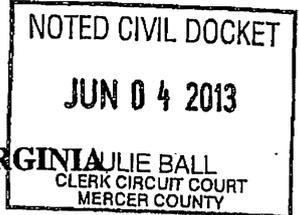


13-1079



IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

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

Plaintiff,

v.

Civil Action No.: 11-C-76

DELILAH STEPHENS,

Defendant.

JUDGMENT ORDER

On the 14th day of May, 2013, came the Plaintiff, Charles Rakes, with his attorneys, Alex Shook and Andrew Meek, and came also the Defendant, Delilah Stephens with her attorneys, Thomas Mannion and Andrew Byrd, for the trial of this matter.

Whereupon the Court empaneled a jury consisting of six (6) jurors (Sandra Bish, Michael Boyd, Lois Hicks, William Vance, Carolyn Darago, and Rhonda Pettrey) and an alternate (Joyce Kessinger). On May 14, 2013, counsel for the parties gave their opening statements and the Plaintiff proceeded with his case-in-chief. The Plaintiff presented evidence on May 14 and 15, 2013, and rested his case on May 15, 2013. The Defendant made an oral motion for a directed verdict on the entire case and on the issue of punitive damages. Both Motions were denied. Juror Lois Hicks was excused from the jury at the end of the session on May 15, 2013, and replaced with Joyce Kessinger. On May 15 and 16, 2013, the Defendant presented evidence and rested her case on the afternoon of May 16, 2013. The Defendant again made an oral motion for a directed verdict on the entire case and on the issue of punitive damages. Both Motions were denied.

Thereafter, the Court read the jury charge and instructions of law to the jury in open court. Whereupon, counsel for the Plaintiff and for the Defendant presented their closing arguments. Once closing arguments were completed, the six (6) jurors retired to the jury room for deliberations.

After approximately forty-five minutes, the jury returned with a question. Later on May 16, 2013, after approximately 1-1/2 hours of deliberation, the jury notified the Bailiff that a unanimous verdict had been reached. The jurors were brought into the courtroom and the foreperson delivered an executed verdict form to the Court. The Court inspected the verdict form and announced the following unanimous verdict in favor of the Plaintiff, Charles Rakes:

SPECIAL INTERROGATORIES AND VERDICT FORM

Question No. 1

Do you find that defendant, Dr. Delilah Stephens, failed to exercise the degree of care, skill and learning of a reasonably prudent doctor in the care and treatment of Gary Rakes, and that such failure was a proximate cause of Gary Rakes death?

Yes X

No

Please read the following instructions before continuing your deliberations:

(a) If your answer was “No” to the question above (1), then sign the verdict form and indicate to the bailiff that you have reached a verdict.

(b) If your answer was “Yes” to the question above (1), then you must proceed to Question No. 2.

The Court **FINDS** that the Defendant is entitled to have the non-economic compensatory damages portion of the verdict reduced by the amount the Plaintiff received in pre-verdict settlements in this action of \$190,000.00.

WHEREFORE, it is **ORDERED** that the Plaintiff Charles Rakes shall have **JUDGMENT** against the Defendant Delilah Stephens in the amount of Eight Hundred Ten Thousand Dollars (**\$810,000.00**), with interest thereon at the rate of 7% per annum (i.e. **\$155.34** per day) from May 16, 2013, until fully paid and satisfied, plus Court costs. These costs shall include the entire jury fee and Court costs taxed by the Clerk, all of which the Defendant shall pay directly to the Circuit Clerk of Mercer County.

Once the Defendant has paid all Court costs, it is **ORDERED** that, as to any costs previously paid by the Plaintiff, he shall be reimbursed by the Clerk issuing payment in the appropriate amount to her attorneys: Hamstead, Williams & Shook PLLC.

Post-trial Motions must be filed within 10 days of the date of the entry of this Order.

The Clerk of the Circuit Court of Mercer County is further directed to send attested copies of this Order to all counsel as follows: Counsel for the Plaintiff, Alex Shook, Hamstead, Williams & Shook PLLC, 315 High Street, Morgantown, WV 26505; Counsel for the Defendant, Thomas Mannion, Mannion & Gray Company, 1375 East 9th Street, Suite 1600, Cleveland, Ohio 44114.

ENTER: June 4, 2013



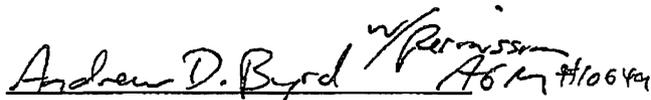
HONORABLE OMAR ABOULHOSN
9TH Judicial Circuit of Mercer County

Prepared By:



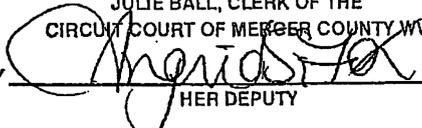
Alex J. Shook (WVBID # 7506)
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Chase Tower Suite 260
707 Virginia Street East
Charleston, West Virginia 25301
Counsel for Defendant Delilah Stephens

THE FOREGOING IS AN ATTESTED COPY OF A DOCUMENT
ENTERED IN THIS OFFICE ON THE 4th DAY
OF June 2013
DATED THIS 4th DAY OF June
2013

JULIE BALL, CLERK OF THE
CIRCUIT COURT OF MERGER COUNTY WV
BY 
HER DEPUTY

COPY

NOTED CIVIL DOCKET
SEP 09 2013
JULIE BALL
CLERK CIRCUIT COURT
MERCER COUNTY

IN THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA

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

v.

