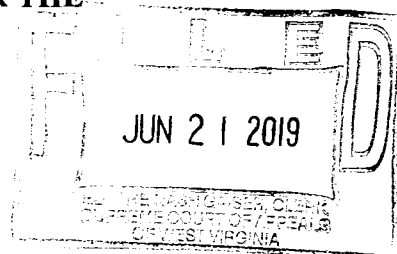


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**IN THE SUPREME COURT OF APPEALS FOR THE  
STATE OF WEST VIRGINIA**



**Marissa Shaffer and  
Timothy Shaffer,**

**Petitioners,**

**Docket No. 19-0305**

**William Bragg, M.D.,  
General Anesthesia Services, Inc. and  
Charleston Area Medical Center, Inc.,**

**Respondents.**

**PETITION FOR APPEAL OF MARISSA SHAFFER AND TIMOTHY SHAFFER**

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## **ASSIGNMENTS OF ERROR**

1. The circuit court erred in finding that Plaintiffs did not submit expert testimony of a causal connection between the alleged failure of informed consent and the injuries suffered by Marissa Shaffer.

2. The circuit court erred in finding a lack of evidence of a violation of the standard of care for informed consent by Defendant CAMC.

3. The circuit court erred in finding a lack of evidence of harm to support a tort of outrage claim against CAMC for lying to Marissa Shaffer about the student's involvement in her epidural placement.

## **STATEMENT OF THE CASE**

This case arises from an unintended dural puncture ("UDP"), sometimes referred to as a "wet tap," which is a complication of a labor epidural that occurs when the guide needle is inserted too far and actually punctures the cover of the patient's spine during the administration and placement of the epidural. In this case, the epidural administered to Petitioner/Plaintiff Marissa Shaffer was during her labor, prior to the delivery of her first child. Ms. Shaffer alleges that, as a result of the UDP, she suffered extreme headaches for days immediately following the UDP, an inability to bond with her child, post-traumatic stress disorder ("PTSD"), persistent depression, and chronic headaches. She alleges that the depression, PTSD, and chronic headaches persist to this day. Her husband, Timothy Shaffer, has a derivative claim for loss of consortium.

### **I. Procedural History**

On January 19, 2017, Marissa Shaffer sent notices of claim to Charleston Area Medical Center, Inc. ("CAMC"), General Anesthesia Services, Inc. ("GAS"), and William Bragg, M.D.

("Bragg"), in fulfillment of the pre-suit requirements of section 55-7B-6 of the *West Virginia Code*. Marissa and Timothy Shaffer commenced this civil action on March 10, 2017, by filing their Complaint against CAMC, GAS, and Bragg. The Complaint alleges that all three Defendants breached the standard of care for informed consent by failing to advise her that CAMC's student nurse anesthetist, a man who was later revealed to be named Garry Chapman, was going to assist Dr. Bragg in the actual placement of the epidural. The Complaint further alleges that, had the Defendants not violated the standard of care and informed Ms. Shaffer of Mr. Chapman's intended participation, she would have declined and asked that Dr. Bragg himself perform the procedure. Had the student not participated, the Shaffers allege, the complication would not have occurred, because the complication arose from the student's inexperience and difficulty determining where the needle was situated in relation to Ms. Shaffer's ligaments, the epidural space, and her dura and spine.

The Shaffers also allege, as a separate tort, that CAMC intentionally lied to Marissa Shaffer in a letter its administrator sent on March 20, 2015, which stated, "A review of your visit was conducted and we found that no student was involved in the epidural placement." JA 244. The Shaffers allege that this lie caused Marissa severe emotional distress. She thus seeks recovery against CAMC for the tort of outrage or intentional infliction of emotional distress. *See* syl. pt. 3, *Tanner v. Rite Aid*, 194 W. Va. 643, 461 S.E.2d 149 (1995) (quoting syl. pt. 6, *Harless v. First Nat'l Bank*, 169 W. Va. 673, 289 S.E.2d 692 (1982)) ("One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.").

At the close of discovery, all three Defendants moved for summary judgment on various grounds. On December 27, 2018, GAS and Bragg filed their motion for summary judgment and accompanying memorandum of law. JA 24; JA 26. On January 9, 2019, CAMC filed its motion for summary judgment and accompanying memorandum of law. JA 40; JA 42. The Shaffers filed a single memorandum in response to both motions for summary judgment on January 18, 2019. JA 54. The circuit court held a hearing on the motions for summary judgment on January 22, 2019. JA 216.

On February 25, 2019, the circuit court, by separate orders, granted both motions for summary judgment. JA 4; JA 14. In those orders, the circuit court acknowledged that a genuine issue of material fact exists as to whether a breach of the standard of care for informed consent occurred (JA 8), but, focusing exclusively on a single question and answer in an expert deposition, the circuit court concluded that Plaintiffs had not provided expert testimony that linked the alleged deviation of the standard of care for informed consent to the UDP and subsequent injuries. JA 8–9; JA 12; JA 18; JA 22–23. The circuit court also concluded that the Shaffers failed to prove by expert testimony that CAMC (as opposed to Bragg and GAS) had violated the standard of care for informed consent. JA 18. Finally, the circuit court dismissed the remaining claim against CAMC for intentional infliction of emotional distress by concluding that the Shaffers had not produced any expert testimony to establish that CAMC’s alleged lying to Marissa Shaffer about the student’s involvement had caused her harm. JA 19; JA 22.

The Shaffers timely filed their Notice of Appeal with this Court on March 26, 2019, assigning seven distinct errors in the circuit court’s reasoning. Those seven errors have been combined into three assignments of errors in the instant Appeal Brief. The facts relevant to those assignments of error, which are set forth immediately below, must include—in light of the circuit

court's focus on isolated statements by experts to the exclusion the actual and complete testimony of those experts—not only the facts surrounding the student's participation in Marissa Shaffer's labor epidural, the informed consent process, CAMC's subsequent lying with respect to the student's involvement, and Marissa Shaffer's physical and emotional injuries, but also some discussion of the testimony by the experts themselves, particularly the expert testimony of Gerald Bushman, M.D., Petitioner's anesthesiology and informed consent expert, regarding the causation issue, and of Dr. Bushman and Frank Ochberg, M.D., regarding the emotional distress caused by CAMC's persistent lying.

