

No. 33335 *Allison J. Riggs and Jack E. Riggs, M.D. v. West Virginia University Hospitals, Inc.*

Starcher, J., dissenting:

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OF WEST VIRGINIA

I have read, and re-read, and re-re-read, the majority's opinion. I don't know what was in the Kool-Aid they were drinking, but I believe that the opinion is one of the most factually misleading and legally pernicious cases to be produced by this Court.

Make no mistake – a West Virginia jury heard from all the witnesses for both sides, and decided that West Virginia University Hospitals (“WVUH”) failed to provide Allison Riggs with a safe, *serratia*-free environment. Ms. Riggs is the daughter of Dr. Jack E. Riggs, a physician who works at WVUH. She was only 14 when she contracted her *serratia* infection at WVUH, and suffered through years of pain and additional surgeries.

No one says that the jury was wrongly instructed. No one says they didn't hear all the evidence. In fact, the majority opinion doesn't even bother to address the evidence produced at trial. Worse, the majority opinion doesn't address the substantive legal arguments that were raised by the parties in their petitions for appeal.

Instead, the majority's opinion is based exclusively on a discretionary, judge-made doctrine called “judicial estoppel.” Courts may apply the doctrine on a whim, but they usually limit its application to prevent a party from abusing the court system.

In this case, the majority opinion uses the judicial estoppel doctrine to avoid having to address the merits of the parties' legal arguments. The majority opinion never addressed how to interpret the relevant portions of the Medical Professional Liability Act ("MPLA"), namely *W.Va. Code*, 55-7B-8. And to apply the judicial estoppel doctrine, the majority opinion totally misconstrues the record, outright ignoring anything that might have supported Ms. Riggs' position.

The result is a complete perversion of justice.

A.

The Majority Opinion is Factually Wrong

In this case, a jury decided that plaintiff Allison Riggs had suffered mightily as a result of her treatment at West Virginia University Hospital. She entered the hospital on April 4, 1995 for a simple surgery to fix a torn anterior cruciate ligament. That one surgery turned into a four-year journey of infection, pain and six additional surgeries. WVUH tried to pass Ms. Riggs' *serratia* infection off as a routine infection acquired in the community. The plaintiffs, in discovery, found that was not true. WVUH's own records revealed that epidemics of *serratia* had been declared in 1991 and 1993. Investigations found *serratia* on mops, in buckets, and wet places; essentially, attempts by janitors to eliminate the bacteria resulted in its spread to additional areas of the hospital. When Ms. Riggs had her surgery in 2005, WVUH had documented 106 additional cases – enough for the hospital to have a “high index of suspicion” that another epidemic was underway.

The plaintiff brought suit against WVUH in 2001. The plaintiff also brought suit against the physician who performed her surgery, Dr. William Post (or more specifically, against Dr. Post's employer, the University of West Virginia Board of Trustees). The plaintiff generally alleged negligence by Dr. Post and WVUH. Dr. Post's employer subsequently settled, and the case proceeded to trial solely against WVUH because of its failure to maintain a safe, *serratia*-free environment.

A jury heard the evidence, found that WVUH had been careless, and awarded Ms. Riggs \$10,000,000.00 in damages for her pain, her suffering, her fears, her anguish, her lost opportunities to have a normal teenage experience. The circuit judge, who also heard the evidence, ruled that the verdict was fair and was supported by the evidence.

But the circuit judge, acting *sua sponte*, believed that *W.Va. Code, 55-7B-8* [1986] limited the plaintiff to only recovering \$1,000,000.00 in non-economic damages. And so, the circuit judge reduced the verdict to the statutory amount when the final judgment order was entered.