CIVIL ACTION NO. 11-C-76-OA

DELILAH STEPHENS, M.D.,
Defendant.

ORDER DENYING DEFENDANT'S
RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW,
OR IN THE ALTERNATIVE MOTION FOR A NEW TRIAL

On July 12, 2013 came the parties for a post-trial motions hearing, specifically concerning the Defendant's *Renewed Motion for Judgment as a Matter of Law, or in the alternative, Motion for New Trial*.¹

The Defendant's Argument:

The Defendant argues that pursuant to Rules 50 and 59 of the West Virginia Rules of Civil Procedure, due to the lack of evidence to support the jury's verdict against her, and in addition to the numerous prejudicial errors that occurred during the trial, the Court should direct entry of judgment in her favor, or in the alternative, order a new trial in this civil proceeding. In support of her motion(s), the Defendant alleged the following grounds:

The Plaintiff complained that the decedent was allergic to Seroquel and that there were medical records to support that allegation. Although Plaintiff's experts Dr. Kenneth Scissors and Dr. Jeffrey Schwartz testified during trial that the decedent died due to ventilator failure as the result of excessive administration of Haldol and Seroquel (in addition to the decedent's underlying chronic lung disease), Dr. Scissors testified that he saw *no evidence* that the Defendant ordered those medications. Further, Dr.

¹ At the conclusion of the hearing, counsel for the parties agreed to allow themselves time before the Court made a ruling upon the Defendant's Motions in order to negotiate a settlement. However, the Court was notified via facsimile on August 28, 2013 that the parties were unable to reach a settlement, therefore, the Motions herein became ripe for ruling.

Scissors also testified that Haldol did not have a sedative effect on the decedent. Dr. Scissors did not dispute that the Defendant ordered Bilevel Positive Airways Pressure (BiPAP) treatment for the decedent, however, he testified that it was the *hospital staff* that failed to administer the BiPAP timely. Moreover, Dr. Scissors testified that the hospital staff was beyond the Defendant's control, and that the Defendant, as any physician in a hospital setting, rely upon nurses and other staff to carry out a doctor's orders.

The other Plaintiff expert, Dr. Schwartz, also testified that the hospital staff was beyond the Defendant's control. Dr. Schwartz testified that had the decedent received the BiPAP treatment when the Defendant had ordered it, he would have survived, unfortunately, the hospital staff failed to carry out the Defendant's order for BiPAP. Further, Dr. Schwartz opined that Seroquel and Haldol do not suppress the respiratory drive, however, the Defendant did not order either of those medications for the decedent. When the decedent's heart rate became tachycardic, Dr. Schwartz testified that the hospital staff should have called the Defendant to alert her to the decedent's condition.

The Defendant emphasized that both of the Plaintiff's experts opined that it was *not* the Defendant's fault that her orders were not followed.

The Defendant's experts, including herself, buttressed the Plaintiff expert testimonies by their own testimonies: Dr. Razzaq testified that the medical records indicated a Seroquel allergy, but he disputed that, which even the Plaintiff's experts agreed that the decedent may not have had an allergy to Seroquel or to Haldol. Defense expert testimony showed that the decedent was often non-compliant with his BiPAP at home, and that he was given Seroquel and Haldol to calm him down while hospitalized, as he would become agitated and combative during his treatment. Also, the charge nurse, Laura Potter, testified that it was a nurse's duty to ensure that a doctor's orders are carried out properly.

The Defendant cites *Spencer v. McClure*, 618 S.E.2d 451 (W. Va. 2005) as a case analogous to the case *sub judice*: “The mere possibility of causation is not sufficient to allow a reasonable jury to find causation.” The *Spencer* Court found that the expert testimony was speculative (that one of the tortfeasors contributed or aggravated the plaintiff’s injuries). There was no evidence to establish that one of the non-settling tortfeasors had caused or contributed to the plaintiff’s injuries. Just as in this case, there was no evidence that the Defendant administered Seroquel or Haldol; that Haldol had no sedative effect on the decedent or on his respiratory drive; and had the BiPAP been carried out pursuant to the Defendant’s order, the decedent would have survived. The cumulative effect of these facts breaks the chain of causation linking the Defendant to the decedent’s ultimate demise. These were intervening or superceding causes of the decedent’s death, and were the proximate cause of the decedent’s death; there was no evidence indicating anything done or not done by the Defendant that contributed to the decedent’s death.

