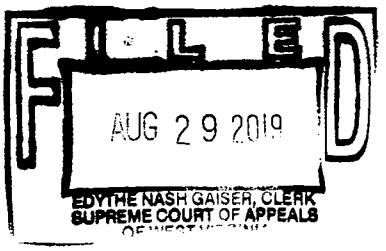
IN THE SUPREME COURT OF APPEALS FOR THE
STATE OF WEST VIRGINIA



Marissa Shaffer and
Timothy Shaffer,
Petitioners,

v.

Docket No. 19-0305
(17-C-343)

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

MARISSA SHAFFER AND TIMOTHY SHAFFER'S REPLY

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I. The deposition question and answer on causation which Defendants rely are still ambiguous, but the entirety of the expert's deposition testimony on causation is not ambiguous and plainly creates a genuine issue of material fact.

The most important issue in this Appeal with respect to both sets of defendants—CAMC and GAS/Bragg—is whether the entirety of Plaintiffs' expert's testimony on causation should be disregarded in favor of a single, ambiguous question and answer in a deposition. Both Defendants argue that Dr. Bushman's question and answer are not ambiguous, and also argue that Plaintiff's counsel should have objected or clarified the record. They are wrong on both counts.

First, for the reasons already stated in Plaintiffs' opening brief, the question and answer on which the circuit court and Defendants rely—"Do you agree that nothing about the informed consent process caused the wet tap?"—are plainly ambiguous. JA 8–9; JA 18; JA 147–48. There still 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.

Lack of informed consent simply does not cause an injury a surgery or procedure to go poorly in the ordinary sense. Rather, it 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 had been provided to the patient. Dr. Bushman's deposition testimony on this latter point—that Ms. Shaffer was not given the opportunity to decline the trainee's participation in the procedure and had the trainee not participated, the wet tap would not have occurred—was so clear that the opposing expert testified that Dr. Bushman felt "strongly" that the trainee's participation was "directly linked to causation." That the moment for objecting to that question and answer came and went without an objection is of no particular moment, because the balance of Dr. Bushman's testimony was so clear on the point—there was nothing left to clear up—and circuit courts are very clearly instructed to consider the entirety of the record in ruling on a motion for summary judgment, not focus on a single question and answer in a deposition, as the circuit court erroneously did in this instance. *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[.]").

II. This Court's memorandum decision in *Hamilton v. Ryu* does not support the circuit court's ruling or the defendants' position.

GAS and Dr. Bragg rely (Resp. at 16–17) on this Court's memorandum decision in *Hamilton v. Ryu*, No. 16-0856 (W. Va. Sup. Ct., Oct. 20, 2017), in support of an argument that it doesn't matter who caused the wet tap—as between Dr. Bragg and the trainee— because the standard of care in the performance of the procedure itself was never in issue. Their reliance on *Hamilton v. Ryu* is plainly misplaced. That case proceeded to trial on the very theory that the Shaffers seek to try—that the plaintiff was not given the opportunity to decline a resident's participation in a surgery and would not have had the surgery had the plaintiff known. The plaintiff lost. That happens—plaintiffs sometimes lose trials—but we are appealing summary judgment, not a jury verdict. The *Hamilton* plaintiff, in appealing the jury verdict, claimed to

have been aggrieved because the trial court refused to allow evidence of the attending physician's schedule in order to show that "special care" was not taken to protect a nerve during surgery. This Court held that the plaintiff had failed to offer expert testimony of the need to take "special care" during surgery and therefore the argument was not relevant to the legitimate issues. The plaintiff's theory of breach and causation in *Hamilton* that is analogous to the Shaffers' theory of breach and causation in the instant case—that the plaintiff was not told a trainee would be participating in a procedure and was not given the opportunity to decline the procedure and would have declined had the plaintiff been so informed—survived summary judgment and was decided by the jury. The theory that was not allowed—that the defendant failed to take "special care" during the procedure itself in violation of the alleged but not proven standard of care—has never been advanced by Marissa Shaffer and is not at issue in the instant Appeal.

III. The "Screening Certificate of Merit" of Dr. Bushman was disclosed in accordance with Rule 26 of the West Virginia Rules of Evidence and is properly considered as part of the record.