The plaintiff's attorneys filed a motion asking the circuit judge to reconsider the judgment order, and argued that the cap on damages found in *W.Va. Code, 55-7B-8* applies only to a "medical professional liability action." "Medical professional liability" is defined as any liability "based on health care services rendered . . . to a patient." *W.Va. Code, 55-7B-2*. The plaintiff's attorneys argued that the facts produced at trial showed that WVUH did not render any health care services specifically to Allison Riggs. The jury's verdict was based upon WVUH's failure to maintain a safe, infection-free environment for

anyone who entered the hospital (patients, visitors and employees alike).¹ Hence, this was an environmental or premises liability case, not a medical professional liability case. By the pure terms of *W.Va. Code*, 55-7B-8, the cap on non-economic damages simply didn't apply.

WVUH filed a response to the plaintiff's motion, and concluded that it was "undisputed" that the medical professionals in the hospital's infection control department did not "provide[] direct medical care to Allison Riggs." Still, WVUH argued that the damages cap in *W.Va. Code*, 55-7B-8 protects all persons who provide health care, and not just those health care providers who provide direct, hands-on patient care.

The circuit judge accepted WVUH's position, and denied the plaintiff's motion to reinstate the \$10,000,000.00 jury award. The circuit judge concluded that a hospital's infection control department was encompassed within protection of the damages cap.

The plaintiff's attorneys reiterated their positions to this Court. This Court granted the plaintiff's appeal, ostensibly to resolve the pure legal question of how *W.Va. Code*, 55-7B-8 applied to the facts of this case.

On appeal, the plaintiff's attorneys argued that, by its strict terms, the damages cap in *W.Va. Code*, 55-7B-8 only applies to protect medical professionals who provide

¹For instance, what if a patient or a visitor slipped on ice at the hospital's entrance, because the hospital failed to treat the ice with salt or sand? What if a patient or a visitor got food poisoning from food cooked in the hospital cafeteria? In either case, any liability against the hospital would not be "based upon health care services rendered . . . to a patient."

Likewise, in this case, patient Allison Riggs sustained a *serratia* infection. But what if one of her parents or friends got a *serratia* infection while visiting her in the hospital? Would the hospital's liability be reduced, even though the hospital rendered no health care services whatsoever to the person who was infected?

hands-on care “to a patient.” The plaintiff’s attorneys said, at oral argument, that you could call this case whatever you wanted: a medical malpractice case, an environment case, or a premises liability case. Whether the MPLA as an amorphous whole “applied” to the case was not the question. The plaintiff’s attorneys argued that generic, administrative functions applicable to everyone who enters the hospital, patient or not, were not encompassed by *W.Va. Code, 55-7B-8*. Because the facts before the circuit court showed that Ms. Riggs was injured by the hospital environment and not as a result of any direct care from WVUH, the plaintiff’s attorneys argued that *W.Va. Code, 55-7B-8* – by its own terms – did not apply.

WVUH, however, asserted before this Court that the plaintiffs were taking an entirely new legal position that contradicted their position before the circuit court. WVUH re-interpreted the plaintiff’s argument, and claimed that the plaintiff’s attorneys were essentially arguing that their case was no longer a medical malpractice case. Even though, factually, the plaintiff was injured because of the hospital environment and not any specific treatment “rendered . . . to a patient,” WVUH argued that legally, because the plaintiff’s attorneys had used the generic term “medical malpractice” throughout the course of the lawsuit, then the medical malpractice damages cap of *W.Va. Code, 55-7B-8* had to apply. WVUH essentially claimed surprise at learning that the plaintiff’s case centered on the hospital environment, rather than treatment by hospital employees. WVUH argued that the plaintiffs were “changing their theory of liability and the law applicable to their claims.” In other words, facts be damned, WVUH took the position that the plaintiff should be judicially estopped from arguing about how to interpret and apply *W.Va. Code, 55-7B-8*.

The position taken by WVUH is, in a word, absurd. Virtually from the outset of this case, WVUH knew the plaintiff's case against the hospital focused on the environment, on the premises, and not on treatment rendered specifically to Allison Riggs. You might think "absurd" is too harsh a word, but let me demonstrate.