With regard to the punitive damages award, the Defendant argues that there was no evidence that she acted maliciously, wantonly, or with criminal indifference to her civil obligations that justify the award per *Peters v. Rivers Edge Mining, Inc.*, 680 S.E.2d 791 (W. Va. 2009). The medical records indicated that the decedent was given a battery of tests during his hospital stay, which lends itself to show that the Defendant did not neglect the decedent while he was hospitalized under her care. The Defendant had examined the decedent thoroughly on September 3, 2010 and twice again on September 4, 2010. During those examinations, the decedent appeared in no acute distress. Further, the Defendant herself testified that she was never contacted by the hospital staff concerning the decedent’s condition or that her orders had not been carried out. The Plaintiff’s own experts testified to those facts as well. In sum, there was no conduct or omission committed by the Defendant to justify any punitive award. For

these reasons, even the punitive damages award is excessive because of the lack of evidence of any reprehensibility on part of the Defendant per *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

Alternatively, the Defendant argues that in addition to the lack of evidence supporting the jury verdict, she suffered prejudice at trial due to the Plaintiff's striking of the only African-American juror on the panel (Tracey Boyer). The Defendant contends that the Plaintiff's counsel's reasoning behind the strike, "I just didn't like her answers", was a bogus explanation. The Defense instituted a *Batson*² challenge and the Plaintiff's revamped answer to the Court's inquiry as to why he struck Ms. Boyer was due to Ms. Boyer's mention of a cigarette commercial indicating that smoking caused emphysema. The Defendant argues that this was just another made up excuse for the strike: The decedent had been a long-time smoker and suffered from the conditions Ms. Boyer believed were caused by smoking. However, the parties agreed *before* trial that they would not mention comparative negligence or that the decedent had somehow contributed to his own demise. Had Ms. Boyer remained a juror, she would have taken the place of the alternate who filled in for Ms. Lois Hicks, who the Court excused from the jury for sleeping during the proceedings.

The Defendant cites other instances of prejudice during the trial that supports her argument for a new trial altogether: For one, during opening statements, the Plaintiff's counsel implied that the Defendant administered Seroquel in violation of the Court's rulings on previous motions *in limine*.³ The Plaintiff's opening statements referring to the Defendant's signing off on orders for Seroquel, stating that other hospital staff members denied ordering Seroquel, and then referring to the Defendant as the "captain of the ship" as the physician in charge of the decedent's care, collectively implied that the Defendant ordered Seroquel or was at minimum responsible for it. This was in contravention to the Court's previous ruling that the parties would not mention this because the Defendant *had not in fact*

² *Batson v. Kentucky*, 476 U.S. 79 (1986) (when an objecting party raises its case of discrimination, the striking party must offer a neutral explanation for making the strike).

³ This Court's Order entered on May 14, 2013.

ordered Seroquel. The Court warned the Plaintiff not to push that issue, and although the Defendant moved for mistrial at that point, she was denied. The Defendant states that violations of *in limine* rulings are subject to a harmless error analysis⁴, and the Plaintiff's references during opening statements were clearly harmful error to the Defendant because the Plaintiff was making a case for the Defendant's ordering Seroquel as being a cause of the decedent's death due to excessive sedation. The Plaintiff's counsel referencing the Defendant as the "captain of the ship"⁵ as if she controlled all aspects of the decedent's hospital stay and the omissions to his treatment also prejudiced her. Even though the Court provided the jury the Defendant's limiting instruction with respect to that prejudicial term, the damage had already been done. In sum, this error affected the Defendant's substantial rights pursuant to Rule 61 of the West Virginia Rules of Civil Procedure, thus necessitating a new trial.

Additionally, the Defendant claims that the Plaintiff's counsel's use of the phrase "protection of their money" during closing arguments, which basically lumped the Defendant and the insurance company and/or the hospital, coupled with numerous references to "they", referring to the Defendant and other unnamed parties, only served to mislead and to inflame the jury. This further fanned the flames of prejudice against the Defendant, resulting in error.

The Defendant also contends that the Court committed error by not allowing the Defense DNR (Do Not Resuscitate) instruction, despite the Court's previous ruling that the DNR orders would be admissible at trial. By disallowing the instruction, the Court impaired the Defendant's ability to present her theory of the case, disputing the proximate cause of the decedent's death: the Defendant's expert believed the decedent had a cardiac arrest on September 5, 2010, and as a result of that medical condition, per the DNR order, the decedent would not be resuscitated.

The Plaintiff's Response:

⁴ *Hosky v. Michelin Tire Corp.*, 307 S.E.2d 603 (W. Va. 1983)

⁵ The Defendant notes that the "captain of the ship" doctrine had been abolished in West Virginia per *Thomas v. Raleigh General Hospital*, 358 S.E.2d 22 (W. Va. 1987).

