

IN THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

Docket No. 101301

**THERESA COLEMAN,**

Administratrix of Estate of Sara Bryanne Coleman

Petitioner/Plaintiff-Below,

v.

**THE HONORABLE DAVID M. PANCAKE, JUDGE and  
ALL DEFENDANTS IN COLEMAN V. HACKNEY, et. al,**

Respondents/Defendants-Below.

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The Honorable David M. Pancake, Judge  
Circuit Court of Cabell County, West Virginia  
Civil Action No. 06-C-589

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**RESPONSE ON BEHALF OF THE RESPONDENTS/DEFENDANTS-BELOW,  
PATTI HACKNEY, CNM AND MITCHELL NUTT, M.D.,  
IN OPPOSITION TO THE MOTION TO STAY THE LOWER COURT PROCEEDINGS**

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Michael J. Farrell, Esquire (WV State Bar # 1168)  
Tamela J. White, Esquire (WV State Bar # 6392)  
Allison N. Carroll, Esquire (WV State Bar # 10294)  
FARRELL, FARRELL & FARRELL, PLLC  
914 Fifth Avenue  
Post Office Box 6457  
Huntington, West Virginia 25772-6457  
Phone: (304) 522-9100  
Facsimile: (304) 522-9162  
*Counsel for Patti Hackney, CNM, and Mitchell Nutt, M.D.*

SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

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**Petitioner/Plaintiff-Below,**

v.

**(From the Circuit Court of Cabell County  
Civil Action No. 06-C-589)**

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ALL DEFENDANTS IN *COLEMAN V. HACKNEY, et. al.*,  
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**Respondents/Defendants-Below.**

**RESPONSE ON BEHALF OF THE RESPONDENTS/DEFENDANTS-BELOW, PATTI  
HACKNEY, CNM AND MITCHELL NUTT, M.D.,  
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Comes now the Respondents/Defendants-Below (hereinafter "Defendants"), Patti Hackney, CNM, RN and Mitchell Nutt, M.D., by and through counsel, Michael J. Farrell, Tamela J. White, Allison N. Carroll and Farrell, Farrell & Farrell, PLLC and respectfully file their response in opposition to the Petitioner's/Plaintiff-Below's *Motion to Stay the Lower Court Proceedings*, filed on October 7, 2010 contemporaneously with the Petitioner's/Plaintiff-Below's *Petition for Writ of Prohibition*. Plaintiff/Petitioner-Below (hereinafter referred to as "Plaintiff") seeks to stay the trial of this matter, scheduled to begin on October 19, 2010, while she pursues her Petition for Writ of Prohibition regarding a discovery ruling that has not yet been formalized as an Order by the trial court. Both Plaintiff's Petition for Writ of Prohibition, which will not be

reexamined in the context of this Response, and Plaintiff's Motion to Stay the Lower Court Proceedings, should be summarily denied as procedurally premature and without legal merit.

I. **Factual Overview of the Case**

The matter below is a medical negligence action filed by plaintiff on August 15, 2006. The standard of care issues involve gynecology and midwifery. The standard of care deviation alleged by plaintiff is that the defendants should not have prescribed oral birth control to the decedent. Oral birth control was prescribed by the defendants beginning on April 8, 2004. On August 16, 2004, the decedent died of a pulmonary embolism (a blood clot in the lungs).

The case has been pending for over four (4) years. Over sixty (60) depositions have been taken. Defendants have disclosed two (2) standard of care witnesses with expertise in gynecology and midwifery. In each of the Defendants' expert disclosures, a heart/lung/vascular tissue pathologist has been disclosed with the pathologist's testimony limited to causation because a pathologist does not prescribe birth control nor does a pathologist decide the clinical circumstances under which birth control is appropriate for prescription.

Standard of care and causation issues are hotly contested. With respect to causation, the medical records created contemporaneously with the death of Sara Coleman reveal that a few days prior, she injured herself on a trampoline. The day before her death, Plaintiff medicated her daughter by giving her Neurontin, a prescription pain medication. The young woman awakened approximately two (2) hours before her death in extremis but she was not taken to the hospital. In litigation, Plaintiff denies the trampoline event ever occurred. As a consequence, the testimony is focused on the decedent's tissue samples. The tissue was harvested at the 2004 autopsy and affixed to slides in May, 2008. Plaintiff and her experts have examined and photographed the slides during the last two years.

