two are facially valid, the explanation for the strike need not be persuasive or plausible. The persuasiveness of the explanation does not become relevant until the third step when the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." 490 S.E.2d 696 (W.Va. 1997).

It is apparent that counsel for the Respondent decided to strike the only African American juror, Tracy Boyer from the jury panel in their case against an African American physician. No neutral, persuasive or credible explanation was given for the strike by counsel for the Respondent. The Respondent sets forth in his brief that Juror Boyer was the only member of the jury panel to display a direct/strong connection between smoking and COPD. (*See* pgs. 4-5 and 29-30 of Respondent's Brief). As set forth above, this is simply not true. Juror Boyer stated that her knowledge of COPD and smoking was based upon television commercials. Juror Boyer did not know anyone who was diagnosed with COPD from smoking and had no direct experience with it. (*See* pgs. 52-53 of "**Exhibit 30**" : SCT1547-SCT1548).

Yet, Juror William Vance, a white male, stated that he was diagnosed with emphysema (a common type of COPD) and that he smoked. (*See* pg. 53 of "**Exhibit 30**" : SCT1548). Juror Vance's knowledge of COPD and smoking was based upon his own personal and direct connection to it and was not based upon television commercials like Juror Boyer.

Moreover, Respondent argues in his brief that his counsel was seeking to keep out any evidence that Mr. Rakes contributed to his own poor health prior to trial. (*See* pg. 30-31 of Respondent's Brief). However, undersigned counsel acknowledged that smoking and/or comparative fault was not being raised as an issue during trial as it had already been decided by the Circuit Court. (*See* pg. 118 of "**Exhibit 30**" : SCT1564)(*Also see* pgs. 7-11 of "**Exhibit 30**" : SCT1536-SCT1537). As the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike,[3] Respondent's alleged neutral explanation for making the strike of Juror Boyer is clearly not persuasive given the clear record below.

Respondent further claims under Parham that deference is given to the Circuit Court in its rulings on Batson challenges. However, Respondent fails to recognize that "deference to the trial court findings on the issue of discriminatory intent...will largely turn on evaluation of **credibility**." Parham, 490 S.E.2d at 702 (emphasis added). Given the facts set forth above and as apparent from the record below, Respondent's counsel's attempted explanation for the strike of the only African American juror, Tracey Boyer lacks credibility given the verbal exchange set forth in the record. (*See* pgs. 114-119 of "**Exhibit 30**" : SCT1563-SCT1564).

Petitioner respectfully submits that Respondent's alleged non-discriminatory reasons for the strike were not facially valid or persuasive in light of the evaluation of Respondent's counsel's credibility under Batson and the record below. Accordingly, the Circuit Court erred in denying Petitioner's new trial on this issue.

---

[3] Parham at Syl. Pt. 2.

2. Respondent's Counsel's Comments were in Direct Violation of the Circuit Court's *in Limine* Rulings and Constitutes Grounds for a New Trial.

Respondent now claims that his counsel did not violate the Circuit Court's *in limine* order. Respondent argues in his brief that his counsel never said at anytime during trial that Petitioner ordered Seroquel. (*See* pgs. 31-32 of Respondent's Brief). Respondent attempts to argue that his counsel made it clear to the jury during trial that Petitioner denied giving Gary Rakes Seroquel, not that she ordered it. (*See* pg. 32 of Respondent's Brief). Yet, the remarks of the Circuit Court and counsel on record make it clear that the statements made by Respondent's counsel during opening statement were in violation of the Circuit Court's *in limine* rulings.

The Respondent submits that the transcript is devoid of any remarks from his counsel that Petitioner ordered Seroquel. (*See* pg. 34 of Respondent's Brief). This is simply not true in light of the record:

> [MR. SHOOK:]: Now, I looked into the physician order form, drug sensitivities, right at the top -- this is a form that the doctors make orders with -- has a list of Seroquel at 20:09 on September 3, 2010, drug sensitivities: Ativan, Seroquel. 20:09 he was given Haldol, 5 milligrams, a heavy sedative. I'll note again, nowhere through any of these orders will you see where he was actually given any respiratory treatment, any treatment for the main problem that he was at the hospital, his elevated CO2 readings. 23:35 on 9/03 of 2010, Seroquel, 100 milligrams, one dose. Dr. Delilah Stephens signed beside that order.

(*See* pgs. 158-59 of "**Exhibit 30**" : SCT1574)(emphasis added).