In 2002, the parties in this case were embroiled in a heated discovery dispute. The plaintiff's attorneys wanted to review certain patient records held by WVUH – the records that subsequently showed an epidemic of *serratia* was occurring when the plaintiff had surgery in 1995. The hospital, of course, objected to producing these records. When the circuit court ordered the hospital to produce the records, the hospital petitioned this Court for a writ of prohibition to halt enforcement of the circuit court's order.

In the petition filed with this Court on September 19, 2002, WVUH repeatedly characterized the plaintiff's lawsuit as *centering on the hospital environment*, not on any treatment provided directly to any patient. As WVUH stated in its petition (with emphasis added):

The Petitioner WVUH denies Respondents' allegations and asserts that, to a reasonable degree of medical probability, the *serratia* bacteria was not introduced during the surgery performed by Dr. Post at WVUH on April 4, 1995. WVUH further asserts that the *environment* at WVUH in April, 1995 did not cause or contribute to Allison's infection . . . and did not increase her risk of contracting an infection. . . .

The memorandum of law that accompanied WVUH's petition described the plaintiff's case in the following manner (with emphasis added):

Plaintiffs allege that the *environment* at WVUH in April, 1995, increased Allison Riggs' risk of contracting a *serratia* infection
...

Read that again. In 2002, WVUH knew the plaintiff's case against WVUH centered on the hospital *environment*, not on any treatment rendered to the plaintiff by any employee of the hospital. Yet somehow, in 2007, WVUH claims total surprise upon hearing the plaintiff's argument that the facts presented to the jury centered on the hospital environment, and not on any treatment rendered to the plaintiff. So, even though *W.Va. Code*, 55-7B-8 doesn't logically apply to these facts, WVUH argues the statute must still be applied because, golly, anything else would just be unfair.

WVUH is certainly entitled to argue its view of the record, within ethical limits. But the snippets of record contained in the hospital's brief just aren't representative of the record as a whole. I've looked at the record; clearly, the majority opinion didn't. That happens from time to time. How else could the majority opinion claim hold that "[b]y not characterizing their claims as premises liability claims until *after* the jury verdict was rendered, [the plaintiff] precluded WVUH from developing a theory of defense on this theory"? ___ W.Va. at ___, ___ S.E.2d at ___ (Slip Op. at 21).

But the fact that the majority opinion chose to virtually cut-and-paste from the factual discussion in the defendant's brief, and follow the hospital down into its rabbit hole, is – in my humble opinion – horrifying.

For example, the majority opinion mimics the defendant's brief and incorrectly states:

At one point, Appellants' counsel maintained that he did not "want the statement that we are alleging that the hospital failed to maintain a safe and proper hospital environment with respect to infection control" included in the jury instructions. At no time did Appellants request that the jury be instructed upon any theory of liability other than medical negligence nor were any objections raised to the instructions ultimately given by the trial court.

___ W.Va. at ___, ___ S.E.2d at ___ (Slip. Op. at 8).

The trial record, however, shows numerous objections by counsel for Ms. Riggs during the parties' extensive discussions with the circuit judge about the jury instructions. The trial record also shows many of the quotes relied upon by the majority opinion were taken entirely out of context.

Most importantly, the transcript of the parties' jury instruction discussions shows absolutely that counsel for Ms. Riggs, counsel for WVUH, and the circuit judge were all in agreement that the trial was focused exclusively on the hospital's failure to maintain a safe environment. All parties to the discussion were clear that no care was rendered directly to Ms. Riggs. As the record reads (with emphasis added):

Plaintiff's counsel: . . . And when you back up and look at page 7 . . . there is a restatement of my case the way [defense counsel for WVUH] writes it . . .

I don't want the statement that we are alleging that the hospital failed to maintain a safe and proper hospital environment with respect to infection control. That's not all my case is. My case is a little more complicated than that and a little more broad than that.

The Court: Sure.

