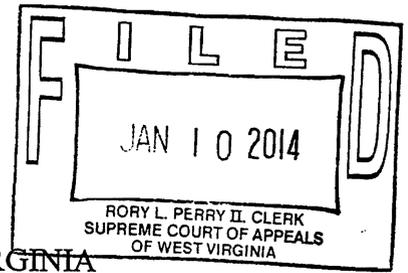


No. 13-1079



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DELILAH STEPHENS, M.D.,

Petitioner/Defendant Below,

v.

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

Respondent/Plaintiff Below.

**PETITIONER DELILAH STEPHENS, M.D.'S BRIEF IN SUPPORT OF
PETITION FOR APPEAL
FROM THE CIRCUIT COURT OF MERCER COUNTY, WEST VIRGINIA
(Civil Action No. 11-C-76)**

Submitted by:

Thomas P. Mannion (WV Bar #6994)

Andrew D. Byrd (WV Bar #11068)

Mannion & Gray Co., L.P.A.

707 Virginia Street East

Chase Tower Suite 260

Charleston, WV 25301

304-513-4242 – Phone

304-513-4243 – Fax

tmannion@mansiongray.com

abyrd@mansiongray.com

Counsel for Petitioner/Defendant Below

Delilah Stephens, M.D.

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I. ASSIGNMENTS OF ERROR

1. Whether the Circuit Court of Mercer County erred in denying Petitioner's Motion for Summary Judgment on Respondent's Amended Complaint?

Suggested Answer: Yes.

2. Whether the Circuit Court of Mercer County erred in denying Petitioner's Motion for Summary Judgment on Respondent's Claim for Punitive Damages?

Suggested Answer: Yes.

3. Whether the Circuit Court of Mercer County erred in denying Petitioner's Renewed Motion for Judgment as a Matter of Law, or in the alternative, Motion for New Trial?

Suggested Answer: Yes.

II. STATEMENT OF THE CASE

This medical malpractice case arises from the treatment that Gary Rakes received at Bluefield Regional Medical Center (hereinafter "BRMC") between September 3, 2010 and September 5, 2010. Gary Rakes received treatment from multiple physicians, doctors and nurses at BRMC. The below civil action was brought by the personal representative of the Estate of Gary Rakes, Charles Rakes (hereafter "Respondent") in the Circuit Court of Mercer County, West Virginia. (*See* "Exhibit 1" : SCT0001-SCT0004).

In the Amended Complaint, Respondent alleged that Gary Rakes' Admission History and Physical medical record of September 3, 2010 noted that his allergies included Seroquel, Ativan and Aldactone. During a previous hospitalization, Respondent alleged that Gary Rakes had an adverse reaction to Seroquel with a dosage of 50 mg.¹ Respondent asserted that the Physician Order form of September 3, 2010, noted in multiple places that Gary Rakes was allergic to

¹Respondent further alleged that Dr. Delilah Stephens (hereinafter "Petitioner") ordered that Gary Rakes be administered Haldol, a drug that was allegedly contraindicated given his condition.

Seroquel. Regardless, Respondent alleged that below Defendant, Toni Muncy, D.O. ordered Gary Rakes be given 100 mg of Seroquel, which was administered by employees of BRMC. Respondent alleged that Petitioner signed off on Dr. Muncy's order and took no further action.

On September 4, 2010, a neurological consult was performed by below Defendant, Dr. Khalid Razzaq due to Gary Rakes' mental status. Respondent alleged that Dr. Razzaq incorrectly noted that Gary Rakes had no known drug allergies and ordered that Gary Rakes be administered 25 mg of Seroquel. Gary Rakes was administered an additional 25 mg of Seroquel on September 4, 2010 by employees of below Defendant, Health Services of the Virginias, Inc. While being sedated most of the day and night on September 4, 2010, Respondent alleged that Gary Rakes expired on September 5, 2010 as a result of chronic respiratory failure with hypercapnia proximately caused by an adverse drug reaction to Seroquel.² (See "**Exhibit 2**" : SCT0005-SCT0009).

During the course of discovery, the depositions of fact witnesses, expert witnesses and the below Defendants were taken in the underlying matter. Petitioner testified that at the time of Gary Rakes' admission, she spoke with his family members who advised that he was allergic to Seroquel. Based upon her conversation with the family members, Petitioner noted in Gary Rakes' medical records that he was allergic to Seroquel. (See pgs. 28-29 of "**Exhibit 3**" : SCT0019-SCT0020).

Petitioner testified that Dr. Toni Muncy, by telephone order, prescribed Gary Rakes the 100 mg of Seroquel on September 3, 2010. (See pgs. 31-33 of "**Exhibit 3**" : SCT0020-SCT0021). Petitioner did not know why Dr. Muncy prescribed the 100 mg of Seroquel. (See pgs. 35 and 41 of "**Exhibit 3**" : SCT0021 and SCT0023). In fact, Dr. Muncy was not part of the

² Respondent declared that the Petitioner deviated from the standard of care by prescribing and administering Haldol and Seroquel to Gary Rakes.

medical team Petitioner worked with at BRMC and was not on call when the Seroquel was administered. (See pgs. 14 and 40 of “**Exhibit 3**” : SCT0016 and SCT0022).

Petitioner further testified that Dr. Khalid Razzaq prescribed Gary Rakes the 25 mg of Seroquel on September 4, 2010. Petitioner did not have any discussions with Dr. Razzaq prior to him administering Gary Rakes the 25 mg of Seroquel. (See pgs. 75-76 and 129 of “**Exhibit 3**” : SCT0031 and SCT0045).

Dr. Razzaq testified at his deposition that he prescribed Gary Rakes Seroquel for agitation on September 4, 2010. (See pg. 14 of “**Exhibit 4**” : SCT0141). Dr. Razzaq confirmed that he did not have any discussions with Petitioner concerning Gary Rakes and his care during the September admission. (See pg. 19 of “**Exhibit 4**” : SCT0142). Floor nurse, Larry Rose testified that Dr. Razzaq gave the order for Seroquel on September 4, 2010. (See pg. 14 of “**Exhibit 6**” : SCT0182).

During the deposition of charge nurse, Laura Potter, Ms. Potter testified that Dr. Jorieth Jose ordered 5 mg of Haldol be given to Gary Rakes. (See pg. 11 of “**Exhibit 7**” : SCT0221). Importantly, Ms. Potter testified that Dr. Muncy gave her the order for 100 mg Seroquel to be administered to Gary Rakes. (See pgs. 11, 13-14 of “**Exhibit 7**” : SCT0221-SCT0222). Ms. Potter recalled receiving the order for Seroquel from Dr. Muncy by telephone. Specifically, Ms. Potter recalled Dr. Muncy advising her that Seroquel was not a true allergy of Gary Rakes. (See pgs. 12-13 of “**Exhibit 7**” : SCT0221).

Dr. Alysa Bell testified at her deposition that she had discussed an order for Haldol with Petitioner before it was actually written. (See pg. 11 of “**Exhibit 10**” : SCT0332). However, Dr. Bell did not know that 5 mg of Haldol had been administered to Gary Rakes on September 4, 2010 until she reviewed the Progress Note. (See pg. 24 of “**Exhibit 10**” : SCT0345). As set forth

above, Petitioner confirmed, just like Nurse Potter, that Dr. Jorieth Jose ordered the Haldol for Gary Rakes. (See pg. 38 of “**Exhibit 3**” : SCT0022).

Also, during the course of discovery, the Respondent produced a copy of the reports from his experts, Dr. Kenneth Scissors and Dr. Jeffrey Schwartz. While Dr. Scissors lists four (4) different opinions why Petitioner deviated from the applicable standard of care, he provided the following opinion on proximate cause: “What was the proximate cause of Mr. Rakes’ death? Mr. Rakes died of ventilator failure, as a result of excessive administration of the sedatives Haldol and Seroquel in the setting of underlying chronic lung disease. (See “**Exhibit 13**” : SCT0598). Thus, Dr. Scissors clearly opines that the proximate cause of Mr. Rakes’ death was the administration of both Haldol and Seroquel.

