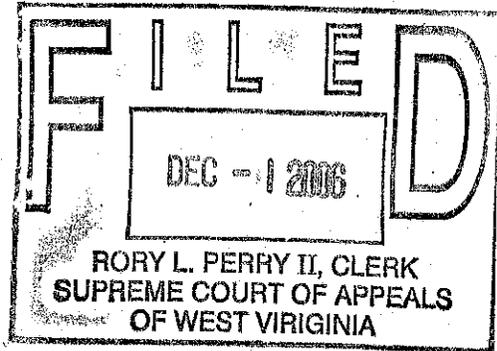


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 33215



MARY ANN KOMINAR, as  
Administratrix of the Estate of  
JASON KOMINAR, deceased,

Plaintiff/ Appellant,

vs.

Appeal No. 33215  
Civil Action No. 99-C-274  
Circuit court of Mingo County  
(Honorable Darrell Pratt)

HEALTH MANAGEMENT ASSOCIATES OF WEST  
VIRGINIA, INC. *d/b/a* WILLIAMSON MEMORIAL  
HOSPITAL INC.; PELAGIO P. ZAMORA;  
PELAGIO P. ZAMORA, INC.; MINGO COUNTY  
AMBULANCE SERVICE, INC., a corporation,

Defendants/ Appellees.

**BRIEF OF APPELLANT, MARY ANN KOMINAR**

Respectfully submitted,

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## KIND OF PROCEEDING AND NATURE OF RULING IN THE LOWER TRIBUNAL

The Appellant/Plaintiff below, files the instant Appeal pursuant to Rule 3 of the West Virginia Rules of Appellate Procedure. Appellant, Mary Ann Kominar, as Administratrix of the Estate of Jason Kominar, deceased, seeks relief from an Order entered on February 2, 2006, by the Circuit Court of Mingo County denying Appellant/Plaintiff motion for a new trial after a defense verdict in a medical malpractice action that was tried to a jury.

After the jury returned a verdict for all defendants, Appellant timely filed a motion to set aside the verdict and award a new trial alleging several errors, including an excessive amount of peremptory strikes for the defendants. This petition comes to the Court as an appeal from the trial court's denial of Appellant's motion for a new trial.

## HISTORY OF PROCEEDING

Appellant, Mary Ann Kominar, Administratrix of the Estate of Jason Kominar, filed this civil action against respondents, Health Management Associates of West Virginia, Inc. d/b/a Williamson Memorial Hospital, Inc. (hereinafter "Williamson Memorial Hospital"), Pelagio P. Zamora, Pelagio P. Zamora, Inc., Mingo County Ambulance Service, Inc. for negligence in the care he received as a patient on July 12, 1997. Appellant claimed Mingo County Ambulance Service improperly intubated Jason Kominar in his esophagus, and failed to detect the improper intubation, depriving Jason Kominar of oxygenation. Furthermore, upon his arrival at Williamson Memorial Hospital, the emergency room physician, Dr. Zamora and nurses, failed to detect the

improper intubation and otherwise failed to perform the medical procedures that would be required on a trauma patient who arrived at the emergency room in Jason Kominar's condition. The jury trial began on May 9, 2005 and concluded on May 20, 2005. The jury returned a verdict for all respondents and against the Appellant on May 20, 2005.

Appellant timely filed her motion to set aside the verdict and award a new trial. After briefing and argument, the court denied Appellant's motion by Order dated February 2, 2006. This is an appeal of the trial court's denial of Appellant's motions for new trial.

#### ASSIGNMENTS OF ERROR

- A. THE COURT ERRED BY PERMITTING THE THREE DEFENDANTS THREE SEPARATE PEREMPTORY CHALLENGES WHERE DEFENDANTS OFFERED NO EVIDENCE AGAINST EACH OTHER AND WERE NOT HOSTILE, BUT, IN FACT, SUPPORTIVE OF EACH OTHER, THEREBY DENYING APPELLANT A FAIR JURY.
- B. THE COURT ERRED BY REFUSING APPELLANT'S INSTRUCTION ON SPOILIATION OF EVIDENCE, THEREBY DENYING HER THE ADVERSE INFERENCE THE JURY WAS ENTITLED TO DRAW FROM THE LOSS, ALTERATION, OR DESTRUCTION OF CRITICAL MEDICAL RECORDS BY THE DEFENDANTS
- C. THE COURT ERRED BY DENYING APPELLANT THE RIGHT TO READ RELEVANT INTERROGATORY ANSWERS TO THE JURY.
- D. THE COURT ERRED IN FAILING TO GRANT A MISTRIAL AFTER OPENING STATEMENTS WHEN DEFENSE COUNSEL VIOLATED A MOTION IN LIMINE CONCERNING SEVERITY OF THE ACCIDENT, ARGUING THAT MEDICAL CARE WAS IRRELEVANT TO THE DEATH.

- E. THE COURT ERRED BY NOT GRANTING A NEW TRIAL FOR VIOLATION OF MOTIONS IN LIMINE.
- F. THE COURT ERRED IN ALLOWING CUMULATIVE EXPERT TESTIMONY FROM SIX DEFENSE EXPERTS, ALL SUPPORTING ALL DEFENDANTS, THEREBY PREJUDICING THE APPELLANT.
- G. REFUSING TO ALLOW APPELLANT TO PRESENT TESTIMONY OF A FACT WITNESS TO CONTRADICT SPECULATIVE OPINION EVIDENCE RESULTED IN ERROR.

#### POINTS OF AUTHORITY

1. Appellate court review of circuit court's ruling on motion for new trial is under abuse of discretion standard. Andrews v. Reynolds Memorial Hospital, Inc., 201 W.Va. 624, 499 S.E.2d 846 (1997).
2. When co-defendants are not hostile toward one another, they are not entitled to separate peremptory strikes. It is incumbent upon them to demonstrate hostility by sufficient proof of same. Otherwise, co-defendants must share their strikes among themselves. Price v. Charleston Area Medical Center, et al., 217 W.Va. 663, 619 S.E.2d 176 (2005); Tawney v. Kirkhart, 130 W.Va. 550, 44 S.E.2d 634 (1947).
3. "If a party can reasonably anticipate litigation, then the party has an affirmative duty to preserve any relevant evidence. When a party mishandles, alters, damages, or destroys evidence so as to impair an opponent's opportunity to litigate a case, a trial court should usually give an 'adverse inference' instruction to the jury, such that the jury may infer that the altered or missing evidence, if it had been available, would have been unfavorable to the offending party's case." Tracy v. Cottrell, 206

W.Va. 363, 524 S.E.2d 879, 887-90 (1999); Hannah v. Heeter, 213 W.Va. 704, 584 S.E.2d 560 (2003).

4. Relevant evidence merely needs to make a fact of consequence more or less probable than it would be without such evidence. The standard for admissibility is liberal favoring broad admissibility. If it tends to prove a fact even slightly it is admissible for any relevant issue. State v. Dorton, 125 W.Va. 381, 245 S.E. 2d 455 (W.Va. 1943); McDougal v. McCammon, 193 W.Va. 229, 455 S.E.2d 788 (1995); State v. Sugg, 193 W.Va. 388, 450 S.E.2d 469 (1995).

