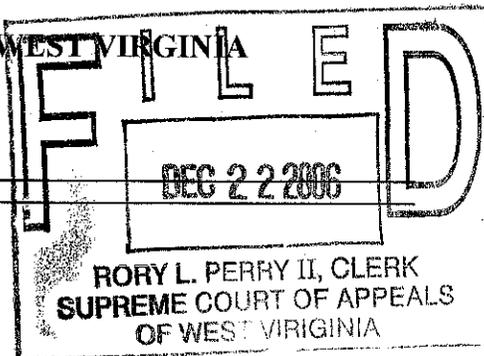


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 33215



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

Plaintiff/Appellant,

v.

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.

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On Appeal from the Circuit Court of Mingo County  
(Honorable Darrell Pratt)  
Civil Action No. 99-C-274

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**BRIEF OF APPELLEES PELAGIO P. ZAMORA, M.D.,  
AND PELAGIO P. ZAMORA, INC.**

Respectfully Submitted,

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**I. KIND OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL**

The appellant, Mary Ann Kominar ["Appellant"], as Administratrix of the Estate of Jason Kominar ["Mr. Kominar"], filed a Petition for Appeal on June 2, 2006, seeking relief from an Order entered by the Circuit Court of Mingo County on February 2, 2006, denying her Motion to Set Aside the Verdict or for New Trial relative to a jury verdict returned on May 20, 2005. The underlying action was a medical professional liability suit alleging that the Mingo County Ambulance Service ["Ambulance Service"], Pelagio P. Zamora, M.D. ["Dr. Zamora"], and Williamson Memorial Hospital [the "Hospital"] [collectively "Appellees"] rendered negligent emergency medical treatment to Mr. Kominar following a severe motor vehicle accident occurring on July 12, 1997. Following two weeks of trial, the jury returned a verdict in favor of all of the defendants. This Court granted Appellant's Petition for Appeal on November 6, 2006, and Appellant filed the appellant brief on December 1, 2006.

**II. STATEMENT OF FACTS**

This case involves the tragic and unfortunate death of Mr. Kominar, a twenty-two year old man who was killed in a single vehicle accident on July 12, 1997. According to the accident report prepared by Officer John Hall of the City of Williamson Police Department, Mr. Kominar was traveling south on Route 119 in Mingo County, West Virginia, at a high rate of speed when he lost control of his vehicle, crossed the median and struck a rock wall head on. Def. Trial Ex. 25. The sequence of events following the accident was as follows:

Accident	8:40 a.m.
Police Notified	8:47 a.m.
Ambulance Service Notified	8:50 a.m.

Ambulance Service Arrival at Scene	8:58 a.m.
Ambulance Service Left Scene	9:11 a.m.
Arrival at the Hospital	9:19 a.m.

Def. Trial Exhibits 22 and 25.

Angela Kay Williams [“Ms. Williams”] was the first to come on the accident scene. Trial Transcript Vol. 3, p. 293. Ms. Williams, after parking her vehicle on the median, saw Mr. Kominar hanging over the passenger side door. Id. at p. 283. While Ms. Williams testified that she witnessed Mr. Kominar fall out of the vehicle, she was unsure whether he pushed himself out of the vehicle or not. Id. at p. 283 – 284. When Ms. Williams got to Mr. Kominar, she noticed that he was breathing very hard in an asthmatic type of way and had a wide-eyed look. Id. at p. 284, 291, 295. Ms. Williams recalled that Mr. Kominar attempted to push himself up from the ground. Id. at p. 285 – 286. Ms. Williams was still on the accident scene when the police arrived. Id. at p. 285.

Daniel Keith Henry arrived on the accident scene shortly after Ms. Williams. Mr. Henry saw the accident occur. Id. at p. 299. Mr. Henry did not see any brake lights come on Mr. Kominar’s vehicle before it crashed into the rock wall. Id. at p. 307, 315. Mr. Henry immediately ran over to Mr. Kominar, observed that he was hurt “pretty badly,” and attempted to calm him down. Id. at p. 300. Mr. Henry testified that Mr. Kominar was lying on his stomach and bleeding from his mouth and nose. Id. at p. 302, 309. There was a lot of blood under Mr. Kominar’s head. Id. at p. 310. Mr. Kominar was attempting to lift his head and move his arms and legs. Id. Mr. Henry told Mr. Kominar to calm down and lay still, but Mr. Kominar did not seem to understand what Mr. Henry was saying and continued to attempt to move his hands. Id.

at p. 303, 306. Mr. Kominar was struggling to breathe and making a gurgling sound. Id. at p. 303, 306. Mr. Kominar's eyes were glassy and rolled back. Id. at p. 305.

Officer Hall testified that he arrived at the accident scene approximately thirteen minutes after the accident and five minutes before the Ambulance Service arrived. Trial Transcript Vol. 8, p. 259 – 261. Officer Hall further testified that when he arrived, he found Mr. Kominar lying beside his vehicle in the ditch line and Ms. Williams and Mr. Henry near him. Id. at p. 260. Mr. Kominar had blood coming from his ears and mouth and was motionless. Id. at p. 260. Mr. Kominar was not breathing. Id. at p. 261. Officer Hall attempted to keep bystanders away from the accident scene until the Ambulance Service arrived. Id. at p. 262. Officer Hall observed the Ambulance Service put Mr. Kominar into the ambulance and testified that he did not see Mr. Kominar move throughout the process. Id. at p. 263. Officer Hall stated that he never saw Mr. Kominar conscious at the accident scene. Id. at p. 263.

Officer Hall's description of Mr. Kominar at the accident scene is consistent with that found by the Ambulance Service when they arrived at the accident scene at 8:58 a.m. Mr. Kominar was treated at the accident scene by three members of the Ambulance Service who had more than 30 years of combined experience working for ambulance units. Trial Transcript Vol. 3, p. 166. According to responding paramedic James York ["Mr. York"], Mr. Kominar was assessed for vital signs of life within one minute of the Ambulance Service's arrival. Id. at p. 167. Mr. York testified that Mr. Kominar was not moving, had no pulse, no respirations and no blood pressure. Id. at p. 187 – 188. Moreover, his pupils were found to be fixed, dilated and non-responsive to light; a finding consistent with brain deterioration. Id. at p. 191. Mr. York conducted a Glasgow Coma Assessment, an assessment designed to give some indication of a

patient's neurological function. Mr. Kominar's score was 3/15, which is the lowest attainable score and consistent with death. Id. at p. 188-191. Mr. Kominar was also connected to a heart monitor, which showed him to be in an "agonal rhythm."<sup>1</sup> Id. at p. 191 – 192. Mr. Kominar was given multiple doses of drugs, including Epinephrine and Atropine, designed to initiate cardiac activity. Mr. Kominar did not respond to these medications. Trial Transcript Vol. 3B, p. 234. During the time these assessments and interventions were taking place, the Ambulance Service crew was also performing cardiopulmonary resuscitation (CPR) on Mr. Kominar, but to no avail. Mr. York testified that CPR was continued throughout the entire transport to the Hospital. Id. at p. 232.