## **II. Statement of the Facts of the Case**

### **A. Ms. Shaffer's epidural, consent process, and dural puncture**

Petitioners Marissa Shaffer and Timothy Shaffer, Plaintiffs below, are married. On January 22, 2015, Marissa Shaffer was admitted to CAMC's Women's and Children's Hospital for the labor and delivery of her first child. Prior to her admission at CAMC, on October 7, 2014, she was presented with and signed a general consent form indicating (in paragraph 7) that she "understand[s] that CAMC is a teaching hospital, and that students in the health care sciences and resident physicians may observe and participate in my treatment under supervision." JA 242. That same general consent form also specifically reserved for Ms. Shaffer the "right to refuse any specific procedure or treatment when it is offered." JA 242.

Not long after she was admitted on January 22, 2015, Ms. Shaffer was seen by Bragg, an anesthesiologist, for the purpose of being administered a labor epidural. According to Ms. Shaffer and her husband, Timothy Shaffer, who was present at the time, Dr. Bragg first came in the room and asked Ms. Shaffer to sign another form. JA 97. Around 1:00 pm on January 22, 2015, Ms. Shaffer signed a more specific consent form, titled, "CAMC Acknowledgment of



Consent to Anesthesia,” specifically consenting to anesthesia care at CAMC. JA 92; JA 243.

Unlike the general consent form Ms. Shaffer signed more than three months earlier, the specific consent form for her anesthesia care made no mention of CAMC being a teaching hospital. JA 243. Also, the way that CAMC’s specific consent form is worded indicates that Ms. Shaffer specifically “request[s] and authorize[s] Doctor Bragg and/or physicians employed or contracted by GAS, Inc. to provide anesthesia care for my surgery or procedure.” JA 243. The specific consent form says nothing about the possibility of a non-physician or student performing her anesthesia care. JA 243.

It is undisputed that sometime after signing the anesthesia consent form, Ms. Shaffer was administered an epidural on January 22, 2015. It is also undisputed that her epidural resulted in an unintended dural puncture (“UDP”), commonly called a “wet tap,” where the dura or covering surrounding the spine is inadvertently punctured by the epidural guide needle. A UDP or wet tap can result in spinal fluid leaking, loss of pressure, and severe headaches that result in “postural limitations” because sitting up or standing can exacerbate the pain.

There is a dispute, however, over who was involved in placing the epidural guide needle and how and when the UDP or wet tap occurred. Marissa Shaffer herself testified that, based on the verbal communication she overheard between Dr. Bragg and a “student,” both of whom were behind her during the procedure, a student attempted to place the needle in her back, and the needle was still in the student’s hands when she overheard Dr. Bragg declare that the procedure had resulted in a “wet tap.” JA 94. Ms. Shaffer testified:

And then the student started placing [the epidural needle] and Dr. Bragg was giving him instructions. I guess he was too far and he kept saying, “Left.” He would say, “Left, left.” And then he did that for several minutes, maybe giving more directions that I didn’t get. And then I heard him say, “Well, it’s already a wet tap. I’ll take it from here.” And then I assume that’s when Dr. Bragg started taking over.

JA 94. Timothy Shaffer, Marissa's husband, who was also present in the room at the time, testified that he could tell that the student started the epidural procedure from the body positioning of the student and Dr. Bragg, because the student was bent over Marissa's back. JA 97.

Dr. Bragg identified the "student" who was present at the time as a student nurse anesthetist at CAMC's School of Nurse Anesthesia named Garry Chapman. Dr. Bragg testified that he first "got the needle started in the correct trajectory," and then "Gary made an attempt to advance the needle unsuccessfully, at which point I took over." JA 99. According to Dr. Bragg, the needle was in his (Dr. Bragg's) hands when the wet tap occurred. JA 99. However, Dr. Bragg testified clearly and unequivocally that "the needle was in [student Garry Chapman's] hands at some point while it was in Ms. Shaffer's back." JA 99.

Ms. Shaffer testified that she was not told that the student was going to participate in the epidural placement, she was not asked whether she consented to the student's participation, and she was not given any the opportunity to say that she didn't want the student to participate. JA 94. She admits that she knew a student was present in the room, but testified, "I didn't know he was participating until he had already started." JA 94. Ms. Shaffer testified that she realized that the student was placing the needle "after I heard Dr. Bragg telling—giving him instructions." JA 94. Ms. Shaffer testified that she did not want the student involved in the placement of her epidural. JA 94. She testified that when she realized the student was participating, the needle was already in his hands and in her back, so she did not say anything. JA 94. In Ms. Shaffer's view, "it was too late at that point." JA 94.

According to Ms. Shaffer, as a result of the wet tap, she suffered extreme, posture-limiting headaches for approximately eight days, before the treatment finally worked. During

this time, she was unable to care for or breastfeed her newborn infant son, and developed a severe depression that persisted for months, with moderate depression persisting much longer despite treatment.

**B. CAMC's denials of a student's involvement in the epidural placement**

CAMC's statements and testimony concerning the events surrounding Ms. Shaffer's epidural placement differ significantly from the accounts of Marissa Shaffer, Timothy Shaffer, and Dr. Bragg. While the Shaffers and Dr. Bragg agree that the "student" participated hands-on in the epidural—that he had his hands on the needle while it was in Ms. Shaffer's back—CAMC has denied that a student was involved at all in the placement of Ms. Shaffer's epidural. A couple of months after the event, in responding to a complaint from Ms. Shaffer about having been billed for treatment for the wet tap, CAMC's administrator, Dawn Schoolcraft, sent Ms. Shaffer a letter, dated March 20, 2015, in which Ms. Schoolcraft stated: "A review of your visit was conducted and we found that no student was involved in the epidural placement." JA 244. In that letter, Ms. Schoolcraft also informs Ms. Shaffer that "your concerns were reviewed by the Women and Children's Grievance Committee which has concurred with the results of this investigation." JA 244.

