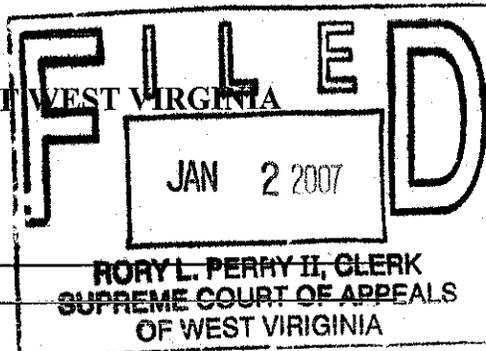


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.

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

**RESPONSIVE BRIEF OF APPELLEE
MINGO COUNTY AMBULANCE SERVICE, INC.**

Respectfully Submitted,

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as Administratrix of the Estate of
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Plaintiff / Appellant

v.

Mingo County Civil Action No. 99-C-274
Honorable Darrell Pratt, Special Judge

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 APPELLEE'S

I. INTRODUCTION

Jason Kominar, Appellant's son, died at the scene of a single car accident on Route 119, in Mingo County, West Virginia. The accident occurred at 8:40 a.m. The police department was notified and an officer was on the scene by 8:53 a.m. By the time the paramedics arrived at 8:58 a.m., Jason had no pulse, was not breathing and had no blood pressure. Tr. Vol. 3, p. 173. Upon assessment it was determined that Jason Kominar had sustained cardiac arrest due to blunt force trauma. Tr. Vol. 8, p. 84. Jason Kominar worked as a volunteer fireman and was well know to the paramedics, Doug Goolsby, James York and Donald Spaulding, Tr. Vol. 3, pp. 185, 186. Despite the fact that Mr. Kominar presented as nonviable at the scene, the paramedics made every attempt to resuscitate. Tr. Vol. 3, pp. 191, 206. From the time of arrival of the paramedics

to the time of the patient's arrival at Williamson Memorial Hospital, twenty-one minutes elapsed. At no time during those twenty-one minutes did Jason Kominar regain spontaneous respiration or blood pressure. Tr. Vol. 4, p. 160. Despite being aware that Jason had been deprived of oxygen for a minimum of twenty-one minutes, the emergency room staff also did everything they could to resuscitate Mr. Kominar, continuing to work with him for an additional ten minutes after his arrival at the hospital before pronouncing him dead on arrival.

II. ERRORS AND OMISSIONS IN APPELLANT'S STATEMENT OF FACTS

As an initial matter, Appellant's Statement of Facts contains numerous inaccuracies. Specifically, on page 5 of her Brief, Appellant states that Jason "Kominar crawled out the window of the vehicle and was breathing and moving when the Mingo County Ambulance arrived." The undisputed testimony was that Jason Kominar either fell or crawled out of his automobile. He was attempting to lift his head and was making crawling movements with his arms. Tr. Vol. 3, pp. 284, 286, 287, 305. When officer John Hall arrived, Jason Kominar had ceased all movement and was not breathing. Tr. Vol. 8, p. 260-261. When the Emergency medical personnel arrived, Jason Kominar was not moving, was not breathing, had no pulse and no blood pressure. Tr. Vol. 3, p. 173. His eyes were fixed and dilated. Tr. Vol. 3, p.96.

Secondly, Appellants statement of facts section contains the statement that the post-mortem x-ray demonstrated that the endotracheal tube had been placed into Jason Kominar's esophagus instead of his trachea. This is patently untrue. All experts, Appellant's as well as Appellees' testified that they could not determine from the x-ray alone where the endotracheal tube was placed because the trachea overlies the esophagus. Tr. Vol. 7, pp. 87, 88.

Third, on page six, Appellant states that Judy Sanger testified that "maintaining the run sheet was part of the requirements of the hospital." Judy Sanger specifically stated that there is

no requirement that the run sheet be kept. Williamson Memorial Hospital was only required to keep medical records that it generated from the time of a patient's admission through the time the patient is discharged. Tr. Vol. 6, p. 251; Tr. Vol. 7, p. 8. Williamson Memorial Hospital was not required to maintain any records from an outside source. Tr. Vol. 6, p. 252.