Plaintiff's counsel: It kind of raises my feathers when I read how [defense counsel] characterized our case in her jury instructions and then it found its way on two occasions in the jury charge. If there is any characterization, I would like to have some input into that.

The Court: On page 7, all that was an attempt to do was to preliminarily tell the jury, you know, to kind of start out and say here is what this case is about, and it started out to be a lot more general than that and I would add a few words and add a few more words until I ended up with what I had, but, generally speaking, I think it's correct. You are alleging they failed to maintain a safe and proper hospital environment with respect to infection control. All she had in hers was to maintain the hospital environment. The rest of the adjectives and modifications I added, safe and proper, and then with respect to infection control because that's what this is about.

Defense counsel: Your honor, I don't have any objection to using his statement. I was trying to submit a jury instruction based on what I thought the scope of their allegations were. If they want to define them more specifically, I don't have an objection to that.

* * *

Plaintiff's counsel: . . . There is also a statement a couple lines down "in the care and treatment of Allison J. Riggs." I think that may be unnecessary in this case because we are not alleging the infection control department actually cared for or treated Allison Riggs.

The Court: Right. That's in there a number of places. . . A number of places. . . .

Plaintiff's counsel: Here is my thought on that. You're right. I think that what [defense counsel] wants to emphasize is that she was not a patient of Dr. Khakoo's or Bonnie McTaggart's, but I think that there was a duty owed by the infection control department to Allison Riggs and that in that context they did owe her a duty of care.

Defense counsel: Your Honor, if I could make a recommendation. . . . I think one of the ways to deal with it is to talk about it in terms of Allison Riggs' hospitalization or when she was hospitalized because that's the duty. **The duty is to provide a proper environment while she is there. We are not providing direct care to her. The infection control department, their duty has to do with the entire hospital infection control process.**

So, when I was going through this I had a concern about the same thing because **there isn't any evidence that any of these people provided direct care to her.**

The Court: Well, you want me to strike "in the care and treatment" and insert "relating to the hospitalization of."

Defense counsel: Yes. . . .

There is just no other way to read this transcript. During the trial – before the jury was instructed – counsel for WVUH conceded that the plaintiff's entire case centered upon the hospital's failure to "provide a proper environment" to the plaintiff. Counsel for WVUH had even proffered a jury instruction about "maintain[ing] the hospital environment," an instruction which the circuit court beefed up to read "failed to maintain a safe and proper hospital environment with respect to infection control."

So, for WVUH to come before this Court and claim surprise about the plaintiff's trial theory baffles me.

But the majority opinion simply ignored these, and other, sections of the record. The end result was to make it look as though, after the jury returned its verdict, WVUH was totally surprised by a new theory proposed by the plaintiff's attorneys and – as

the majority opinion states “precluded . . . from developing a theory of defense on this theory.”

B.

The Majority Opinion is Legally Wrong

By re-casting the procedural history of this case, the majority opinion made it look as though the plaintiff was before this Court with “dirty hands” while WVUH was innocent and surprised. The application of the doctrine of judicial estoppel was then easy and assured.

The problem is, by using judicial estoppel the way it was used in this case, the majority opinion has unintentionally but virtually obliterated many of the *Rules of Civil Procedure*. Prior to the adoption of the *Federal Rules of Civil Procedure* in 1938, and the *West Virginia Rules of Civil Procedure* in 1960, much of legal procedure was game of “gotchas.” Plaintiffs and defendants had to plead their legal theories and facts with precision. A plaintiff had to specifically say whether he was bringing an action of covenant, debt, detinue, replevin, trespass, assumpsit, ejectment, or case, and so on. Any mistake was grounds for a case being dismissed.

After the adoption of the federal and state *Rules of Civil Procedure*, parties only had to plead their case or their defenses by giving “notice” to the opposing party. That means a complaint or an answer only had paint the alleged facts and legal theories with a broad brush, with enough specificity to put the opposing party on notice.