Ms. Schoolcraft's letter is not only noteworthy because it contradicts the testimony of Dr. Bragg, Marissa Shaffer, and Timothy Shaffer. Apparently, Ms. Schoolcraft's statement that "no student was involved in the epidural placement" is not what Ms. Schoolcraft herself had been told by the CAMC nurse anesthetist whom she asked to investigate, prior to sending the letter. According to Marion Jones, the lead nurse anesthetist (or "CRNA") at CAMC Women's and Children's, who was asked to investigate by Ms. Schoolcraft, she informed Ms. Schoolcraft that her investigation revealed that a student "was involved" in the epidural placement but that Dr.

Bragg believed he “caused” the wet tap himself. JA 103. Ms. Jones admitted that Ms. Schoolcraft’s statement in the letter was not correct based on what Ms. Jones had told her, and that she had told her that a student “was involved in the epidural placement.” JA 105.

Garry Chapman himself initially testified, in an affidavit he signed on February 24, 2017, between CAMC’s receipt of Ms. Shaffer’s notice of claim (sent January 19, 2017) and the commencement of the instant lawsuit with her Complaint (filed March 10, 2017), that “[a]s a CRNA student at Charleston Area Medical Center, I never placed an epidural.” JA 85. In that affidavit, Mr. Chapman testified that he does not recall Ms. Shaffer, but that he knows (presumably based on his general practice at CAMC) his “only involvement in her care would have been to introduce myself as a student, take a history, explain the procedure, and set up the equipment necessary for Dr. Bragg to perform the epidural himself.” JA 85. Chapman testified at his deposition that he never had his hands on an epidural needle while it was in a patient’s back while at CAMC, but that an unknown number of times he had his hands on an anesthesiologist’s hands while the anesthesiologist was inserting the needle in a patient’s back. JA 107.

**C. Expert testimony regarding whether the student’s participation in the epidural placement caused the dural puncture**

Petitioner’s anesthesiology expert, Dr. Bushman, was clear in testifying at his deposition that Ms. Shaffer was deprived of the opportunity to decline the student’s participation in her labor epidural by the failure of the informed consent process:

It seems to me we’re here because she never understood that [Chapman was going to assist or participate with the actual epidural placement]. And that is not what the consent form says and her expectations, as she’s articulated, seem to comport with what the consent form says, but that’s not what the behavior that occurred was.

So you can parse it a million different nuance ways but it really doesn't make any difference. She did not understand, in my opinion that a trainee

was going to be placing her epidural. And that's the crux of it. She didn't have the opportunity, based on not having that information; of saying I don't want that. I want Dr. Bragg to do it.

JA 144.

Dr. Bushman also testified that but for the student's participation in the epidural placement, the wet tap would not have occurred:

The trainee's participation in her care is the most important part of causation. And that derives from the fact that when he could not position the needle correctly, that instead of withdrawing the needle and starting over and accomplishing what presumably is his usual very, very low rate of wet taps, Dr. Bragg started from where Mr. Chapman stopped. That doesn't change the risk of the needle malposition it perpetrates it.

JA 146.

Respondent's anesthesiology expert, John Sullivan, M.D., was also asked whether the trainee's participation caused Marissa Shaffer's wet tap. Dr. Sullivan stated: "It's possible. I certainly didn't feel as strongly as your expert witness [Dr. Bushman] did about that. He seemed to feel that that specific phenomena was directly linked to causation." JA 67.

**D. Expert testimony concerning whether CAMC's lying about the student's involvement in the procedure caused Ms. Shaffer to suffer severe emotional distress**

According to Dr. Bushman, "Mrs. Shaffer suffered more than the early and late complications of the 'wet tap.' She also suffered the extreme psychological abuse of the hospital denying on the part of the parties involved that there was an undocumented trainee involved."

JA 82. At his deposition, Dr. Bushman testified that Ms. Shaffer was "emotionally traumatized" by CAMC's behavior and referred to that behavior as "gas-lighting." JA 147. Frank Ochberg, M.D., a psychiatrist and another Plaintiffs' expert, testified that CAMC's and Chapman's lying about Chapman's involvement in the placement of the epidural caused "profound and lasting damage to the plaintiff." JA 189.

## SUMMARY OF ARGUMENT

The circuit court erroneously focused on a single, ambiguous question and answer in Plaintiffs' expert's deposition—to the complete and total exclusion of the clear and unambiguous totality of the expert's testimony—in finding: “[Plaintiffs' expert] Dr. Bushman did not link the deviation from the standard of care during the informed consent process to the cause of Ms. Shaffer's injury.” JA 8–9; JA 12; JA 18; JA 22–23. The single, ambiguous question and answer that the circuit court relied on was this: Plaintiffs' expert, Gerald Bushman, M.D., was asked, “Do you agree that nothing about the informed consent process caused the wet tap?” He answered, “Correct.” There is *nothing* in that question or in Dr. Bushman's answer that suggests that Dr. Bushman was thinking of and applying the *legal* standard or *legal* definition of proximate cause for informed consent cases in the State of West Virginia, rather than the ordinary meaning of the word “caused” when he gave his answer.