The ambulance arrived at the Hospital at 9:19 a.m. At that point, almost forty minutes had elapsed since the accident and nearly thirty minutes since Mr. Kominar allegedly demonstrated *any* action consistent with life. Because the Ambulance Service had radioed ahead to the Hospital's emergency department, a trauma team, including Dr. Zamora, had been assembled and was waiting for Mr. Kominar to arrive. Trial Transcript Vol. 3, p. 17. Mr. Kominar was brought into the Hospital's emergency room while CPR was being conducted. Id. at p. 26. Dr. Zamora and members of the Hospital's staff quickly conducted assessments of Mr. Kominar. Dr. Zamora testified that Mr. Kominar's face was badly bruised, swollen, and covered with blood. Id. at p. 94. Mr. Kominar's pupils were fixed and dilated. Id. at p. 94. He had no pulse, no respirations, and no blood pressure. Id. at p. 90. Mr. Kominar was unresponsive. Trial Transcript Vol. 8B, p. 201. Fourteen areas of Mr. Kominar's body were checked for a pulse and none were detected. Id. at p. 204. Mr. Kominar's condition in the Hospital emergency room

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<sup>1</sup> "Agonal" is defined as "pertaining to or occurring at the time just before death." *Dorland's Medical Dictionary*.

remained unchanged despite continuing efforts at resuscitation. Trial Transcript Vol. 3, p. 109. Despite the efforts of multiple trained and experienced medical personnel both in the field and in the emergency department, Mr. Kominar was pronounced dead at 9:30 a.m. According to Dr. Zamora's final diagnosis, Mr. Kominar was "dead on arrival." Id. at p. 109.

On May 2, 2005, the Circuit Court heard arguments on pre-trial motions. The Circuit Court ruled that the Appellant and each Appellee was entitled to separate peremptory strikes. During jury selection on the second day of trial, May 10, 2005, counsel for Appellant, Marvin Masters, Esq., objected to separate strikes for each Appellee by arguing that "[i]t just makes it impossible for a party to have a fair shot at those strikes." Trial Transcript Vol. 2, p. 22. The following interaction ensued, to which counsel for the Appellant cites only selectively:

THE COURT: I have read your case law. I think there is some adverse positions that the hospital has to take with the doctor as far as the hospital and the doctor with the ambulance service. They could -- they all have the same, maybe the same, general defense that we think he was dead at the scene. But specifically the hospital is going to say it was the ambulance service that caused the problem or it was Dr. Zamora. Dr. Zamora is going to blame it on the ambulance service. So I think -- they are not really in common with their defenses. I think they have to have two strikes.

MR. MASTERS: Your Honor, I have taken the depositions of all of their experts. They are not adverse to one another. They really have sort of gained up on this situation and you will not see them do anything but hold hands in this courtroom. I have seen their case develop. I know how they plan to try the case.

THE COURT: I think you 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.

Trial Transcript Vol. 2, p. 23. Judge Pratt, at the November 10, 2005 hearing on Appellant's Motion to Set Aside the Verdict or for New Trial, further articulated his rationale for granting separate peremptory challenges:

So, the fact that the plaintiff had alleged separate acts of negligence against the different defendants and considering the totality, I can't find that any injustice was done, even though possibly if I had known what the evidence was in the middle of the trial, I might have looked at it a little bit differently.

So, what I did is I went back and analyzed those guidelines and tried the case. And if you take the pleadings alone, then there's no requirement that the defendant would have to share peremptory challenges.

Were the defendants charged with separate acts of negligence or wrongdoing? Yes, they were.

Was the alleged negligence or wrongdoing occurring at different points in time? Yes. They were in the span of twenty minutes or so. Each person, each defendant, had a different time frame they were dealing with.

If negligence was found, is it subject to apportionment? It certainly could have been by the jury, thinking that if something was done improperly by the ambulance service, that could have been corrected if noticed by the emergency room nurses and doctors.

Did the defendants share a common theory of defense? They didn't at the time we picked the jury, but ultimately I think they did.

And I don't know, I don't believe -- I didn't check the pleadings, but I don't remember if there were any cross claims filed by any of the defendants or not. And that probably -- with the Price case, that would have tipped us off to go back and look at that again, but I didn't, I didn't go back and look at that.

And the only way I can view it at this time is if you take those factors and I apply those factors with the information I had available to me at the beginning of the trial and during the jury

selection, I would make the same ruling, that it would not have required each defendant to share the peremptory challenge.

Hearing Transcript, Nov. 10, 2005, at p. 17 – 18. Moreover, Appellant similarly fails to mention that during the pre-trial hearing the Hospital offered to give up its peremptory strikes if Appellant would dismiss any independent allegations of negligence against the nursing staff. Id. at p. 12. Judge Pratt, at the November 10, 2005 hearing on Appellant's Motion to Set Aside the Verdict or for New Trial, stated that, "that's why I still felt that there was a possibility that there could be separate allegations against separate defendants and also finger pointing." Id. Also, throughout the trial, Appellant constantly played Dr. Zamora against a Hospital nurse, Tracy Booth, regarding inconsistent observations of Mr. Kominar in order to create hostility. Id. at p. 13.

In trial, Appellant called three expert witnesses to testify in the areas of emergency medicine, neurology and trauma surgery. Appellant's emergency medicine expert, Stephen Holbrook, M.D., acknowledged under cross-examination that Mr. Kominar was dead at the time he arrived at the Hospital's emergency room. Trial Transcript Vol. 4, p. 11. Appellant's neurology expert, Peter Bernad, M.D., changed his testimony from an earlier deposition in which he had acknowledged that there was nothing that Dr. Zamora could have done to save Mr. Kominar upon presentation to the emergency room. Trial Transcript Vol. 5, p. 36. Appellant's trauma surgery expert, Alex Zakharia, M.D., provided testimony, which he acknowledged was at odds with the observations of the six different medical personnel who saw Mr. Kominar both in the field and at the emergency room on July 12, 1997, including one EMT, two paramedics, two registered nurses and one physician. Trial Transcript Vol. 4, p. 285 – 286.

