

No. 30463 – Jerry and Kathy Withrow, natural parents and guardians of Rebekah Lynn Withrow, a minor, and Jerry Withrow, individually, and Kathy Withrow, individually v. West Virginia University Hospitals, Inc., a West Virginia corporation, dba Ruby Memorial Hospital, and the University of West Virginia Board of Trustees

FILED

December 10, 2002

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED

December 11, 2002

RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, Justice, dissenting:

I dissent from the majority opinion, because I believe inferences can be drawn from the record that are favorable to the plaintiff/appellant. I therefore believe summary judgment was improper.

Rebekah Withrow suffered a stroke when her platelet count fell to 13,000 on December 2, 1995. The day before, her platelet count had been 32,000.

The record indicates that Rebekah's doctor, Dr. Marie Steiner, entered a protocol order that required Rebekah to be transfused with platelets if her platelet count reached or fell below 20,000. On November 25, 1995, Dr. Steiner entered an order requiring Rebekah's platelet count to be kept above 40,000. The circuit court specifically found that this order "temporarily superseded the protocol order."

The record also indicates that the order regarding a platelet count of 40,000 was discontinued on November 30, 1995, so any person reading Rebekah's medical chart would believe that the protocol order specifying a platelet count of 20,000 was in place.

The appellants do not dispute that the defendant/appellee, West Virginia University Hospital, reacted quickly to transfuse Rebekah with platelets when it was discovered

that her platelet count was 13,000. Their argument is over *who* discontinued the 40,000 platelet count order on November 30, 1995.

The appellants assert that a nurse working for the appellee hospital entered the discontinue order, without any authorization from Dr. Steiner to do so. Thus, the hospital's alleged failure to abide by Dr. Steiner's order to keep Rebekah's platelet count above 40,000, and the alleged inappropriate and unauthorized discontinuance of Dr. Steiner's order by a nurse form the factual basis of the appellant's negligence claim against the appellee.

Thus, the order allegedly in effect on December 1, 1995, when Rebekah's platelet count was 32,000, still required that Rebekah's platelet count be kept above 40,000. The appellant's expert did opine that Rebekah should have been transfused with platelets on December 1 until her count was again above 40,000, and explained that the transfusion would have prevented the stroke.

Despite this evidentiary dispute, the circuit court and the majority opinion concluded that there were no questions of fact, and no inferences favorable to the appellant that could be drawn from the record. I believe these conclusions were wrong, and believe a jury should have been allowed to decide if the hospital's actions were negligent.

I therefore respectfully dissent.