## **II. Nature of Proceedings Below.**

The trial date in this case has been moved three (3) times. On October 1, 2009, it was set for August 9, 2010. On July 23, 2010, Defendants' pathology expert, Dr. Colin Bloor, suffered a disabling stroke which rendered him incapable of participating in the trial of this matter. The Defendants notified the Court and counsel of this event and while first informing defense counsel that Plaintiff did not object to a brief continuance, in a telephonic conference with the trial court, counsel changed their position and informed the Court that out-of-town counsel, Mr. Long did not object but that Mr. and Mrs. Staples did object. The Court then offered two (2) different trial dates to the plaintiff and instructed the plaintiff to select the best date for them and also granted the defendants leave to recruit a substitute pathologist.

The Defendants recruited and disclosed a substitute pathologist, to testify on causation matters, on September 7, 2010. This pathologist, Dr. Richard Mitchell has been made available for discovery deposition (but Plaintiff has elected to not proceed with that deposition). In her Notice of Deposition, plaintiff asked Dr. Mitchell to be prepared to discuss standard of care issues and to produce standard of care related materials at the deposition.

Specifically, the deponent was instructed to produce the following.

- a. Paragraph 9: "All materials and things in the deponent's possession that describes the role of an advanced nurse practitioner (certified nurse midwife) in the collaboration with a physician in any and all aspects of patient care."
- b. Paragraph 10: "All materials and things in the deponent's possession that describes the role of an advanced nurse practitioner (certified nurse midwife) in the collaboration with a physician with respect to prescriptions recommended by and/or provided to a nurse practitioner."
- c. Paragraph 11: "All things in the deponent's possession and/or known to the deponent upon which the deponent relies to claim that Sara B. Coleman was a proper candidate for oral birth control therapy in the amounts prescribed."

- d. Paragraph 12: "All things in the deponents possession and/or known to the deponent upon which the deponent relies to claim that there was not a deviation from the applicable standard of care in this case."
- e. Paragraph 16: "Any and all literature, including but not limited to pamphlet(s), teaching material(s) used by the deponent in clinical practice concerning any and all of the following subject matters: (a) oral birth control; (b) ovarian cysts; (c) dysmenorrhea; (d) menorrhagia; (e) smoking; (f) obesity; (g) blood clots; and (h) a family history of DVTs, blood clots, obesity and smoking."
- f. Paragraph 17: "All educational literature, internet search results, medical literature, health education materials and everything of that kind in your possession and/or known to you that supports your allegation that a family history of deep vein thrombosis and/or blood clots and/or smoking, and/or obesity is not a contraindication for oral birth control."

In response, defense counsel confirmed the limitation that the witness imposed upon his testimony and that the witness would not be offering standard of care opinions as these subjects are beyond his expertise. Unfortunately, Plaintiff refused to withdraw the pending requests as set forth in their deposition notice despite the fact that all parties need to be preparing for the 2 ½ week trial of this matter (plaintiff has disclosed eight (8) expert witnesses from out of state and one (1) from Charleston; the defendants have four (4) out-of-state expert witnesses and two (2) local expert witnesses). A Motion for Protective Order was filed, given the upcoming trial date and the lack of necessity of wasting time with a witness, the parameters of his opinions and testimony being limited by the witness himself.

Hearing on the Motion occurred on October 1, with the discovery deposition being previously scheduled for October 5, 2010. The trial court granted the Motion for Protective Order as reflected in the Hearing Transcript. *See* Appendix A to Response on Behalf of the Respondents/Defendants-Below, Patti Hackney, CNM and Mitchell Nutt, M.D., in Opposition to the Petition for Writ of Prohibition, filed this day.

The trial court restricted deposition questions about the subject matters addressed in paragraphs 9, 10, 11, 12, 16 and 17 of Plaintiff's Notice to Take the Deposition of Dr. Richard Mitchell, because they exceeded the scope of Dr. Mitchell's expert disclosure and would not lead to the discovery of admissible evidence. *See* Appendix A to the Response on Behalf of the Respondents/Defendants-Below, Patti Hackney, CNM and Mitchell Nutt, M.D., in Opposition to the Petition for Writ of Prohibition, pp. 14-15, filed this day; W.Va. R. Civ. P. 26(a); W.Va. R. Evid. 702 (which requires that an expert's opinions must be based upon an expert's "knowledge, skill, experience, training, or education" in order to be admissible).

Thereafter, plaintiff unilaterally canceled the October 5, 2010 discovery deposition of Dr. Mitchell. Because trial is imminent, on October 8, Defendants offered to present Dr. Mitchell for an October 13, 2010 deposition. Plaintiff declined the offer. There is simply no abuse of discretion where, as here, the trial court merely defined the scope of discovery to be co-extensive with the disclosed opinions and expertise. Plaintiff's Petition for Writ of Prohibition and the Motion to Stay the Lower Court Proceedings should be denied summarily so that trial may proceed as scheduled.