Dr. Zamora called two experts to testify in support of the care and treatment provided to Mr. Kominar in the emergency room as well as Mr. Kominar's chances for survival at the time of presentation to the Hospital's emergency room. Trial Transcript Vol. 6, p.89; Trial Transcript Vol. 7, p. 194. Importantly, on direct examination by counsel for Dr. Zamora, neither expert was asked to opine about the treatment rendered by the other Appellees. Such testimony was elicited only upon questioning by other counsel. Stephen Stapczynski, M.D., an emergency room physician, testified that he believed Dr. Zamora's care and treatment of Mr. Kominar met or exceeded the standard care. Trial Transcript Vol.6, p. 91. David Livingston, M.D., a trauma surgeon from Newark, New Jersey, testified that he believed Dr. Zamora's care and treatment of Mr. Kominar met or exceeded the standard care as well. Trial Transcript Vol. 7, p. 196. Both experts testified in their opinion that Mr. Kominar suffered from blunt traumatic arrest secondary to the motor vehicle accident and that in their opinion, by the time Mr. Kominar arrived in the emergency room, he had suffered irreversible brain damage and was non-resuscitatable. Trial Transcript Vol. 7, p. 197; Trial Transcript Vol. 6, p. 199.

Following two weeks of trial, the jury returned a verdict in favor of Appellees in less than two hours. Following the return of the verdict, Appellant filed her Motion to Set Aside the Verdict or for New Trial. By Order entered February 2, 2006, the Circuit Court of Mingo County denied the Motion and the Petition for Appeal ensued. This Court granted Appellant's Petition for Appeal on November 6, 2006.

### **III. ARGUMENT**

#### **A. THE CIRCUIT COURT OF MINGO COUNTY PROPERLY PERMITTED EACH APPELLEE THREE PEREMPTORY CHALLENGES.**

Appellant alleges that the Circuit Court of Mingo County erred by granting Appellees separate peremptory strikes for a total of nine collective strikes to Appellant's three strikes. Appellant's Brief at p. 15. Appellant argues that this allowed Appellees to "pick a jury of their choosing," thereby making "[i]t is statistically impossible for [Appellant] to receive a fair trial with a three-to-one strike ratio." *Id.* at 15 – 16. But the Circuit Court of Mingo County's decision should not be disturbed since the decision to permit three peremptory challenges per Appellee was based on a thorough review and examination into the position of the parties as it existed at the time of the jury selection. *See* Hearing Transcript, November 10, 2005, at pp. 15 – 19.

Rule 47(b) of the West Virginia Rules of Civil Procedure sets forth the procedure by which a court may allot peremptory challenges in cases involving multiple parties:

Unless the court directs that a jury shall consist of a greater number, a jury shall consist of six persons. The plaintiff and defendant shall each have peremptory challenges which shall be exercised one at a time, alternatively, beginning with the plaintiff. Several defendants or several plaintiffs may be considered as a single party for the purposes of exercising challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

W.Va. R. Civ. P. 47(b) (2006) ["Rule 47(b)"]. This Court has noted that a fair reading of Rule 47(b) suggests that a circuit court is vested with the "degree of flexibility or discretion" required to determine the number of additional peremptory challenges to be allowed in a trial involving

multiple parties. See Price v. Charleston Area Medical Center, 217 W.Va. 663, 619 S.E.2d 176 (2005).

The use of peremptory strikes in a medical malpractice action involving multiple defendants was recently addressed in Price v. Charleston Area Medical Center, 217 W.Va. 663, 619 S.E.2d 176 (2005). In the case underlying Price, the plaintiff brought a medical malpractice action against the defendants, three health care providers, alleging medical malpractice for the failure of the defendants to timely diagnose appendicitis. The jury found for the defendants following an eight-day trial. The plaintiff alleged on appeal that the circuit court erred in granting each of the defendants separate peremptory strikes. This Court, reversing the circuit court, held as follows:

Accordingly, this Court holds that in the determination by the trial court of the number of peremptory challenges to be allowed two or more plaintiffs or two or more defendants pursuant to Rule 47(b) of the West Virginia Rules of Civil Procedure, plaintiffs or defendants with like interests are ordinarily to be considered as a single party for the purpose of allocating the challenges. Where, however, the interests of the plaintiffs or the interests of the defendants are antagonistic or hostile, the trial court, in its discretion, may allow the plaintiffs or the defendants separate peremptory challenges, upon motion, and upon a showing that separate peremptory challenges are necessary for a fair trial.

Specifically, in determining whether the interests of two or more plaintiffs or two or more defendants are antagonistic or hostile for purposes of allowing separate peremptory challenges under Rule 47(b) of the West Virginia Rules of Civil Procedure, the allegations in the complaint, the representation of the plaintiffs or defendants by separate counsel and the filing of separate answers are not enough. Rather, the trial court should also consider the stated positions and assertions of counsel and whether the record indicates that the respective interests are antagonistic or hostile.

In the case of two or more defendants, the trial court should consider a number of additional factors including, but not limited

to: (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 negligence, if found against the defendants, is subject to apportionment, (4) whether the defendants share a common theory of defense and (5) whether cross-claims have been filed.

Id. at pp. 184 – 185.<sup>2</sup>

In reversing the circuit court's decision in the action underlying Price, this Court found that the circuit court had not undertaken a thorough investigation into the interests of the parties. Id. at p. 185. For instance, the circuit court in the underlying action informed counsel for the parties that it was going to grant each of the defendants separate peremptory challenges, but did not provide any rationale for its decision. The circuit court did not give its rationale until its decision was challenged by plaintiff's counsel, at which time the circuit court briefly indicated that the separate peremptory challenges were being granted because the plaintiff had alleged separate theories of liability against the defendants. The circuit court did not make any further comment during the jury selection process nor did the defendants' counsel move or set forth any reason in support of the circuit court's ruling. Id. Since "the mere statement that conflicting interests exist, without more, is not sufficient to warrant the granting of separate peremptory

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<sup>2</sup> In reaching this decision, this Court examined a number of cases from other jurisdictions on the issue of additional peremptory challenges. See Kloetzli v. Kalmabacher, 501 A.2d 499 (Md. 1985) cert. denied 505 A.2d 1342 (1986) (holding that the granting of additional peremptory challenges did not constitute an abuse of discretion because, as a result of the statements and representations of counsel placed on the record during the jury selection proceed, a basis was established before the trial court showing adversity in the interests of the defendants); Sommerkamp v. Linton, 114 S.W.3d 811 (Ky. 2003) (holding that the lower court's granting separate peremptory challenges did not constitute an abuse of discretion since the judge reached a well-reasoned decision based on a pre-trial conference on the issue of peremptory challenges and based his decision on a number of factors weighing in favor of antagonism). As the this Court noted, "what the above cases have in common is that the decision to grant separate peremptory challenges must be based upon a determination, from the factors existing at the time the ruling is made, that antagonistic or hostile interests are shown and that separate peremptory challenges are necessary for a fair trial." Price, 217 W.Va. at --, 619 S.E.2d at 185.

challenges to one or more defendants in a civil trial[.]” this Court reversed and remanded the action for a new trial.