The new *Rules* also contained provisions allowing parties to conduct discovery, to learn facts about their own case and their opponent's case from each party. As each party learned new facts, they might also have discovered new causes of action against their opponent. And so, the new *Rules* permitted parties to amend their pleadings to conform to the facts – even if those facts were learned in the middle of a trial, or even after the jury had already returned a verdict.

The majority opinion totally ignored the *West Virginia Rules of Civil Procedure*, and in the process may have accidentally eviscerated 47 years of progress. The majority opinion says that the plaintiff in this case could not challenge the application of a statute to her case (because the facts did not warrant its application), simply because the plaintiff called her case a “medical malpractice” action. Even though WVUH was on notice that the plaintiff's lawsuit was based on the hospital environment and not its treatment of the plaintiff, because the plaintiff did not specifically plead that fact and did not specifically plead, in her 2001 complaint, that the medical malpractice cap in *W.Va. Code*, 55-7B-8 did *not* apply to her case, then . . . well, then the statute applies. Gotcha.

“Judicial estoppel”² is a discretionary doctrine, invented by courts, and applied by courts to prevent a party from contradicting previous *declarations* or *statements* made in the same or an earlier proceeding with an intent to mislead the court. As *Am.Jur* suggests, the two positions taken by the party must be totally inconsistent—that is, the truth of one

²Also known as “doctrine of preclusion of inconsistent positions” and “doctrine of the conclusiveness of the judgment.”

statement must necessarily preclude the truth of the other statement (at least where the party had, or was chargeable with, full knowledge of the facts).³ *Am.Jur.2d*, Estoppel, § 34. The doctrine prevents a party from getting a court (or courts) to issue conflicting rulings regarding the same parties and factual scenarios.

In Syllabus Point 2 of the case relied upon by the majority opinion, *W.Va. Dept. of Transportation v. Robertson*, 618 S.E.2d 506 (2005), the Court stated that judicial estoppel bars a party from re-litigating an *issue* by contradicting a previous *position*.⁴

³*Am.Jur.2d*, Estoppel, § 34, states that the following five circumstances are often required in order for the doctrine of judicial estoppel to apply:

- (1) the two inconsistent positions must be taken by the same party or parties in privity with each other, although it has been held that identity of the parties is not necessarily required for the application of judicial estoppel;
- (2) the positions must be taken in the same or related proceedings involving the same parties or parties in privity with each other;
- (3) the party taking the positions must have been successful in maintaining the first position and must have received some benefit or unfair advantage, or the opposing party is prejudiced by the changed argument, although there is also authority holding that no benefit need be obtained;
- (4) the inconsistency must be part of an intentional effort to mislead the court that courts should not tolerate, although the doctrine of judicial estoppel does not apply when the prior position was taken because of inadvertence, mistake, or is an innocent inconsistency or apparent inconsistency that is actually reconcilable; and
- (5) the two positions must be totally inconsistent—that is, the truth of one position must necessarily preclude the truth of the other position, at least where the party had, or was chargeable with, full knowledge of the facts.

⁴Syllabus Point 2 of *Robertson* states:

Judicial estoppel bars a party from re-litigating an issue when:

- (1) the party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, or with a position taken earlier in the same case;
- (2) the positions were taken in proceedings involving the same adverse party;
- (3) the

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The majority opinion in this case confused the terms *issue* and *positions*: the majority concluded that the terms mean *legal theories*. This is incorrect. The terms generally mean *factual declarations* or *factual statements*. The doctrine is usually applied when a party gets a favorable court ruling asserting one fact, and then tries to get another favorable ruling by asserting a contradicting fact.⁵

⁴(...continued)

party taking the inconsistent positions received some benefit from his/her original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process.