Contrary to the opinion in his report regarding proximate cause, Dr. Scissors testified at deposition that he prefers Haldol over Seroquel as it is simpler and more straightforward to use. (See pg. 51 of “**Exhibit 11**” : SCT0394). Dr. Scissors testified that if a patient is having severe agitation, a prescription of Haldol would be a consideration. (See pg. 82 of “**Exhibit 11**” : SCT0402). Importantly, Dr Scissors testified he does not believe the Haldol had a sedative effect on Gary Rakes, and that it was the combination of Haldol and Seroquel (not Haldol alone) that led to the last event (i.e. Gary Rakes’ death):

Q: So can you say that it was the Haldol versus the Seroquel that set things in motion?

A: No, I think it was the combination. I think it’s apparent from the discussion we just had that the 5 milligrams of Haldol did not in the first three hours have an adequate calming effect, and then the Seroquel was given, and then after that he was sedated. So whether it’s just the combination or for some reason he was more responsive to the sedating effect of Seroquel, we can’t say. But we do know he did not respond to the Haldol alone and with the addition of Seroquel he became very sedated.

(See pgs. 85-86 of “**Exhibit 11**” : SCT0403).

Dr. Scissors also testified that it is unlikely that Haldol would affect a patient's sedation level. Specifically, Dr. Scissors stated that he would not expect Haldol to interfere with a patient's respiratory function unless it got to the level of causing sedation. (See pg. 89 of "Exhibit 11" : SCT0404). In fact, Dr. Scissors stated that Haldol would not have a major impact or a clinically significant impact on his respiratory function if it was not causing sedation. (See pgs. 90-91 of "Exhibit 11" : SCCT0404). Dr. Scissors opines that Haldol, as well as Seroquel, were out of Gary Rakes' system at the time of death. (See pg. 168 of "Exhibit 11" : SCT0423).

Furthermore, Dr. Scissors testified that he has no proof that Gary Rakes was not ventilating adequately on September 4, 2010. (See pgs. 74-75 of "Exhibit 11" : SCT0400).³ Even without this proof, Dr. Scissors testified that he believes BiPAP⁴ should have been ordered at any point that Gary Rakes was asleep for the sleep apnea. (See pg. 76 of "Exhibit 11" : SCT0400). Dr. Scissors stated that if Gary Rakes would have received BiPAP, he would have survived. (See pg. 111 of "Exhibit 11" : SCT0409). Dr. Scissors did not dispute that Petitioner ordered the BiPAP, but merely opined that it was not in a timely fashion. (See pg. 167 of "Exhibit 11" – SCT0423).

Dr. Jeffrey Schwartz's report stated that the "house staff physicians and their attending, Dr. Stephens, had little understanding of this patient's chronic respiratory failure and poor respiratory drive that allowed Mr. Rakes to appear comfortable during physiologic state that is normally associated with visible respiratory distress. They did not understand the nature of obesity-hypoventilation syndrome..." Dr. Schwartz further stated in his report that "because Mr. Rake's breathing typically appeared unlabored, the severity of his respiratory failure was

³ Dr. Scissors opined in his report that Petitioner deviated from the standard of care by not ordering adequate or timely CPAP or BiPAP. (See "Exhibit 13" : SCT0594).

⁴ Petitioner submits that the term BiPAP is used to refer to bilevel positive airway pressure. A BiPAP machine uses variable levels of air pressure to assist individuals with breathing difficulties noninvasively.

overlooked by the medical house staff and their supervising physician, Dr. Stephens.” (See “**Exhibit 14**” : SCT0606).

While Dr. Schwartz stated that the respiratory failure of Gary Rakes was overlooked by the Petitioner, Dr. Schwartz testified to the following:

Q: Well, you understand in this case that BiPAP therapy was ordered. Correct?

A: It was ordered on the 4th, yes, I know that.

Q: All right. So have you done any type of calculation to determine that at that point in time it would have been too late for this gentleman, for the BiPAP therapy to be successful when it was ordered?

A: Well, bizarrely, it was ordered for the night of the 4th. It was ordered QHS, which is evening. And I do believe that 9:00 or 10:00 p.m., if he would have gotten appropriate BiPAP therapy, he may well have survived.

Q: And is that to a reasonable degree of medical certainty.

A: Yes...

(See pg. 30 of “**Exhibit 12**” : SCT0491 and pg. 60 of “**Exhibit 12**” : SCT0521).

Moreover, Dr. Schwartz testified to a reasonable degree of medical certainty that sedation was a contributing cause of Gary Rakes’ death, and Haldol was one of the contributing medications that started the cascade of him being sedated. (See pg. 20 of “**Exhibit 12**” : SCT0481). However, Dr. Schwartz testified that Haldol does not suppress the respiratory drive. Id. More importantly, Dr. Schwartz did not even know how long or if Haldol was in Gary Rakes’ system at the time of death because he did not perform any type of calculation. Id. Nevertheless, he disagreed with Dr. Scissors’ conclusion that it was out of Gary Rakes system at the time of death. (See pg. 21 of “**Exhibit 12**” : SCT0482).

Following discovery in the matter, Petitioner filed two motions for summary judgment with the Circuit Court: one on the Respondent’s amended complaint and one on Respondent’s

claim for punitive damages. (See “**Exhibit 32**” : SCT1956). Petitioner argued in her Motion for Summary Judgment that the actions of the Petitioner did not proximately cause Gary Rakes’ death. (See “**Exhibit 15**” : SCT0611-SCT0703). To the extent that the Circuit Court did not grant Petitioner’s Motion for Summary Judgment on the entire Amended Complaint, Petitioner filed a Motion for Summary Judgment on Respondent’s claim for punitive damages, arguing that the claim was not warranted against her. (See “**Exhibit 16**” : SCT0704-SCT0776). Respondent filed a response in opposition to both Motions and Petitioner filed her reply thereto. (See “**Exhibit 17**” : SCT0777-SCT0900 and “**Exhibit 18**” : SCT0901-SCT0916).

Subsequent to the close of discovery, the parties filed numerous motions *in limine*. Of particular importance to this appeal, is Petitioner’s Motion *in Limine* to preclude any testimony that Petitioner ordered and administered Seroquel to Gary Rakes and that the order and administration of Haldol alone was the cause of Gary Rakes’ death. (See “**Exhibit 19**” : SCT0917-SCT0923). After the filing of the dispositive motions and pre-trial motions, below Defendants, Health Services of the Virginias, Inc., Toni Muncy, D.O. and Khalid Razzaq, M.D. resolved their claims with the Respondent during the April 18, 2013 mediation.

A pre-trial conference was held on April 29, 2013 before the Honorable Judge Omar Aboulhosn at which the Petitioner and Respondent argued numerous motions. On the first day of trial, the Circuit Court entered its Pre-Trial Conference Order wherein Judge Aboulhosn denied Petitioner’s motions for summary judgment. Judge Aboulhosn granted Petitioner’s Motion *in Limine* to preclude any testimony that Petitioner ordered and administered Seroquel to Gary Rakes and that the order and administration of Haldol alone was the cause of Gary Rakes’ death. (See “**Exhibit 20**” : SCT0924-SCT0928).

On May 14, 2013, Petitioner and Respondent commenced the trial of this matter. During the jury selection/*voir dire* at trial, counsel for the Respondent inquired of the entire jury panel whether any of them had heard of the medical condition COPD. The Circuit Court noted that almost everyone on the panel and in the audience raised their hand. In turn, the Circuit Court allowed Respondent's counsel to *voir dire* individuals as he chose due to the amount of jurors who raised their hands. (See pgs. 48-49 of "**Exhibit 30**" : SCT1546-SCT1547).

Respondent's counsel proceeded to ask Juror Darago questions about COPD:

Q: [...]What's your familiarity with COPD, your understanding?

A: My husband was a coal miner for 30 years and he has COPD. He has black lung.

Q: And is he living now?

A: Yes.

Q: Okay, how does he get along with that?

A: He does pretty well.

(See pg. 49 of "**Exhibit 30**" : SCT1547).

Respondent's counsel next asked Juror Kessinger and Juror Bish questions about their knowledge of COPD. Juror Kessinger stated that she knew about COPD from working in the medical field and hearing about it on television. Juror Bish stated that her father had black lung and COPD, and that he had passed away. (See pgs. 49-52 of "**Exhibit 30**" : SCT1547).

Next, Respondent's counsel questioned Juror Tracy Boyer, an African American:

Q: Ms. Boyer? I thought I saw you raise your hand.

A: Yeah.

Q: I'm trying to get everybody here.

A: I know that COPD can come from smoking so many years.

Q: You know somebody that had it from that, from smoking?

