

FILED

July 10, 2003

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

Starcher, C.J., dissenting:

I dissent from the majority's opinion. The circuit court's decision to not sanction Attorney Haddad appears to have been based upon a secret, sealed affidavit reviewed by the circuit court in an *in camera* proceeding. The attorney for the plaintiff was thereby denied the opportunity to cross-examine Attorney Haddad, and possibly contradict his statement of the events surrounding the discovery of the letters written by Dr. Stewart.

I also dissent because the majority opinion downplays the importance of the letters, apparently accepting Dr. Stewart's contention that from the beginning he admitted that no lateral padding was used during Ms. Beto's surgery. However, this contention runs contrary to the fact that the plaintiff was forced to go to trial to prove that the absence of lateral padding breached the standard of care and caused the plaintiff's injury. The report of the operation, prepared by both the doctor and two operating room nurses, was silent about lateral padding. The letters were therefore the only contemporaneous documents that demonstrated that lateral padding had not been used.

The record shows that Attorney Haddad knew of the existence of the letters, but did nothing to comply with the plaintiff's discovery requests to make these letters available. The failure of Attorney Haddad to produce or identify the letters, and his

continued misrepresentations about whether they even existed, impaired the plaintiff's case and imposed exceptional hardships upon her ability to fairly try her case.

The discovery process is intended to be a simple, fair, and hopefully truthful procedure. The majority opinion acquiesces to this goal, but I still respectfully dissent, and believe the circuit court should have allowed the plaintiff an opportunity to cross examine Attorney Haddad, and thereby establish the need for additional sanctions.