Other courts, under state rules equivalent to Rule 47(b) of the West Virginia Rules of Civil Procedure, have held that multiple defendants in medical malpractice actions were entitled to separate peremptory strikes. In Bernal v. Lindholm, et al., 727 N.E.2d 145 (Ohio Ct. App. 1999), an Ohio Court of Appeals held that the lower court did not error by granting defendants, two physicians and a clinic, three peremptory challenges a piece in the underlying medical malpractice action. On appeal, the plaintiff argued that she should have been granted a total of nine peremptory strikes to equal the total number of the defendants’ peremptory strikes since the defendants’ defenses were closely coordinated. Id. at p. 153. In holding that the lower court did not error, the court in Bernal noted that the defendants were represented by separate counsel and filed separate pleadings and motions. Id. at p. 155. Moreover, while the similar defense asserted by the defendants could have exonerated them all, if the jury chose not to accept the shared theory, it nevertheless could have found one defendant liable and not the other. Id. The court further found that the plaintiff suffered no prejudice since the defendants only exercised a total of two peremptory strikes. Id.

In another similar case, Marshall v. Hartford Hospital, et al., 783 A.2d 1085 (Conn. Ct. App. 2001), the Appellate Court of Connecticut held that the lower court did not error by allotting the defendants, a physician and a hospital, four peremptory challenges a piece since the medical malpractice claims against each were distinct. The plaintiff sought damages for the complications arising out of the insertion of an IV in her daughter. The plaintiff alleged that the hospital, through its employees, improperly inserted the IV and failed to prevent necrosis upon

discovering that the IV blocked the flow of blood. Id. at p. 1087. The plaintiff alleged that the physician was negligent in that he failed to timely attend to her daughter, thereby losing or decreasing the chance of successful treatment. Id. The count against the physician was separate from the count against the hospital in the underlying complaint and identified the physician separate from the hospital. The lower court ruled that there was no unity of interest among the defendants and allocated four peremptory strikes to each defendant. Id. at p. 1088. On appeal, the plaintiff argued that the lower court erred by granting the defendants four peremptory strikes a piece since a unity of interest existed between the defendants. The plaintiff argued that a unity of interest existed since the physician was employed by the hospital and the defendants did not have an adverse relationship. The court in Marshall looked to “whether the defendant physician’s alleged negligence and the defendant hospital’s alleged negligence differ[ed] in that the liability of each [was] separate and distinct from the liability of the other.” Id. at p. 1093.

The court noted that,

[a]ny negligence of the defendant hospital’s employees, the nurses, arising from their actions or their inactions occurred before the defendant physician arrived on the scene. The defendant physician, on the facts as alleged, was not involved in the nurses’ negligence, and the nurses were not involved in the defendant physician’s negligence. Thus, a jury could find the defendant hospital liable for the acts of its staff and nurses, excluding the defendant physician, which finding would constitute a different basis for liability. ... The plaintiff could have brought the action against the defendant physician without naming the defendant hospital as an additional defendant.

Id. at p. 1093. Accordingly, the court held that the lower court correctly discerned that the defendants’ interests were separate and did not abuse its discretion by granting each defendant four peremptory challenges. Id. at p. 1094.

Unlike the circuit court in the action underlying Price, the Circuit Court of Mingo County conducted a thorough investigation into the interests of the parties before making the decision to grant the Appellees separate peremptory challenges. See Hearing Transcript, Nov. 10, 2005. Appellant herself filed a motion on this issue, which was addressed in detail at the pre-trial conference. Memorandum in Regard to Plaintiff's Request for Equal Peremptory Strikes Between Both Parties, May 3, 2005. Appellees filed responses setting forth the nature of the relationship among them and, based on the factors existing at the time of the decision, the Circuit Court of Mingo County appropriately determined that antagonistic interests existed among Appellees. See Williamson Memorial Hospital's Memorandum in Opposition to Plaintiff's Request for Equal Peremptory Strikes Between Both Parties, May 5, 2005; Dr. Zamora's Joinder in Williamson Memorial Hospital's Memorandum in Opposition to Plaintiff's Request for Equal Peremptory Strikes Between Both Parties, May 6, 2005. One of the best illustrations of this fact occurred at the pre-trial conference. At the pre-trial conference, counsel for the Hospital agreed to waive its request for separate challenges if Appellant stipulated that there were no independent acts of negligence alleged against it. See Hearing Transcript, Nov. 10, 2005, at p. 12. Appellant would not agree, thus making it clear that Appellant intended to present separate allegations of negligence against each Appellee at trial, that the alleged negligence was to have occurred at separate points of time, and that the alleged negligence would be subject to apportionment among each Appellee – all factors set forth by this Court in Price. See Id.

The Circuit Court of Mingo County did not abuse its discretion by allocating separate peremptory challenges to each Appellee. Rather, the Circuit Court of Mingo County, in accordance with Price, properly determined that the interests of Appellees were antagonistic and

hostile, even though each Appellee asserted that Mr. Kominar had died as a result of the accident.<sup>3</sup> First, the identities of Appellees were separate and distinct in the underlying complaint and throughout the underlying action. The Ambulance Service was the ambulance company that provided emergency medical treatment at the scene and en route to the Hospital, while the Hospital employed the staff that provided treatment to Mr. Kominar in the emergency room twenty minutes after the Ambulance Service arrived on the scene. Dr. Zamora was the physician directing treatment in the emergency room. The allegations differed depending on the type of treatment each Appellee afforded to Mr. Kominar as well as the time and location of that treatment. Like in Marshall, the interest of each Appellee in the underlying action was distinct since the alleged negligence of each Appellee was distinct. Appellant asserted separate and distinct theories and allegations against each Appellee depending on their separate treatment of Mr. Kominar at separate times. Appellant alleged that the Ambulance Service improperly intubated Mr. Kominar at the accident scene. Appellant alleged that Dr. Zamora failed to properly investigate, evaluate and diagnose the condition of Mr. Kominar upon arrival at the Hospital. Second Amended Complaint at p. 6. Appellant also asserted a negligent retention claim against the Hospital and later contended that the Hospital was guilty of spoliation. Consequently, Dr. Zamora's interest in escaping liability could have been adverse to that of the Ambulance Service since Dr. Zamora could have argued that Mr. Kominar died as a result of the treatment provided at the scene. Dr. Zamora also could have argued that the negligence of the Hospital's employees, and not his own, proximately caused Mr. Kominar's injuries.