5. All relevant evidence is admissible where a witness is in a position to have peculiar knowledge, which jurors would not ordinarily have, their testimony is admissible. State v. Jameson, 194 W.Va. 561, 461 S.E.2d 67 (1995); West Virginia Rules of Evidence 402.

6. Interrogatory answers may be used in the trial of a case as evidence to the extent permitted by the West Virginia Rules of Evidence. West Virginia Rules of Civil Procedure 33(c).

7. Once a trial judge has ruled on a motion *in limine*, the ruling becomes the law of the case and a deliberate violation of a motion *in limine* is grounds for a mistrial or reversal after an adverse verdict. Honaker v. Mahon, 210 W.Va. 53, 552 S.E.2d 788 (2001).

#### STATEMENT OF FACTS

Jason Kominar was 22 years of age on July 12, 1997. On his way from his home to a class, he lost control of his vehicle and wrecked into an embankment in Mingo

County. The ambulance crew testified that he was dead at the scene. Passers-by testified that Jason crawled out the window of the vehicle and was breathing and moving when the Mingo County Ambulance Service arrived. There was no dispute that the wreck involved a significant collision. Jason was taken directly to the Williamson Memorial Hospital, arriving there within a very few minutes where he was pronounced dead after defendants, Dr. Pelagio Zamora and Williamson Memorial Hospital, claimed that they had attempted to resuscitate him. Jason Kominar's parents, Steve and Mary Ann Kominar, were notified and went directly to the emergency room.

The time sequence is generally as follows:

Accident	8:47 a.m.
EMS arrived <ul style="list-style-type: none"> <li>• EMT intubated Jason at scene or on way to hospital</li> <li>• EMT ran EKG on Jason on way to hospital</li> </ul>	8:58 a.m.
EMS left for hospital	9:11 a.m.
EMS arrived at hospital	9:19 a.m.
CPR started at hospital	9:20 a.m.
Second EKG started on Jason at hospital	9:17 a.m.
Dr. Zamora (ER doctor) ordered CPR to cease	9:30 a.m.

After Jason Kominar was pronounced deceased by Dr. Zamora, Dr. Zamora decided to do an x-ray to determine what had caused Jason's death. He also ordered blood chemistry drawn at 10:32 a.m. (after death), which was collected at 10:34 a.m. At 10:40 a.m., a drug screen was collected.

The x-ray demonstrated that the endotracheal tube had been inserted into Jason's stomach instead of his lungs. Jason's stomach was greatly distended with air having been pumped into his stomach. Dr. Zamora testified that the reason he had the x-ray

performed *after* Jason's death was that he wanted to know what had happened. Trial Tr. Vol. 3, May 11, 2005, at pp. 34-35.

All defendants claimed that Jason was dead at the scene. Consequently, the most important objective evidence of liability and proximate cause was the ambulance run sheet, the EKGs run on Jason by the EMTs from the scene to the hospital, and the EKG that was run on Jason while he was at the emergency room between 9:17 and 9:27 a.m. This data, if correct, would have demonstrated, without question, whether Jason's heart was beating during transport and treatment.

The ambulance run sheet is a form with three duplicating copies. One copy is for the hospital, one for the state, and the original for the ambulance service. James York, an EMT on this run, who signed the ambulance run sheet testified that he remembered stapling the ambulance EKG to the hospital copy of the run sheet and giving it to the personnel at the emergency room on September 12, 1997. Trial Tr. Vol. 3, May 11, 2005, at pp. 154-155. Further, the Williamson Memorial Hospital's 30(b)(7) designee, Judy Sanger, testified that had the run sheet been delivered to the hospital's emergency room the practice and procedure was that it was delivered to the records department where it would be kept as part of Jason's medical file, and that maintaining of the run sheet was part of the requirements of the hospital. Trial Tr. Vol. 7, May 17, 2005, at pp. 8-16. Although ordered to produce the hospital's copy of the run sheet and the ambulance service's EKG strips, the hospital testified it was not to be found. *Id.*

Appellant, previous to the subject trial, prepared to try this case and appeared with witnesses at the Mingo County Courthouse for jury selection on April 12, 2004. At

that time, counsel for the Mingo County Ambulance Service advised the court that he had discovered that the ambulance run sheet had been altered. Consequently, that trial was continued to allow discovery on the issue of how it was altered and who altered it. There was no procedure for the ambulance service to make a copy of its own EKG strip. Therefore, the only copy of the ambulance record was altered and there was no copy of the EKG for anyone to review.

There were several alterations on the run sheet, including an alteration of the pulse and the degree of pupil dilatation. Defendant Trial Exhibit 22. Also, there were three members of the ambulance team who were on the run and cared for Jason Kominar. However, there was just one signature on the ambulance run sheet. The only signature was by Mr. York, even though the procedure was for all members on the run to sign the run sheet. These alterations could have been significant. It was also significant to know when the alteration was made. The only way to determine when the alterations were made was to review the hospital's copy of the ambulance run sheet since the state did not have a copy.

Therefore, the only direct record evidence, which could have refuted defendants' claims that Jason Kominar was dead at the scene before the ambulance arrived at the hospital, was in the hands of Williamson Memorial Hospital and it had lost or destroyed the same.

Additionally, the hospital EKG strips were important. However, the hospital strips were for only short periods of the 10 minutes they were run. Dr. Zamora testified that the hospital had intentionally looked for the best portion of the strips (showing the

best rhythm of Jason) and had cut those out and placed them in the chart, throwing the remainder away. Plaintiff Trial Exhibit 1; see also Trial Tr. Vol. 3, May 11, 2005, at p. 44. That procedure left Appellant with only a portion of Jason's heart strips from the hospital, which was critical to analyzing his condition while in the emergency room. It should be noted that the hospital testimony and record was that there was no attempt to shock Jason by defibrillator.

Appellant proved without question that:

1. The ambulance service had possession of the original run sheet and that it was altered while in its possession. Trial Tr. Vol. 3, May 11, 2005, at pp. 114, 152, 157.
2. The hospital had possession of the hospital's copy of the ambulance run sheet and the ambulance EKG, and its own EKG, and had either intentionally or otherwise lost or destroyed entirely the ambulance record and EKG, and definitely intentionally destroyed the major part of its own EKG strips. Trial Tr. Vol. 3, May 11, 2005, pp. 154, 155; Vol. 7, May 17, 2005, at p. 10.
3. Both defendants had a duty to keep the records in question. Trial Tr. Vol. 3, May 11, 2005, at p. 154; Vol. 7, May 17, 2005, pp. 9, 15, 16.
4. Since defendants' primary defense was that Jason was dead before anyone could help him, obviously, defendants had a motive for destroying or altering the records.