In the ordinary meaning of the word, a lack of informed consent is never the “cause” of complications resulting from a medical procedure. What is said or not said during the consent process does not increase the risks of the procedure, increase the patient's organs' susceptibility to certain kinds of complications, or cause a surgeon's or anesthesiologist's hands to become unsteady. Rather, lack of informed consent deprives the patient of the opportunity to decline a procedure or aspects of the procedure that he or she reasonably might decline if the required information were provided to the patient. “In cases applying the doctrine of informed consent . . . a causal relationship, between such failure to disclose and damage to the patient, may be shown if a reasonable person in the patient's circumstances would have refused to consent to the surgery had the risks been properly disclosed.” *Adams v. El-Bash*, 175 W. Va. 781, 338 S.E.2d 381 (1985).

In contrast to the confusion that resulted from the Defendants' and circuit court's patently erroneous focus on one ambiguous question and answer, the *totality* of Dr. Bushman's testimony on the causation question was so unambiguous, unequivocal, and unmistakable—that the lack of informed consent deprived Marissa Shaffer of the opportunity to decline the student's participation in her labor epidural *and* that the student's participation in her labor epidural caused Ms. Shaffer's dural puncture during the procedure—that when Defendants' expert, John Sullivan, M.D., was asked whether the student's participation caused Marissa Shaffer's wet tap, he stated: "It's possible. I certainly didn't feel as strongly as your expert witness [Dr. Bushman] did about that. He seemed to feel that that specific phenomena was directly linked to causation." JA 67.

Remarkably and regrettably, in the proceedings below the *opposing expert* reviewed the totality of his counterpart's deposition testimony and characterized Dr. Bushman as "strongly" of the opinion that the student's participation was "directly linked to causation," but we are on appeal because the circuit court erroneously focused on one question and answer from that same deposition and concluded that the same expert "did not link the deviation from the standard of care during the informed consent process to the cause of Ms. Shaffer's injury." The totality of the evidence—and obviously any given expert's opinion and testimony—must be considered in ruling on a motion for summary judgment. *See* syl. pt. 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995) ("Summary 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[.]").

The circuit court also erred in finding that the Shaffers' expert did not testify that CAMC (as opposed to its co-Defendants Bragg and GAS) deviated from the standard of care in the

informed consent process, JA 18, and in concluding (to the extent the circuit court did so, as the order is not clear) that there was no evidence that CAMC breached the standard of care for informed consent. Contrary to the circuit court's patently erroneous finding, Dr. Bushman testified in his original certificate of merit (a sworn statement) that CAMC was responsible for informed consent with respect to its own students' participation in procedures in its own hospitals. JA 81 ("Although it appears that Dr. Bragg is an employee of a private corporation providing medical services at the hospital, I believe the hospital is responsible for employees and health care trainees who otherwise provide and document care to the patient.").

At his deposition, Dr. Bushman testified about all of the failings in the informed consent process, but was not asked about assignments of responsibility for the different aspects of that process between hospital and anesthesiologist. However, the documentary evidence submitted to the circuit court plainly shows that Bragg and CAMC took responsibility for different aspects of the informed consent process. Bragg handled the oral portion of the process with the patient, but it was CAMC itself that prepared the informed consent forms for both general consent and specific consent to an anesthesiology procedure. JA 242; JA 243. Dr. Bushman repeatedly criticized CAMC's specific consent form as inadequate and below the standard of care, because it not only failed to disclose its trainee's involvement, but it even specifically stated that Bragg or one of his "physician" colleagues affiliated with GAS would perform the epidural. JA 139; JA 140-41; JA 145. As Dr. Bushman explained:

It seems to me we're here because [Ms. Shaffer] never understood that [Chapman was going to assist or participate with the actual epidural placement]. And that is not what the consent form says and her expectations, as she's articulated, seem to comport with what the consent form says, but that's not what was the behavior that occurred.



JA 144. The circuit court's error is particularly glaring because the Defendants' own expert, John Sullivan, M.D., testified that the standard of care for hospitals requires disclosure of a trainee's participation in a specific procedure such as an epidural, and referred in his deposition to a written directive to that effect promulgated by the Joint Commission on the Accreditation of Hospitals, which Dr. Sullivan described as "an oversight agency for hospitals"—not anesthesiologists. JA 170.

The circuit court's final error was in finding that there was insufficient expert evidence of emotional harm to Marissa Shaffer resulting from CAMC's lying to support a claim for the tort of outrage or intentional infliction of emotional distress. Contrary to the circuit court's ruling, expert testimony is not even required to establish severe emotional distress as an element of the tort of outrage or intentional infliction of emotional distress. Syl. pt. 4, *Tanner v. Rite Aid*, 194 W. Va. 643, 461 S.E.2d 149 (1995).

Even if expert testimony were required to prove "severe emotional distress," the circuit court did not properly consider the testimony that was submitted to it and made available. According to Dr. Bushman, "Mrs. Shaffer suffered more than the early and late complications of the 'wet tap.' She also suffered the extreme psychological abuse of the hospital denying on the part of the parties involved that there was an undocumented trainee involved." JA 82. At his deposition, Dr. Bushman testified that Ms. Shaffer was "emotionally traumatized" by CAMC's behavior and referred to that behavior as "gas-lighting." JA 147. The circuit court did not even acknowledge or apparently consider Dr. Bushman's testimony. JA 14-23. Dr. Bushman's testimony on this point was not only submitted and put into the record, it was brought to the circuit court's attention in the Shaffers' response memorandum. JA 70. It is difficult to account for the circuit court's silent refusal to consider evidence properly submitted and placed before it.