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<sup>3</sup> Similar to the factual scenario presented by Bernal, the jury could have disregarded Appellees' defense that Mr. Kominar had died by the time the Ambulance Service arrived at the accident scene and allocated liability against one or more of the Appellees.

Further, while Appellees all premised their defenses on the fact that the motor vehicle accident caused Mr. Kominar's death, each Appellee's theory of defense was indeed separate. Dr. Zamora's position at the start of the trial was separate from that of the Ambulance Service since Dr. Zamora argued that even if Mr. Kominar was improperly intubated at the accident scene, there was nothing that could be done by the time Mr. Kominar reached the emergency room. Dr. Zamora's defense was also separate than that of the Hospital since the Appellant made allegations of nursing negligence and spoliation of evidence against the hospital, but not Dr. Zamora.

Based on the foregoing, the Circuit Court of Mingo County did not abuse its discretion in determining that Appellees' interests were antagonistic or hostile based on the record before trial and, in fact, acted in a manner consistent with this Court's holding in Price.

**B. THE CIRCUIT COURT OF MINGO COUNTY PROPERLY ALLOWED EXPERT TESTIMONY FROM EACH APPELLEE.**

Appellant alleges that the Circuit Court of Mingo County erred by allowing the Appellees to cumulatively call six experts to testify as to Dr. Zamora and the Ambulance Service's standards of care as well as the survivability of Mr. Kominar at different periods of time.<sup>4</sup> Appellant Brief at p. 33. In support of this argument, Appellant erroneously conveys to this Court that the experts presented by the Appellees, notably Dr. Zamora and the Ambulance Service, all testified to the same thing – specifically, that all six experts testified that the care rendered to Mr. Kominar exceeded the standard of care. Id. However, to the contrary, the

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<sup>4</sup> The Ambulance Service presented expert testimony from David E. Seidler, M.D., in the area of emergency medicine and Jeffrey Young, M.D., in the area of trauma surgery. The Hospital presented expert testimony from Roger Barkin, M.D., in the area of emergency medicine. Dr. Zamora presented expert testimony from Joseph Stephen Stapczynski, Jr., M.D., in the area of emergency medicine and David H. Livingston, M.D., in the area of trauma surgery. The Respondents jointly presented the expert testimony of W. Scott Morse, M.D., in the area of radiology.

experts presented by Dr. Zamora testified *solely* as to Dr. Zamora's standard of care. Dr. Zamora needed to present experts separate and apart from the Ambulance Service as Dr. Zamora's standard of care differed from the standard of care owed by the Ambulance Service. After all, Dr. Zamora treated Mr. Kominar as an emergency room physician rather than a paramedic and treated Mr. Kominar in the emergency room as opposed to the accident scene. Accordingly, the expert testimony presented by Dr. Zamora was not cumulative and the Circuit Court of Mingo County did not error by allowing its admittance at trial.

Rule 702 of the West Virginia Rules of Evidence governs the admissibility of testimony by expert witnesses:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise.

W. Va. R. Evid. 702 (2006) ["Rule 702"]. Rule 702 is tempered by Rule 403 of the West Virginia Rules of Evidence, which limits the admissibility of relevant evidence based on grounds of prejudice, confusion, or waste of time:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

W. Va. R. Evid. 403 (2006) ["Rule 403"]. Despite the limitations imposed by Rule 403, this Court holds that the admissibility of expert testimony under Rule 702 is a matter within the sound discretion of the trial court. See Tracy v. Cottrell, 206 W.Va. 363, 524 S.E.2d 879 (1999). "Under Rule 702, [a] trial judge has broad discretion to decide whether expert testimony

should be admitted, and where the evidence of unnecessary, cumulative, confusing or misleading, the trial judge may properly refuse to admit it.” Rozas v. Rozas, 176 W. Va. 235, 342 S.E.2d 201 (1986). However, “Rule 403 is not to be employed liberally.” Franklin D. Cleckley, Handbook on Evidence for West Virginia Lawyers § 4-3A(1) (3d Ed. 1994). Rather, a court must engage in a balancing test in order to determine whether the probative value of the evidence is substantially outweighed by counterfactors listed in Rule 403. Syl. Pt. 3, State v. Carey, 210 W.Va. 651, 558 S.E.2d 650 (2001).

Normally, in order to be probative, evidence must be relevant, and must tend to make issues in the case more or less likely than would be so without evidence; other factors that bear on probative value are importance of the issue and the force of the evidence. State v. Guthrie, 194 W.Va. 657, 681, 461 S.E.2d 163, 187 (1995). “In applying Rule 403, it is pertinent whether a litigant has some alternative way to deal with the evidence that it claims the need to rebut that would involve a lesser risk of prejudice and confusion.” Id. at pp. 683, 189. “As to the balancing under Rule 403, the trial court enjoys broad discretion. The Rule 403 balancing test is essentially a matter of trial conduct, and the trial court’s discretion will not be overturned absent a showing of clear abuse.” Syl. Pt. 10, State v. Derr, 192 W.Va. 165, 451 S.E.2d 731 (1994) quoted in Syl. Pt. 2, State v. Taylor, 215 W.Va. 74, 593 S.E.2d 645 (2004). “A medical malpractice case is always necessarily a battle of expert witnesses. Within only very broad limits all qualified opinion testimony should be allowed; that is, not disallowed because it is cumulative to other evidence.” Lake v. Clark, 533 So.2d 797, 799 (Fla. Ct. App. 1988). See also 75 Am. Jur. 2d Trial § 342 (2006).

