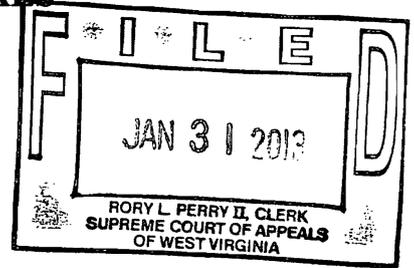


12-1069

**IN THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA  
AT CHARLESTON**



**TERESA DELLINGER, Individually and  
in Her capacity as Executrix of the Estate of  
AMBER DELLINGER, Deceased,**

**PLAINTIFF/PETITIONER**

**vs:**

**Civil Action No. 09-C-681  
Hon. Paul Zakaib, Jr.**

**CHARLESTON AREA MEDICAL CENTER, INC.  
and PEDIATRIX MEDICAL GROUP, INC.**

**DEFENDANTS/RESPONDENTS**

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**PETITIONER'S REPLY BRIEF**

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A handwritten signature in cursive script that reads "John D. Wooton".

**John D. Wooton Esq.  
State Bar No.: 4138  
The Wooton Law Firm  
Post Office Box 2600  
Beckley WV 25802-2600  
Telephone: (304) 255-2188**

**ATTORNEY FOR PETITIONER**

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**PETITIONER’S REPLY BRIEF**

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**I.  
STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Mrs. Dellinger urges that the error committed by court below in granting judgment to Pediatrix is so clear that oral argument is unnecessary. If the Court finds oral argument necessary, however, argument should focus, Mrs. Dellinger believes, upon W.Va.R.App.P. 19(a)(1), (2), (4).

**II.  
ARGUMENT**

**THE TRIAL COURT IMPROPERLY AWARDED  
DEFENDANT PEDIATRIX A SUMMARY JUDGMENT**

***A. Introduction.***

This is actually a very simple case. The sole question before the Court is whether there is a genuine issue of material fact as to whether respondent Pediatrix Medical Group, Inc. (“Pediatrix”),

was guilty of negligence between the hours of 2:30 a.m. and 4:00 a.m. on the morning of September 23, 2007 in its care of Amber Dellinger (“Amber”), the little girl who died on Pediatrix’s watch. Pediatrix’s approach to this issue is to ignore it, deflect or distort it. Instead, Pediatrix focuses upon the actions of its employee, Manuel Jose Caceres, M.D. (“Dr. Caceres”), after 3:50 a.m. or 4:00 a.m. on that same day, the approximate time Dr. Caceres actually arrived at the hospital to check on Amber’s condition and thereupon to intubate her. Nobody, least of all Mrs. Dellinger, faults Dr. Caceres’ actions once he got to the hospital. It is his actions—or lack of action—between 2:30 a.m., when Dr. Caceres was first contacted by phone at home and notified of Amber’s distress in the first of three telephone calls to him by the hospital during this period, and 4:00 a.m., by which time he had arrived at the facility, that forms the basis of Mrs. Dellinger’s action.

This is thus a case of post 4:00 a.m. apples and pre-4:00 a.m. oranges. Pediatrix focuses its defense on the time period that is not in controversy. When it comes to the real time period in dispute, *i.e.*, the ninety minutes between 2:30 a.m. and 4:00 a.m., Pediatrix essentially ignores it. When it is forced by Mrs. Dellinger’s arguments to grapple with time period, the respondent either distorts the facts or, worse, invents supportive but nonexistent facts out of whole cloth as a means of supporting its argument.<sup>1</sup>

Mrs. Dellinger is given the option under W.Va.R.App.P. 10(d), (g) of restating the Statement of the Case. The Petitioner has already set out these facts in her Petitioner’s Brief pp. 1-3; these facts

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<sup>1</sup>Daniel Patrick Moynihan once said that “Everyone is entitled to his own opinion, but not to his own facts,” quoted in H.W. Brands, “A Revisionist’s Burden, a review of Margaret MacMillan, *Dangerous Games: The Uses and Abuses of History* (New York: Modern Library, 2009) in The National Interest (July/August 2009). Clearly, Senator Moynihan had never read a Pediatrix appellate brief before making that statement.

need not be repeated in this submission. Suffice it to say that the Statement of the Case set out in the Brief on Behalf on the Respondent, Pediatrix Medical Group, P.C. (hereinafter “the Pediatrix Brief”), is of an extraordinary and unnecessary length (Pediatrix Brief pp. 1-5). This approach seems consistent with Pediatrix’s strategy of obscuring the important issue in this case under a fog of excessive detail.