The Plaintiff presented sufficient evidence that established a *prima facie* case of the Defendant's negligence that proximately caused the decedent's death: (1) She failed to order follow-up ABG (arterial blood gas) tests after the decedent came under her care; (2) She failed to provide any bronchodilators or breathing treatments; (3) She failed to order BiPAP on September 3, 2010 and during the day of September 4, 2010; (4) She failed to provide the *appropriate* BiPAP settings for when the order was actually carried out on night of September 4, 2010; She permitted the decedent to remain heavily sedated in an obtunded state even after she examined him on September 4, 2010; and (5) She failed to consult a pulmonologist as had been done in the decedent's past admissions to the hospital. Per Syl. Pt. 5, *Wager v. Sine*, 201 S.E.2d 260 (W. Va. 1973), "all reasonable doubts and inferences should be resolved in favor of the party against whom the verdict is asked to be directed." Per the West Virginia Medical Professional Liability Act, the Plaintiff argues that all necessary elements were proved that the decedent's death resulted from the Defendant's breach of the standard of care, and such breach was a proximate cause of his death.

The Plaintiff argues that expert Dr. Schwartz specifically testified that the Defendant did not order the appropriate BiPAP therapy settings considering the decedent's condition on the night of September 4, 2010. Further, Dr. Schwartz opined that the decedent most likely would not have survived ("too little, too late") given his heavily sedated state. Both of the Plaintiff's experts opined that the Defendant's care of the decedent was so poor, that regardless of the BiPAP settings she ordered, he would have died. In sum, the Defendant did nothing to help the decedent's condition and allowed his condition to further deteriorate. Moreover, the Defendant noted in the death certificate and in the death summary of the hospital's medical record that BiPAP was not administered because the appropriate settings had not been known, *not* because the order for BiPAP was not carried out by hospital staff. The

Defendant had a different reason for the decedent's demise in her trial testimony than she provided in the death certificate and the death summary.

The Plaintiff reiterates that it need only show that the Defendant's breach of her duty of care was "a" proximate cause, not the "sole" cause per *Mays v. Chang*, 579 S.E.2d 561 (W. Va. 2003). Furthermore, the Plaintiff's experts rebutted the intervening/superseding cause of the decedent's death espoused by the Defendant (that the hospital staff's failure to administer BiPAP treatment pursuant to her order for same) because they both opined that the decedent would have died regardless at that point. The Defendant ordered BiPAP too late to make a difference.

With regard to the Defendant's *Motion for Judgment as a Matter of Law* concerning the punitive damages award, the Plaintiff contends that it presented evidence that the Defendant acted with recklessness justifying punitive damages: First, both of the Plaintiff's experts testified that they thought the Defendant's care of the decedent was dangerous – Dr. Scissors specifically testified that the Defendant's care of the decedent was "reckless." The Defendant knew the decedent was in the hospital due to his elevated CO2 levels; she knew elevated CO2 levels could be deadly; and she did *nothing* about it (the decedent was given no ventilator support; no treatment for his respiratory issues; no follow-up ABG tests; no pulmonologist consult; and no counter-effect to the heavy sedatives he was given as he lay flat on his back with both his wrists bound while unconscious).

Second, pursuant to *Mayer v. Frobe*, 40 W. Va. 246 (1895), even *reckless* conduct permits a jury to assess punitive damages. The jury was properly instructed on this point as well. The Plaintiff never suggested that the Defendant had been wanton, willful or malicious in her treatment of the decedent, but did argue that she had been reckless. The Defendant even admitted that the decedent was supposed to be on BiPAP while he was asleep to help with ventilation. The medical records showed that the decedent was dependent upon BiPAP during sleep, which is why he had the machine at his home. The

Defendant observed the decedent at 10:00 a.m. on September 4, 2010 in an obtunded state, and although she was aware he needed BiPAP while he was asleep, she failed to order it until twelve hours later. The Defendant stated in the death summary that BiPAP was not administered because the decedent's settings were unknown, but then changed her story at trial and provided another reason – she blamed the nursing staff. The Defendant never consulted with a pulmonologist about the decedent's condition. Although she examined the decedent again during the afternoon of September 4, 2010, she failed to abort Dr. Razzaq's order for additional Seroquel. In sum, there was enough evidence to justify the punitive damages award due to her recklessness.

The Plaintiff's expert, Dr. Scissors, underscored that the standard of care had previously been established by the hospital with regard to the decedent's care. The Defendant was familiar with the decedent's condition because he had presented to that hospital several times in similar states over a period of several months. Notably, even two months prior to the decedent's final admission, the Defendant herself established the appropriate standard of care for the decedent, but for inexplicable reasons that "mystify" Dr. Scissors, she failed to follow her own standard of care during that final time.