Cumulative evidence is defined as “additional evidence of the same kind to the same point.” See In re Renewed Investigation of State Police Crime Laboratory, Serology Div., 219 W.Va. 408, 633 S.E.2d 762, 769 (2006); State v. Spaulding, 188 W.Va. 96, 99, 422 S.E.2d 818, 821 (1992). The expert testimony presented by Dr. Zamora and the Ambulance Service did not go to the same point. Dr. Zamora’s expert testimony went directly to Dr. Zamora’s standard of care in the treatment of Mr. Kominar in the Hospital’s emergency room. The Ambulance Service, on the other hand, provided treatment through paramedics to Mr. Kominar at the accident scene. The expert testimony also addressed the issue of whether Dr. Zamora could have done anything to save Mr. Kominar even if there had been an improper intubation. This is evidenced by the fact that Appellant made separate and independent allegations of negligence against Dr. Zamora and the Ambulance Service. See Second Amended Complaint, Civil Action No. 99-C-274, June 14, 2000. Specifically, Appellant alleged that Dr. Zamora provided negligent emergency care to Mr. Kominar in the following ways:

- a. Failure to properly oversee others under his supervision and/or control in the monitoring and evaluation of Jason Kominar;
- b. Failure to properly oversee others under his supervision and/or control in the monitoring and evaluation of Jason Kominar;
- c. Failure to recommend, formulate and/or carry out proper treatment of Jason Kominar including, but not limited to making proper diagnostic and treatment decisions;
- d. Negligently causing injury and death to [Jason Kominar]; and
- e. Other negligent acts.

Id. at p. 6. Appellant made the following general allegations against the Ambulance Service as a defendant in the underlying action:

- a. Failure to properly investigate, evaluate, monitor, oversee and investigate the condition of Jason Kominar during EMS and hospital care commencing on or about July 12, 1997;
- b. Failure to properly oversee others under their supervision and/or control in the monitoring, oversight and evaluation of Jason Kominar;
- c. Failure to take timely and appropriate action to treat Jason Kominar;
- d. Negligently causing injury to Jason Kominar during treatment; and
- e. Other negligent acts.

Id. at pp. 4 – 5. These allegations relate to different treatment given at different times and at different locations. Therefore, the expert testimony presented by Dr. Zamora did not go to the “same point” as the expert testimony provided by the Ambulance Service and, accordingly, was not cumulative.

While Appellant argues that Dr. Zamora and the Ambulance Service provided cumulative expert testimony with regard to the standard of care, Appellant completely disregards the fact that she herself called three experts, all of whom identified and testified as to the particular deviations from the standard of care allegedly committed by Dr. Zamora and the Ambulance Service in violation of the MPLA.<sup>5</sup> As to Dr. Zamora, Appellant called an emergency physician,

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<sup>5</sup> Appellant was required to present expert testimony with regard to Dr. Zamora and the Ambulance Service’s alleged breach of their standards of care in accordance with the MPLA – specifically, W.Va. Code § 55-7B-7, “Testimony of expert witness on standard of care”:

The applicable standard of care and a defendant's failure to meet said standard, if at issue, shall be established in medical professional liability

a neurologist, and a surgeon to testify as to Dr. Zamora's alleged breaches of the standard of care and its causative effect. Certainly, West Virginia law affords Dr. Zamora and the Ambulance Service the right to present expert testimony to rebut the allegations made by the Appellant against each of them in the underlying action. After all, Dr. Zamora could not count on the Ambulance Service to present an expert to testify regarding Dr. Zamora's standard of care after the Ambulance Service delivered and released Mr. Kominar to the care of Dr. Zamora following the accident.

In his own defense, Dr. Zamora called Stephen Stapczynski, M.D., an emergency physician, as an expert in the field of emergency medicine. Trial Transcript Vol. 6, p. 76. Counsel for Dr. Zamora specifically inquired as to "whether Dr. Zamora met the standard of care in treating Mr. Kominar" and "whether Jason Kominar had any chance of survival at the time he arrived at the emergency room at [the] Hospital[.]" Id. at pp. 88 – 89. Counsel for Dr. Zamora did not inquire from Dr. Stapczynski as to whether the standard of care was met for any other Appellee – only Dr. Zamora. Dr. Zamora also called David H. Livingston, M.D., a trauma surgeon, as an expert in the field of trauma surgery. Trial Transcript Vol. 7, p. 185 – 186. Dr. Livingston testified as to Dr. Zamora's care of Mr. Kominar and whether it met the standard of care. Id. at p. 194. Dr. Livingston also addressed Mr. Kominar's chance of survival upon delivery to the emergency room. Id. If Dr. Zamora was denied the opportunity to present this

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cases by the plaintiff by testimony of one or more knowledgeable, competent expert witnesses if required by the court. Such expert testimony may only be admitted in evidence if the foundation, therefor, is first laid establishing that: ... (e) *such expert is engaged or qualified in the same or substantially similar medical field as the defendant health care provider.*

(emphasis added) W.Va. Code § 55-7B-7 (2000).

expert testimony, he would have effectively been denied a defense as the experts presented by the other Appellees did not specifically address Dr. Zamora and his standard of care as a physician. Accordingly, Dr. Stapczynski and Dr. Livingston's expert testimony, which specifically addressed Dr. Zamora, the standard of care Dr. Zamora owed to Mr. Kominar, and whether Dr. Zamora breached that standard of care, was not cumulative and was properly permitted by the Circuit Court of Mingo County.

Courts that have dealt with cumulative expert evidence issues in medical malpractice cases have permitted parties to present separate expert testimony when there were multiple defendants. For example, in Tsoukas v. Lapid, 733 N.E.2d 823 (Ill. Ct. App. 2000), an Illinois Court of Appeals held that the presentation of an expert by each defendant in a medical malpractice action testifying to that particular defendant's standard of care was not unduly prejudicial to the plaintiff since it did not result in cumulative evidence. The court in Tsoukas held that the plaintiff's claim of prejudice resulting from the alleged cumulative evidence was not supported by the record since the decision to allow, limit or exclude testimony was within the discretion of the lower court. Id. at p. 832. In so holding, the court stated that "[t]he multiple defense experts were the result of multiple defendants, each entitled to present an expert in his own defense." Id. Moreover, to the extent that the defendants presented testimony regarding causation, the court in Tsoukas held that the testimony was admissible since "[e]ach party is entitled to present evidence supporting his theory of the case." Id.

In another similar case, Frederick v. Woman's Hospital of Acadiana, 626 So.2d 467 (La. Ct. App. 1993), a Louisiana Court of Appeals addressed the medical malpractice plaintiffs' contention that the lower court erred by allowing the defendants, a obstetrician/gynecologist and

a hospital, to present cumulative expert testimony on identical elements of the case. In the underlying action, the plaintiffs brought a medical malpractice action to recover damages for personal injuries suffered by a child prior to birth. Specifically, the plaintiffs raised issue with the defendants' presentation of two pediatric neurosurgeons and three obstetrician/gynecologists. Applying Rules 403 and 702 of the Louisiana Code of Evidence, the Louisiana Court of Appeals held that the lower court did not error as "each [pediatric neurosurgeon's] testimony added dimensional perspective to the testimony of the other, and the testimony was offered in behalf of different parties who could conceivably prove adverse to one another."<sup>6</sup> Id. at pp. 472 – 473. Moreover, the lower court did not error in allowing the testimony of the three obstetrician/gynecologists since each had a different educational background and specialization. Id. at p. 473.