Frank Ochberg, M.D., a psychiatrist and another Plaintiffs' expert, testified that CAMC's and Chapman's lying about Chapman's involvement in the placement of the epidural caused "profound and lasting damage to the plaintiff." The circuit court disregarded Dr. Ochberg's testimony on the basis that Dr. Ochberg characterized the harm caused by CAMC's lying as a "moral injury," which the circuit court decided was "not a recognized medical diagnosis"—presumably meaning that it is not a diagnosis in the DSM-V, but even that is not clear—even though no defendant filed a motion to exclude or limit Dr. Ochberg's testimony, and the circuit court did not undertake any kind of legal analysis on its own to gauge the reliability or admissibility of Dr. Ochberg's opinions. The circuit court simply decided to disregard Dr. Ochberg's opinion that CAMC's lying to Marissa Shaffer caused "profound and lasting damage." As with the circuit court's other errors, this one plainly resulted from a combination of the circuit court not reviewing and not referring to this Court's prior decisions and not reviewing and not referring to the records, documents, depositions, and other evidence submitted by the Shaffers in opposition to the Defendants' motions for summary judgment.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Oral argument is necessary under Rule 18(a). One reason that oral argument is necessary is that circuit court's orders are so lacking in legal citations and careful consideration of all of the evidence in the record submitted by the opposing party and brought to the circuit court's attention that the circuit court's reasoning and basis for its rulings are almost a matter of conjecture. While Petitioners have tried in good faith to present the circuit court's rulings in a fair light, and not attack straw arguments, it is an impossible task when entire issues as weighty as whether a particular expert's testimony on a particular point is admissible are decided without motion, without legal citation, and with a single sentence or two that is not even factually correct

or clear in its meaning, such as, “Dr. Ochberg conceded that a ‘moral injury’ is not a recognized medical diagnosis.”

Oral argument should be set under Rule 20. Many of the issues raised in the instant Appeal are of fundamental public importance. In deciding that Petitioners had not offered sufficient expert evidence on the issue of proximate causation by referring only to a single, ambiguous question and answer, the approach taken by the circuit court unfortunately threatens to transform the pretrial discovery and summary judgment process into a test of whether a party can word a question sufficiently cleverly and ambiguously and sneak it into an otherwise obscure section of a deposition (this particular question and answer is apropos of none of the questions surrounding it for pages) and then present a “gotcha” summary judgment motion to a Circuit Court. The summary judgment standard is extremely important, and the requirement that the evidence be considered in its totality on summary judgment is of fundamental public importance to the administration of justice in civil cases. This Court would also have the opportunity to revisit and clarify the standard for proximate cause in informed consent cases, which, although the circuit court did not get into the law or this Court’s prior decisions, is a complicated area of the law that would benefit from this Court’s additional guidance.

## **ARGUMENT**

### **I. The circuit court erred in finding that Plaintiffs did not submit expert testimony of a causal connection between the alleged failure of informed consent and the injuries suffered by Marissa Shaffer.**

The circuit court erroneously focused on a single, ambiguous question and answer in Plaintiffs’ expert’s deposition—to the complete and total exclusion of the clear and unambiguous totality of the expert’s testimony—in finding: “[Plaintiffs’ expert] Dr. Bushman did not link the deviation from the standard of care during the informed consent process to the cause of Ms.

Shaffer's injury." JA 8–9; JA 18. The single, ambiguous question and answer that the circuit court cited and relied on was this: The Shaffers' expert, Gerald Bushman, M.D., was asked, "Do you agree that nothing about the informed consent process caused the wet tap?" He answered, "Correct." JA 8–9; JA 18; JA 147–48. There is *nothing* in that question or in Dr. Bushman's answer that suggests that Dr. Bushman was thinking of and applying the *legal* standard or *legal* definition of proximate cause for informed consent cases in the State of West Virginia, rather than the ordinary meaning of the word "caused" when he gave his answer.

In the ordinary meaning of the word, a lack of informed consent is never the "cause" of complications resulting from a medical procedure. What is said or not said during the consent process does not increase the risks of the procedure, increase the patient's organs' susceptibility to certain kinds of complications, or cause a surgeon's or anesthesiologist's hands to become unsteady. Rather, lack of informed consent deprives the patient of the opportunity to decline a procedure or aspects of the procedure that he or she reasonably might decline if the required information were provided to the patient. "In cases applying the doctrine of informed consent . . . a causal relationship, between such failure to disclose and damage to the patient, may be shown if a reasonable person in the patient's circumstances would have refused to consent to the surgery had the risks been properly disclosed." *Adams v. El-Bash*, 175 W. Va. 781, 338 S.E.2d 381 (1985). Applying that proper standard for proximate cause in this informed case to the totality of Dr. Bushman's testimony, as required in ruling on a motion for summary judgment, it is clear that the motion for summary judgment should have been denied.

**A. The circuit court erroneously focused exclusively on a single question and answer rather than considering the totality of the expert's testimony on causation as required in ruling on a summary judgment motion.**

The standard for ruling on a motion for summary judgment is well-established. “A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.” *Holsten v. Massey*, 200 W. Va. 775, 490 S.E.2d 864 (1997). It is also well-established that the trial court should consider the *totality* of the evidence in the record in making the determination as to whether there is a genuine issue of fact, not simply rely on a single piece of evidence or a single ambiguous deposition answer to the exclusion of the rest of the evidence, testimony, and record. *See* syl. pt. 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995) (“Summary 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[.]”).

Considering the totality of the evidence presented, especially the totality of the testimony of Gerald Bushman, M.D., the anesthesiology expert proffered by the Shaffers—rather than focusing on a single, ambiguous question and answer—it is clear that summary judgment was not appropriate with respect to the Shaffers’ informed consent claim. As explained in greater detail in the next section, the proximate causation inquiry in cases premised on lack of informed consent never turns on whether the failure to utter certain words “caused” a surgeon or anesthesiologist to botch a procedure that he or she normally performs well, as though a medical procedure is a magical spell and the informed consent process is a necessary incantation that must precede the casting of the spell in order for the magician-healer to carry it off successfully. Informed consent is not a ritual. It is a process by which the patient is given the information necessary to accept or reject the procedure or certain aspects or portions of it, and it is the patient’s decision that potentially alters the outcome, not the utterance of the words.