A: Not really, but I've seen commercials on TV.

Q: Do you know anything else about, COPD?

A: And you could catch emphysema with it.

(See pgs. 52-53 of "**Exhibit 30**" : SCT1547-SCT1548).

Respondent's counsel then questioned Juror Vance. Juror Vance stated that he had emphysema. When asked how he was diagnosed with emphysema, Juror Vance stated "I was a firefighter in service. My lungs were burned. **And, of course, I smoked, too.**" This was counsel for Respondent's last direct question to the jury panel regarding COPD. (See pg. 53 of "**Exhibit 30**" : SCT1548)(emphasis added). Juror Vance was a white male on the jury panel. (See Exhibit 2 of "**Exhibit 29**" : SCT1542-SCT1533). Juror Vance directly linked smoking to emphysema, which is a common type of COPD. Yet, Respondent's counsel did not strike Juror Vance for his knowledge of COPD/emphysema when he physically had the condition and smoked.

Instead, counsel for the Respondent decided to strike the only African American juror, Tracy Boyer. Immediately following the Respondent's peremptory strike of Juror Boyer, counsel for the Petitioner approached the bench, immediately objected to the peremptory strike, and instituted a "Batson" challenge on the record. The record is as follows:

[MR. MANNION]: Your Honor, the plaintiff has moved to strike Juror No. 10, Tracy Boyer. I will note that it's the only African-American on this jury panel to be stricken. We have an African American defendant. There's no basis. Her answers in voir dire were absolutely unbiased, and I'm raising a Batson challenge.

[THE COURT]: Mr. Shook?

[MR. SHOOK]: I have complete discretion to use my discretionary strikes as I see fit, if I don't think she's going to be a good juror. It didn't have anything to do with her race or – I hate to raise that point.

[THE COURT]: Under Batson you have to have a nondiscriminatory reason to strike her.

[MR. SHOOK]: I didn't like her answers.

[MR. MANNION]: It's not sufficient to say you don't like her answers.

[MR. SHOOK]: We need to go on the record if we're going to make a record on that. I don't understand what the objection is.

[THE COURT]: The objection is pretty clear, Mr. Shook. She is the only African-American that's on the jury panel, and you have to have a non-discriminatory reason to be able to strike her. You have to be able to articulate that.

[MR. SHOOK]: I didn't think her answers sounded like she would be a good witness for me.

[...]

She just seemed to have a lack of understanding of the questions that I asked to her – a good juror for me, rather. She made references to smoking and causing lung problems, other issues that I think would make her bad juror for my client.

[MR. MANNION]: Your Honor, I don't believe he's set forth a nondiscriminatory basis. It's pretty clear what he's trying to do. She's the only African-American – there have been plenty of people who talked about different conditions that folks have had, and she didn't say anything that would give any reason where she would not be a fair juror [...]

(See pgs. 114-116 of “**Exhibit 30**” : SCT1563).

A recess was then taken by the Circuit Court to examine the issue. (See pg. 116 of “**Exhibit 30**” : SCT1563). The Circuit Court then requested another conference with counsel for the Petitioner and Respondent. After another brief recess, the Circuit Court overruled Petitioner's objection. Petitioner's counsel then objected to preserve the record for appeal. (See pgs. 117-19 of “**Exhibit 30**” : SCT1564).

The Circuit Court empanelled 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). (See pgs. 120-21 of “**Exhibit 30**” : SCT1564-SCT1565). On May 14, 2013, counsel for the parties gave their opening statements.

During counsel for Respondent’s opening statement, Respondent’s counsel, despite the Circuit Court’s pre-trial order, stated to the jury that Petitioner ordered and administered Seroquel to Gary Rakes:

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

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

Counsel for Petitioner immediately objected, and a bench conference was had:

[MR. MANNION]: Objection. Your Honor. This violates the motion in limine order.

[THE COURT]: Let's approach.

[MR. SHOOK]: I can go on and explain –

[MR. MANNION]: That's unbelievable.

[THE COURT]: Stop, guys.

[MR. MANNION]: He's implying that she ordered that –

[THE COURT]: Stop. Sir, when I speak, you stop.

[MR. MANNION]: Yes. I've got it.

[THE COURT]: I need to understand what exactly you're saying he's violated.

[MR. MANNION]: Yes. He's now essentially saying -- he told this jury, "Let's see who ordered this medication," and then he gets up there and says Delilah Stephens signed for this. We had a pretrial motion in limine that she didn't order this.

[MR. MEEK]: I think she –

[MR. SHOOK]: I'm getting ready to clarify that. She signed this the next morning, and she knew about it at 10 o'clock in the morning.

[MR. MANNION]: That's not the way it was –

[THE COURT]: What do you –

[MR. MANNION]: There's a pretrial motion in limine in which he's not allowed to say that Dr. Stephens ordered Seroquel, because she didn't. And what he just did there was clearly implied to the jury that she ordered it. He said "Let's look at who ordered this," and he puts it up there and he shows it and says, "Delilah Stephens signed it." That's what he just did.

[MR. SHOOK]: That's not what I did, and I was interrupted before I could explain what I was going to say about that, that she signed off on it the next day at 10 a.m.

[THE COURT]: If he says that, does that clarify that?

[MR. MANNION]: I mean, I think that that violated the motion. You clearly were implying -- he was clearly implying that she ordered that, and I think it needs to be clear that she did not order that medication at any time.

[MR. SHOOK]: I'll make it clear, if you let me finish.

[THE COURT]: Don't push the envelope, Mr. Shook. Okay?

[MR. SHOOK]: Sure. Sure.

[THE COURT]: I don't know why you did it that way just now, but it does push the envelope.

[MR. SHOOK]: Okay.

[THE COURT]: And I'm not going to play games like that in this courtroom. We're going to stick by what we said -- I ruled on, and we don't push envelopes.

[MR. SHOOK]: Certainly.

[MR. MANNION]: Okay.

(See pgs. 159-61 of "Exhibit 30" : SCT1574)

After conclusion of the bench conference, Respondent's counsel continued his opening statement, and despite his stated intention to "clarify" and "explain" his previous comment, continued to imply that Petitioner ordered the Seroquel that was administered to the decedent, in violation of the Circuit Court's *in limine* ruling:

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

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

Petitioner's counsel objected immediately once again, and a bench conference was had:

[MR. MANNION]: Your Honor, first of all, the ruling was he couldn't say she ordered it, so he gets up there and says "Well, she denies ordering it," then says she's the captain of the ship. He is implying that she ordered it. There is no evidence ever in this case that she ordered Seroquel. And he said he was going to get up there and make that clear when we came up here the last time, and it wasn't. Instead, what he did was confuse the issue and make it sound like she did order it.

[THE COURT]: When we had our pretrial motions –

[MR. SHOOK]: Yes.

[THE COURT]: -- did you not say you weren't going to say that, and we agreed -- I mean, agreed to this.

[MR. SHOOK]: I agree that she did not order it. She denies ordering it.

[MR. MANNION]: No, no. That's –

[THE COURT]: There's a big difference, Mr. Shook, between she didn't do it and she denies doing it; big difference.

[MR. MANNION]: Huge.

[THE COURT]: And I don't appreciate the pushing of this envelope the way you've done it. When you represent something, you have to be frank about it. When we were back in the conference room, when we discussed these motions, you said you would not mention that. You agreed with the motion in limine, did you not?

[MR. SHOOK]: Yeah, I do agree. I think that -- I'll be clear. I apologize. I didn't mean to push the envelope. I thought I'd made it clear that she didn't -- she didn't do it, that she denies it.

[...]

[THE COURT]: I mean, I'm not sure how to clarify this up at this point, so I can allow you to clarify it up in your opening statement. I'm telling you, Mr. Shook, I don't appreciate the pushing of this envelope. It may not have been your intent, but when I asked you back in conference, you know, "Do you agree to this," and you agreed to it, I mean, what else am I supposed to think? You agreed to it, and we made it clear what you could and couldn't say and how you -- I thought it was all understood.

(See pgs. 163-65 of “**Exhibit 30**” : SCT1575-SCT1576)(emphasis added).