Fourth, Appellants correctly assert the run sheet had been altered. However, the alterations that were made in no way served to benefit the defendant Mingo County Ambulance Service. In fact, the alterations, if they accurately reflected Jason Kominar's condition, would be detrimental to Mingo County Ambulance Authority's defense. Consequently, the Court ruled that a spoliation instruction was not appropriate against Mingo County Ambulance Service.

Moreover, the expert physicians who testified did not base their testimony on only the run sheet and hospital records as Appellants represent. Appellants completely discount and fail to mention the fact that Jason Kominar, a volunteer fireman, had had been brought to the ER in January 27, 1999 suffering from smoke inhalation. A chest x-ray was taken at that time. Consequently, Appellees' expert radiologist was able to compare the chest x-ray taken on January 27, 1999 to the post-mortem chest x-ray taken on July 12, 1999. The x-rays were markedly different and the July x-ray was clearly indicative of fatal internal injuries, specifically, a fatal bleed into Jason Kominar's chest cavity.

Appellants assert defendant Mingo County Ambulance Service deliberately destroyed the EKG strips that were run on Jason Kominar in the ambulance on the way to the hospital. Appellants fail to point to any rule, regulation or statute that requires that the EKG strips be maintained. Moreover, in some instances, such as the one at issue, it is just not feasible to keep the strips. The strips become contaminated with blood and trampled as the emergency medical personnel attempt resuscitation. Tr. Vol. 5, pp. 175-178. It must be kept in mind that there are

two paramedics trying to resuscitate a patient in a very small space in the back of a rapidly moving vehicle. Resuscitation in this case involved intubating, starting intravenous fluids, continuing CPR, administering cardiac drugs and, decompressing the chest due to a collapsed lung all the while communicating with Medical Command in Huntington and the Emergency Room at Williamson Memorial Hospital.

On page eight of Appellant's Brief, it is stated that "Appellant proved without question" and then provides a list of nine things Appellant allegedly proved at trial. Appellee submits that if Appellant had actually proved these nine things without question, there would not have been a defense verdict.

Finally, on page ten, Appellant states "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." This is an inaccurate statement. The issue as to the Mingo County Ambulance Service was whether the emergency medical personnel negligently intubated Jason Kominar into his esophagus instead of his trachea. "Negligently getting the patient to the hospital" was never an issue. As to the hospital and Dr. Zamora, the issue was whether Dr. Zamora and the ER staff negligently failed to recognize the alleged improper intubation and take corrective measures.

III. STATEMENT OF FACTS AND PROCEDURAL HISTORY

This is Appellee, Mingo County Ambulance Service, Inc.'s Brief in Response to the Appeal filed by Mary Ann Kominar, as Administratrix of the Estate of Jason Kominar, deceased, seeking relief from an Order entered on February 2, 2005, by the Honorable Darrell Pratt, Special Judge sitting in the Circuit Court of Mingo County, denying a new trial after a defense verdict in a medical malpractice action.

On July 12, 1997, Mr. Kominar lost control of his vehicle, crossed four lanes of traffic, and crashed into a rock cliff on Route 119, in Mingo County, West Virginia. According to two eyewitnesses, Danny Henry and Angela Williams, after the crash, Jason Kominar was hanging out the passenger side window and either fell or pushed himself out of the truck, landing facedown on the side of the road. Blood was gushing out of his nose and mouth and you could hear his chest rattle and gurgle as he tried to breath. Tr. Vol. 3, p. 284; 287; 305 His eyes were rolled back in his head. He attempted to raise his head. Tr. 3, p. 286. Mr. Henry told him to lie still, that help was on the way. Tr. Vol. 3, pp. 300-301 Mr. Henry stated that at no time did he think Jason was conscious of what was going on. Mr. Henry stated that Jason was making crawling and scratching movements with his arms and legs. Tr. Vol. 3, p. 304.