5. There were no EKG strips from the scene to the hospital and "a random sampling" of strips is only a small portion and left out the majority of evidence showing Jason's heart rhythms during his care in the emergency room.
6. The missing strips were essential evidence that Appellant needed to prove her case since six of defendants' experts all opined that Jason was dead before the ambulance service arrived at the scene. Defendants' experts testified that they were relying on the testimony of defendants' employees and the altered run sheet for the above-mentioned opinion.
7. Appellant was greatly prejudiced by not having the records, which, if produced and not altered, would have definitely told whether Jason was alive during various stages of treatment.
8. The missing ambulance run sheet was not merely collateral evidence. It and the EKG rhythm strips were direct evidence, which would have demonstrated the heart rate of Jason.
9. The altered record was inconsistent with the "other evidence." Zero "0" heart rate is significantly different from either "100" or "18" heart rate, and a 7mm dilation of pupil is significantly different from 3mm dilation. The altered record showed the heart rate at 18 and the pupil dilation at 3mm. The argument by defendants and the lower court's finding that the different findings above would not indicate a potentially different patient defies medical science. Certainly, the cover-up of the heart rate and the

inability of not even to be able to compare it to the hospital's copy significantly affected Appellant's ability to present the truth in this case.

Based upon the above, the Appellant offered a spoliation instruction, which was denied. Plaintiff's Jury Instruction No. 39; Trial Tr. Vol. 8, May 18, 2005, pp. 298-309.

Appellant deposed all medical witnesses for all defendants and their experts. Unlike most medical negligence cases, each defendant had each expert testify about whether any defendant or its employees were negligent. Trial Tr. Vol. 6, May 16, 2005, at pp. 91, 128, 183, 184; Trial Tr. Vol. 7, May 17, 2005, at pp. 85, 196, 206, 218, 252, 274, 275; Trial Tr. Vol. 8, May 18, 2005, at p. 83. Every defense expert said none of the defendants were negligent, that all medical providers provided good care and/or exceptionally good care. *Id.* Faced with this barrage of duplicitous testimony, Appellant moved the court to restrict the testimony because Appellant had only one emergency room expert, one neurologist, and one radiologist to offer testimony against all defendants. Trial Tr. Vol. Vol. 7, May 17, 2005, at pp 315.

The issues in the case were whether the ambulance service was negligent getting the patient to the hospital and whether the hospital and Dr. Zamora, the emergency room physician, were negligent once at the hospital. There were no cross claims by any of the defendants. None of the defendants had experts to provide testimony or argument against another defendant. Appellant had fully discovered the case. Appellant knew this, advised the court of this, and, throughout the trial, defendants did exactly as Appellants claimed they would do by offering all experts to support the case of other defendants.

Appellant objected to the court giving all three defendants separate set of strikes because it destroyed Appellant's right to a fair jury. Trial Tr. Vol. 2, May 10, 2005, at pp. 22-24. The court stated, "I think you [Appellant] are generally right. I think the general defense is you're correct on that. But I'm still saying that technically as to legal defenses they are at odds with one another. They are adverse to one another. All of them are adverse to you." *Id.* at 23, emphasis supplied. The transcript then goes "off the record." But the court did not look at the defendants' expert testimony or require defendants to explain or demonstrate their hostility, and there was no motion by defendants supported by any documentation.

The court allowed all three defendants three separate strikes to Appellant's three strikes; thus, making the strike ratio 9:3. This procedure guarantees defendants a better jury than Appellant. Statistically, Appellant will always end up with a jury that clearly favors the defendant. Out of 18 to choose from, defendants got the right to strike nine -- half the potential jurors.

Appellant moved the court for a motion *in limine* prohibiting the investigating officer from testifying as to the cause of death being the high rate of speed and further, from defendants arguing that Appellant decedent died from a violent collision and that in essence, medical care would be useless. This motion was granted by the circuit court.

In opening statement, counsel for Williamson Memorial Hospital, William Mundy, violated this motion by putting up a blow-up of a portion of the accident report and photographs and stating the following:

Jason Kominar died . . . when his truck went across four lanes of highway at high speed and crashed head on into a rock cliff.

\*\*\*

[T]he drawing of the accident scene made by the Officer John Hall . . . No evidence that he ever attempted to brake. . . John Hall says high-speed motor vehicle accident.

\*\*\*

You can see the front part of the truck basically destroyed.

Trial Tr. Vol. 2, May 10, 2005, at pp. 152-153. At this point, Appellant objected and the court sustained the objection. "It will be sustained." ... "Confine yourself to the evidence that will be shown in the case." *Id.* at 153-154. Not to be outdone, Mr. Mundy continued telling the jury how severe the impact was then said, "according to the National Highway Safety Administration 41,967 people were killed in motor vehicle accidents." *Id.* at 155. Appellant again objected. The court again sustained the objection. "Focus on the facts that you are going to present in this case." *Id.* Appellant's counsel stated to the court that defendants had violated the motion *in limine*. *Id.* at 155-156. Appellant then moved for mistrial on that basis. *Id.* at 237-239.

This argument was made by defendants to convince the jury that the collision was not survivable, thus making the medical care irrelevant. However, neither side had presented any competent testimony to verify this. Appellant had earlier moved to prohibit the investigating officer from testifying that the accident was not survivable, was a high speed collision or about biomechanics. Trial Tr. Vol. 2, May 14, 2005, at p. 242. The circuit court had granted the motion because John Hall was not qualified to render such opinions. *See* Trial Court Order dated February 14, 2002. Further medical care is only necessary when one is injured or ill. Based on the court's early ruling,

Appellant did not hire an expert or develop evidence on that issue and neither did defendants. However, to further prejudice the jury and in direct defiance of the court's motion *in limine*, defense counsel for the ambulance service asked John Hall during the trial:

Q. Given your experience as a police officer and someone who has investigated hundred[s] of accidents, would it [be] fair to say given the injuries that you observed and the condition of the scene of the accident that you were not surprised to learn that Jason hadn't survived this accident?

A. That is correct.

Trial Tr. Vol. 8, May 18, 2005, at p. 269. Appellant asked to approach. The court stated, "In a moment" and later denied that defense counsel had violated the motion *in limine* and stated, "I believe it wouldn't be proper to draw any more attention to it. . . ." *Id.* at 278. Appellant was significantly prejudiced by defense counsel's conduct and Appellant should have been granted a mistrial or a new trial after the defense verdict.

Defendants' experts claimed that Appellant had a significant tear in his aorta or other artery and bled out and died before the ambulance personnel ever saw him. Trial Tr. Vol. 6, at pp. 183, 199; Trial Tr. Vol. 7, May 17, 2005, at pp. 103, 104, 110, 142, 208, 228, 230, 276, 277, 305, 311. There was no autopsy because, from discussions among the medical examiner, the hospital personnel, and John Hall, the medical examiner determined no autopsy was necessary. Trial Tr. Vol. 3, May 11, 2005, at pp. 133, 135. Consequently, there was no direct proof of any bleed. However, James Spaulding, the embalmer, testified in deposition that if there were such a tear he would see the result from embalming because the fluid would escape from the same tear. Defendants

objected to this evidence and the court sustained the objection. Appellant, therefore, was denied admissibility of relevant evidence to refute pure undocumented opinion evidence. Trial Tr. Vol. 8, May 18, 2005, at pp. 20-23.