Petitioner’s counsel moved for a mistrial and requested a limiting instruction be provided to the jury in order to remedy Respondent’s violation of the Court’s *in limine* ruling. These requests were denied. *Id.* The Respondent proceeded with his case-in-chief. The Respondent presented evidence on May 14, 2013 and May 15, 2013. Prior to the close of Respondent’s case-in-chief, counsel for the Petitioner brought to the attention of the Circuit Court that counsel for the Respondent had referred to the Petitioner as the “captain of the ship.” Petitioner’s counsel provided the Circuit Court with the case law in West Virginia abolishing the doctrine. To avoid any further prejudice to the Petitioner, the Circuit Court could nothing more than issue a limiting instruction to the jury. (See pg. 482 of “**Exhibit 30**” : SCT1697).

The Respondent rested his case on May 15, 2013. At that time, the Petitioner made oral motions for a directed verdict on the issue of punitive damages and on proximate causation. (See

pgs. 470-76 of “**Exhibit 30**” : SCT1694-SCT1696). These motions were denied. (See pg. 478 of “**Exhibit 30**” : SCT1696).

On May 15, 2013, Juror Lois Hicks was excused from the jury at the end of the session and replaced with Joyce Kessinger. (See pg. 634-35 of “**Exhibit 30**” : SCT1735-SCT1736).⁵ On May 15, 2013 and May 16, 2013, the Petitioner presented evidence. Before resting her case, Petitioner requested the Circuit Court read her proposed jury instruction on the Respondent’s Do Not Resuscitate Order “DNR.” Gary Rakes had this order in place at the time of his death on September 5, 2010 when he suffered cardiac arrest. The Circuit Court denied Petitioner’s request. (See pg. 684-88 of “**Exhibit 30**” : SCT1799-SCT1800).

Petitioner rested her case on the afternoon of May 16, 2013. The Petitioner again made an oral motion for a directed verdict on the entire case and on the issue of punitive damages. Both motions were denied. (See pgs. 929-36 of “**Exhibit 30**” : SCT1860-SCT1862). The Circuit Court then read the jury charge and instructions of law to the jury in open court. The parties then proceeded with closing statements.

Following the Respondent’s closing statement, counsel for the Petitioner objected to the statements of Respondent’s counsel and moved for a mistrial. Respondent’s counsel, on multiple occasions during closing statement, argued to the jury that the Petitioner hired the “best lawyers in the country” to protect “their money.” (See pgs. 968-969; 972 of “**Exhibit 30**” : SCT1870 and SCT1871). Respondent’s counsel also informed the jury that the decision the jury makes affects the community and that the jury can impliedly not let the community down. (See pgs. 966, 969, 970, 976 of “**Exhibit 30**” : SCT1870-SCT1872). The Circuit Court overruled the objection and movement of a mistrial by the Petitioner. (See pgs. 978-979 of “**Exhibit 30**” : SCT1873).

⁵ Petitioner submits to this Honorable Court that if selected, Juror Boyer would have been the alternate on the jury panel. Eventually, Juror Boyer would have been on the panel because Juror Hicks was excused during trial.

Once closing arguments were completed, the six (6) jurors retired to the jury room for deliberations. After approximately one hour and a half of deliberation, with an intermittent jury question, the jury returned a unanimous verdict against the Petitioner. The jury awarded the Respondent \$500,000.00 in non-economic damages and \$500,000.00 in punitive damages. (See pgs. 998-1000 of “**Exhibit 30**” : SCT1878).

On June 4, 2013, the Court entered a Judgment Order in the amount of \$810,000.00, which encompassed an off-set for all pre-verdict settlements from the jury’s non-economic damage award. (See “**Exhibit 26**” : SCT1057-SCT1060). Petitioner timely filed her renewed motion for judgment as a matter of law, or in the alternative, motion for a new trial pursuant to Rules 50 and 59 of the West Virginia Rules of Civil Procedure. (See “**Exhibit 27**” : SCT1062-SCT1229). Respondent filed his memorandum in opposition to Petitioner’s motions and Petitioner filed her reply brief to Respondent’s memorandum in opposition. (See “**Exhibit 28**” : SCT1230-SCT1383 and “**Exhibit 29**” : SCT1384-SCT1533). By order dated September 9, 2013, the Circuit Court of Mercer County, West Virginia, by and through, Judge Omar Aboulhosn, denied Petitioner’s renewed motion for judgment as a matter of law, or in the alternative, motion for a new trial. (See “**Exhibit 31**” : SCT1927-SCT1947).

III. SUMMARY OF ARGUMENT

The Honorable Judge Omar Aboulhosn’s Order dated May 14, 2013, denying Petitioner’s motions for summary judgment and his Order dated September 9, 2013, denying Petitioner’s renewed motion for judgment as a matter of law, or in the alternative, motion for a new trial pursuant to Rules 50 and 59 of the West Virginia Rules of Civil Procedure were erroneous.

Based upon the facts elicited during discovery and the evidence submitted at trial, there is no evidence to support proximate causation in this case. Even accepting the Respondent’s theory

in this case as true regarding Gary Rakes' death, it was intervening/superseding causes that lead to Gary Rakes' death. Respondent's Amended Complaint and Respondent's experts testified that Gary Rakes died of ventilator failure, as a result of excessive administration of the sedatives Haldol and Seroquel in the setting of underlying chronic lung disease. The facts during discovery showed that Petitioner did not order Seroquel to be administered to Gary Rakes.

The reality is that Toni Muncy, D.O. gave charge nurse, Laura Potter the order for 100 mg of Seroquel to be administered to Gary Rakes. Dr. Muncy was not part of Petitioner's team at BRMC. Thus, Petitioner had no control over Dr. Muncy. Moreover, the evidence showed that Dr. Razzaq placed the order to nurse, Larry Rose, for 25 mg of Seroquel to be administered to Gary Rakes on September 4, 2010. Dr. Razzaq did not consult with Petitioner and Petitioner had no control over Dr. Razzaq.

Furthermore, the facts elicited during discovery and the evidence at trial showed that the administration of Haldol alone did not proximately cause Gary Rakes' death. Respondent's expert, Dr. Scissors, testified during his deposition and at trial that the proximate cause of Mr. Rakes' death was the administration of both Haldol and Seroquel. Dr Scissors testified he does not believe the Haldol had a sedative effect on Gary Rakes, as the medical records indicate Mr. Rakes was still alert and combative. Dr. Scissors, Dr. Schwartz, the Petitioner and certain fact witnesses testified that Dr. Jose Jorieth ordered that the Haldol be administered to Gary Rakes.

Moreover, the facts elicited during discovery and the evidence at trial made it apparent that Petitioner's order for BiPAP was not followed by the staff at BRMC. Dr. Schwartz testified that had Petitioner's order for BiPAP therapy been administered, Gary Rakes would have survived. The facts and medical records during discovery and the evidence and testimony at trial make it abundantly clear that Petitioner ordered BiPAP to be administered to Gary Rakes on the

night of September 4, 2010. Likewise, there is no evidence in this case that Petitioner's conduct was done maliciously, wantonly, mischievously, or with criminal indifference to civil obligations. No malice on the part of Petitioner was ever presented during discovery or at trial.

In addition, a new trial should be ordered as it is reasonably clear that prejudicial error crept into the record at the trial in this matter resulting in substantial injustice to the Petitioner.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the Revised Rules of Appellate Procedure, Petitioner submits that oral argument is necessary as there are extensive facts and legal arguments on behalf of the Petitioner in support of reversing the Circuit Court's rulings. While adequately presented in Petitioner's Brief and the record below, Petitioner submits that this Honorable Court will be significantly aided by oral argument. Petitioner respectfully submits to this Honorable Court that oral argument is appropriate and submits that this case is suitable for Rule 19 argument, as a case involving "assignments of error, claims of unsustainable exercise of discretion where the law governing that discretion is settled, and as a case claiming insufficient evidence or a result against the weight of the evidence." W.Va.R.A.P. 19(a)(1)-(3).

V. ARGUMENT

A. Applicable Standard of Review

1. Motions for Summary Judgment.

Petitioner submits that the Circuit Court erred in denying her Motion for Summary Judgment on the Respondent's Amended Complaint and in denying her Motion for Summary Judgment on Respondent's Claim for Punitive Damages. This Honorable Court reviews *de novo* the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court." Syl. Pt. 1, Findley v. State Farm Mut. Automobile Ins. Co., 576 S.E.2d 807 (W.Va.