The Plaintiff points out that the Court reviews punitive damages under *Garnes v. Fleming Landfill, Inc.* 413 S.E.2d 897 (W. Va. 1991) and *TXO Prod. Corp. v. Alliance Res. Corp.*, 419 S.E.2d (W. Va. 1992): Punitive damages should bear a reasonable relationship to the harm likely to occur from a defendant's conduct as well as to the harm that actually occurred. In the case *sub judice*, the \$500,000.00 for the loss of life is reasonable.

"The jury should consider how long a defendant continued in his actions, whether he was aware of his actions causing or likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him."

Per Syl. Pt. 3, *Garnes*. The Plaintiff argues that the Defendant attempted to conceal her actions by changing her opinion as to cause of death once she got sued: In the death summary, the Defendant wrote that BiPAP not administered due to unknown settings, but then she testified at trial that her BiPAP order was not carried out by the nursing staff. In the death certificate and the death summary, the Defendant listed that a cause of death was due to an adverse reaction to Seroquel, but then she testified at trial that Seroquel did not cause the death.

Other factors support the jury's finding of punitive damages: The Defendant refused to receive the Plaintiff's multiple attempts at service of the Notice of Claim, and she subsequently filed a Motion to Dismiss this action from the onset claiming that she did not have the opportunity to mediate. Also, the Defendant's representatives walked out of court-ordered mediation in less than an hour and offered the Plaintiff zero dollars to settle the case.⁶

The Plaintiff further argues that per the *Garnes* case, a jury can consider if a defendant profited from the conduct, and to recommend punitive damages in order to remove the profit and to discourage the same conduct, all the while maintaining a reasonable relationship to the compensatory damages. Further, the financial position of a defendant is relevant: In the case *sub judice*, the Defendant is a doctor, and likely one of the nation's top earners; she was compensated for treating the decedent. The punitive damages were the same amount as the compensatory damages, therefore, a 1:1 ratio is reasonable. Further, the Defendant was covered by her insurance carrier for this cause of action, and although the matter could have been settled, the Defendant's personal financial position is not really an issue.

The Plaintiff also encourages the Court to consider additional factors to justify the punitive damages award, such as the costs of this litigation – the Plaintiff has spent \$40,000.00 in this civil proceeding. The Defendant is not in danger of having any criminal sanctions imposed upon her, there

⁶ The Court notes from the trial record that the jury was not made aware of these occurrences.

are no other civil actions pending for her same conduct. Lastly, the appropriateness of the punitive damages is to encourage fair and reasonable settlements when a clear wrong has been committed; the Plaintiff offered to settle with the Defendant for \$100,000.00 before trial.

In response to the Defendant's *Batson* challenge, the Plaintiff's striking of Ms. Boyer as a potential juror was proper. Ms. Boyer told the Court that she understood that smoking can cause COPD. The decedent was a life-long smoker who had recently quit – the Plaintiff struck Ms. Boyer to rid itself of any potential prejudice to the Plaintiff that he somehow caused his own demise. The Plaintiff filed such pre-trial motions *in limine* to avoid such prejudices during the trial. There is no “time limit” to provide the Court with a neutral explanation for striking Ms. Boyer per *Parham v. Horace Mann*, 490 S.E.2d 696 (W. Va. 1997). The medical records mentioned that the decedent was a smoker, these records were ruled admissible for trial. Simply stated, the Plaintiff sought to avoid any prejudices to its theory of the case, and by using one of his peremptory strikes, properly struck Ms. Boyer for a non-discriminatory, neutral reason.

Despite the Defendant's contentions otherwise, the Plaintiff did not violate *in limine* rulings during opening statements – the Plaintiff never stated that the Defendant ordered Seroquel, only that the testimonial evidence would show that the Defendant approved of this by signing off on it, and being aware of it; also, that the Defendant signed off on Dr. Jose's ordering Haldol. The Plaintiff stated that it would show that she was aware of these medications having been ordered, but had done nothing proactive about them, despite the medical records indicating an adverse reaction to Seroquel. The decedent died from a combination of being heavily sedated and elevated CO2 levels, among other chronic lung problems, and *needed* ventilator support. Nevertheless, the Defendant did not order such treatment, despite her knowledge of the decedent's history of respiratory problems from his prior admissions to that hospital, and having ordered such treatment for the decedent in earlier admissions to

the hospital. During a previous admission, she had ordered ventilator support as well as a pulmonologist consult for the decedent, however, she did not do this the last time, and as a result, the decedent died.

The Plaintiff's counsel argues that he did not use inflammatory language in this trial – the “captain of the ship” was a term to describe the Defendant as the attending physician, therefore the primary person responsible for the decedent's care. The decedent was *her* patient. Further, the Defendant received a curative instruction on the matter when she objected. Also, when the Plaintiff referred to “their money”, that simply was directed to the Defense team; the Plaintiff was permitted to tell the jury to send a message that her conduct was unacceptable and requested a means to deter future conduct. Ultimately, that form of argument is permitted where punitive damages are sought, as they were in this case per *Davis v. Celotex Corp.*, 420 S.E.2d 557 (W. Va. 1992). In sum, if the alleged prejudicial terms did not cause manifest injustice, then they are deemed harmless. There was enough evidence to support the verdict.