During discovery, Appellant had inquired by interrogatory as to who was present and had assisted in Jason's care. The hospital responded by interrogatory answer by identifying certain personnel. Trial Tr. Vol. 8, May 18, 2005, at pp. 24-25, 32, 34. When Appellant deposed these individuals several stated they were not there. In addition, Dr. Zamora had testified that many of the personnel were on standby, waiting to take care of Jason when he arrived via ambulance. Trial Tr. Vol. 3, May 11, 2005, at pp. 17-18. This evidence was admissible and relevant to demonstrate the lack of credibility of the hospital as to the care Jason received since there was clearly inconsistent testimony. Appellant then offered to read the defendant's interrogatory answer to demonstrate this inconsistency between the sworn interrogatory answer and the witness identified therein. The court refused to allow it. *Id.* at 34.

### ARGUMENT

- A. THE COURT ERRED BY PERMITTING THE THREE DEFENDANTS THREE SEPARATE PEREMPTORY CHALLENGES WHERE DEFENDANTS OFFERED NO EVIDENCE AGAINST EACH OTHER AND WERE NOT HOSTILE, BUT, IN FACT, SUPPORTIVE OF EACH OTHER, THEREBY DENYING APPELLANT A FAIR JURY.**

The West Virginia Supreme Court has held that, "to warrant separate peremptory challenges, the Appellants or defendants as the case may be, as proponents, bear the burden of showing that their interests are antagonistic or hostile and that separate challenges are necessary for a fair trial." Syl. Pt. 3, Price v. Charleston Area

Medical Center, et al., 217 W.Va. 663, 619 S.E.2d 176 (2005). This Court set forth factors that should be considered by the lower court in determining whether such interests are hostile between two or more defendants or Appellants. These factors include, but are not limited to, the following: (1) whether the defendants are charged with separate acts of negligence or wrongdoing, (2) whether the alleged negligence or wrongdoing occurred at different points of time, (3) whether the negligence, if found against defendants, is subject to apportionment, (4) whether the defendants share a common theory of defense, and (5) whether cross claims have been filed. *Id.*

Appellant was prejudiced in this case by the fact that Defendants had nine strikes to Appellant's three strikes, thus permitting the defendants to essentially pick the jury of their choosing. As in Price, each of the three defendants were allowed three peremptory strikes each. As previously mentioned, in West Virginia, the law requires that before a defendant is allowed separate strikes they must demonstrate to the court, by motion made prior to jury selection, that their identities are separate and distinct and that there is a basis for them to be allowed to have more strikes than the Appellant. Price v. Charleston Area Medical Center, et al., 217 W.Va. 663, 619 S.E.2d 176 (2005); Tawney v. Kirkhart, 130 W.Va. 550, 44 S.E.2d 634 (W.Va. 1947). Defendants made no offer or showing of any conflict between the defendants in the case at hand. While the defendants argued that, since the Appellant asserted separate acts of negligence against each defendant, they were entitled to the additional strikes, they, in fact, were not hostile at all. However, in Price, supra, the Court found that was clearly not enough to

allow additional strikes. It is statistically impossible for the Appellant to receive a fair trial with a three-to-one strike ratio.

Appellant's medical liability claims against the defendants included an individual claim against Mingo County Ambulance Service and Dr. Zamora, with a vicarious liability claim against Williamson Memorial Hospital for Dr. Zamora's actions. The alleged acts of negligence occurred at two separate times, at the scene by the ambulance service and at the hospital for both defendants, Williamson Memorial and Dr. Zamora. The defendants in this case demonstrated no animosity and/or conflict toward each other. Their defenses were the same; there were no cross-claims in the case; there was no finger pointing in the case. Each and every defense expert testified on behalf of one another that no defendant in this case deviated from the standard of care thereby supporting each other's defenses. Furthermore, in each of the defendants' opening statements and closing arguments the counsel for the parties reiterated each other's theories and defenses. *See e.g.*, Trial Tr., Volume 8, May 18, 2005. The interests of the defendants were clearly not antagonistic. With all the above-mentioned facts in this case, Appellant was severely prejudiced and could not have had a fair trial with this three to one ratio.

It is a litigant's right to peremptory challenges of prospective jurors to secure an impartial and unbiased jury. W.V.R.C.P. 38(a); Barker v. Benefit Trust Life Ins. Co., 174 W.Va. 187, 324 S.E.2d 148 (1984). By law, in order for the defendants to each have three separate peremptory challenges an offer of showing of conflict of interests between the defendants must be provided to the Court. "A mere statement that conflicting interests

exist between the defendants, without more, does not require the trial judge to take initiative in inspecting pleadings to determine whether to call larger panel of jurors in order to allow defendant four separate peremptory challenges." W. Va. Code §56-6-12 (2002); Tawney v. Kirkhart, 130 W.Va. 550, 44 S.E.2d 634 (W.Va. 1947); Price v. Charleston Area Medical Center, et al., 217 W.Va. 663, 619 S.E.2d 176 (2005). The parties who request additional strikes must demonstrate to the court that they indeed have a real need for the strikes because they have hostile interests. Merely claiming that they have conflicting interests is not enough. And, in particular, when a claim is made by a party that they are hostile and conflicting the party should be held to the representations. If the claims of conflict and hostility prove to be merely a strategy to gain an advantage over the opposing party, then the party should be granted a new trial regardless of hearings with reference to the jury strikes. Here, the defendants made no real showing of conflict and hostility. It was a mere subterfuge to gain an unfair advantage in jury selection. Obviously, any party would be prejudiced.

**B. THE COURT ERRED BY REFUSING APPELLANT'S INSTRUCTION ON SPOILIATION OF EVIDENCE, THEREBY DENYING HER THE ADVERSE INFERENCE THE JURY WAS ENTITLED TO DRAW FROM THE LOSS, ALTERATION, OR DESTRUCTION OF CRITICAL MEDICAL RECORDS BY THE DEFENDANTS.**

Appellant contends the trial court erred in failing to give Appellant's requested instruction concerning defendants' spoliation of Mr. Kominar's cardiac monitor strip evidence and the ambulance run sheet. The West Virginia Supreme Court has previously held that if an Appellant is able to demonstrate that records have been altered or destroyed that the Court may, in certain circumstances, instruct the jury as to

a rebuttable presumption or inference in favor of the Appellant on issues of negligence and causation. Appellant submits that the jury should have had the opportunity to conclude whether the defendants, either separately or collectively, negligently or deliberately failed to record or retain (1) the original ambulance run sheet, unaltered, (2) the ambulance cardiac monitor strips, and (3) the hospital's copy of the ambulance run sheet, and/or (4) the hospital cardiac monitor strips. The facts supported the burden of proof being shifted to the defendants in this case. The Appellant was entitled to the rebuttable presumption that the run sheets and monitor strips, if available, would have supported plaintiff's position.

The adverse inference instruction continues to be the primary remedy available against a party-spoliator. That was the holding in Harrison v. Davis, 197 W.Va. 651, 478 S.E.2d 104 (1996), which was a medical malpractice action arising from the death of a newborn child. Upon the plaintiff's discovery that the hospital had destroyed the fetal monitoring strips, the plaintiff added a count for spoliation of evidence. *Id.* This Court affirmed the circuit court's dismissal on other grounds, but added the comment that the adverse inference instruction was the available remedy for the spoliation of evidence. The adverse inference instruction should have been given to the jury based on the evidence in this case and the lower court's error in failing to give such instruction requires reversal.