The court in Frederick noted that it could not state that the probative value of the expert testimony offered by the defendants substantially outweighed any of the concerns articulated in Louisiana's Rule 403. The court also indicated that the plaintiffs were free to cross-examine the experts and had produced expert testimony supporting their own case. The court felt that a greater danger would have occurred had the lower court denied the defendants the ability to produce expert testimony. In this regard, the court made the following observation about a party's right to elicit expert testimony in a medical malpractice case:

As a general rule, however, it would be safe to say that a party has a fundamental right to elicit the medical expert testimony of one witness on any point of significance to resolution of the issues

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<sup>6</sup> In a more recent case, Zappola v. Leibinger, 2006 WL 1174448 (Ohio Ct. App. May 4, 2006), an Ohio Court of Appeals held the lower court did not error in allowing the expert testimony of two neurosurgeons regarding the standard of care of the defendant neurosurgeon in a medical malpractice action, even though portions of the testimony might be cumulative, since the second expert witness provided an *additional* perspective rather than a *cumulative* one.

presented and probably a second witness as well, for added perspective.

Id. While the court did recognize that there might be occasions where a party could be justified in having a concern that a well-heeled party could retain an arsenal of experts to prove its case, the court did feel that there were a number of provisions in the Code of Evidence to address such a concern.

The Circuit Court of Mingo County made an informed decision to permit the Appellees to present expert testimony to defend themselves from the separate and distinct allegations of negligence made against them by Appellant. Moreover, the fact that Dr. Zamora and the Ambulance Service provided separate treatment to Mr. Kominar, at separate times, and at separate locations further evidences the need for the Appellees to present their own expert testimony. With the broad discretion afforded by Rule 403 and Rule 702, the Circuit Court of Mingo County did not allow for cumulative evidence, but rather afforded Dr. Zamora and the Ambulance Service the opportunity to establish a defense to Appellant's allegations in the underlying action. Therefore, there is no clear showing of abuse by the Circuit Court of Mingo County and Appellant's allegation of error should fail.

Appellant states in her brief that "[a]dding to the prejudice was the Court's refusal to allow Appellant to call her radiologist in the case in chief." Appellant Brief at p. 34. However, the Appellant fails to state that she did not timely disclose a radiology expert. Although Appellant deposed radiologist Lewis M. Rothman, M.D., in 2001, Appellant chose not to call Dr. Rothman as a rebuttal witness presumably since Dr. Rothman's deposition testimony regarding the cause of Mr. Kominar's death was not favorable to Appellant's case. As such, Appellant cannot claim that she was prejudiced since she chose not to call Dr. Rothman as a witness.

**C. THE CIRCUIT COURT OF MINGO COUNTY PROPERLY REFUSED APPELLANT'S INSTRUCTION ON SPOILIATION OF EVIDENCE.**

Appellant's second assignment of error alleges that the Circuit Court of Mingo County erred by refusing to give Appellant's spoliation instruction. Appellant Brief at p. 17. However, as to Dr. Zamora, Appellant never presented any evidence that Dr. Zamora had an independent duty to keep or maintain any of the records at issue or that Dr. Zamora spoiled or destroyed the records in question. See Record, generally. Appellant requested a spoliation instruction against the Hospital and the Ambulance Service. Accordingly, Dr. Zamora filed a motion in limine to prohibit Appellant from soliciting testimony regarding spoliation of evidence against Dr. Zamora. "Motion in Limine to Prohibit Plaintiff from Soliciting Testimony regarding Spoliation of Evidence Against Defendant Pelagio P. Zamora, Inc." May 6, 2005. Appellant did not request an instruction as to Dr. Zamora and, therefore, this assignment of error should not be raised against him.

**D. THE CIRCUIT COURT OF MINGO COUNTY PROPERLY DENIED APPELLANT'S MOTION SEEKING TO READ INTERROGATORY ANSWERS INTO THE RECORD.**

Dr. Zamora defers to the Hospital's response to this issue raised by Appellant.

**E. THE CIRCUIT COURT OF MINGO COUNTY PROPERLY DENIED APPELLANT'S MOTION FOR A MISTRIAL AFTER OPENING STATEMENTS.**

Appellant's fourth assignment of error alleges that the Circuit Court of Mingo County improperly denied Appellant's motion for a mistrial alleging that Appellees' counsel violated a motion in limine prohibiting "argument or evidence presented concerning the wreck in question insofar as the survivability of the collision." Appellant Brief at p. 29. However, the survivability of Mr. Kominar after the accident was one of the foremost issues in the underlying case.

The Circuit Court of Mingo County did not prohibit Appellees' counsel from mentioning or presenting evidence concerning the survivability of the accident in question. In fact, counsel for the Appellant presented evidence to the jury concerning the survivability of the accident as well as utilized photographs of the accident scene and Mr. Kominar's truck in the questioning of witnesses at trial.<sup>7</sup> Counsel for Appellant also elicited testimony from Appellant's own witnesses concerning Mr. Kominar's use of brake lights. Id. Therefore, Appellees did not violate the Circuit Court of Mingo County's order and the Circuit Court properly denied Appellant's motion for a mistrial.

**F. THE CIRCUIT COURT OF MINGO COUNTY PROPERLY DENIED APPELLANT'S MOTION FOR A NEW TRIAL AS APPELLEES DID NOT VIOLATE THE COURT'S ORDER WITH REGARD TO MOTIONS IN LIMINE.**

Appellant's fifth assignment of error alleges that Officer John Hall, a patrolman for the City of Williamson who responded to Mr. Kominar's accident scene on July 12, 1997, gave impermissible testimony regarding whether Mr. Kominar could have survived the accident in violation of the Circuit Court of Mingo County's ruling in limine. Appellant Brief at p. 30.

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<sup>7</sup> In opening argument, counsel for Appellant specifically stated that he was intending to produce evidence regarding the survivability of the accident:

What the defendants in this case say when asked about this is that when the ambulance people got to the accident that Jason Kominar had suffered a blunt chest trauma arrest. Therefore there was no way to bring his back. There was nothing really to be done to bring him back. He was basically – could not survive as a result of that accident arrest.

The fact, ladies and gentleman, that the plaintiff will present though expert testimony bring that into question. The evidence will be that, first of all, Jason Kominar did have a heartbeat. Was breathing when the ambulance arrived. *That he did have survivability.* That he would have survived had the appropriate care been given. Had he not been improperly intubated.