Further, the Plaintiff argues that the Defendant's DNR instruction was a misstatement of law, despite its contention otherwise, and that the Court was correct to refuse it per Syl. Pt. 2, *State v. Collins*, 180 S.E.2d 54 (W. Va. 1971). There is no law stating that health care professionals can be held criminally liable for performing CPR. Plus, all the experts agreed that the decedent did not require intubation, therefore the DNR instruction was inapplicable and therefore irrelevant in this particular case. The Plaintiff's theory of the case focused on the Defendant's reckless conduct during the two days before the decedent went into cardiac arrest and dying on September 5, 2010. The Court's refusal of the instruction did not impede the Defendant from arguing anything related to the DNR order and therefore did not impair her ability to provide an alternate theory of causation, as per Syl. Pt. 2, *Shia v. Chvasta*, 377 S.E.2d 644 (W. Va. 1988).

Applicable Law:

A court may grant a Rule 50 motion where there is “no legally sufficient evidentiary basis” for a jury to find in favor of a party on the issue in question. However, such a motion must be considered in light most favorable to the plaintiff, but if the plaintiff fails to establish a *prima facie* right to recover, a court should grant the motion. With respect to a motion concerning Rule 59, a new trial should be granted only where it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done.

Pursuant to W. Va. Code § 55-7B-3(a), a doctor’s failure to exercise the requisite degree of care must be a proximate cause of the injury or death.

“In actions of tort, where gross fraud, malice, oppression, or wanton, willful or *reckless* conduct or criminal indifference to civil obligations affecting the rights of others appear . . . the jury may assess . . . punitive damages[.]” Syl. Pt. 4, *Mayer v. Frobe*, 22 S.E. 58 (W. Va. 1895)(emphasis added).

To prove a violation of equal protection, the analytical framework established in *Batson v. Kentucky*, 476 U.S. 79 (1986), 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. Syl. Pt. 1, *Parham v. Horace Mann Insurance Company*, 490 S.E.2d 696 (W. Va. 1997).

Findings of Fact:

1. The trial in the above-styled matter began on May 14, 2013 and concluded on May 16, 2013.

2. The Court had ruled on various pre-trial motions *in limine*, of importance to the Motions filed herein, the Court prohibited any statements, arguments or references that the Plaintiff was comparatively negligent in requiring medical treatment.
3. The decedent's medical records were admitted at trial; throughout the records there were references to the decedent's long history of smoking.
4. During *voir dire*, the Plaintiff exercised his peremptory strikes and struck Ms. Tracey Boyer as a juror.
5. Ms. Boyer was the only African-American on the jury panel; the Defendant is African-American.
6. At the time the Plaintiff struck Ms. Boyer as a juror, the explanation provided by the Plaintiff was because he did not like her answers to his questions during *voir dire*.
7. Ms. Boyer had stated that smoking caused COPD, a condition the decedent had presented when he went to the hospital on September 3, 2010.
8. In response to the Defendant's *Batson* challenge, the Plaintiff's counsel advised the Court that the reason he struck Ms. Boyer was because of concern that she would be a prejudicial juror against the decedent, and that the decedent somehow contributed to his own demise or was somehow comparatively negligent in his care.
9. The decedent had been admitted to the Bluefield Regional Medical Center (BRMC) several times previously for similar presenting conditions as he had on his final admission.
10. The decedent had a DNR order on file at BRMC, which prohibited hospital staff from intubating or resuscitating him should he go into cardiac arrest.
11. The decedent suffered from a fatal cardiac arrest on September 5, 2010.

12. The decedent was dependent upon BiPAP in order to lower the buildup of carbon dioxide in his blood.
13. The decedent required the use of BiPAP during sleep.
14. The decedent had often been non-compliant with the use of his BiPAP at home.
15. The decedent had higher or elevated carbon dioxide (CO₂) levels due to his respiratory problems and due to his non-compliance with the use of his BiPAP.
16. Elevated CO₂ levels can cause a sedative effect, confusion, and can become deadly.
17. Several times prior to his final admission to the hospital, and notably in June 2010, the decedent presented to BRMC with elevated CO₂ levels.
18. The Defendant was the decedent's attending physician in June 2010.
19. During his June 2010 hospitalization, a pulmonologist was consulted to manage the decedent's lung problems.
20. During the June 2010 hospitalization, the decedent's CO₂ levels were monitored through ABG studies, and he received a BiPAP as well as bronchodilators to assist in reducing his CO₂ levels.
21. On September 3, 2010, the decedent presented to BRMC again with elevated CO₂ levels.
22. The Defendant had been the decedent's attending physician during the hospitalization in September 2010.
23. During the September 3, 2010 admission, the decedent received no follow-up ABG studies, no pulmonologist consult, and no BiPAP until 10:00 p.m. on September 4, 2010.
24. During the September 2010 hospitalization, the decedent had been given Seroquel, which the Defendant had noted from his medical records as causing him an adverse reaction.
25. During the September 2010 hospitalization, the decedent had been given Haldol.