⁵For example: in *Robertson*, the landowner in an eminent domain proceeding claimed she owned 11.08 acres, and a court approved a settlement for \$1.9 million for the cost of the land excluding coal underlying the property. Later, the landowner tried to settle the coal value by asserting her parcel of land contained 22.33 acres. Because the landowner led the court to believe she only owned 11.08 acres, the integrity of the judicial process would be adversely affected by letting her rely upon an inconsistent factual position.

In *MacDonald v. Long*, 131 S.E. 252 (W.Va. 1926), defendant Long signed a contract to buy a corporate grist mill but later refused to consummate the sale. The grist mill company later brought a chancery suit to dissolve the corporation and dispose of the company-owned mill. The chancery court appointed a special receiver. The special receiver sued the defendant for specific performance, to enforce the sale contract. The Court concluded that because the grist mill company had repudiated the sale contract in the chancery suit, the receiver could not subsequently take an inconsistent position and try and enforce the contract.

Bankruptcy courts generate quite a few judicial estoppel cases. In *Chandler v. Samford University*, 35 F.Supp.2d 861 (N.D.Ala. 1999), an employee claimed in district court she was a victim of racial discrimination by her employer. The employee subsequently filed for bankruptcy, but never revealed the pending discrimination claim to the bankruptcy court. The bankruptcy was discharged favorably to the employee as a “no asset case.” The district court dismissed the discrimination case because a debtor’s assertion of a legal claim not disclosed in an earlier bankruptcy proceeding is the assumption of inconsistent positions, and is evidence of intent to manipulate the judicial system.

Rarely is the doctrine invoked to mean legal theories in the same case, because Rule 8(e)(2) of the *Rules of Civil Procedure* specifically allows competing legal positions.⁶ The doctrine is designed to keep litigants from asserting one factual position that a court relies upon to the litigant's favor, and then asserting a conflicting factual position later that makes the court look foolish.

Furthermore, Rule 15 of the *Rules of Civil Procedure* allows a litigant to amend pleadings to conform the legal theories to the evidence introduced in the case.⁷ So long as

⁶Rule 8(e)(2) of the *Rules of Civil Procedure* states:

A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or on equitable grounds or on both.

⁷Rule 15(b) of the *Rules of Civil Procedure* states:

(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of

(continued...)

a jury's verdict is supported by the evidence, it doesn't matter what legal theory is eventually relied upon by the parties.

More importantly, it doesn't matter if a party didn't make a motion to amend a pleading under Rule 15. The general rule – by this Court and others – is that appellate courts will regard the pleadings as amended to conform to the proof even though the defaulting pleader made no formal motion to amend.⁸

⁷(...continued)

such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

⁸The failure to amend a pleading “does not affect the result of the trial of these issues” has generally been interpreted, in West Virginia and nationwide, to mean that **appellate courts will deem the pleadings amended to conform to the evidence**. In Syllabus Point 4 of *Floyd v. Floyd*, 148 W.Va. 183, 133 S.E.2d 726 (1963), the Court said (with emphasis added):

Under both the old trial procedure in effect in West Virginia prior to July 1, 1960, and the new procedure in effect on and after that date as *Rules of Civil Procedure*, pleadings could be amended under control of the court during the trial of a case to encompass an issue raised by the evidence although not in the pleadings; but if an issue is so raised in trial and trial by consent of the parties without such amendment, **it is treated as if it had been raised in the pleadings and the failure to amend will not affect the verdict**.

See also, *City Bank of Wheeling v. Bryan*, 72 W.Va. 29, 78 S.E. 400 (1913) (“A variance between the allegation and proof, not called to the attention of the lower court by any means, if not so great as to show distinct causes of suit, will be treated by this court as having been waived.”). For additional authorities, *see*, *Carter v. Swift*, 513 S.E.2d 766 (Ga.App.,1999) (Although accord and satisfaction was not pled as affirmative defense in action to recover on promissory note, the issue was tried by the parties, and, therefore, would be treated on appeal as if raised by the pleadings.); *Boers v. Payline Systems, Inc.*, 918 P.2d 432 (continued...)