Likewise, Mrs. Dellinger has already set out own her statement of the facts (Petitioner’s Brief pp. 3-10). Pediatrix presents a competing statement of the facts (Pediatrix Brief pp. 5-11). Pediatrix continues its bent in that section of its brief of burying the relevant facts in an over-inclusive body of minutiae. Pediatrix’s factual statement contains a number of nonexistent, inaccurate or misleading assertions of fact. Rather than separately restating the facts, Mrs. Dellinger will merely make reference to those alleged misstatement in the course of her argument. Above all, however, Mrs. Dellinger rejects Pediatrix’s disapproval of her efforts in this regard on the ground that “Petitioner’s Statement of Facts is replete with argument and not fact” (Pediatrix Brief p. 5).<sup>2</sup> A fair reading of Mrs. Dellinger’s factual statement will put the lie to that assertion. To the contrary, Mrs. Dellinger, unlike her opposite number, has focused her factual statement of the key issue in this case instead of the dross of irrelevant facts and side issues with which Pediatrix is mostly occupied. A fair reading of her two briefs in this matter will demonstrate the truth of Mrs. Dellinger’s assertion that the judgment and order of the court below should be reversed and remanded.

As noted above, this is truly a simple case. The validity of the summary judgment entered below rests entirely upon an examination of the 2:30 a.m. to 4:00 a.m. time period. As Mrs.

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<sup>2</sup> By contrast, the Pediatrix Brief is filled with facts. The only problem is that some of them, as noted above, are nonexistent facts that are made up out of whole cloth by Pediatrix for the purpose of its Brief.

Dellinger stressed in her Petitioner's Brief pp. 6, 16-21 (and will reiterate here), unresolved issues of material fact remain after an examination of what is known of the events of those ninety minutes. The only conclusion to be drawn is that the trial court flatly sidestepped that crucial issue in its entry of summary judgment. Mrs. Dellinger asks this Court to correct that mistake, to reverse that error and to remand the case to the circuit court for a trial before the trier of fact.

***B. The Trial Court Incorrectly Found That Petitioner Had Not Established a Prima Facie Case of Medical Negligence Against Pediatrix Medical Group, P.C.***

As noted, Pediatrix has chosen to ignore the six-hundred pound elephant in the courtroom, namely, the question of what Dr. C knew or did not know between 2:30 a.m. and 4:00 a.m. and what he did or should have done during that same time period. Instead, again as noted above, Pediatrix prefers to focus on elements of the case that are not in dispute. For example, Pediatrix notes "that Dr. Caceres was not involved with the patient's care at any time during the events in the treatment room and throughout the IV insertion process" (Pediatrix Brief p. 7). *See also* Pediatrix Brief p. 6 (same). This fact is, of course, not contested and is thus irrelevant to the questions before the Court. Pediatrix goes on to state that "[i]t is uncontested that Dr. Hawks was not negligent (Pediatrix Brief p. 7). *See also* Pediatrix Brief p, 18 (same). Again, Mrs. Dellinger has never contended to the contrary; hence, the very raising of the issue is mere filler. Likewise, Pediatrix argues "that CAMC and its nurse(s) are not Pediatrix" (Pediatrix Brief p. 7). Of course, this fact too was never contested or even in doubt; hence the argument is mere underbrush calculated to mask the true issue upon which this case should turn.

Having indulged in the presentation of a number of irrelevancies and downright factual inaccuracies, Pediatrix detours into a plain and inexcusable mischaracterizations of the record.

Pediatrix states that “[i]t is uncontested that there was and is no claim of negligence on the part of Dr. Caceres through 3:45” (Pediatrix Brief p. 7). This is utterly untrue.<sup>3</sup> The very thrust of Mrs. Dellinger’s argument that summary judgment was improper in this case focuses exclusively upon the fact that there *is* a claim of negligence against Dr. Caceres for his actions—or inaction—between 2:30 a.m. and 4:00 a.m. Accordingly, Pediatrix’s statement in this regard represents a blatant attempt to define Mrs. Dellinger’s primary argument out of existence. This slight of hand may have convinced the trial court but Mrs. Dellinger has every confidence that this conjurer’s trick will not succeed here.