2002). This Honorable Court has further declared that "[s]ummary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 2, Williams v. Precision Coil, Inc., 459 S.E.2d 329 (W.Va. 1995). *Also see* Dellinger v. Pediatrix Med. Group, 750 S.E.2d 668 (W.Va. 2013).

2. Renewed Motion for Judgment as a Matter of Law and Motion for New Trial.

Petitioner submits that the Circuit Court erred in denying her Renewed Motion for Judgment as a Matter of Law, or in the alternative, Motion for New Trial. The standards this Honorable Court follows in conducting its review of said motion are well settled. This Court has held that "[t]he appellate standard of review for an order granting or denying a renewed motion for a judgment as a matter of law after trial pursuant to Rule 50(b) of the *West Virginia Rules of Civil Procedure* is *de novo*." Syl. Pt. 1, Fredeking v. Tyler, 680 S.E.2d 16 (W.Va. 2009). This Honorable Court's review of rulings on motions for new trials, is set forth in syllabus point four of Sanders v. Georgia-Pacific Corp., 225 S.E.2d 218 (W.Va. 1976), "[a]lthough the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence." *Also see* West v. W.Va. DOT, 687 S.E.2d 346 (W.Va. 2009).

B. The Circuit Court of Mercer County Erred in Denying Petitioner's Motion for Summary Judgment on Respondent's Amended Complaint as There Were No Genuine Issues of Material Fact that Petitioner Did Not Proximately Cause the Death of Gary Rakes.

This Honorable Court has declared that when the principles of summary judgment are applied in a medical malpractice case, one of the threshold questions is the existence of expert

witnesses opining the alleged negligence. Neary v. Charleston Area Medical Center, Inc., 460 S.E.2d 464, 469 (W.Va. 1995). Pursuant to the West Virginia Medical Professional Liability Act, the following are necessary elements of proof that an injury or death resulted from the failure of a health care provider to follow the accepted standard of care: (1) The health care provider failed to exercise that degree of care, skill and learning required or expected of a reasonable, prudent health care provider in the profession or class to which the health care provider belongs acting in the same or similar circumstances; and (2) such failure was a proximate cause of the injury or death. *See* W.Va. Code § 55-7B-3(a).

Under West Virginia law, the Respondent was required to establish that Petitioner deviated from the applicable standard of care, and that the deviation was ‘a proximate cause’ of Gary Rakes’ death. Mays v. Chang, 579 S.E.2d 561, 565 (W.Va. 2003). As made apparent by this Honorable Court in Neary, *supra*, it is the general rule that in medical malpractice cases, negligence or want of professional skill can be proven only by expert witnesses. Syl. Pt. 3, Farley v. Shook, 629 S.E.2d 739 (W.Va. 2006).

Petitioner submits there were no genuine issues of material fact that Petitioner did not proximately cause the death of Gary Rakes. As set forth in Respondent’s Amended Complaint, Respondent alleged that Petitioner willfully and recklessly ignored documented allergies, contraindications, and black box label warnings and willfully and recklessly provided excessive doses of Haldol and Seroquel to sedate an agitated patient. As a result, Respondent claimed that Gary Rakes died. (*See* “**Exhibit 2**” : SCT0005-SCT011).

Respondent’s expert, Dr. Kenneth Scissors opined that the proximate cause of Gary Rakes’ death was a result of the excessive administration of the sedatives Haldol and Seroquel in the setting of underlying chronic lung disease. (*See* “**Exhibit 13**” : SCT0598). It is undisputed in

the record below that Petitioner did not order Seroquel to be administered to Gary Rakes. Dr. Toni Muncy gave charge nurse, Laura Potter the order for 100 mg Seroquel to be administered to Gary Rakes. (See pgs. 11, 13-14 of “**Exhibit 7**” : SCT0221-SCT0222). Dr. Muncy was not part of the Petitioner’s team at BRMC, and thus, Dr. Muncy did not consult Petitioner before administering the Seroquel. (See pg. 14 of “**Exhibit 3**” : SCT0016). Moreover, Dr. Razzaq placed the order to nurse, Larry Rose, for 25 mg of Seroquel to be administered to Gary Rakes on September 4, 2010. (See pg. 14 of “**Exhibit 6**” : SCT0182)(Also see pg. 14 of “**Exhibit 4**” : SCT0141). Dr. Razzaq did not consult Petitioner before ordering the Seroquel to be administered to Gary Rakes. (See pg. 19 of “**Exhibit 4**” : SCT0142).

Respondent further alleged in his Amended Complaint that Petitioner ordered Haldol to be administered to Gary Rakes. (See “**Exhibit 2**” : SCT0005-SCT011). The record below is clear that the administration of Haldol alone did not proximately cause Gary Rakes’ death. Respondent’s expert, Dr. Kenneth Scissors, opined in his report that the proximate cause of Mr. Rakes’ death was the administration of both Haldol and Seroquel. (See “**Exhibit 13**” : SCT0598). Contrary to the opinion in his report, Dr. Scissors testified at deposition that he actually preferred Haldol over Seroquel as it is simpler and more straightforward to use. (See pg. 51 of “**Exhibit 11**” : SCT0394). Importantly, Dr. Scissors testified that he does not believe Haldol had a sedative effect on Gary Rakes, and that it was the combination of Haldol and Seroquel, not Haldol alone, that led to Gary Rakes’ death. (See pgs. 85-86 of “**Exhibit 11**” : SCT0403).

Dr. Scissors testified it is unlikely that Haldol would affect a patient’s sedation level or a patient’s respiratory function unless it got to the level of causing sedation. (See pg. 89 of “**Exhibit 11**” : SCT0404). Dr. Scissors’ testimony made it apparent that due to the fact that

Haldol did not have a sedative effect on Gary Rakes, it would not have a major impact or a clinically significant impact on his respiratory function. (See pgs. 90-91 of “**Exhibit 11**” : SCT0404). Dr. Scissors opined that Haldol was out of Gary Rakes’ system at the time of death. (See pg. 168 of “**Exhibit 11**” : SCT0423).

The West Virginia Medical Professional Liability Act states that “the applicable standard of care and a defendant's failure to meet the standard of care, if at issue, shall be established in medical professional liability cases by the plaintiff by testimony of one or more knowledgeable, competent expert witnesses if required by the court. See W.Va. Code § 55-7B-7.

Respondent’s expert, Dr. Scissors opined in his report that Petitioner deviated from the standard of care by not ordering adequate or timely CPAP or BiPAP. (See “**Exhibit 13**” : SCT0594). Respondent’s own expert, Dr. Schwartz, testified to a reasonable degree of medical certainty that if BiPAP was administered at 9:00 p.m. or 10:00 p.m. on September 4, 2010, as ordered by Petitioner, Gary Rakes would have survived. (See pg. 30 of “**Exhibit 12**” : SCT0491).

As this Honorable Court’s threshold focus will be on the existence of expert witnesses opining to the alleged negligence of the Petitioner, Neary, *supra*, the underlying record is clear that the actions of the Petitioner did not proximately cause Gary Rakes’ death. The Petitioner did not order Seroquel to be administered to Gary Rakes, a drug that the Respondent alleged Mr. Rakes was allergic to. Further, the undisputed facts showed that the administration of Haldol alone did not proximately cause Gary Rakes’ death. Haldol was not listed as a known allergy of Gary Rakes. Respondent’s retained expert, Dr. Scissors, testified he did not believe the Haldol had a sedative effect on Gary Rakes, and that it was the combination of Haldol and Seroquel (not Haldol alone) that led to Gary Rakes’ death. Moreover, Respondent’s retained expert, Dr.

Schwartz testified to a reasonable degree of medical certainty that Gary Rakes would have survived if he would have received appropriate BiPAP therapy at 9:00 or 10:00 p.m. on September 4, 2010; which was ordered by Petitioner, but not followed by staff at BRMC.

Given the undisputed record, Petitioner respectfully submits to this Honorable Court that the Circuit Court erred in denying Petitioner's Motion for Summary Judgment on the Respondent's Amended Complaint as the Respondent presented no evidence of proximate cause sufficient to survive summary judgment.

C. The Circuit Court of Mercer County Erred in Denying Petitioner's Motion for Summary Judgment on Respondent's Claim for Punitive Damages as There Were No Genuine Issues of Material Fact that Petitioner Did Not Act Maliciously, Wantonly, Mischievously, or with Criminal Indifference to the Civil Obligations of Gary Rakes.