Taken together, the plaintiff in this case did not assert conflicting facts with an intent to mislead the Court. The plaintiff did not prevail before the circuit judge by asserting one fact, but is now attempting to prevail by asserting a wholly conflicting alternate fact. Since the beginning of this case in 2001, the plaintiff has always asserted that her case against WVUH centered upon the hospital environment.⁹ The facts presented to the jury

⁸(...continued)

(Or.App.,1996) (When defect in pleading consists of omission of necessary fact that pleader could have added by amendment . . . Court of Appeals will treat case as though question had been raised at proper time and pleadings amended accordingly.); *Auburn Harpswell Ass'n v. Day*, 438 A.2d 234 (Me.,1981) (Issues not raised by the pleadings but tried by express or implied consent are treated in all respects as if they had been raised in the pleadings. Rules Civ.Proc., Rule 15(b)); *Pickett v. First American Sav. & Loan Ass'n*, 412 N.E.2d 1113 (Ill.App.5.Dist.,1980) (In interest of justice, courts of review will not ignore plaintiff's real claim so long as it is supported by evidence, even though it may not have been adequately pleaded); *Sorrells v. Bailey Cattle Co.*, 595 S.W.2d 950 (Ark.App.,1980) (In *de novo* review of equity case, Court of Appeals treated pleadings as amended to conform with proof); *PSL Realty Co. v. Granite Inv. Co.*, 395 N.E.2d 641 (Ill.App. 5 Dist.,1979) (Where issues regarding propriety of receiver's spending hundreds of thousands of dollars for capital improvements to apartment units, spending for renovation of units and propriety of receiver's purchasing mortgages covering units were presented to trial court, and issues were continued in Appellate Court in both briefs and oral argument, parties were deemed to have formed issues at trial, even absent formal pleadings); *Goldman v. Bloom*, 280 N.W.2d 170 (Wis.,1979) (Complaint will be treated as amended, even though no amendment has been requested, where the proof, varying from the pleadings, has been submitted and accepted.)

⁹The case against Ms. Riggs' treating physician, Dr. Post, *was* one of medical negligence. Dr. Post was apparently negligent in allowing an infection to occur in the first place, and negligent in failing to diagnose and treat the infection in subsequent surgeries. This explains why many of the pleadings and other filings in the record freely use the phrase "medical malpractice." The plaintiff's attorneys concede that this case involved medical malpractice – but the medical malpractice component of the case was eliminated when Dr. Post's employer settled before trial.

This subtle nuance in the plaintiff's case was, of course, ignored by the majority opinion.

concerned the hospital environment. WVUH has acknowledged, since as early as 2002, that it understood that the plaintiff's case centered on the hospital environment.

Under these conditions, judicial estoppel does not apply.

Instead, the parties freely presented their facts to the ultimate truth-finder, the jury. The jury concluded that WVUH had a duty of care to maintain a safe environment for the plaintiff, that WVUH breached that duty, and that the breach was a proximate cause of her damages. The precise nature of the plaintiff's legal theories could be inconsistent under Rule 8, and under Rule 15 this Court can adopt whatever legal theory is supported by the facts. The plaintiff's failure to amend the pleadings to conform to the evidence is irrelevant; under Rule 15, "the failure so to amend does not affect the result of the trial of these issues."

But the majority's opinion tramples the *Rules of Civil Procedure*, and imposed an impossible burden upon the plaintiff. The majority opinion expects plaintiffs to file specific factual allegations in their complaint before conducting discovery, and to list all statutes that do not apply to their case.

And, in the end, a jury's verdict was ignored and justice was denied.

If there is any light to be found in the majority's opinion, it is in the fact that it did not actually address the parties' legal arguments. I suspect it was because the majority opinion could not do so without either issuing an opinion unfavorable to the hospital, or issuing an opinion that was more factually and legally wrong.

I dissent.