The Circuit Court agreed with Petitioner's counsel that counsel for the Respondent was "pushing the envelope" and that counsel needed to stick by the rulings.[4] (*See* pgs. 159-61 of "**Exhibit 30**" : SCT1574). Petitioner respectfully submits that there was nothing implied about

[4] The Circuit Court granted Petitioner's Motion *in Limine* to preclude any testimony that Petitioner ordered and administered Seroquel to Gary Rakes and that the order and administration of Haldol alone was the cause of Gary Rakes' death. (*See* "**Exhibit 20**" : SCT0924-SCT0928). This ruling was made on the same day as the opening statements of counsel for both Petitioner and Respondent.

this comment. There can be no dispute that Respondent's counsel tells the jury that Petitioner ordered the Seroquel.

But even more important is the fact that counsel for the Respondent violated the Circuit Court's *in limine* ruling, not once, but twice:

> [MR. SHOOK]: And then it goes on to say that this medication was ordered via a telephone order from a Dr. Toni Muncy, read back by Laura Potter. Dr. Stephens signed off on this order the following day, according to her testimony. She denies ordering the Seroquel for this patient; however, she clearly knew about it at 10 a.m. the next morning, as we'll see in the medical records. Dr. Muncy -- Dr. Stephens denies ordering it. Let's be clear on that. Dr. Muncy denies ordering that Seroquel medication. The nurse that's noted in the record as having administered the Seroquel, the nurse denies administering the Seroquel. The nurse has noted in the record, points to Laura Potter, says Laura Potter administered that Seroquel. Laura Potter denies administering the Seroquel. So nobody takes credit for ordering the Seroquel, everybody denies administering it. This is Dr. Stephens' show. She's the captain of the ship.

(*See* pgs. 161-63 of "**Exhibit 30**" : SCT1575)(emphasis added).

Again, there can be no dispute that Respondent's counsel advised the jury that Petitioner ordered the Seroquel. The Circuit Court noted very clearly on the record that Petitioner had violated his *in limine* rulings and was not sure how to clarify it. The Circuit Court also noted that counsel for the Respondent had agreed not to mention this to the jury prior to trial. (*See* pgs. 163-65 of "**Exhibit 30**" : SCT1575-SCT1576).

At no point did Respondent go "out of this way to make it perfectly clear to the jury throughout the trial and in closing argument that Petitioner did not order Seroquel." (*See* pg. 34 of Respondent's Brief). As noted in Respondent's brief on pages thirty-one (31) and thirty-two (32), his counsel agreed not to mention that Petitioner ordered Seroquel. Yet, his counsel did the opposite. "A deliberate and intentional violation of a trial court's ruling on a motion *in limine,* and thereby the intentional introduction of prejudicial evidence into a trial, is a ground for reversing a jury's verdict. However, in order for a violation of a trial court's evidentiary ruling to

serve as the basis for a new trial, the ruling must be specific in its prohibitions, and the violation must be clear." Syl. Pt. 10, Foster v. Sakhai, 559 S.E.2d 53 (W.Va. 2001).

Respondent also argues that regardless of whether Petitioner believes these statements imply that Petitioner ordered the Seroquel, Petitioner had ample time to make it clear after opening statements. (*See* pg. 34 of Respondent's Brief). However, Petitioner's attempt to do so was denied by the Circuit Court. Petitioner's counsel moved for a mistrial and requested a limiting instruction be provided to the jury in order to remedy Respondent's violation of the Circuit Court's *in limine* ruling. Again, these requests were denied. (*See* pgs. 163-65 of "**Exhibit 30**" : SCT1575-SCT1576).

Furthermore, allowing Respondent's counsel to violate the Circuit Court's *in limine* rulings twice, without a limiting instruction was not harmless error as suggested by the Respondent in his brief. Respondent's counsel's violations of the Circuit Court's *in limine* rulings were detrimental to the defense and substantial right of the Petitioner. Thus, the Circuit Court erred in denying a new trial on this issue.

3. Respondent's Counsel's Reference to the Protection of "Their Money" During Closing Argument, Among Other Comments, and that Petitioner was the Captain of the Ship, Inflamed, Prejudiced, and Misled the Jury and Warrants a New Trial.

Respondent argues on pages thirty-four (34) and thirty-five (35) of his brief that the context behind Respondent's counsel's use of the phrase "captain of the ship" during opening statement was that Petitioner was the attending physician and responsible for the course of the treatment she chose for Gary Rakes. Respondent further submits that the phrase was used to describe Petitioner's role as attending physician and to describe the facts. However, the record indicates otherwise:

> [MR. SHOOK]: And then it goes on to say that this medication was ordered via a telephone order from a Dr. Toni Muncy, read back by Laura Potter. Dr. Stephens signed off on this order the following day, according to her testimony. She denies ordering the Seroquel for this patient; however, she clearly knew about it at 10 a.m. the next morning, as we'll see in the medical records. Dr. Muncy -- Dr. Stephens denies ordering it. Let's be clear on that. Dr. Muncy denies ordering that Seroquel medication. The nurse that's noted in the record as having administered the Seroquel, the nurse denies administering the Seroquel. The nurse has noted in the record, points to Laura Potter, says Laura Potter administered that Seroquel. Laura Potter denies administering the Seroquel. So nobody takes credit for ordering the Seroquel, everybody denies administering it. This is Dr. Stephens' show. She's the captain of the ship.