"If a party can reasonably anticipate litigation, then the party has an affirmative duty to preserve any relevant evidence. When a party mishandles, alters, damages, or destroys evidence so as to impair an opponent's opportunity to litigate a case, a trial

court should usually give an "adverse inference" instruction to the jury, such that the jury may infer that the altered or missing evidence, if it had been available, would have been unfavorable to the offending party's case." Tracy v. Cottrell, 206 W.Va. 363, 524 S.E.2d 879, 887-90 (1999). When the alleged spoliator is a party to the litigation, the Court has concluded that under certain circumstances, an adverse inference instruction may be given where physical evidence was destroyed by a party in the case. *Id.*

Defendants' argument that Appellant did not meet her burden of proof on each of the elements listed in Hannah is without merit. In Hannah v. Heeter, 213 W.Va. 704, 584 S.E.2d 560 (2003), the West Virginia Supreme Court of Appeals reiterated the factors set forth in Syllabus Point 2 of Tracy v. Cottrell, 206 W.Va. 363, 524 S.E.2d 879 (1999), that must be considered prior to the court instructing the jury on adverse inference for evidence spoliation. The four factors Appellant proved were:

(1) the party's degree of control, ownership, possession or authority over the destroyed evidence; (2) the amount of prejudice suffered by the opposing party as a result of the missing or destroyed evidence and whether such prejudice was substantial; (3) the reasonableness of anticipating that the evidence would be needed for litigation; and (4) if the party controlled, owned, possessed or had authority over the evidence, the party's degree of fault in causing the destruction of the evidence.

Hannah, 213 W.Va. 704, 584 S.E.2d 560 (2003).

In focusing on the four factors listed above, the facts are that all of the elements of a spoliation claim were clearly met in this case, proving that defendants had a legal duty to preserve the medical records of Jason Kominar and that it had lost and/or destroyed those highly relevant documents in its possession.

i. **MINGO COUNTY AMBULANCE SERVICE RUN SHEET**

Mingo County Ambulance Service had a duty to maintain the original run sheet, unaltered. After months of searching for the original run sheet, it was finally found. Appellant proved the run sheet had been altered. Appellant never received a copy of the run sheet unaltered. The only defendant who maintained possession of the original run sheet was the ambulance service. Appellant, Mrs. Kominar, appeared at the ambulance service within days after the death to get a copy of the run sheet. Therefore, litigation was reasonably expected. The Appellant should have been entitled to her instruction based upon the altered run sheet.

**Element Number 1:** Defendant Mingo County Ambulance Service, had total control, ownership, possession and authority of the altered run sheet and destroyed EKG strip evidence, as well as a legal duty to maintain it. Trial Tr. Vol. 3, May 11, 2005, at pp. 114, 152, 157. They had the duty and responsibility to maintain the original record and to enter into his chart all portions of the medical records concerning Jason Kominar. *Id.* The original run sheet should have been placed in his chart unaltered. The defendant ambulance service were the only ones who had possession of the original record and could have altered it.

**Element Number 2:** Defendant, as a result of all the missing and/or destroyed evidence mentioned above, highly and substantially prejudiced the Appellant. The run sheet is extremely important to the Appellant's case. Appellant's ability to meet her burden of proving medical malpractice was hindered by the defendants' failure to maintain the original run sheet in an unaltered manner. Appellant's expert testified

that the alteration of the run sheet hindered his ability to offer testimony on the issues of the defendants' negligence and causation. Trial Tr. Vol. 4, May 12, 2005, at pp. 215, 253-254.

**Element Number 3:** Defendant was quite aware of the reasonableness of anticipating the evidence would be needed for litigation. This is a medical malpractice case concerning the care Mr. Kominar received at the scene and at the defendant hospital. Mrs. Kominar approached defendant Mingo County Ambulance Service and Williamson Memorial Hospital and requested the medical records of her son, Jason. It was reasonable to anticipate the medical records would be considered throughout the duration of the litigation.

**Element Number 4:** Defendant ambulance service was the only defendant, which maintains the original run sheet in its entirety. Trial Tr. Vol. 3, May 11, 2005, at p. 154. Therefore, in regard to the altered run sheet, its degree of fault would be substantial.

ii. **WILLIAMSON MEMORIAL HOSPITAL'S COPY OF THE AMBULANCE RUN SHEET AND THE AMBULANCE SERVICE EKG STRIPS**

An employee for the ambulance service, James York, testified that he filled out the run sheet and signed the run sheet. The ambulance run sheet has separate carbon copies attached. He testified that he then stapled the EKG monitor strips to the defendant hospital's copy of the run sheet and left it with the hospital in the emergency room. Trial Tr. Vol. 3, May 11, 2005, at pp. 154-155. The record custodian for the hospital, testified that once the hospital receives the run sheet, its procedure is for it to

be made a part of the original hospital record. The defendant hospital was never able to produce their copy of the run sheet nor the EKG strips. Trial Tr. Vol. 7, May 17, 2005, at p. 10. Since the original run sheet was altered, the hospital's copy of the sheet was the only copy that could tell what was on the original. The hospital had the run sheet. It was part of their record. Mrs. Kominar approached the hospital shortly after Jason's death and requested a copy of his medical records. Therefore, the hospital was aware that litigation was possible. Once again, the Appellant's proposed instruction should have been given to the jury, as questions of fact were present pertaining to the missing records.

**Element Number 1:** Defendant hospital had total control, ownership, possession and authority of the destroyed evidence, as well as a legal duty to maintain it. The defendant hospital had the duty and responsibility to maintain the medical chart and records and to enter into the chart all portions of the medical records concerning Mr. Kominar. Trial Tr. Vol. 7, May 17, 2005 at p. 9. The hospital's copy of the run sheet as well as the attached EKG strips should have been placed in Mr. Kominar's medical chart. *Id.* The hospital never produce their copy of the run sheet nor the EKG strips from the ambulance. These records are not within his hospital file and therefore were destroyed. Trial Tr. Vol. 7, May 17, 2005 at p. 10.

**Element Number 2:** Defendant, as a result of all the missing and/or destroyed evidence mentioned above, highly and substantially prejudiced the Appellant. These medical records, which represented Jason's cardiac status as well as the run sheet, are extremely important to the Appellant's case. Appellant's ability to meet her burden of

proving medical malpractice was hindered by the defendants' failure during a critical period of defendants' treatment to conduct, record or retain the results of his cardiac status and monitor results in his original medical records and to maintain the hospital's copy of the run sheet. Appellant's expert did testify that the absence of such records within the original medical chart and the further alteration of the run sheet hindered his ability to offer testimony on the issues of the defendants' negligence and causation. Trial Tr. Vol. 4, May 12, 2005, at pp. 215, 253-254.

**Element Number 3:** Defendant was quite aware of the reasonableness of anticipating the evidence would be needed for litigation. This is a medical malpractice case concerning the care Mr. Kominar received at the scene and at the defendant hospital. Mrs. Kominar approached defendant Mingo County Ambulance Service and Williamson Memorial Hospital and requested the medical records of her son, Jason. It was reasonable to anticipate the medical records would be considered throughout the duration of the litigation.