To compound this error, Pediatrix then repeats the inaccuracy by stating that “[i]t is uncontested that there was and is no claim of negligence on the part of Dr. Caceres through 3:45” (Pediatrix Brief p. 7). And, if this repeated misstatement were not enough, Pediatrix follows up this misrepresentation of the record with a distortion of the testimony of Marc Weber, M.D., J.D., Mrs. Dillinger’s expert witness (“Dr. Weber”), that “Dr. Weber testified that there was no negligence on the part of Dr. Caceres through 3:45 a.m.” (Pediatrix Brief p. 9).<sup>4</sup> When one examines Dr. Weber’s testimony, one finds that he said nothing of the kind. Pediatrix’s defense of the erroneous trial court judgment and order thus rests upon a foundation of what can most charitably be called a willful misinterpretation of the record.

As noted above, the essential reason why the judgment and order below are in error is because genuine issues of material fact remain in this case with respect to Dr. Caceres’s potential negligence before 3:45. That is the crux of this case. To illustrate why summary judgment was

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<sup>3</sup> See nn. 1-2, *supra*.

<sup>4</sup> See nn. 1-2, *supra*.

improper, *see* Syl. Pts. 1-4, *Dean v. State of West Virginia*, \_\_\_ W.Va. \_\_\_, \_\_\_ S.E.2d \_\_\_, 2012 W.Va. Lexis 782 (W.Va., filed November 9, 2012)(trial court entry of summary judgment reversed), it is important to examine what Dr. Weber, Mrs. Dellinger’s expert, actually said in fact.

When one looks to the crucial 2:30 a.m. to 4:00 a.m. time period, one finds that Dr. Caceres talked on three occasions with Charleston Area Medical Center (“CAMC”) staff regarding Amber and her worsening condition. The first of these conversations took place “[r]ight around 2:30 a.m.” (Caceres Dep. p. 23, l. 3), in response to a call to Dr. Caceres from medical resident physician Anita Hawks-Henley, D.O., a CAMC employee (“Dr. Hawks”), a physician on duty at CAMC (Caceres Dep. p. 23, l. 4-6). Then, Dr. Hawks called a second time between 2:30 a.m. and 2:45 a.m. to talk about further treatment options, including a gas blood test and x-ray (Caceres Dep. p. 39, l. 7-8, 16 to p. 40, l. 7 to p. 44, l. 24). The use of an x-ray was intended to deal with Amber’s worsening breathing difficulties. The stated reason for the x-ray, in other words, was Amber’s “verified respiratory distress” (Caceres Dep. p. 44, l. 21-24). The two physicians then talked a third time at 3:35 a.m. (Caceres Dep. p. 40, l. 8-14; p. 51, l. 1-15). On the basis of these three conversations—and especially the third—Dr Caceres decided to come into the hospital to see Amber in person (Caceres Dep. p. 40, l. 9-14).

Thus, what *is* uncontested is that Dr. Caceres was in constant touch with the hospital from 2:30 a.m. on. He was telephonically in charge of Amber’s care, albeit at a distance. It is likewise uncontested that he and Dr. Hawks discussed a blood gas test, among other treatment and diagnostic options, no later than 2:45 A.M. Finally, it is uncontested that Dr. Caceres did not intubate Amber to deal with her respiratory distress until approximately 4:00 a.m., when he began to perform an intubation upon the young girl. The range of medical personnel qualified to perform intubations

include “paramedics, doctors and surgeons” ([http://wiki.answers.com/Q/How do you intubate](http://wiki.answers.com/Q/How_do_you_intubate), visited January 30, 2013). Even highly experienced registered nurses in addition to physicians and surgeons are qualified to perform intubations (<http://allnurses.com/nicu-nursing-neonatal/can-nurses-intubate-130385.html>, visited January 30, 2012). Thus, the notion that only Dr. Caceres could do an intubation—especially if it was an emergency, which surely Amber’s condition was—is insupportable. Dr. Hawks, for one, could have undertaken the procedure. At the least a genuine issue of material fact exists as to whether Amber’s treatment in this regard necessarily had to await Dr. Caceres’s arrival. Even at that, it would be a genuine issue of material fact, assuming that to be the case, as to whether Dr. Caceres either should have left for the hospital earlier than he did or have instructed somebody on site to start blood gas studies earlier and then to do the intubation procedure in his absence.