(emphasis added) Trial Transcript Vol. 1, p. 105.

Specifically, Officer Hall, upon questioning by counsel for the Ambulance Service, testified that he was not surprised that Mr. Kominar did not survive the accident. Trial Transcript Vol. 8B, p. 269. Appellant contends that such testimony violated the Circuit Court of Mingo County's motion in limine, which prohibited counsel for the Appellees from eliciting testimony from Officer Hall as an accident reconstructionist. However, Officer Hall's testimony did not violate the Circuit Court's order and Appellant's allegation of error should fail.

The Circuit Court of Mingo County ordered that Officer Hall could not be asked to testify concerning the dynamics of Mr. Kominar's accident, the actions of Mr. Kominar, and the opinions of Officer Hall concerning the cause of the accident and/or Mr. Kominar's negligence prior to the accident. But such testimony was not elicited from Officer Hall by Appellees. Rather, counsel for the Ambulance Service, after eliciting testimony from Officer Hall regarding his experience as a police officer and the number of automobile accidents he has investigated, simply questioned Officer Hall as to whether he was surprised that Mr. Kominar did not survive the accident.<sup>8</sup> Id. Neither the question nor Officer Hall's answer resulted in testimony as to the

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<sup>8</sup> Counsel for the Ambulance Service questioned Officer Hall as follows:

Q. Given your experience as a police officer and someone who has investigated hundred of accidents, would it 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.

Id. at p. 269. Counsel for Appellant, Marvin Masters, Esq., objected to Mr. Flanagan's question:

Mr. Masters: Victor Flanagan in his examination violated a motion in limine rule that was made by Judge Thornsby and brought up again and again about reconstruction. He had this witness testify that he though he bounced around in the vehicle. That was a specific motion that we made. And, in fact, the witness admitted that he - in his

mechanics of the accident, the actions of Mr. Kominar, opinions on the cause of the accident, or the role Mr. Kominar played in the accident. Such testimony is clearly admissible under Rule 701 of the West Virginia Rules of Evidence, which states that “[i]f the witness is not testifying as an expert, his or her testimony in the form of opinions or inferences is 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’ testimony or the determination of a fact in issue.” W. Va. R. Evid. 701 (2006).

Moreover, counsel for Appellant did not object to Officer Hall’s testimony. And the testimony elicited from Officer Hall by counsel for Appellees was not unlike the testimony elicited by counsel for Appellant of the many scene witnesses, none of whom had the same level expertise and experience as Officer Hall. Therefore, Appellant’s assignment of error should fail as the testimony of Officer Hall did not violate the court’s order with regard to the motion in limine preventing the eliciting of testimony from Officer Hall as an accident reconstructionist.

**G. THE CIRCUIT COURT OF MINGO COUNTY PROPERLY PREVENTED APPELLANT FROM PRESENTING TESTIMONY OF A FACT WITNESS.**

Appellant alleges that the Circuit Court of Mingo County erred in failing to permit her to call James Spaulding on the issue of whether “there were any leaks of embalming fluid at the

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deposition that he was not a reconstructionist and could not really say that from a professional standpoint.

The Court: I don’t believe the answer was intended to make him a reconstructionist. It might have technically violated the rules by Judge Thornbury. I’m going to overrule your objection. I believe it wouldn’t be proper to draw any more attention to it that what has already been brought.

Trial Transcript Vol. 8B, p. 278.

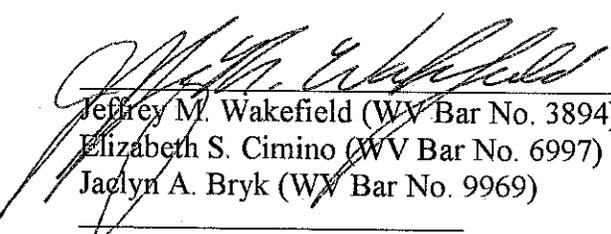
time of Jason Kominar's embalming." Appellant Brief at p. 34. First, it must be noted the Appellant had significant difficulty getting Mr. Spaulding to appear at trial. On at least one occasion, Mr. Spaulding was supposed to testify for Appellant, but never appeared in court.<sup>9</sup> Whether Appellant ever obtained Mr. Spaulding's agreement to testify is not known. Nonetheless, the Circuit Court of Mingo County appropriately ruled that Mr. Spaulding would be permitted to testify as to the external appearance of the Mr. Kominar's body. The Circuit Court also determined that Mr. Spaulding lacked the qualifications under Rule 702 of the West Virginia Rules of Evidence to opine as to the extent of Mr. Kominar's internal injuries. In fact, as a layperson, any testimony by Mr. Spaulding as to Mr. Kominar's internal injuries was speculative at best. Thus, the Circuit Court of Mingo County's ruling was appropriate and was not in error.

#### IV. CONCLUSION

Based upon the foregoing, appellees Pelagio P. Zamora, M.D., and Pelagio P. Zamora, Inc., respectfully request the Court uphold the Circuit Court of Mingo County's Order denying appellant Mary Ann Kominar's, as Administratrix of the Estate of Jason Kominar, Motion to Set Aside the Verdict and for a New Trial.

**PELAGIO P. ZAMORA, M.D., and  
PELAGIO P. ZAMORA, INC.**

**By Counsel,**

  
\_\_\_\_\_  
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Elizabeth S. Cimino (WV Bar No. 6997)  
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<sup>9</sup> Mr. Spaulding, at the time of trial, was a resident of Kentucky and not subject to a West Virginia subpoena.

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**CERTIFICATE OF SERVICE**

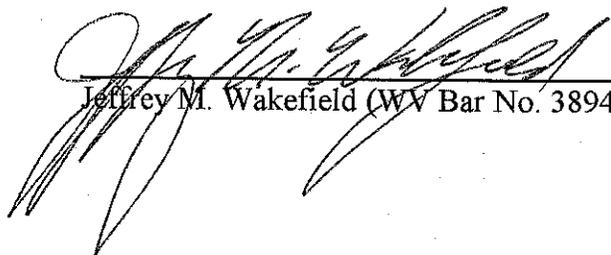
I, Jeffrey M. Wakefield, counsel for Pelagio P. Zamora, M.D., and Pelagio P. Zamora, Inc., do hereby certify that true and exact copies of the foregoing "BRIEF OF APPELLEES PELAGIO P. ZAMORA AND PELAGIO P. ZAMORA, INC." was served upon the parties hereto by U.S. Mail, first class, postage prepaid, on this the 22<sup>nd</sup> day of December, 2006, addressed to the following counsel of record:

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