26. The decedent required sedation as he had been non-compliant with medical treatment and had been agitated.
27. The Defendant did not order these medications; however, the Defendant noted in the medical records that the decedent was "quite sedated" at 10:00 a.m. on September 4, 2010 as a result of Haldol and Seroquel given to the decedent.
28. In addition to the sedative effect of the medications, the decedent had elevated levels of CO₂ which further exacerbated his sedated condition.
29. The decedent appeared in no "acute distress" when the Defendant examined him on September 3, 2010 and on September 4, 2010.
30. The decedent died on September 5, 2010 at approximately 7:00 a.m.
31. The Defendant stated in the death summary of the medical record that the decedent had not been on his BiPAP at the hospital because the settings were not known.
32. The Defendant stated in the death summary that the decedent was sedated most of the night and most of the day on September 4, 2010.
33. The Defendant provided in the death summary that one of the diagnoses was an adverse reaction to Seroquel, as well as acute on chronic respiratory failure with hypercapnia.
34. These diagnoses were provided as the immediate cause of death in the death certificate the Defendant certified to the Department of Health and Human Resources.
35. At trial, the Defendant testified that she did not believe that the decedent had an adverse reaction to Seroquel.
36. At trial, the Defense argued that the Defendant's order for BiPAP had not been carried out by hospital staff.

37. At trial, the Plaintiff's expert, Dr. Scissors opined that the Defendant had deviated from the standard of care that she helped establish at BRMC for this decedent due to his prior admissions to the emergency room.
38. Dr. Scissors opined that the Defendant should have ordered treatment for the decedent's respiratory problems when he was admitted on September 3, 2010.
39. Dr. Scissors testified that the standard of care in this case was obvious, and that the Defendant deviated from that standard of care.
40. Dr. Scissors testified that there was a problem with the Defendant's ordering BiPAP for the decedent by 10:00 p.m. on September 4, 2010 because he had been lying unconscious for twelve hours with a steady rise in his CO₂, approaching fatal levels.
41. Dr. Scissors opined that leaving the decedent in that condition was "beyond dangerous", it was "just reckless."⁷
42. Dr. Scissors testified that the decedent's prolonged sedated state as caused by Seroquel and Haldol, the failure to obtain a pulmonologist consult, and coupled with the failure to administer BiPAP, as part of the standard of care established by the Defendant during the earlier hospital admission, caused the decedent's death in this case.
43. Dr. Scissors opined that the decedent did not seem to have an allergy or adverse reaction to Seroquel.
44. The Plaintiff's expert, Dr. Schwartz testified that the decedent should have been on BiPAP when he was admitted on September 3, 2010.
45. Dr. Schwartz testified that if the Defendant was unaware of the BiPAP settings, she could have checked the decedent's prior records there to determine what the appropriate settings were.

⁷ Trial Transcript, May 14, 2013, page 227, lines 4 – 5.

46. Dr. Schwartz testified that a pulmonologist consult would also have helped determine the appropriate BiPAP settings; a pulmonologist consult would have been available to the Defendant when the decedent was admitted on September 3, 2010.

47. Dr. Schwartz opined that the Defendant deviated from the standard of care of the decedent and that such deviation caused the death.

48. In the verdict form, the jury awarded the Plaintiff \$500,000.00 in compensable damages, and \$500,000.00 in punitive damages.

Ruling:

The Court reviewed the pertinent trial transcripts, the pleadings of counsel, and heard the arguments in support of their respective positions, and as a result of these deliberations, the Court **FINDS** and **CONCLUDES** that there was enough evidence to justify the jury's verdict, as well as the award for punitive damages. The Plaintiff proved by a preponderance of the evidence that the Defendant had breached her duty of care to the decedent, and as a result of that breach, proximately caused the decedent's demise. Expert testimony provided a *prima facie* showing that the Defendant's breach of duty of care to the decedent had been reckless and even dangerous. The compensable award was identical to the punitive damages award, which was a reasonable amount for the loss of life. The Plaintiff's experts testified that the Defendant's own failure to uphold the standard of care that she herself set with respect to the decedent had contributed to his death.

With respect to the Defendant's *Batson* challenge on the Plaintiff's striking of the only African-American juror, the Court **FINDS** and **CONCLUDES** that pursuant to the holding in *Batson*, the Plaintiff provided the Court with a non-discriminatory, neutral reason for exercising his peremptory strikes.