Understood this way, and considering the totality of the testimony of Dr. Bushman placed into the record and called to the attention of the circuit court in the Shaffers' response memorandum, there were obvious genuine issues of fact as to whether the failure of informed consent deprived Marissa Shaffer of the opportunity to decline the participation of CAMC's student, Garry Chapman, in the epidural procedure, and whether Chapman's participation caused the unintended dural puncture or wet tap.<sup>1</sup>

Dr. Bushman made it clear in testifying at his deposition that Marissa Shaffer was deprived of the opportunity to decline Chapman's participation by the failure of the informed consent process:

It seems to me we're here because she never understood that [Chapman was going to assist or participate with the actual epidural placement]. And that is not what the consent form says and her expectations, as she's articulated, seem to comport with what the consent form says, but that's not what the behavior that occurred was.

So you can parse it a million different nuance ways but it really doesn't make any difference. She did not understand, in my opinion that a trainee was going to be placing her epidural. And that's the crux of it. She didn't have the opportunity, based on not having that information; of saying I don't want that. I want Dr. Bragg to do it.

JA 144.

Dr. Bushman also testified clearly that had Ms. Shaffer declined the student's participation in the epidural placement, then, more likely than not, the wet tap would not have occurred:

The trainee's participation in her care is the most important part of causation. And that derives from the fact that when he could not position the needle correctly, that instead of withdrawing the needle and starting over and accomplishing what presumably is his usual very, very low rate

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<sup>1</sup> There is one more step in the causal chain—whether Marissa Shaffer reasonably would have declined Chapman's participation had the Defendants not breached the standard of care in the informed consent process—but, as explained in the next section, this question is a jury question and not a proper subject of expert testimony.

of wet taps, Dr. Bragg started from where Mr. Chapman stopped. That doesn't change the risk of the needle malposition it perpetrates it.

JA 146.

Dr. Bushman explained the causal issues greater detail in his Addendum to his screening certificate of merit (JA 100-01)—which, like his original certificate of merit, was also prepared as a sworn statement and submitted to the circuit court in opposition to the motions for summary judgment—and elsewhere in his deposition. The primary driver of the risk for a wet tap or UDP (apart from patient-related risks that do not apply to Ms. Shaffer) is the experience of the practitioner attempting to place the needle, with studies showing that it takes 20 to 90 attempts—the latter is a number far in excess of whatever experience Chapman might have claimed at the time, which ranges somewhere from zero, according to his affidavit, to 44, according to Chapman's academic transcript—to achieve a success rate of greater than 80%. JA 81; JA 134-35. The success rate of experienced physicians is much, much higher, with only 1-3% (according to Dr. Bushman) or even only 1 in 150 (according to Dr. Sullivan) attempted labor epidurals resulting in a UDP. JA 81.

As Dr. Bushman explained in his addendum report and in his deposition, even though it appears from Dr. Bragg's deposition testimony that the needle was in Dr. Bragg's hands at the time the dural puncture occurred, the risk of dural puncture was created by Chapman's unsuccessful attempt at placing the needle. Chapman essentially got the needle lost in Ms. Shaffer's back, and when Dr. Bragg took over, he didn't or couldn't know where it was. JA 100-01; JA 134.

Defendants' expert anesthesiologist, Dr. Sullivan, was more equivocal on the causation issue than Dr. Bushman, but even he conceded that it is "possible" that Chapman's involvement in the procedure was the cause of the UDP. JA 67. Specifically, when asked whether

Chapman's involvement made it more likely that the procedure would result in UDP than if Bragg had performed the procedure from start to finish, Dr. Sullivan stated: "It's possible. I certainly didn't feel as strongly as your expert witness did about that. He seemed to feel that that specific phenomena was directly linked to causation." JA 67. Dr. Sullivan continued, "It is possible that [Chapman's involvement] might increase [the risk of UDP] slightly, but not to the degree that I would feel confident stating that it was linked directly to causation." JA 67. Dr. Sullivan conceded that the most likely reason that Chapman was unsuccessful in placing the epidural guide needle was his lack of experience. What Dr. Sullivan described at his deposition, in other words, is the very epitome of a genuine issue of material fact: Dr. Bushman feels strongly that Chapman's participation was directly linked to causation, Dr. Sullivan thinks that it's possible that Chapman's involvement is linked to causation but would not feel confident testifying that it was directly linked, and therefore the jury will have to decide the issue.

Remarkably and regrettably, in the proceedings below the *opposing expert* reviewed the totality of his counterpart's deposition testimony and characterized Dr. Bushman as "strongly" of the opinion that the student's participation was "directly linked to causation," offered a tepid disagreement, but we are on appeal because the circuit court erroneously focused on one question and answer from that same deposition and concluded that the same expert "did not link the deviation from the standard of care during the informed consent process to the cause of Ms. Shaffer's injury." JA 8-9; JA 18. The totality of the evidence—and obviously any given expert's opinion and testimony—must be considered in ruling on a motion for summary judgment.

**B. The circuit court failed to conduct the proper legal analysis for proximate cause in informed consent cases.**



This Court’s prior decisions make clear that lack of informed consent deprives the patient of the opportunity to decline a procedure or aspects of the procedure that he or she would decline if the required information were provided to the patient, and causation turns on whether a reasonable patient would have declined the procedure or an aspect of the procedure had she been provided the required information. “In cases applying the doctrine of informed consent . . . a causal relationship, between such failure to disclose and damage to the patient, may be shown if a reasonable person in the patient’s circumstances would have refused to consent to the surgery had the risks been properly disclosed.” *Adams v. El-Bash*, 175 W. Va. 781, 338 S.E.2d 381 (1985). In other words, the causation question in informed consent cases boils down to this: “If adequate disclosure could reasonably be expected to have caused that person to decline the treatment because of the revelation of the kind of risk or danger that resulted in harm, causation is shown, but otherwise not.” *Id.*, 175 W. Va. at 786, 338 S.E.2d at 386 (quoting *Canterbury v. Spence*, 464 F.2d 772, 790–91 (D.C. Cir. 1972)).