(*See* pgs. 161-63 of "**Exhibit 30**" : SCT1575)(emphasis added).

It is apparent that counsel for the Respondent is implying that Petitioner was ultimately responsible for the person who ordered Seroquel as she was "captain of the ship." Under this doctrine, a surgeon is likened to the captain of a ship, in that it is his duty to control everything going on in the operating room. However, this Honorable Court has rejected the doctrine, recognizing that the trend toward specialization in medicine has created situations where surgeons do not always have the right to control all personnel within the operating room. *See generally*, Thomas v. Raleigh General Hospital, 358 S.E.2d 222 (W.Va. 1987).

Nevertheless, it is clear that counsel for the Respondent was implying that Petitioner was responsible for all actions of all other physicians, nurses and hospital staff during Gary Rakes' care at Bluefield Regional Medical Center. This is simply not true. Again, while a limiting instruction was given by the Circuit Court, Petitioner submits that this instruction was too late in that the jury had already been subjected to these prejudicial statements for half of the trial.

Respondent further argues in his brief on pages thirty-five (35) and thirty-six (36) that his counsel's comments to the jury that Petitioner hired the "best lawyers in the country" to protect "their money,"[5] that the jury's decision affects the community, and that the jury can impliedly

[5] (*See* pgs. 968-969; 972 of "**Exhibit 30**" : SCT1870 and SCT1871).

not let the community down, were harmless error.[6] Respondent argues that while comments during closing argument may be prejudicial, they will be treated as harmless error when the jury has been adequately instructed. Id. at pg. 36 (internal citations omitted). However, there was no instruction given regarding these comments to the jury by counsel for the Respondent.

The law of this Court states that "great latitude is allowed to counsel in argument of cases, but counsel must keep within the evidence, not make statements calculated to inflame, prejudice or mislead the jury, nor permit or encourage witnesses to make remarks which would have a tendency to inflame, prejudice or mislead the jury. *See* Syl. Pt. 2, State v. Kennedy, 249 S.E.2d 188 (W.Va. 1978)(emphasis added).

Petitioner submits that the improper comments made by Respondent's counsel during opening and closing statements exceeded the scope of permissible arguments allowed under West Virginia law. Respondent argues that the cumulative error doctrine only applies where it is apparent that a reversal is necessary. (*See* pg. 36 of Respondent's Brief). However, the doctrine actually states when "it is apparent that justice requires a reversal" as a result of the "presence of several seemingly inconsequential errors has made any resulting judgment inherently unreliable." Syl. pt. 8, Tennant v. Marion Health Care Found., Inc, 459 S.E.2d 374 (1995). The arguments and comments made by Respondent's counsel during opening and closing statements did nothing more than inflame, prejudice and mislead the jury. Thus, the Circuit Court erred in denying Petitioner's motion for new trial on these issues.

4. The Circuit Court's Denial of the Petitioner's Do Not Resuscitate Jury Instruction Was Error.

The Respondent argues that the Petitioner's proposed Do Not Resuscitate "DNR" jury instruction was a misstatement of the law and that the Circuit Court properly pointed it out. (*See*

[6] (*See* pgs. 966, 969, 970, 976 of "Exhibit 30" : SCT1870-SCT1871 and SCT1872).

pg. 36 of Respondent's Brief).[7] Upon review of the DNR instruction, it is apparent that West Virginia Code § 16-30C-7 requires that health care providers comply with do-not-resuscitate orders. There can be no dispute as to the clear and unambiguous language of the statute.

Respondent also argues that the West Virginia Code does not provide criminal penalties against a health care provider who provides cardiopulmonary resuscitation to a person for whom a do not resuscitate order has been issued. (*See* pg. 36 of Respondent's Brief). However, West Virginia Code § 16-30C-9(b) states, in part, that "[n]o health care provider...shall be subject to criminal prosecution or civil liability for providing cardiopulmonary resuscitation to a person for whom a do not resuscitate order has been issued, provided that such physician...(1) reasonably and in good faith was unaware of the issuance of a DNR order; or (2) reasonably and in good faith believed that consent to the DNR order had been revoked or canceled." *See* W.Va. Code § 16-30C-9. Petitioner believes that this language makes it apparent that if a physician knows there is a DNR order and intentionally violates it by provided cardiopulmonary resuscitation, they can be subject to criminal or civil liability. Regardless, Petitioner's counsel agreed to remove the portion regarding the criminal prosecution from the proposed DNR instruction, but the Circuit Court denied this request. (*See* pgs. 686-688 of "**Exhibit 30**" : SCT1800).