III. **Plaintiff's Is Not Entitled to Stay of Lower Court Proceedings Pursuant to W.Va. R. App. Proc. 14.**

Rule 14 of the West Virginia Rules of Appellate Procedure provides in subsection (c) a stay of proceedings will not be granted in an action from which an award of prohibition has been sought until this Honorable Court has determined to issue a Rule to Show Cause. Subsection (c) states:

If the Supreme Court determines to issue a rule to show cause, the Clerk thereof shall mail copies of such rule to each respondent by certified mail. The Clerk of the Supreme Court shall also mail a copy of the rule to the petitioner, or to his counsel. **Unless otherwise provided, the issuance of a rule to show cause in prohibition stays all further proceedings in the underlying action for which an award of writ of prohibition is sought.** If the Supreme Court determines not to issue a rule to show cause, such determination shall be without prejudice to the right of the petitioner to present a petition to a lower court having proper jurisdiction, unless the Supreme Court specifically notes in the order denying a rule to show cause, that the denial is with prejudice. [emphasis added].

Pursuant to W.Va. R. App. Proc. 14, it is premature to stay the lower court's proceedings until this Court has reviewed the Plaintiff's Petition for Writ of Prohibition and issued a Rule to Show Cause.

Plaintiff therefore requests what is essentially "emergency" relief by this Court from the October 19 trial date. She fails however to explain or factually support her claim that fundamental fairness would be jeopardized if the stay is denied.

The burden is upon Plaintiff to articulate why the equities of this case warrant emergency relief by this Court. *See Clinton v. Jones*, 520 U.S. 681, 708, 117 S.Ct. 1636, 1651 (1997) ("The proponent of a stay bears the burden of establishing its need."). This Court has generally reserved the kinds of "emergency stays" now sought by Plaintiff for matters involving imminent and irreparable harm, such as child custody cases. *See e.g. In re Harley C.*, 203 W.Va. 594, 509 S.E.2d 875 (1998). Plaintiff cannot and does not meet her burden of showing imminent and irreparable harm simply by stating that the trial court has hampered her ability to depose Dr. Mitchell on subjects outside the realm of his proffered expertise.<sup>1</sup>

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<sup>1</sup> At page 6 of her Motion, Plaintiff makes reference to the grant of summary judgment to Allan Chamberlain, M.D. Her statement is a legal nullity for several reasons: (1) the ruling was announced on July 1, 2010 at the Pretrial Conference; (2) the Order granting that Motion has not yet been entered; (3) the Plaintiff's Petition for Writ of Prohibition does not seek relief from that ruling; and (4) the Motion for Stay is not conditioned upon that ruling. Therefore, the grant of summary judgment to Allan Chamberlain, M.D. is not at issue and does not constitute a basis for Plaintiff's Motion to Stay the Lower Court Proceedings.

WHEREFORE, for the foregoing reasons and others which may be apparent to the Honorable Court, Defendants respectfully request that the Plaintiff's Motion to Stay the Lower Court Proceedings be hereby DENIED.

**Patti Hackney, CNM, RN**  
**Mitchell Nutt, M.D.**

**By Counsel**

*Tamela J. White*

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Michael J. Farrell, Esquire (WV State Bar #1168)  
Tamela J. White, Esquire (WV State Bar # 6392)  
Allison N. Carroll, Esquire (WV State Bar #10294)  
Farrell, Farrell & Farrell, PLLC  
P.O. Box 6457  
Huntington, WV 25772-7457  
Phone: (304) 522-9100  
Facsimile: (304) 522-9162

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing *Response on behalf of the Respondents/Defendants-Below Patti Hackney, CNM and Mitchell Nutt, M.D., in Opposition to the Motion to Stay the Lower Court Proceedings* has been served upon the following this the 12th day of October, 2010, via hand delivery and/or facsimile to Counsel of Record:

Gail Henderson-Staples, Esquire  
Dwight J. Staples, Esquire  
Henderson, Henderson & Staples, LC  
711½ 5<sup>th</sup> Avenue  
Huntington, WV 25701

J. Franklin Long, Esquire  
Law Offices of J. Franklin Long  
727 Bland Street  
Bluefield, WV 24704

*Tamela White*

Michael J. Farrell, Esquire (WV State Bar # 1168)

Tamela J. White, Esquire (WV State Bar # 6392)

Allison N. Carroll, Esquire (WV State Bar #10294)

Farrell, Farrell & Farrell, PLLC

P.O. Box 6457

Huntington, WV 25772-7457

Phone: (304) 522-9100

Facsimile: (304) 522-9162