**Element Number 4:** Through trial testimony, it had become clear that defendant hospital is the only defendant, which maintains the medical record in its entirety, including but not limited to its copy of the run sheet and the ambulance EKG strips. Therefore, in regard to those documents its degree of fault would be substantial.

**iii. WILLIAMSON MEMORIAL HOSPITAL'S DESTRUCTION OF EKG STRIPS**

The hospital had a duty to maintain their own cardiac monitoring strips during which were printed and recorded during their treatment of Jason Kominar. Dr. Zamora testified that the strips were run constantly. Trial Tr. Vol. 3, May 11, 2005, at p. 44. He

testified that he and the hospital staff cut the strips, put certain strips in Jason's medical chart and destroyed the rest of the strips. Trial Tr. Vol. 3, May 11, 2005, at p. 44. The cardiac monitor strips recorded and printed during the time treatment was performed on Jason were part of his medical record. These strips should have been placed in his original chart with the hospital. Instead, the defendant physician and hospital picked and chose which portions of the strips would be placed in his record and destroyed the others. *Id.* By doing this, Appellant was deprived of pertinent medical information concerning Jason's medical condition. This put the Appellant at a disadvantage in proving her case, therefore an adverse instruction is warranted.

**Element Number 1:** Defendant hospital had total control, ownership, possession and authority of the destroyed evidence, as well as a legal duty to maintain it. The defendant hospital had the duty and responsibility to maintain the medical chart and records and to enter into the chart all portions of the medical records concerning Mr. Kominar. Trial Tr. Vol. 7, May 17, 2005, at p. 9. Defendant hospital never produced the remaining EKG strips from the emergency room treatment. These records should have also been placed in Mr. Kominar's chart. Instead, only a portion of the strips was placed in his medical record and testimony at trial revealed that the remainder of the strips were destroyed. Trial Tr. Vol. 3, Vol. May 11, 2005, at p. 44. Defendant hospital was the only entity who had total control, ownership, possession and authority over the destroyed cardiac monitor strip evidence.

**Element Number 2:** Defendant, as a result of all the destroyed evidence mentioned above, highly and substantially prejudiced the Appellant. These EKG strips,

which represented Jason's cardiac status during his treatment at the hospital, are extremely important to the Appellant's case. Appellant's ability to meet her burden of proving medical malpractice was hindered by the defendant's failure during a critical period of defendant's treatment to record or retain the results of his cardiac status in his original medical records. Appellant's expert did testify that the absence of such records within the original medical chart and the further alteration of the run sheet hindered his ability to offer testimony on the issues of the defendants' negligence and causation.

**Element Number 3:** Defendant was quite aware of the reasonableness of anticipating the evidence would be needed for litigation. This is a medical malpractice case concerning the care Mr. Kominar received at the scene and at the defendant hospital. Mrs. Kominar approached defendant Mingo County Ambulance Service and Williamson Memorial Hospital and requested the medical records of her son, Jason. It was reasonable to anticipate the medical records would be considered throughout the duration of the litigation.

**Element Number 4:** Through trial testimony, it had become clear that defendant hospital is the only defendant, which maintains the medical record in its entirety, including but not limited to the EKG strips run at the hospital. Therefore, in regard to those documents its degree of fault would be substantial. The jury was never allowed to give the Appellant the adverse inference that she was entitled to with respect to the missing and altered records.

In Public Health Trust of Dade County v. Valcin, 507 So.2d 596 (Fla. 1987), the Supreme Court of Florida was faced with the issue of spoliation. More specifically, in

Valcin, the Appellant's expert's ability to determine whether an operation had been performed with due care was hindered by the failure of the surgeon to prepare an operative report. The only record which existed was an inadequately prepared operative note which failed to record relevant information such as the preoperative diagnosis, a detailed record of the surgeon's actions and procedures utilized, the operative findings, and the condition of the patient upon being transferred to the recovery ward. Valcin, 507 So.2d at 597-598.

The Court in Valcin concluded that a rebuttable presumption shifting the burden of proof (i.e., both the burden of persuasion and the burden of production of evidence) would "best implement the public policy that adequate operative notes be kept." *Id.* at 601. The Valcin Court explained that such a rebuttable presumption

affects the burden of proof, shifting the burden to the party against whom the presumption operates to prove the nonexistence of the fact presumed. **"When evidence rebutting such a presumption is introduced, the presumption does not automatically disappear. It is not overcome until the trier of fact believes that the presumed fact has been overcome by whatever degree of persuasion is required by the substantive law of the case."** . . . Rebuttable presumptions which shift the burden of proof are "expressions of social policy," rather than mere procedural devices employed "to facilitate the determination of the particular action." . . .

**[Such a] presumption shifts the burden of proof, ensuring that the issue of negligence goes to the jury. This interpretation appears to best implement public policy that adequate operative notes be kept**

*Id.*, at 600-601 (citations omitted; emphases added).

In reaching this conclusion, the Court in Valcin noted that such a presumption is necessary to serve the purposes of justice when essential medical records are found to be either missing or inadequate due to the negligence of a defendant. *Id.*, at 599-600. As

an example of such a situation, the Court discussed the case of Patrick v. Sedwick, 391 P.2d 453 (Alaska 1964).

In Sedwick, the Supreme Court of Alaska addressed the effect of an inadequately prepared operative record and concluded:

[The surgeon] was the only person who could have prepared a full and accurate report of what was observed and done through the incision in appellant's throat. We hold that he was obligated to his client to prepare such a report and that he failed to discharge his duty in this respect. **We shall not permit the absence of personal recollection or of recorded facts to serve as a defense under the circumstances of this case.**

Sedwick, 391 P.2d at 457-58 (emphasis added).

We hold that it was incumbent upon the appellee surgeon to have described accurately and fully in his report of the operation everything of consequence that he did and which his trained eye observed during the operation. To have maximum probative force the report should have been dictated immediately after the operation. **If these requirements had been met the report would have been more likely to have refreshed his recollection and have supplied sufficient facts to have permitted expert witnesses to testify on the question of negligence.**

*Id.*, at 457 (emphasis added).

Other jurisdictions have adopted the rationale and holding of the Florida Supreme Court in Valcin. For instance, in Sweet v. Sisters of Providence, 895 P.2d 484 (Alaska 1995), the Appellants contended that the defendant breached its duty to create and preserve three types of medical records (i.e., informed consent forms, nursing records, and contemporaneously created records of their infant son's "crash") and that such failure impaired their ability to prove medical negligence.

Relying upon the holdings of both Valcin and Sedwick, the Supreme Court of Alaska concluded:

[W]e hold that the trial court should have adopted a rebuttable presumption that Providence was medically negligent in treating Jacob and that this negligence legally caused Jacob's injuries, absent a jury finding that Providence's failure to maintain Jacob's records was excused.

Sisters of Providence, 895 P.2d at 492. The Court stressed that such presumption would apply not only to the issue of negligence but also to the issue of causation, stating "[j]ust as the missing records may have impaired the Sweet's ability to prove medical negligence, they would in the same way impair the Sweets' ability to prove a causal connection between any negligence and Jacob's injuries." *Id.*, at 491.