The availability of blood gas studies is crucial to this question. The trial court erroneously found that “[i]t is undisputed that once the 3:50 a.m. blood gas results were available to Pediatrix/Dr. Caceres, he met the appropriate standard of care by properly and timely intubating the patient” (Order, Conclusions of Law ¶ 13)(emphasis supplied). That formulation begs the question in two respects. First, were the blood gas results really only available at 3:50 a.m.? Second, would sound medical practice by Dr. Caceres had mandated undertaking the blood gas studies earlier, perhaps when the Pediatrix employee was first in telephone contact with the hospital around 2:35 a.m.? The resolution of either question—or both—requires resolving genuine issues of material fact that, in the absence of that resolution, made the entry of a summary judgment improper. *Dean v. State of West Virginia, supra*.

The truth is that it is not clear that the blood gas study results were not available until 3:50 a.m. As the Court will note, *all* Dr. Weber said in this regard is that the blood was collected at 3:15 a.m. (Weber Dep. p. 65. l. 23 to p. 66, l. 6), and that he would expect that the results would be available “in a few minutes” (Weber Dep. p. 113. l. 20). Moreover, even according to that time line, a genuine issue of material fact exists as to whether the blood should have been collected earlier—perhaps soon after the 2:35 a.m. telephone by Dr. Caceres to Dr. Hawks—in order to speed up the process so that Amber might have received the care she needed at an earlier point in time.

The slippery way with which Pediatrix plays fast and loose with the facts can be illustrated by first considering Dr. Weber’s testimony as to when the blood gas test actually became available:

Q. So based on the medical record, do you know or do you have an opinion as to when those blood gas studies were available?

A. I don’t think it was clear in the medical record.

(Weber Dep. p. 68. l. 17-21). From this forthright testimony, Pediatrix draws the following astonishing conclusion:

*Dr. Weber testified that there was no material fact in dispute that the study results became available after Dr. Caceres arrived and once available, Dr. Caceres acted appropriately and within the standard of care.*

(Pediatrix Brief p. 11)(emphasis supplied).<sup>5</sup> As one reading Dr. Weber’s testimony can plainly see, the expert witness said nothing of the kind.<sup>6</sup> Pediatrix’s appellate strategy seems to be that if the facts of the case do not favor them, well, no problem; it will simply make it up out of whole cloth in order

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<sup>5</sup> One notes that Pediatrix cited the Weber Deposition p. 105-109, 111-112 (Pediatrix Brief p. 11. Plainly, Pediatrix would have done better to consult page 68 of Dr. Weber’s deposition in order to find out what really happened.

<sup>6</sup> See nn. 1-2, *supra*.

to come up with facts more to its liking.<sup>7</sup> Once the facts are correctly stated, it is clear that the resolution of that issue should have been left to a jury to determine.

Pediatrix attempts to slither around this issue by asserting that “[t]here is no material dispute of fact that the blood gas result was not available to Dr. Caceres prior to the time he arrived at the hospital (Pediatrix Brief p. 15). This statement is either false, misleading or meaningless on a number of levels. First, it is meaningless because it is a tautology. Of course the blood gas result was not available to Dr. Caceres until he got to the hospital. That is, failing some sort of electronic legerdemain, he had to be there to read them. This statement would have made as much sense, *i.e.*, none, had Dr. Caceres not shown up at the hospital until weeks later.