That question—in this case whether Marissa Shaffer could reasonably be expected to have declined the student’s participation had it been properly disclosed—is, under established precedent in West Virginia, a jury question. *Id.*, 175 W. Va. at 786, 338 S.E.2d at 386 (holding that the question of causation in an informed consent case was properly left for the jury to decide); *id.*, syl. pt. 4 (“Questions of negligence, due care, proximate cause and concurrent negligence present issues of fact for jury determination when the evidence pertaining to such issues is conflicting or where the facts, even though undisputed, are such that reasonable men may draw different conclusions from them.”) (quoting syl. pt. 6, *McAllister v. Weirton Hospital Co.*, 173 W. Va. 75, 312 S.E.2d 738 (1983)). Accordingly, Dr. Bushman’s testimony does not address—expert testimony should not address—whether Marissa Shaffer reasonably would have

declined the participation of the student had she been informed of it, but he made it clear in testifying at his deposition that she was deprived of the opportunity to decline it by the failure of the informed consent process. JA 144.

**II. The circuit court erred in finding a lack of evidence of a violation of the standard of care for informed consent by Defendant CAMC.**

The circuit court erred in finding that the Shaffers' expert did not testify that CAMC (as opposed to its co-Defendants Bragg and GAS) deviated from the standard of care in the informed consent process, JA 18, and in concluding (to the extent the circuit court did so, as the order is not clear) that there was no evidence that CAMC breached the standard of care for informed consent. Contrary to the circuit court's patently erroneous finding, Dr. Bushman testified in his original certificate of merit (a sworn statement) that CAMC was responsible for informed consent with respect to its own students' participation in procedures in its own hospitals. JA 81 ("Although it appears that Dr. Bragg is an employee of a private corporation providing medical services at the hospital, I believe the hospital is responsible for employees and health care trainees who otherwise provide and document care to the patient."); JA 82 ("In providing a trainee to do the procedure without consent or documentation of participation, even under the supervision of Dr. Bragg, the hospital (CAMC) is responsible for the trainee's activity, including the complication."); JA 82 ("[Ms. Shaffer] also suffered the extreme psychological abuse of the hospital denying on the part of the parties involved that there was an undocumented trainee involved."). This screening certificate of merit was a fully executed affidavit, and was not only incorporated into Dr. Bushman's testimony, but also it was properly submitted specifically in opposition to the motion for summary judgment as Exhibit 1. JA 58; JA 80-84.

At his deposition, Dr. Bushman testified about all of the failings in the informed consent process, but was not asked about assignments of responsibility for the different aspects of that

process between hospital and anesthesiologist. However, the documentary evidence submitted to the circuit court plainly shows that Bragg and CAMC took responsibility for different aspects of the informed consent process. Bragg handled the oral portion of the process with the patient, but it was CAMC itself that prepared the informed consent forms for both general consent and specific consent to an anesthesiology procedure. JA 242; JA 243. As Dr. Bushman pointed out multiple times throughout his deposition, the written specific consent form that Marissa Shaffer signed actually negates any concern she might otherwise have had as to whether Chapman was there just to observe or to participate. The form says that Dr. Bragg or one of his partner physicians is going to do the procedure, not a student nurse. That is not what occurred, and it is clearly wrong and a breach of the standard of care. JA 139–41; JA 145.

Simply put, according to Dr. Bushman, “Anyone who looks at that consent form believes that Dr. Bragg’s doing the epidural, period, end of discussion.” JA 143. In other words, CAMC’s consent form not only failed to disclose its trainee’s involvement, but it even specifically stated that Bragg or one of his “physician” colleagues affiliated with GAS would perform the epidural. JA 243. As Dr. Bushman explained:

It seems to me we’re here because [Ms. Shaffer] never understood that [Chapman was going to assist or participate with the actual epidural placement]. And that is not what the consent form says and her expectations, as she’s articulated, seem to comport with what the consent form says, but that’s not what was the behavior that occurred.

JA 144.

The circuit court’s error is particularly glaring because the Defendants’ own expert, John Sullivan, M.D., testified that the standard of care for hospitals requires disclosure of a trainee’s participation in a specific procedure such as an epidural, and referred in his deposition to a written directive to that effect promulgated by the Joint Commission on the Accreditation of

Hospitals, which Dr. Sullivan described as “an oversight agency for hospitals”—not anesthesiologists. JA 170.

**III. The circuit court erred in finding a lack of evidence of harm to support a tort of outrage claim against CAMC for lying to Marissa Shaffer about the student’s involvement in her epidural placement.**

On March 20, 2015, approximately two months after Marissa Shaffer’s epidural and the delivery of her first child, Dawn Schoolcraft, a CAMC hospital administrator, sent a letter to Ms. Shaffer that stated, “A review of your visit was conducted and we found that no student was involved in the epidural placement.” JA 244. Ms. Shaffer alleges that this statement was an intentional falsehood. She submitted evidence that the statement was at least contrary to the information that was provided to Ms. Schoolcraft by another witness, Marion Jones, who was the head of nurse anesthetists at CAMC Women’s and Children’s, the hospital where Ms. Shaffer delivered. According to Ms. Jones’s deposition testimony, she informed Ms. Schoolcraft that a student “was involved” in the epidural placement but that Dr. Bragg believed he “caused” the wet tap himself. JA 103. Ms. Jones herself testified that the statement in Dawn Schoolcraft’s letter to Marissa Shaffer did not accurately reflect what she had told Ms. Schoolcraft. JA 105 (“Q. First off, that’s not what you told Dawn 4 Schoolcraft, correct? A. Correct. . . .”); *id.* (“Q. . . . [Y]ou told her that a student was involved in the epidural placement, correct? Yes? A. Yes.”). Ms. Shaffer alleges that CAMC’s pattern of lying has continued throughout the litigation, particularly in the form of continued denials by Garry Chapman of having attempted to place the epidural. JA 85–86.