The well established standard for punitive damages requires proof of "gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others." Workman v. UA Theatre Circuit, Inc., 84 F. Supp. 2d 790 (2000)(citing Alkire v. First National Bank of Parsons, 475 S.E.2d 122, 129 (W.Va. 1996)) See also Mayer v. Frobe, 22 S.E. 58 (W.Va. 1895). The Supreme Court of Appeals of West Virginia, in Alkire, stated that:

"[a]lthough there are tempting shorthand phrases to characterize the type of conduct which warrants punitive damage consideration, for example, 'conscious indifference,' 'reckless, willful and wanton,' [and] 'particularly egregious' we are still committed to the traditional rule announced in Mayer and cited with approval in a number of subsequent cases."

Alkire, 475 S.E.2d at 129 (internal citations omitted).

Further, in Jarvis v. Modern Woodmen of Am., the West Virginia Supreme Court stated "[t]o sustain a claim for punitive damages, the wrongful act must have been done maliciously, wantonly, mischievously, or with criminal indifference to civil obligations. A wrongful act, done

under a bona fide claim of right, and without malice in any form, constitutes no basis for such damages." 406 S.E.2d 736, 742 (W.Va. 1991)(citing Syl. Pt. 3, Jopling v. Bluefield Water Works & Improvement Co., 74 S.E. 943 (W.Va. 1912)).

In order to sustain a claim for punitive damages, the Respondent had to show that the alleged conduct was more than negligent (i.e. deviation from the applicable standard of care). The Respondent had to show that Petitioner's conduct was malicious, wanton, or done with criminal indifference. The Respondent's support for punitive damages during discovery was that the named Defendants below willfully and recklessly failed to ignore documented allergies, contraindications, and black box warnings; willfully and recklessly provided excessive doses of Haldol and Seroquel; and willfully and recklessly failed to take any measure to investigate or rectify the reasons for Mr. Rakes' prolonged state of unconsciousness as to evince a conscious disregard for the rights of the Gary Rakes. (See "**Exhibit 2**" : SCT0008).

Despite the allegations in the Respondent's Amended Complaint, the undisputed facts can only be based on negligence, not malice or willfulness. As set forth above, the undisputed record proves that Petitioner noted in Gary Rakes' medical records that he was allergic to Seroquel. (See pgs. 28-29 of "**Exhibit 3**" : SCT0019-SCT0020). Petitioner did not ignore this alleged documented allergy as made apparent by the fact that Dr. Khalid Razzaq and Dr. Toni Muncy ordered that the Seroquel be given to Gary Rakes, not Petitioner. (See pgs. 11, 13-14 of "**Exhibit 7**" : SCT0221-SCT0222). (Also see pg. 14 of "**Exhibit 4**" : SCT0141).

More importantly, the evidence below did not show that Petitioner ignored Gary Rakes. In fact, Petitioner ordered that BIPAP therapy be administered to Mr. Rakes the night before his death. (See pgs. 28-29 of "**Exhibit 3**" : SCT0019-SCT0020). Petitioner's order was not followed.

Respondent's own expert testified that had Petitioner's order been followed, Mr. Rakes would have survived. (See pg. 30 of "Exhibit 12" : SCT0491 and pg. 60 of "Exhibit 12" : SCT0521).

The question for trial, if any, was whether Petitioner's conduct deviated from the applicable standard of care. Certainly, there were no genuine issue of material fact existed as to punitive damages. It is widely accepted that punitive damages are not recoverable for simple negligence. See Surber v. Greyhound Lines, Inc., 2006 U.S. Dist. LEXIS 92641 (S.D. WV. 2006)(granting the defendant's motion for summary judgment on punitive damages based on lack of evidence of wanton or willful conduct). Accordingly, Petitioner submits that based on the lack of evidence to support punitive damages, the Circuit Court erred in denying Petitioner's Motion for Summary Judgment on Respondent's Claim for Punitive Damages.

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

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

The Petitioner moved for directed verdict on the entire case and on the issue of punitive damages both at the close of the Respondent's case-in-chief and at the close of the Petitioner's case-in-chief. Both motions were denied by the Circuit Court. The basis for Petitioner's argument at trial was that Respondent failed to establish proximate causation and that the evidence at trial pointed to intervening/superseding causation.

The proximate cause of an injury is the last negligent act contributing to the injury and without which the injury would not have occurred. Syl. Pt. 5, Stewart v. George, 607 S.E.2d 394 (W.Va. 2004). The burden of establishing proximate cause is always on the plaintiff. Syl. Pt. 2, Walton v. Given, 215 S.E.2d 647 (W.Va. 1957)(stating that "The burden is on the plaintiff to prove by a preponderance of the evidence that the defendant was negligent and that such negligence was

the proximate cause of the injury.”). *See also* Tolley v. Carboline Company, 617 S.E.2d 508, 512 (W.Va. 2005)(Citing Whetstine v. Gates Rubber Co., 895 F.2d 388, 393 (7th Cir. 1990)(“A plaintiff who fails to establish the element of proximate cause...has not sustained his burden of making a prima facie case[.]”).

Proximate cause must be understood to be that cause which in actual sequence, unbroken by any independent cause, produced the wrong complained of, without which the wrong would not have occurred. *See* Syl. Pt. 5, Jackson v. Putnam County Bd. of Educ., 653 S.E.2d 632 (W.Va. 2007). "An intervening cause, in order to relieve a person charged with negligence in connection with an injury, must be a negligent act, or omission, which constitutes a new effective cause and operates independently of any other act, making it and it only, the proximate cause of the injury." *See* Syl. Pt. 12, Marcus v. Staubs, 736 S.E.2d 360 (W.Va. 2012).

At trial, Respondent’s expert, Dr. Scissors, testified that the proximate cause of Mr. Rakes’ death was a result of the excessive administration of the sedatives Haldol and Seroquel in the setting of underlying chronic lung disease. (*See* pg. 285 of “**Exhibit 30**” : SCT1606). Yet, Dr. Scissors testified at trial that Petitioner did not order the Seroquel and that Petitioner emphasized in the medical records that Seroquel was not to be given. (*See* pgs. 279-80 of “**Exhibit 30**” : SCT1604). Dr. Scissors testified at trial that Gary Rakes did not have a reaction to the Haldol and it did not interfere with his respiratory function. (*See* pgs. 276-77 of “**Exhibit 30**” : SCT1603-SCT1604).⁶

Respondent’s expert, Dr. Schwartz testified that had Petitioner’s order for BiPAP therapy been carried out, Mr. Rakes may have survived. Dr. Schwartz admitted that the fact that the Petitioner’s BiPAP order was not carried out was not Petitioner’s fault. Dr. Schwartz testified

⁶ Dr. Schwartz, Petitioner’s experts, Petitioner, Dr. Razzaq, Nurse Potter, Nurse Grose, and Nurse Rose all testified at trial that the two doses of Seroquel (100mg and 25mg) were not ordered or administered by Petitioner.

that no one called Petitioner to advise her that the BiPAP order was not carried out. (See pgs. 366 of “**Exhibit 30**” : SCT1668). In fact, Nurse Potter, Nurse Grose, and Nurse Rose all testified at trial that it was the obligation of the staff at BRMC to make sure that this type of order was carried out. (See pgs. 589, 623 and 626-27, and 770-72 of “**Exhibit 30**” : SCT1724, SCT1733-SCT1734, and SCT1821).

The evidence at trial was clear. Petitioner did not order or administer the Seroquel, the Haldol had no sedative effect on Gary Rakes or his respiratory drive, and if the BiPAP therapy order placed by Petitioner was carried out by staff at BRMC, Mr. Rakes would have survived. These undisputed facts at trial break the causal connection to the Respondent’s alleged theory on proximate causation (i.e. ventilator failure, as a result of excessive administration of the sedatives Haldol and Seroquel in the setting of underlying chronic lung disease). The evidence established the proximate cause of Gary Rakes’ death was out of the control of Petitioner.

Furthermore, Petitioner submits the evidence at trial failed to satisfy any claim for punitive damages under the standard set forth in Peters v. Rivers Edge Mining, Inc., 680 S.E.2d 791 (W.Va. 2009). Under the pronouncement in Peters, the Respondent had to prove that Petitioner’s conduct and/or medical treatment was done “maliciously, wantonly, mischievously, or with criminal indifference to civil obligations. A wrongful act, done under a *bona fide* claim of right, and without malice in any form, constitutes no basis for such damages.” Id. at 821 (internal citations omitted). The evidence at trial as discussed *supra*, did not support this type of conduct. No conduct, action, or inaction on the part of Petitioner warranted Respondent’s claim for punitive damages to go to the jury.