Second, the statement is comprised of equal parts falsehood and willful misrepresentation. Dr. Weber did not testify as to when the blood gas studies were available. Instead, he stated that “I don’t think it was clear in the medical record” (Weber Dep. p. 68, l. 21). This, too, sounds very much like a genuine issue of material fact for a jury to resolve. What is more, Dr. Weber was directly critical of Pediatrix’s actions in the ICU before Dr. Caceres ever showed up on the scene:

Q. ... do you have any criticisms of the care that the patient received in the PICU?

A. I believe there should have been a more emergent intubation and airway management.

(Weber Dep. p. 65, l. 6-11). This ties in directly with the issue of what Dr. Caceres did or did not do between 2:30 a.m. and 4:00 a.m. It suggests that Amber should have been intubated earlier. This suggests in turn that the gas blood test should have been administered earlier. It also suggests that, given Dr. Caceres’s role in Amber’s treatment and his three contacts with the hospital during this

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<sup>7</sup>See nn. 1-2, *supra*.

crisis before he got to the hospital, Dr. Weber's criticism is justly laid at Dr. Caceres's feet. This fact suggests above all that genuine issues of material fact exist as to Dr. Caceres potential negligence during that ninety-minute span. So much for the assertion by Pediatrix that Dr. Caceres cannot be criticized for any actions he took prior to arriving at the hospital at 3:50 a.m. So much, too, for Pediatrix's fanciful assertion that Dr. Weber absolved Dr. Caceres of any possible negligence before 3:50 a.m. Dr. Weber did nothing of the kind; in fact Dr. Weber's testimony explains why summary judgment was simply inapposite here.

Lest there be any lingering doubts on this point, one can examine another example of Dr. Weber's expert testimony on this point:

Q. ... You don't have any criticism of Dr. Caceres while the patient was up in the pediatrics unit. Right?

A. Well, I think we've talked that I think the airway should have been managed more aggressively at or around the time the blood gas results were returned. I understand that he wasn't in the unit [but] he was in phone contact ...

(Weber Dep. p. 106, l. 5-13). There can be no doubt that Dr. Weber repeated time after time his insistence that the intubation should have been undertaken sooner and more emergently.<sup>8</sup> See Weber Dep. p. 106, l. 8-24, p. 107, l. 23-25, p. 108, l.1 to p. 109, l. 1. That is, as Dr. Weber testified, "I think ... it needed to have been done more emergently based on the blood gas results" (Weber Dep. p. 111, l. 3-5). This matter of timing and medical quarter backing was Dr. Caceres's responsibility, whether he exercised it (or not) at home during his three phone calls with Dr. Hawks, or at the hospital when he finally arrived on the scene between 3:50 a.m. and 4:00 a.m.

Against this backdrop, the following testimony by Dr. Weber falls into its proper context:

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<sup>8</sup> Indeed, Pediatrix quotes one of those instances and even places it in its brief (Pediatrix Brief pp. 14-15).

- Q. Okay. So I want to make sure. You have no criticism of Dr. Caceres before 3:45 a.m.; correct?
- A. I don't have any criticism *prior to the time he was aware or should have been aware of the blood gas result*. That's correct.

(Weber Dep. p. 108. l. 8-14)(emphasis supplied). This testimony simply cannot be read, as both Pediatrix and the trial court apparently did, as absolving Dr. Caceres's efforts prior to 3:45 a.m. Instead, it all depends upon when the physician became aware or, more to the point, when he *should* have become aware of the blood gas tests. Put another way, Dr. Weber's absolution of Dr. Caceres's actions prior to 3:50 or 4:00 a.m. is linked to the issue of whether Dr. Caceres's should have jump-started the process by ordering blood gas tests as early as 2:35 a.m. or at least at some time before he finally arrived at the CAMC. In other words, Dr. Weber's testimony is highly conditioned. His lack of criticism of Pediatrix is entirely dependent on the events that took place or should have taken place between 2:30 a.m. and 4:00 a.m. Pediatrix's attempt to pass off that testimony as a ringing endorsement of Dr. Caceres's actions willfully misreads the plain meaning and import of that testimony. Since the record does not show when the blood gas test became available, that becomes the unanswerable question that Dr. Weber is implicitly posing. It is the existence of that unanswerable question that should have turned this case into one for the trier of fact to adjudicate.