The Court **FINDS** and **CONCLUDES** that the other instances of prejudice cited by the Defendant in the Plaintiff's opening statements, that she had given the decedent Seroquel and that she was the "captain of the ship", are at most harmless errors. It was clear that the evidence elicited during the trial proved that the Defendant did not order Seroquel for the decedent; even the Plaintiff's experts agreed with the Defendant that she did not order Seroquel. Further, the jury was instructed that opening statements were not considered evidence, and the jury was further given a limiting instruction, provided by and approved by the Defendant, to negate any harm concerning the "captain of the ship" terminology. Additionally, as pointed out by the Defendant, Plaintiff's own experts agreed that the Defendant had no control over the hospital staff who failed to carry out her order for BiPAP timely, or over the other physicians who may have ordered the Seroquel. The trial record shows that the Plaintiff's case in chief focused on the Defendant's failure to do anything concerning the decedent's deteriorating condition until it was too late.

The Court also **FINDS** and **CONCLUDES** that the Plaintiff's referring to "their money", "them", and "they" during closing arguments is harmless error. The Defendant objected to these references after counsel for the Plaintiff finished his closing arguments. After a review of the Plaintiff's closing argument, the Court notes that the Plaintiff again focused on the Defendant's failure to treat the decedent properly, and that the plural references appeared to be directed toward the defense team, as the Plaintiff contended. Given the evidence presented during the trial, the Court disagrees with the Defendant that these alleged cumulative errors caused manifest injustice. The Plaintiff sought punitive damages due to the reckless conduct by the Defendant; the jury was properly instructed on this – the Plaintiff had leeway to persuade the jury to send a message that such conduct must be deterred, which the Plaintiff argued during the closing arguments. Additionally, despite the Defendant's contention that

the use of “they” and other such references inflamed the jury, the Court is not convinced given the one to one ratio of the compensatory damages to the punitive damages.

Finally, the Court **FINDS** and **CONCLUDES** that its refusal to give the Defendant’s DNR instruction to the jury had not contributed to any prejudicial error. The Defendant’s instruction, as originally proposed, was simply an incorrect statement of the law, which the Defendant acknowledged by offering to modify it. However, even though the Defendant agreed to modify the instruction to make it a proper statement of the law, the Plaintiff’s theory of the case, specifically with regard to the cause of the decedent’s death, rendered such an instruction irrelevant. Further, the Plaintiff agreed that the DNR order would have precluded any intubation and resuscitation of the decedent when he finally went into cardiac arrest early in the morning on September 5, 2010. The Defendant referred to the DNR order in its case in chief. Nevertheless, there was no reason to submit such an instruction to the jury when the question of whether to intubate or resuscitate the decedent was simply not an issue with regard to the Defendant’s treatment (or lack thereof pursuant to the Plaintiff’s theory of causation) of the decedent on September 3, 2010 or on September 4, 2010. Those were the primary dates on which the Plaintiff focused in its medical malpractice action. The Defendant argued that the decedent appeared in no acute distress on those dates, therefore, the DNR instruction had no bearing on the decedent’s condition at that time. Further, when the decedent finally died on September 5, 2010, the evidence indicated that he could not be saved at that point, whether a DNR order was in place or not. The Defendant was not impaired in presenting its own theory of the case regardless.

The picture before this Court is that although other hospital staff members contributed to the decedent’s demise, the Defendant played a prominent role by virtue of being the decedent’s attending physician. The Defendant, mindful at the time of the decedent’s allergy or adverse responses to Seroquel, originally noted it as one of the primary causes of the decedent’s death. The Defendant,

mindful that the decedent required BiPAP while sleeping, did not order same while the decedent remained in an obtunded state throughout most of the day on September 4, 2010. The Defendant provided other, contradictory reasons for the decedent's death during the trial, which differed from what she provided in the death certificate and the death summary in the medical record. That the BiPAP settings were unknown to her during the decedent's final admission as the reason it was not administered differs from the contention that the staff failed to timely carry out the order for same. Aware of the decedent's condition due to the several similar instances he had presented to the Defendant previously and during which the Defendant provided the appropriate standard of care for the decedent illustrates that the Defendant simply knew how to treat this patient by experience. On September 3, 2010, the decedent was admitted to the hospital for similar conditions as he had presented before, at the time they were not life threatening, but then he was not provided any further treatment which had previously proven successful with this patient. The decedent had been sedated to the point of no return, and during that time, his carbon dioxide levels became deadly to the point that when the Defendant did order BiPAP treatment for him, it was too late. In the Court's mind, these few instances alone justified the jury's verdict and the punitive damages pursuant to our modern jurisprudence.

Accordingly, the Defendant's Motions are hereby **DENIED** for the reasons aforesaid.

The Circuit Clerk is directed to forward a copy of this Order to counsel of record as follows:

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ENTER: This 9th day of Sept, 2013.



OMAR J. ABOULHOSN, JUDGE