Accordingly, Petitioner submits that the Circuit Court erred in denying Petitioner’s Renewed Motion for Judgment as a Matter of Law on the Respondent’s Amended Complaint on

the issue of proximate causation as it was not established and there were intervening/superseding causes outside the control of the Petitioner. Petitioner submits that the Circuit Court erred in denying Petitioner's Renewed Motion for Judgment as a Matter of Law on the Respondent's claim for punitive damages as the Petitioner's conduct was not malicious, wanton, mischievous, or with criminal indifference to civil obligations.

B. Motion for New Trial.

1. Respondent's Peremptory Strike of the Only African American Juror.

In West Virginia, it is a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and article III, section 10, of the Constitution of West Virginia for a party in a civil action to purposefully eliminate potential jurors from a jury through the use of peremptory strikes solely upon the basis of gender or race. *See* Syl. Pt. 3, Parham v. Horace Mann Insurance Company, 490 S.E.2d 696 (W.Va. 1997). When a peremptory strike is challenged, the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. *Id.* at Syl. Pt. 2.

To prove a violation of equal protection, the analytical framework established in the U.S. Supreme Court case of Batson v. Kentucky, 476 U.S. 79 (1986) controls and involves three steps. *First*, there must be a prima facie case of improper discrimination. *Second*, if a prima facie case is shown, the striking party must offer a neutral explanation for making the strike. *Third*, if a neutral explanation is given, the trial court must determine whether the opponent of the strike has proved purposeful discrimination. So long as the reasons given in step two are facially valid, the explanation for the strike need not be persuasive or plausible. The persuasiveness of the explanation does not become relevant until the third step when the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination. When a

peremptory strike is challenged, the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike. Id. at Syl. Pt. 1.

In Parham, *supra*, during jury selection, Appellees peremptorily struck one of two potential black jurors from the venire (the other black venireperson was selected to serve as a juror). Id. at 699. Counsel for the Appellant challenged Appellees' counsel's peremptory strike and requested that Appellees' counsel place on the record why he took a black juror off the jury. Appellees' counsel objected to Appellant counsel's request. This Court stated that it would be Appellees' counsel obligation, if challenged, to articulate a non-racial basis for removal of the black juror. After the jury returned a verdict in favor of the Appellees, Appellants filed their motion for a new trial, arguing that the trial court committed reversible error by failing to require Appellees to state a race-neutral reason for using a peremptory strike against one of the black jurors. Id. at 699.

In response to the motion for a new trial, the trial court sent copies of a letter to counsel for both parties, requesting that counsel for the Appellees submit an affidavit stating his reasons for striking the prospective juror. The Appellees' counsel stated that he struck the juror because the black juror was a social worker, who tends to foster a more liberal view and have a greater tendency to find for the individual and against the corporation. Also, the Appellees' counsel stated that he struck the prospective juror because she knew the Appellants. Id. The trial court found that the jury represented the population of Raleigh County and denied the motion for a new trial. Id. at 700.

On appeal, this Honorable Court analyzed the Appellees peremptory strike under the analytical framework contained in the landmark decision of Batson v. Kentucky, *supra*. In so doing, this Court found that the Appellees' counsel peremptorily struck the juror belonging to the

same cognizable racial group as Appellants. This Court found that the Appellees' counsel offered a race-neutral explanation for the strike and that the circuit court was able to evaluate the credibility of the reasons offered by the Appellees' counsel. Id. at 702.

This Honorable Court held that after examining the record and providing substantial deference to the trial court's findings, it could not find that the trial court erred by determining that the Appellants failed to prove purposeful racial discrimination by Appellees' counsel's use of a peremptory strike against one of the black jurors. Id. The evidence below is distinguishable from the facts of Parham. In Parham, after the Appellees' strike of the black juror, there was still one black juror left on the panel. Id. at 699, fn 1. At trial, Juror Tracey Boyer was the only African American on the jury panel.

Also, in Parham, the Appellees' counsel provided two race-neutral reasons for the peremptory strike of the black juror: (1) he believed the potential juror's occupation as a social worker "fostered a more liberal view and a greater tendency to find for the individual [and] against the corporation", and (2) the potential juror indicated that she knew the Appellants. Id. at 702. Here, after the Batson challenge was instituted by Petitioner, the Circuit Court requested a non-discriminatory basis for Respondent's counsel's striking the only African American juror. Respondent counsel's response was simply: "I didn't like her answer." (*See* pgs. 114-116 of "**Exhibit 30**" : SCT1563).

The Circuit Court advised Respondent's counsel that there had to be a non-discriminatory basis for the strike. On his second attempt, Respondent's counsel advised the Circuit Court Juror Boyer seemed to have a lack of understanding of the questions that he asked her and that she made references to smoking causing lung problems. On his third and final attempt, Respondent's counsel stated that the reason he struck Juror Boyer was because she drew a strong connection

between smoking and respiratory issues. Respondent's counsel further noted that there is going to be an issue at trial whether Gary Rakes was a smoker or not, which places negligence or a comparative fault aspect on the part of his client. (See pgs. 114-119 of "**Exhibit 30**" : SCT1563-SCT1564). However, these alleged non-discriminatory reasons for the strike were not facially valid in light of the evaluation of Respondent's counsel's credibility under Batson.

There was no evidence in the record to suggest that Juror Boyer lacked an understanding of the questions that were asked of her. (See pgs. 52-53 and 62-63 of "**Exhibit 30**" : SCT1547-SCT1548 and SCT1550). Juror Boyer did not raise any other issues that would suggest she was a bad juror. Also, Juror Boyer did not draw a strong connection between smoking and respiratory issues. Juror Boyer simply stated that COPD "can come" from smoking for so many years and that you can catch emphysema with it. (See pgs. 52-53 of "**Exhibit 30**" : SCT1547-SCT1548). Moreover, this was simply observed by Ms. Boyer on television commercials, not through personal experience. In fact, the Circuit Court ultimately instructed the jury panel that they must not use information from outside sources (i.e. television) and that television cannot be an influence in the case. (See pgs. 131-132 of "**Exhibit 30**" – SCT1567).

Even more telling of the Respondent's facially invalid explanation for the strike is that Juror Vance directly linked smoking to emphysema, which is a common type of COPD. (See pg. 53 of "**Exhibit 30**" : SCT1548). Juror Vance was a white male on the jury panel. (See Exhibit 2 of "**Exhibit 29**" – SCT1524-SCT1533). Respondent's counsel did not strike Juror Vance for his knowledge of COPD/emphysema when he physically had the condition and smoked. Instead, counsel for the Respondent decided to strike the only African American juror, Tracy Boyer, for seeing a television commercial regarding the same.

Furthermore, Respondent's counsel's explanation for the strike was that there was going to be an issue at trial whether Gary Rakes was a smoker or not, which places negligence or a comparative fault aspect on the part of his client. This was Respondent's counsel's final reason for the strike of Juror Boyer. (See pg. 117 of "Exhibit 30" : SCT1564). However, as undersigned counsel correctly asserted on record, smoking and/or comparative fault was not being raised as an issue during trial and had already been decided by the Circuit Court. (See pg. 118 of "Exhibit 30" : SCT1564)(Also see pgs. 7-11 of "Exhibit 30" : SCT1536-SCT1537).

Petitioner submits that Respondent's counsel provided no neutral or facially valid basis for striking Juror Boyer. Petitioner carried her burden under Batson, *supra* of proving purposeful discrimination in Respondent's striking of Tracey Boyer, who would have been the alternate on the jury panel; and eventually, on the panel because Juror Hicks was excused during trial. No facially valid neutral explanation was ever provided on the record by Respondent's counsel. Accordingly, the Circuit Court erred in denying Petitioner's new trial on this issue alone.

2. Respondent's Counsel's Comments in Opening Statement that Seroquel was Administered by Petitioner was in Direct Violation of the Circuit Court's *in Limine* Ruling and Does Not Constitute Harmless Error.