The irony of Dr. Weber's testimony quoted just above is that Pediatrix quotes that very language at the top of page 10 of its Pediatrix Brief. Does Pediatrix actually believe that this testimony really does absolve Dr. Caceres? Given Dr. Weber's plain words, that proposition would be hard to believe. It is more likely that Pediatrix is attempting to confuse the Court by focusing on the apples of the events after 3:45 a.m. (or 4:00 a.m.) to the exclusion of the oranges of the 2:30 a.m. and 4:00 a.m. time period. Because Dr. Weber consistently criticized Pediatrix's failure to take a

more aggressive stance toward airway management prior to 4:00 a.m., it is clear that the question of what Dr. Caceres should have done between 2:30 a.m. and 4:00 a.m. is equally a genuine issue of material fact that should have precluded summary judgment.

Dr. Weber is a careful, precise witness. Some of the implications of his testimony are inferential, to be sure. Nonetheless, they are clearly made and supportive of Mrs. Dellinger's case. It is clearly established in this State that proximate cause can be established through inferences. *Sexton v. Grieco*, 216 W.Va. 714, 613 S.E.2d 81, 87 (2005). As a result, the *Sexton* test has been abundantly satisfied in this case and thus this appeal should succeed.

Having failed to rebut Mrs. Dellinger's arguments on the merits, Pediatrix seeks instead to have them ruled out of court. For example, the respondent argues that Mrs. Dellinger "now advances a new argument not presented in the trial court hypothecating that Dr. Weber was unable to given [sic] an opinion regarding when the blood gas result became available because a time was not in the medical record" (Pediatrix Brief p. 16). The result, Pediatrix continues, is that Mrs. Dellinger's "failure to raise this objection/argument before the trial court constitutes waiver of the argument and it should not be considered by this Court" (Pediatrix Brief pp. 1617).

This argument wholly lacks merit. The argument to which Pediatrix points is not an objection at all. It is an observation made upon testimony in a deposition which has been of record throughout much of the trial court litigation. Moreover, it is part of the argument that Mrs. Dellinger consistently made to the trial court. Mrs. Dellinger has uniformly made the same argument here as she made in the trial court. That argument focused on the blood gas results evidence both at trial and in this forum. By no means does her argument violate either Syl. Pt. 1, *State v. Simons*, 201 W.Va. 235, 496

S.E.2d 185 (1997), nor Syl. Pt. 1, *State Road Commission v. Ferguson*, 148 W.Va. 742, 137 S.E.2d 206 (1964).

Pediatrix next makes the curious yet mysterious statement that Mrs. Dellinger “alternatively blames either her counsel for not asking right question or Dr. Caceres for not volunteering information about the publication of the blood gas result to him” (Pediatrix Brief p. 17). Pediatrix then asserts that “this argument was not presented to the court-below [sic] and should be disregarded” (Pediatrix Brief p. 17). Mrs. Dellinger is frankly unable to figure out what Pediatrix is talking about. Suffice it to say that Mrs. Dellinger relied on Dr. Weber’s testimony both here and in the court below; she has consistently argued that, as outlined above, Dr. Weber’s testimony shows that the 2:30 a.m. to 4:00 a.m. time period gives rise to so many genuine issues of material fact that one need not worry about right questions not being asked and/or Dr. Caceres’s alleged failure to be forthcoming in his testimony. On the record, the testimony of Dr. Weber, Mrs. Dellinger’s expert witness, authoritatively establishes by itself that summary judgment was improper. *See* Syl. Pt. 4, *Estate of Fout-Iser ex rel. Fout-Iser v. Hahn*, 220 W.Va. 673, 649 S.E.2d 246 (2007).

Pediatrix next faults Mrs. Dellinger for her trial strategy (Pediatrix Brief pp. 18-19). This attempt fails as well, One notes in that regard that Pediatrix criticizes Mrs. Dellinger for “attempt[ing] to challenge the veracity of Dr. Caceres’[s] testimony regarding when the blood gas results were available” (Pediatrix Brief p. 18). This argument makes no sense. The fact is that Dr. Caceres never offered such testimony.<sup>9</sup> Dr. Caceres was only able to testify that the blood gas results were available to him when he finally showed up at the hospital at 3:50 or so. By no means did Dr. Caceres ever testify, or was he able to testify, as to “when the blood gas results were available”

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<sup>9</sup> *See* nn. 1-2, *supra*.

(Pediatrix Brief p. 1). And how could he? Dr. Caceres was not at the hospital during the time when the results were being prepared. It is not a question of Dr. Caceres's veracity but rather the logical impossibility that limited what his testimony could possibly impart.