Appellant was entitled to the rebuttable presumption that the defendants were negligent and that such negligence proximately caused Mr. Kominar's death.

**C. THE COURT ERRED BY DENYING APPELLANT THE RIGHT TO READ RELEVANT INTERROGATORY ANSWERS TO THE JURY.**

The Court erred in refusing to allow the Appellant to read to the jury certain discovery responses of the defendant hospital, including (1) the request that defendant hospital produce the medical records of Jason Kominar and the defendant hospital's response, which included a record that did not include the triage sheet; (2) the defendant's interrogatory answers wherein the hospital identified certain individuals who were represented to have provided care for the Appellant and who indicated that they did not recall or provide any care. Trial Tr. Vol. 7, May 17, 2005, at pp. 13-14. These alleged caregivers' names did not appear on the medical records as providing care. Rule 33(c) of the West Virginia Rules of Civil Procedure state,

Interrogatories may relate to any matters which can be inquired into under Rule 26(b)(1), and the answers may be used to the extent permitted

the rules of evidence. An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

Certain discovery responses of defendant hospital were relevant and supported Appellant's allegations that Jason Kominar's medical records were altered. It was an abuse of discretion to deny their admission. State v. Dorton, 125 W.Va. 381, 245 S.E. 2d 455 (W.Va. 1943); McDougal v. McCammon, 193 W.Va. 229, 455 S.E.2d 788 (1995); State v. Sugg, 193 W.Va. 388, 450 S.E.2d 469 (1995).

**D. THE COURT ERRED IN FAILING TO GRANT A MISTRIAL AFTER OPENING STATEMENTS WHEN DEFENSE COUNSEL VIOLATED A MOTION IN LIMINE CONCERNING SEVERITY OF THE ACCIDENT, ARGUING THAT MEDICAL CARE WAS IRRELEVANT TO THE DEATH.**

The Court erred in failing to grant Appellant's motion for a mistrial after opening statements wherein defense counsel violated the motion *in limine* specifically holding that there could be no argument or evidence presented concerning the wreck in question insofar as the survivability of the collision. Appellant in this case, relying upon Judge Thornsby's ruling, did not name or call a biomechanics engineer even though Appellant had, in fact, consulted with one on the assumption that this type of evidence would not be presented at trial. The Court, at the pre-trial, made clear rulings in that regard, holding that defendants could demonstrate the physical condition of Jason Kominar after the wreck, but could not focus the case on whether the wreck was so severe that Jason Kominar could not survive.

As mentioned previously, a deliberate and intentional violation of a trial court's ruling on a motion *in limine*, and thereby the intentional introduction of prejudicial evidence into a trial, is a ground for reversing a jury's verdict. Honaker, 552 S.E.2d at 790. Defense counsel, in his opening statements, continued to argue that Appellant's accident was not survivable, even citing auto death statistics. Without a doubt, the Court's previous ruling on motion *in limine* excluded any and all such testimony. Trial Tr. Vol. 2, May 10 2005, at pp. 240-241. This statement to the jury was deliberately introduced in opening statements, during testimony and in closing arguments to establish a theory in the case without proper evidence to support it. These statements prejudiced the Appellant and created jury confusion, as the most significant allegation in this case is that Mr. Kominar was improperly intubated and died as a result. It was not whether or not Mr. Kominar hit his brakes prior to the accident, whether it was a high-speed accident or whether it was a survivable accident. Therefore, Appellant was prejudiced by the trial court not granting a mistrial in opening statement and after other violations of the motion as described in "Statement of Facts" *supra*.

**E. THE COURT ERRED BY NOT GRANTING A NEW TRIAL FOR VIOLATION OF MOTIONS IN LIMINE.**

In a dramatic and pointed question and answer, defense counsel asked Officer John Hall if he was surprised that Jason Kominar died in this wreck, to which Officer Hall opined that he was not. Trial Tr. Vol. 8, May 18, 2005, at p. 269. This specifically violated a ruling *in limine* that John Hall was not an accident reconstructionist and could not testify to whether Appellant could have survived this collision. Trial Tr. Vol.

8, May 18, 2005, at p. 278. Prior to giving this opinion, Mr. Hall performed a pre-accident investigation and developed opinion concerning the dynamics of the accident. From that investigation, Mr. Hall developed his opinions regarding Mr. Kominar's chance of survivability from the accident. Mr. Hall admitted he was not qualified to render such opinion evidence. He then, by the question posed to him by defense counsel, revealed his opinions regarding Mr. Kominar's survivability of the accident derived from his investigation to the jury during his trial testimony. This testimony clearly violated the Court's previous motion *in limine*.

The West Virginia Supreme Court previously addressed this issue regarding a violation of a previous ruling regarding a motion *in limine*. It stated, "[o]nce a trial judge rules on a motion *in limine*, that ruling become the law of the case unless modified by a subsequent ruling of the court. A trial court is vested with the exclusive authority to determine when and to what extent an *in limine* order is to be modified." Syl. Pt. 4, Honaker v. Mohan, 210 W.Va. 53, 552 S.E.2d 788 (2001); (citing Syl. Pt. 4, Tennant v. Marion Health Care Foundation, Inc., 194 W.Va. 97, 459 S.E.2d 374 (1995)). "A deliberate and intentional violation of a trial court's ruling on a motion *in limine*, and thereby the intentional introduction of prejudicial evidence into a trial, is a ground for reversing a jury's verdict." *Id.* at 790. The Court further held,

In deciding whether to set aside a jury's verdict due to a party's violation of a trial court's ruling on a motion *in limine*, a court should consider whether the evidence excluded by the court's order was deliberately introduced or solicited by the party, or whether the violation of the court's order was inadvertent. The violation of the court's ruling must have been reasonably calculated to cause, and probably did cause, the rendition of an improper judgment. A court should also consider the inflammatory

nature of the violation such that a substantial right of the party seeking to set aside the jury's verdict and was prejudiced, and the likelihood that the violation created jury confusion, wasted the jury's time on collateral issues, or otherwise wasted scarce judicial resources. The court may also consider whether the violation could have been cured by a jury instruction to disregard the challenged evidence.

*Id.* at 790. In this case, the defendant deliberately solicited the testimony of Mr. Hall. The defendant argues the testimony was admissible as a lay witness opinion. This testimony was not simply a lay witness opinion. It was not merely based upon his experience as a police officer that had investigated many traffic fatalities, but rather his investigation of Mr. Kominar's actual accident. One cannot separate out his own investigation from his opinion of survivability of Mr. Kominar.

Defendant further argues that Mr. Hall's opinions were no different than from the opinions solicited from the eyewitnesses at the scene. The three witnesses Appellant called to testify regarding what they observed at the scene never testified if they believed Mr. Kominar could have survived the accident. In addition, none of the three witnesses performed any pre-accident investigation to determine the cause or severity of the accident.

The testimony solicited from Mr. Hall was highly prejudicial to the Appellant to warrant a new trial.