Petitioner's counsel further argued that the DNR jury instruction goes directly to proximate cause. (*See* pgs. 688 of "**Exhibit 30**" : SCT1800). Respondent argues that it was not relevant to the facts of the case. However, this is clearly relevant. Petitioner ordered that BiPAP be administered the night of September 4, 2010. The evidence is undisputed that Petitioner's order was not followed by hospital staff at Bluefield Regional Medical Center. Once Mr. Rakes coded, the DNR order prevented anyone from resuscitating him – another break in causation.

[7] Petitioner's proposed DNR jury instruction is in the Appendix as "**Exhibit 21**" : SCT929-SCT930.

Again, the jury was never instructed on the law or principles that apply to a DNR order as found in Chapter 16 Article 30C of the West Virginia Code; impeding on Petitioner's theory of the case (i.e. no proximate causation) as developed through the evidence. Thus, the Circuit Court erred in denying a new trial on this issue.

III. CONCLUSION

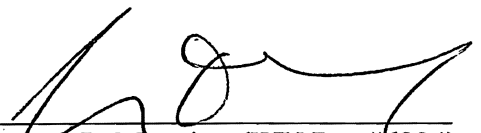
WHEREFORE, for the reasons set forth herein and in Petitioner Delilah Stephens, M.D.'s Brief in Support of Petition for Appeal, Petitioner, by and through her counsel of record, respectfully prays that this Honorable Court GRANT Petitioner's Petition for Appeal, and reverse the Circuit Court's May 14, 2013 Pre-Trial Conference Order denying Petitioner's Motion for Summary Judgment on the Respondent's Amended Complaint and remand for the entry of an order granting said motion. Should this Honorable Court find that Circuit Court was not in error in denying Petitioner's Motion for Summary Judgment on the Respondent's Amended Complaint, then Petitioner respectfully prays that this Honorable Court reverse the Circuit Court's May 14, 2013 Pre-Trial Conference Order denying Petitioner's Motion for Summary Judgment on the Respondent's claim for punitive damages and remand for the entry of an order granting said motion.

Further, the Petitioner respectfully prays that this Honorable Court conclude that the Circuit Court erred in denying Petitioner's Renewed Motion for Judgment as a Matter of Law on the Respondent's case, and reverse the June 4, 2013 Judgment Order, and remand the case for entry of judgment as a matter of law in favor of the Petitioner. Should this Honorable Court conclude that the Circuit Court did not err in denying Petitioner's Renewed Motion for Judgment as a Matter of Law on the Respondent's case, then Petitioner respectfully prays that this Honorable Court find that the jury's award of punitive damages was not supported by the record

at trial, reverse the June 4, 2013 Judgment Order, and remand the case for entry of judgment in favor of the Petitioner on Respondent's claim for punitive damages and reduce the verdict to reflect the same.

In the alternative, Petitioner respectfully prays that this Honorable Court conclude that prejudicial error crept into the record at the trial in this matter resulting in substantial injustice to the Petitioner, that the Circuit Court erred in denying Petitioner's Motion for a New Trial, and reverse and remand the case for a new trial. In addition, Petitioner further prays for such further and full relief as this Honorable Court deems appropriate under the circumstances.

Respectfully submitted,



Thomas P. Mannion (WV Bar #6994)
Andrew D. Byrd (WV Bar #11068)
Mannion & Gray Co., L.P.A.
707 Virginia Street East
Chase Tower Suite 260
Charleston, WV 25301
304-513-4242 – Phone
304-513-4243 – Fax
tmannion@manniongray.com
abyrd@manniongray.com
Counsel for Petitioner Delilah Stephens, M.D.

No. 13-1079

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DELILAH STEPHENS, M.D.,

Petitioner/Defendant Below,

v.

CHARLES RAKES, personal representative
of the Estate of GARY RAKES,

Respondent/Plaintiff Below.

CERTIFICATE OF SERVICE

The undersigned counsel for the Petitioner, Defendant Delilah Stephens, M.D. does hereby certify that the foregoing ***"Petitioner Delilah Stephens, M.D.'s Reply Brief"*** was served upon the following counsel of record by mailing a true copy thereof via United States mail:

Alex J. Shook
Andrew G. Meek
Hamstead, Williams & Shook, PLLC
315 High Street
Morgantown, WV 26505
Counsel for Respondent/Plaintiff Below

This 17th day of March, 2014.

Thomas P. Mannion (WV Bar #6994)
Andrew D. Byrd (WV Bar #11068)