Both Defendants argue that the "Screening Certificate of Merit" of Dr. Bushman is not admissible under W. Va. Code § 55-7B-6(j). This argument fails for two reasons. First and foremost, the original screening certificate of merit of Dr. Bushman was disclosed (without having been re-branded) during the prosecution of the instant civil action in accordance with Rule 26 of the West Virginia Rules of Civil Procedure, and Dr. Bushman was available to be cross-examined on it. One assumes that had Dr. Bushman's affidavit been re-branded, as by changing the caption only, that the issue would not even be raised. It should not have been raised anyway. The text of W. Va. Code § 55-7B-6(j) make clear that the provision is concerned with the use of pre-suit allegations and pre-suit settlements against the physician as evidence in a

different proceeding. Nothing prohibits the use of the same expert or the same opinions in the circuit court case following the required pre-suit activity, and it would be a pure waste of time and resources to require such documents to be re-named for use in those cases. Dr. Bushman's "addendum," however styled, was never actually part of any pre-trial certificate of merit process, and was produced and disclosed solely in fulfillment of the Plaintiffs' Rule 26 obligations.

Second, this is not an argument that either of these Defendants raised with the circuit court, and it is not an argument that the circuit court considered. Dr. Bushman's Screening Certificate of Merit was literally "Exhibit 1" to Plaintiffs' response in opposition to the motions for summary judgment that are at issue. JA 58. "[W]hen nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal." *Whitlow v. Board of Educ.*, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993).

IV. There is sufficient evidence, including expert evidence, that CAMC had a duty of care with respect to the disclosure of the participation of its trainee in Ms. Shaffer's care and breached that duty of care.

In its response, CAMC simply dismisses or disregards the evidence that referred to in the Shaffers' opening brief that shows that CAMC had a duty of care and breached it. That evidence includes Dr. Bushman's Screening Certificate of Merit, which CAMC now objects to but failed to object to before the circuit court, even though it was introduced as "Exhibit 1" in opposition to CAMC's motion for summary judgment. JA 58. "[W]hen nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal." *Whitlow v. Board of Educ.*, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993). It also includes the testimony of CAMC's own expert, John Sullivan, M.D., who 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 170–71. Their own expert's testimony is crystal clear and, by itself, would be sufficient at the summary judgment stage to defeat summary judgment on this issue. *Id.* Lastly, the Shaffers pointed out in their opening brief that Dr. Bushman himself was very clearly and specifically critical of the content of the specific consent form that Marissa Shaffer signed, which indicated that Dr. Bragg or one of his affiliates at GAS, would perform the epidural. That form was CAMC's form, not Dr. Bragg's or GAS's form. JA 243.

V. CAMC did not oppose the tort of outrage claim on the basis of inadequate pleading at before the circuit court

Lastly, CAMC claims that this Court should not consider the circuit court's decision with respect to the Shaffers' tort of outrage claim because, CAMC now contends, it was not adequately pleaded in the Shaffers' complaint. Of the several issues and arguments not considered by the circuit court that the Defendants seek to raise for the first time in this Appeal, this one is the one that should be most obviously rejected under this Court's general rule that, "when nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal." *Whitlow v. Board of Educ.*, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993). The reason is that technical deficiencies in a pleading, such as a complaint, are very often cleaned up at the circuit court level through the broad discretion given to circuit court's to permit amendments to complaints—even at trial to conform to the evidence—so that issues can be decided on the merits, rather than on technicalities. Whatever may be said about the pleading, CAMC was plainly put on notice in the Shaffers' complaint that its repeated denials of its trainee's involvement in the epidural were at

issue in the case and considered, at the very least, an aggravating circumstance. Much of discovery focused on CAMC's pattern of lying to Marissa Shaffer about Garry Chapman's involvement. The Shaffers plainly objected to dismissal of their case against CAMC on the basis that they had sufficient evidence of a stand-alone action against CAMC under the tort of outrage, CAMC did not object on the basis of any pleading inadequacy, and the circuit court did not consider or pass on any objection based on the alleged inadequacy of the pleading, which CAMC raises now, on appeal, for the first time.

CONCLUSION

For the foregoing reasons, the circuit court's orders should be reversed.

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