The poverty of Pediatrix's argument is underscored by its statement that "Pediatrix's duty arose when Dr. Caceres was first informed of the blood gas result upon his arrival at the hospital" (Pediatrix Brief p. 18). This statement is sheer fantasy, needless to say. The whole point of Mrs. Dellinger's argument on appeal is that this duty arose much earlier, namely, some time between 2:30 a.m. and 4:00 a.m. The issue before the Court is the extent to which—if any—Dr. Caceres non-negligently discharged that duty during that crucial ninety minutes before he actually arrived at the hospital. The fact is that resolution of the issue turns on unresolved but genuine issues of material fact. Pediatrix cannot succeed in this appeal by sweeping the events (or non-events) of this 2:30 a.m. to 4:00 a.m. time period under the rug. These events are pertinent, relevant, determinative—and unresolved. That, in a word, is why the trial court's entry of summary judgment was erroneous.

Special note must be taken of three particular sentences in the Pediatrix Brief:

Dr. Weber never testified that Dr. Caceres violated or beached the standard of care. Dr. Weber testified that the duty of care arose when the blood gas results were available to Dr. Caceres. Dr. Weber admitted that the facts of the case were that the results were not available until Dr. Caceres was already prepared to intubate the patient.

(Pediatrix Brief pp. 18-19). These statements of would-be fact are truly remarkable in their cumulative effect. The first sentence begs the question, because the gravamen of Dr. Weber's testimony was that the facts necessary to establish that point were unknown. The second and third

sentences, by contrast, are simply untrue.<sup>10</sup> Dr. Weber never testified, as the second sentence suggests, that the duty of care only arose when Dr. Caceres got the blood gas results; instead, Dr. Weber considered it an open question as to which the decisive facts were unavailable, which is why summary judgment was so inappropriate. Nor, in particular, did Dr. Weber ever testify that the blood gas results only became available when Dr. Caceres had shown up at the hospital and was prepared to intubate. Simply put, it never happened.

Pediatrix then attacks the inclusiveness of Mrs. Dellinger's Assignments of Error:

[Mrs. Dellinger] also presents a new assignment of error regarding the trial court's proper decision that [Mrs. Dellinger] failed to create a genuine issue of material fact on the issue of proximate causation. [Mrs. Dellinger] failed to include that assertion as an assignment of error in her Notice of Appeal. [Mrs. Dellinger's] failure to raise this issue in her Notice of Appeal constitutes waiver of the argument and it should not be considered by this Court.

(Pediatrix Brief pp. 19-20, citing *State v. Simons, supra*; and *State Road Commission v. Ferguson, supra*. This argument is particularly unavailing. Mrs. Dellinger's first Assignment of Error states that "[t]he Court erred in granting Summary Judgment in favor of defendant, Pediatrix." Surely, that covers the waterfront in terms of the trial court's findings on all issues, including proximate causation. What is more, within that particular assignment of error, Mrs. Dellinger cites *Estate of Fout-Iser ex rel. Fout-Iser v. Hahn, supra*, which as both the Court and Pediatrix know, deals with the proximate causation issue that the respondent accuses Mrs. Dellinger of omitting from her Assignment of Error (Assignment of Error p. 3). Like the rest of Pediatrix's argument points, this argument, too, is unavailing.

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<sup>10</sup> See nn. 1-2, *supra*.

Pediatrix next attacks Mrs. Dellinger's proof of proximate cause (Pediatrix Brief pp. 20-21). The respondent's point seems to be that Mrs. Dellinger was allegedly unable to tell if Amber would have lived or died; hence, there was no evidence that Dr. Caceres's actions could have led to her death. This argument turns on the assertion that:

The La Crosse Virus is a dangerous virus. When it attacks the brain, it causes death because there is no treatment for it.

(Pediatrix Brief p. 11). As with so much else in the Pediatrix Brief, these statements are untrue.<sup>11</sup> Certainly, La Crosse Encephalitis is a dangerous disease. But when one examines the two deposition citations that supposedly support Pediatrix's statement on the virus, one finds they simply do not say what Pediatrix represents them as stating. Certainly, Dr. Weber said no such thing (Weber Dep. p. 20, l. 6-16). Nor, even, did Dr. Caceres (Caceres Dep. p. 87, l. 14 to p. 88, l. 5). In fact, Dr. Caceres admitted that mortality from the virus was only 1% (Caceres Dep. p. 88, l. 9-12). This is consistent with a statement from the Virginia Department of Health, which found that:

Death from LAC encephalitis occurs in less than 1% of clinical cases, but children with severe disease may suffer from learning disabilities and other neurological deficits.