**F. THE COURT ERRED IN ALLOWING CUMULATIVE EXPERT TESTIMONY FROM SIX DEFENSE EXPERTS, ALL SUPPORTING ALL DEFENDANTS, THEREBY PREJUDICING THE APPELLANT.**

The Court erred in allowing defense counsel, over Appellant's objection, to call six experts to testify that neither the EMTs nor Dr. Zamora deviated from the standard

of care in this case. In fact, these six defense experts testified that the care rendered to Jason Kominar exceeded the standard of care. Trial Tr. Vol. 6 at pp. 91, 128, 183, 184; Trial Tr. Vol. 7, May 17, 2005 pp. 85, 196, 206, 218, 252, 274, 275; Trial Tr. Vol. 8, May 18, 2005, at p. 83. While there were three defendants in the case, the hospital was only in the case for the *respondeat superior* claim involving Dr. Zamora. The experts involved testified not only to standard of care but also to causation. Therefore, for two defendants, there were six experts testifying all to the same thing. Each expert testified on behalf of every defendant regarding standard of care and causation. Trial Tr. Vol. 6 at pp. 91, 128, 183, 184; Trial Tr. Vol. 7, May 17, 2005, at pp. 85, 196, 206, 218, 252, 274, 275; Trial Tr. Vol. 8, May 18, 2005, at p. 83.

While there is certain discretion given a trial court in determining when evidence becomes so cumulative that it is prejudicial, this far exceeded any reasonable limits of cumulative expert testimony. "Under W. Va. R. Evid. 702, a trial judge has broad discretion to decide whether expert testimony should be admitted, and where the evidence is unnecessary, cumulative, confusing or misleading the trial judge may properly refuse to admit it." Syl. Pt. 4, Rozas v. Rozas, 176 W. Va. 235, 342 S.E. 2d 201 (1986); see also Morris v. Boppana, 182 W. Va. 248, 387 S.E.2d 302 (1989); State v. Koon, 190 W. Va. 632, 440 S.E.2d 442 (1993). However, the trial court may not abuse this discretion. Jones v. Patterson Contracting, Inc., 524, S.E. 2d 915, 206 W. Va. 399 (1999); see also Taylor v. Cabell Huntington Hospital, Inc., 538, S.E. 2d 719, 208 W. Va. 128 (2000). In this case, defendants offered four (4) days of duplicative testimony all calculated to exonerate all defendants. Since each expert was testifying on behalf of

every defendant, the cumulative evidence was colossal. The jury heard the same testimony delivered through six medical experts on the defense side. This massive amount of identical testimony was extremely prejudicial to the Appellant. Adding to the prejudice was the Court's refusal to allow Appellant to call her radiologist in the case in chief. Appellant is, therefore, entitled to a new trial.

**G. REFUSING TO ALLOW APPELLANT TO PRESENT TESTIMONY OF A FACT WITNESS TO CONTRADICT SPECULATIVE OPINION EVIDENCE RESULTED IN ERROR.**

The Court erred in failing to permit Appellant to call James Spalding on the issue of whether there were any leaks of embalming fluid at the time of Jason Kominar's embalming. Trial Tr. Vol. 7, May 17, 2005, at pp. 19, 22. This was relevant evidence in the case inasmuch as the defense experts indicated that Mr. Kominar had totally bled out before the ambulance arrived at the scene. Mr. Spalding was experienced and could have testified that there was no major artery lacerations noted upon embalming; that normally, if there were any such major lacerations, embalming fluid would leak into the body cavity and could be detected by him. *Id.* The West Virginia Supreme Court in State v. Jameson, addressed the issue wherein the state in the trial court did not attempt to qualify an investigator for the fire department and an assistant state fire marshal as expert witnesses. The Court held that through their experience, it was apparent that they were in a position to have peculiar knowledge about "poor patterns" that jurors would not ordinarily have and thus their testimony was admissible. State v. Jameson, 194 W. Va. 561, 461 S.E.2d 67 (1995). Under W. Va. R. Evid. 701, the opinion testimony of a lay witness is admissible. The opinions are limited to those opinions or inferences

which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. *Id.* Mr. Spaulding was the embalmer for Jason Kominar. His opinions were clearly and rationally based upon his perception of Jason at the time of his embalming. In addition, his testimony regarding the embalming would have been helpful to clearly understand his testimony as well as a determination of a fact in issue.

The defense in this case focused on the fact Jason could not survive the blunt trauma arrest with his severe internal injuries. Trial Tr. Vol. 6, at pp. 183, 199; Trial Tr. Vol. 7, May 17, 2005, at pp. 103, 104, 110, 142, 208, 228, 230, 276, 277, 305, 311. Mr. Spaulding's testimony would have contradicted the defendant's theories that Jason bled out from his injuries and therefore posed a question of fact for the jury. Mr. Spaulding's testimony regarding his embalming methods and what embalming procedures he performed of Jason was clearly relevant. Rule 402 of the West Virginia Rules of Evidence states that "all relevant evidence is admissible." Mr. Spaulding's testimony was clearly admissible. In addition, Appellant's experts relied upon Mr. Spaulding's deposition testimony in forming some of their opinions. The Court erred in placing limitations on Mr. Spaulding's testimony and therefore the Appellant is entitled to a new trial

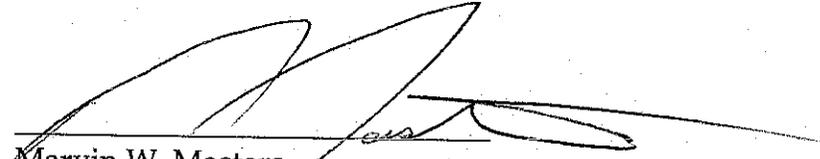
CONCLUSION

For all the foregoing reasons, Appellant/Plaintiff respectfully prays that this Honorable Court grant his Petition for Appeal and reverse the circuit court's ruling which denied Appellant's Motion to Set Aside the Verdict or For a New Trial.

Respectfully submitted,

MARY ANN KOMINAR, as  
Administratrix of the Estate of  
JASON KOMINAR, deceased

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 33215

MARY ANN KOMINAR, as  
Administratrix of the Estate of  
JASON KOMINAR, deceased,

Plaintiff/ Appellant,

vs.

Civil Action No. 99-C-274  
(Honorable Darrell Pratt)

HEALTH MANAGEMENT ASSOCIATES OF WEST  
VIRGINIA, INC. *d/b/a* WILLIAMSON MEMORIAL  
HOSPITAL INC.; PELAGIO P. ZAMORA;  
PELAGIO P. ZAMORA, INC.; MINGO COUNTY  
AMBULANCE SERVICE, INC., a corporation,

Defendants/ Appellees.

CERTIFICATE OF SERVICE

I, Marvin W. Masters, counsel for Appellant/Plaintiff, do hereby certify that true  
and exact nine (9) copies of the foregoing "Brief of Appellant, Mary Ann Kominar"  
were served upon:

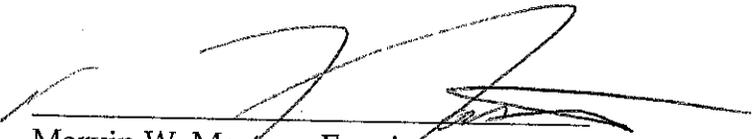
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in an envelope properly stamped, addressed and deposited in the regular course of the  
United States Mail, this 1<sup>st</sup> day of December, 2006.



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