On the first day of trial, the Circuit Court granted Petitioner's Motion *in Limine* to preclude any testimony that Petitioner ordered and administered Seroquel to Gary Rakes and that the order and administration of Haldol alone was the cause of Gary Rakes' death. (See "Exhibit 20" : SCT0924-SCT0928). This ruling was made on the same day as the opening statements of counsel for both Petitioner and Respondent. Nevertheless, Respondent's counsel violated the Circuit Court's Order twice during opening statement.

In West Virginia, "once a trial judge rules on a motion *in limine*, that ruling becomes the law of the case unless modified by a subsequent ruling of the court. A trial court is vested with

the exclusive authority to determine when and to what extent an *in limine* order is be modified.” See Syl. Pt. 2, Adams v. Consol. Rail Corp., 591 S.E.2d 269 (W.Va. 2003). In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury. Where practicable, these matters should be determined upon a pretrial motion in limine. Id. at 272.

Rule 61 of the West Virginia Rules of Civil Procedure states that “No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.” See Rule 61 of W.Va. R.C.P.

This Honorable Court established the rule that failure to follow a trial judge’s *in limine* ruling is not always reversible error. It is subject to a harmless error analysis. See Ilosky v. Michelin Tire Corp, 307 S.E.2d 603 (W.Va. 1983)(finding that violation of the trial court’s *in limine* ruling was harmless error as it did not go to causation).

As set forth more fully herein, part of Respondent’s theory on causation in the underlying case was that Gary Rakes died of ventilator failure, as a result of excessive administration of the sedatives Haldol and Seroquel (which Mr. Rakes allegedly had a known allergy to) in the setting of underlying chronic lung disease. At trial, counsel for the Respondent conveyed to the jury during opening statement that Petitioner ordered Seroquel to be given to Gary Rakes, not once, but twice. (See pgs. 158-166 of “**Exhibit 30**” : SCT1574-SCT1576). While counsel for the

Petitioner objected twice and moved for a mistrial, the Circuit Court denied the Respondent's request and no limiting instruction was given to the jury. *Id.*

Under the harmless error analysis provided under West Virginia law and Rule 61 of the West Virginia Rules of Civil Procedure, it is apparent that Respondent's counsel's comments during opening statement went directly to Respondent's theory of causation. Allowing the Respondent's counsel to violate the Circuit Court's *in limine* rulings twice, without a limiting instruction was not harmless error, and was detrimental to the defense and substantial right of the Petitioner. Thus, the Circuit Court erred in denying a new trial on this issue alone.

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

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

In Syllabus Point One of Black v. Peerless Elite Laundry Co., 169 S.E. 447 (W.Va. 1933), this Honorable Court explained that it would "not consider errors predicated upon the abuse of counsel of the privilege of argument, unless it appears that the complaining party asked for and was refused an instruction to the jury to disregard the improper remarks, and duly excepted to such refusal." Syl. Pt. 6, McCullough v. Clark, 106 S.E. 61 (W.Va. 1921). *See also* Pasquale v. Ohio Power Co., 418 S.E.2d 738 (W.Va. 1992).

Petitioner submits that the improper comments made by Respondent's counsel during opening and closing statements exceeded the scope of permissible arguments allowed under

West Virginia law. During opening statement Respondent's counsel referred to Petitioner as the "captain of the ship." (*See* pg. 163 of "Exhibit 30" : SCT1575). This doctrine was abolished in West Virginia in Thomas v. Raleigh General Hospital, 358 S.E.2d 222 (W.Va. 1987).⁷

At the close of the Respondent's case-in-chief, undersigned counsel brought the fact that the doctrine was abolished to the Circuit Court's attention and offered a limiting instruction to be pronounced to the jury in attempt to mitigate the prejudicial and inflammatory comments already made. The instruction was given by the Circuit Court. (*See* pgs. 296-300, 482 of "Exhibit 30" : SCT1651-SCT1652 and SCT1697). Petitioner submits that this instruction was too late in that the jury had already been subjected to these prejudicial statements for half of the trial.

Furthermore, during closing argument, Respondent's counsel argued to the jury that the Petitioner hired the "best lawyers in the country" to protect "their money." (*See* pgs. 968-969; 972 of "Exhibit 30" : SCT1870 and SCT181871). Respondent's counsel also informed the jury that the decision jury makes affects the community and that the jury can impliedly not let the community down. (*See* pgs. 966, 969, 970, 976 of "Exhibit 30" : SCT1870-SCT1871 and SCT1872). Petitioner objected to this commentary after the close of Respondent's closing statement. The Circuit Court overruled the objection and movement of mistrial by the Petitioner. (*See* pgs. 978-979 of "Exhibit 30" : SCT1873).

Collectively, the arguments and comments made by Respondent's counsel during opening and closing statements did nothing more than inflame, prejudice and mislead the jury. "The cumulative error doctrine may be applied in a civil case when it is apparent that justice requires a reversal of a judgment because the presence of several seemingly inconsequential

⁷ In rejecting the doctrine, this Court recognized that the doctrine requires a physician to control everything and that liability is virtually imposed by virtue of the physician's status, without a showing of actual control. *Id.* at 224.

errors has made any resulting judgment inherently unreliable.” Syl. pt. 8, Tennant v. Marion Health Care Found., Inc, 459 S.E.2d 374 (1995).

None of the arguments made by Respondent’s counsel relate to or were within the scope of the evidence. This was a medical malpractice trial. The arguments by Respondent’s counsel were against the law of this State, based on facts not in the record, contained appeals to the jury’s passions and prejudice, and excited and inflamed the minds of the jury against Petitioner and her counsel. *See generally*, Crum v. Ward, 122 S.E.2d 18, 26 (W.Va. 1961). Thus, the Circuit Court erred in denying Petitioner’s motion for new trial on these issues.

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

Rule 51 of the West Virginia rules of Civil Procedure states, in part, that:

“... No party may assign as error the giving or the refusal to give an instruction unless the party objects thereto before the arguments to the jury are begun, stating distinctly, as to any given instruction, the matter to which the party objects and the grounds of the party’s objection; but the court or any appellate court, may, in the interest of justice, notice plain error in the giving or refusal to give an instruction, whether or not it has been made the subject of objection. Opportunity shall be given to make objection to the giving or refusal to give an instruction out of the hearing of the jury.”

See W.Va. R.C.P. 51.

“Even if a requested instruction is a correct statement of the law, refusal to grant such instruction is not error when the jury was fully instructed on all principles that applied to the case and the refusal of the instruction in no way impeded the offering side’s closing argument or foreclosed the jury’s passing on the offering side’s basic theory of the case as developed through the evidence.” *See* Syl. Pt. 2 of Shia v. Chvasta, 377 S.E.2d 644 (W.Va. 1988).

At the pre-trial conference in the underlying matter, the Circuit Court ruled that the Do Not Resuscitate (“DNR”) medical orders would be admissible into evidence at trial. (*See*

“**Exhibit 20**” : SCT0924-SCT0928). During trial, Petitioner submitted a proposed jury instruction to the Circuit Court which provided an accurate statement of the law: if there was a DNR order in place, it must be complied with.⁸ (See “**Exhibit 21**” : SCT0929-SCT0930). This instruction was directly in correlation with the West Virginia Code governing DNR orders. However, this Honorable Court denied giving the jury instruction on DNR over Petitioner’s counsel’s objection. (See pgs. 684-88 of “**Exhibit 30**” : SCT1799-SCT1800)

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

VI. CONCLUSION

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

⁸ W.Va. Code § 16-30C-7 states, in part, that “Health care providers shall comply with the do-not-resuscitate order when presented with one of the following: (1) A do-not-resuscitate order completed by a physician on a form...”

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

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

Respectfully submitted,



Thomas P. Mannion (WV Bar #6994)

Andrew D. Byrd (WV Bar #11068)

Mannion & Gray Co., L.P.A.

707 Virginia Street East

Chase Tower Suite 260

Charleston, WV 25301

304-513-4242 – Phone

304-513-4243 – Fax

tmannion@mansiongray.com

abyrd@mansiongray.com

Counsel for Petitioner Delilah Stephens, M.D.

No. 13-1079

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DELILAH STEPHENS, M.D.,

Petitioner/Defendant Below,

v.

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

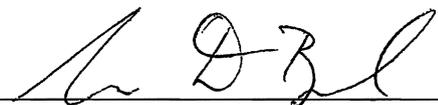
Respondent/Plaintiff Below.

CERTIFICATE OF SERVICE

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

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

This 10th day of January, 2014.



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