(<http://www.vdh.virginia.gov/Epidemiology/DEE/Vectorborne/factsheets/lacrosse.htm>, visited January 30, 2013). The federal Centers for Disease Control and Prevention ("the CDC") agrees with that 1% figure (<http://www.cdc.gov/lac/tech/symptoms.html>, visited January 30, 2013). This makes it much more likely that it was Dr. Caceres instead of the virus which is the ultimate culprit here. In any case, Mrs. Dellinger has sufficiently established causation in the sense required under *Estate of*

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<sup>11</sup> See nn. 1-2, *supra*.

*Fout-Iser ex rel. Fout-Iser v. Hahn, supra* for purposes of establishing her prima facie case of Pediatrix's negligence and proximate causation.

As Pediatrix acknowledges (Pediatrix Dep. pp. 20-21), Dr. Weber was unable to opine conclusively what caused Amber's death. Pediatrix quotes Dr. Weber's testimony as to why the cause of death might not have been a "hypoxic ischemic event" (Weber Dep. p. 46, l. 25 to p. 47, l. 19). In typical fashion, however, Pediatrix, engages in the fine art of selective quotation surgery by cutting off its excerpt from that deposition just before the point at which Dr. Weber testified that because Amber was doing well in terms of the La Crosse virus and in light of other pertinent evidence, the sudden emergency that arose *did* suggest at least the possibility of such a hypoxic ischemic event (Weber Dep. p. 47, l. 19 to p. 50, l. 4). Given the totality of that testimony—both the parts Pediatrix left in and the parts it left out—Mrs. Dellinger has met her burden with respect to proximate causation. *Estate of Fout-Iser ex rel. Fout-Iser v. Hahn, supra*, 649 S.E.2d at 251. This is especially the case given that this Court has stated that questions of proximate causation are best left to the jury in any case. *Stewart v. George*, 216 W.Va. 288, 607 S.E.2d 394, 399 (2004).

### III.

#### CONCLUSION

For the reasons set out above, petitioner/plaintiff Teresa Dellinger, individually and in her capacity as Executrix of the Estate of Amber Dellinger, Deceased, respectfully renews her request that the Court disapprove and vacate the orders entered below and remand the matter to the trial court for a trial before the trier of fact.

Dated: January 31, 2013

Respectfully submitted,  
TERESA DELLINGER, individually and in her  
capacity as Executrix of the Estate of AMBER  
DELLINGER, Deceased

By Counsel

THE WOOTON LAW FIRM

A handwritten signature in cursive script, reading "John D. Wooton". The signature is written in black ink and is positioned above a horizontal line.

JOHN D. WOOTON  
WV Bar I.D. No. 4138  
Post Office Box 2600  
Beckley, West Virginia 25802-2600

**IN THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA  
AT CHARLESTON**

**TERESA DELLINGER, Individually and  
in Her capacity as Executrix of the Estate of  
AMBER DELLINGER, Deceased,**

**PLAINTIFF/PETITIONER**

**vs:**

**Civil Action No. 09-C-681  
Hon. Paul Zakaib, Jr.**

**CHARLESTON AREA MEDICAL CENTER, INC.  
and PEDIATRTIX MEDICAL GROUP, INC.**

**DEFENDANTS/RESPONDENTS**

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**CERTIFICATE OF SERVICE**

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I, John D. Wooton, counsel for petitioner/plaintiff Teresa Dellinger, individually and in her capacity as Executrix of the Estate of Amber Dellinger, Deceased, do hereby certify that a true and exact copy of the foregoing Petitioner's Reply Brief was this day mailed to the following address by first class mail, postage prepaid:

Tamela J. White  
Farrell, White & Legg, PLLC  
Post Office Box 6457  
Huntington, WV 25772-6457

Dated: January 31, 2013

  
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John D. Wooton  
WV State Bar I.D. No. 4138