According to Dr. Bushman’s report, “Mrs. Shaffer suffered more than the early and late complications of the ‘wet tap.’ She also suffered the extreme psychological abuse of the hospital denying on the part of the parties involved that there was an undocumented trainee involved.”

At his deposition, Dr. Bushman testified that Ms. Shaffer was “emotionally traumatized” by CAMC’s behavior and referred to that behavior as “gas-lighting.” JA 147. Frank Ochberg, M.D., a psychiatrist and another Plaintiffs’ expert, testified that CAMC’s and Chapman’s lying about Chapman’s involvement in the placement of the epidural caused “profound and lasting damage to the plaintiff.” JA 189. Dr. Ochberg explained the harm caused by CAMC’s lying in detail:

There is a profound dispute about what happened. And I'm of the opinion that that means that somebody is lying and somebody is covering up, not that it's some kind of honest disagreement about what went on. And I believe that the disagreement about the role of the student is an important issue in my testimony, my assessment of why there was such a profound and lasting damage to the plaintiff. That while horrible pain and inability to attend to your child as a mom in the opening moments of life is quite significant, that the damage is changed, magnified when you believe that the authorities are lying to you and have betrayed you. And that's an area that my field deals with now and we try to teach that because the moral injury is a significant element of the post-traumatic picture regardless of what the DSM says. I think a lot of this case is going to come down to that. And I'm not here to judge what the student did and why the student is so strong in saying “I never had my hand on a needle” and yet there is abundant evidence that he did.

JA 189.

“One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.” Syl. pt. 3, *Tanner v. Rite Aid*, 194 W. Va. 643, 461 S.E.2d 149 (1995) (quoting syl. pt. 6, *Harless v. First Nat’l Bank*, 169 W. Va. 673, 289 S.E.2d 692 (1982)). Although Ms. Shaffer has submitted the testimony of two experts, expert testimony is not necessary to support her claim of severe emotional distress. See syl. pt. 4, *Tanner*, 194 W. Va. 643, 461 S.E. 2d 149. Accordingly, considering the totality of the evidence in the record, there is a genuine issue of fact for the jury as to whether CAMC made an

intentional or reckless misrepresentation of the truth as to the student's participation to Marissa Shaffer, whether that conduct was "extreme and outrageous," and whether she suffered severe emotional distress as a result of it.

The circuit court's decision to dismiss the allegations against CAMC turned on three separate, glaring errors, each of which is remarkable by itself. First, the circuit court, without citing any prior decisions or precedent from this Court, erroneously determined that expert testimony was necessary in order to show that Marissa Shaffer suffered "severe emotional distress" as a result of CAMC's lying. That is incorrect. *See* syl. pt. 4, *Tanner*, 194 W. Va. 643, 461 S.E. 2d 149 (Although expert testimony may be a helpful and effective method of proving emotional distress, it is not always necessary.)

Second, the circuit court explicitly disregarded the testimony of one of the Shaffers' experts, Frank Ochberg, on the grounds that his testimony that she suffered "profound and lasting damage" as a consequence of CAMC's lying was "not a recognized medical diagnosis," without a motion to exclude or limit Dr. Ochberg's testimony, without a hearing on the matter, and without conducting, citing, or considering Rule 702 of the West Virginia Rules of Evidence or this Court's prior decisions and precedents concerning the admissibility of expert testimony under that rule. JA 22. This is a plain violation of this Court's holding in syllabus point 4 of *San Francisco v. Wendy's Int'l, Inc.*, 221 W. Va. 734, 656 S.E.2d 485 (2007), which could not be more precisely on point. In that case, this Court explained that the "the summary judgment process does not conform well to the discipline and analysis" required of Rule 702 admissibility decisions, and therefore that the Rule 702 admissibility analysis "should be employed only with great care and circumspection at the summary judgment stage." Syl. pt. 4, *Wendy's*, 221 W. Va. 734, 656 S.E.2d 485. The circuit court's order reflects an undisciplined approach, lacking in

analysis, care, and circumspection in striking Dr. Ochberg's opinion on the matter without so much as a motion or discussion of the legal standards. Even more egregious, because there was no motion presented with regard to the admissibility of Dr. Ochberg's testimony, the Shaffers were not given a chance to defend Dr. Ochberg. *See id.* ("Given the plain language of the *West Virginia Rules of Evidence*, the side trying to defend the admission of expert evidence must be given an adequate chance to do so.").

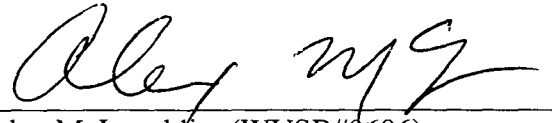
Third, the circuit court did not even acknowledge the expert testimony of Gerald Bushman, M.D., on this matter. Dr. Bushman's testimony that Marissa Shaffer was "emotionally traumatized" by CAMC's lying was not only submitted to the circuit court as part of the record, it was brought to the circuit court's attention in the Shaffers' response memorandum for this very issue. JA 70. To the extent that the circuit court may have ever questioned the qualifications of Dr. Bushman to offer those opinions,<sup>2</sup> no one ever raised that issue, the Shaffers were never given an opportunity to respond to it, and that doesn't appear to have been the basis of the circuit court's decision to ignore the Shaffers' proffer of Dr. Bushman's testimony. The circuit court simply ignored it, as though it did not exist or was not brought to the circuit court's attention. JA 14–23.

### CONCLUSION

For the foregoing reasons, the circuit court's orders granting Defendants'/Respondents' motions for summary judgment should be reversed, and the case should be remanded to the Circuit Court of Kanawha County for trial on all issues.

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<sup>2</sup> Dr. Bushman is an anesthesiologist, not a psychiatrist, but still a medical doctor who necessarily received extensive training in medical school and residency in psychiatry.



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