Williamson Police Officer John Hall arrived at 8:47 a.m., shortly after Ms. Williams and Mr. Henry. Mr. Hall testified that when he approached the vehicle he saw Mr. Kominar lying on his back in a ditch. He had blood coming from his ears and his mouth. Tr. Vol. 8, p. 260. He was motionless and he could not tell if he was breathing. Tr. Vol. 8, p. 261. After these initial observations, Officer Hall went back to his car and notified 911 to dispatch an ambulance to the scene. They were already on the way at the time of his call. Tr. Vol. 8, p. 261. Officer Hall testified that he never saw Jason Kominar conscious at the accident scene. He never saw him moving, talking or breathing.

Mr. Kominar was not moving when the paramedics arrived. He was not breathing and had no pulse or blood pressure. Tr. Vol. 3, p. 173. He was in traumatic arrest. Tr. Vol. 3, p. 188. The pre-hospital care record indicates that he was unresponsive, cyanotic, apneic and his pupils were fixed and dilated. Tr. Vol. 3, p. 96. He had a Glasgow Coma Score of 3 which indicates the patient is not viable Tr. Vol. 3, p. 191. The medics immobilized him and began CPR. Once they

had him in the ambulance, they intubated him and attached a heart monitor. The heart monitor revealed an agonal or "dying" heart rate. Tr. Vol. 3, pp. 190-191. IV medication designed to "jump start" the heart was administered to no avail. En route to the hospital it was necessary to perform a needle decompression due to a collapsed lung. Tr. Vol. 3 Part B, p. 203. At no time did Jason Kominar regain spontaneous respiration and blood pressure.

Mr. Kominar arrived at the Williamson Memorial Hospital Emergency Room at 9:20 a.m. Dr. Pelagio Zamora, the emergency room physician and staff continued CPR for ten (10) more minutes at which time Mr. Kominar was pronounced dead of multiple trauma.

The triage notes indicate that Mr. Kominar sustained multiple traumatic injuries. He was bleeding out of both ears as well as his nose and mouth, which indicates a possible skull fracture. Tr. Vol. 8, pp. 201 - 202. His stomach was rigid and distended which indicates internal bleeding. Tr. Vol. 8, p. 208. He had multiple fractures of his limbs. Tr. Vol 8, p. 210.

Dr. Zamora ordered a chest x-ray be taken after Jason was pronounced dead. The chest x-ray, which was taken in the AP position by a portable x-ray machine while the deceased was strapped to a backboard, revealed multiple findings of blunt force trauma to the chest consistent with a ruptured aorta. Tr. Vol. 7, p. 99. Specifically, the x-ray revealed the blunt force trauma Jason Kominar sustained had pushed his heart all the way into the left side of his chest. Tr. Vol. 7, p. 101. It further revealed that the mediastinum, the central cavity in the chest had been pushed to the left and was significantly widened. Tr. Vol. 7, p. 101. This was easily demonstrated by comparing a chest x-ray of Jason Kominar taken on January 27, 1999, to the post-mortem x-ray taken on July 12, 1999. These findings possibly indicated the force of the trauma was so great that it disrupted the ligaments, the soft tissue cords that pull the heart and mediastinum in place. Tr. Vol. 7, p. 101 The more likely conclusion, however, was that the right side of Jason

Kominar's chest had filled with so much blood (approximately two of the five liters contained in the human body) that it displaced these organs. Tr. Vol. 7, pp. 102-104. A widened mediastinum is also a finding consistent with a ruptured aorta. Tr. Vol. 7, p. 105.

The x-ray taken after Jason Kominar expired was not dispositive on the issue of the placement of the endotracheal tube. Every defense expert, testified that one portable x-ray taken in the AP position was not conclusive as to whether or not the endotracheal tube was properly placed. In order to do so, you had to take into account additional evidence. Tr. Vol. 7, p. 87. Specifically, the pre-hospital care treatment sheet (the run sheet), and the doctor and nurses notes from the emergency room. Tr. Vol. 7, p. 88. Dr. Zamora's notes indicate he clinically assessed where the tube was upon Jason Kominar's arrival in the hospital and that he was able to hear breath sounds over the lungs, specifically, "breath sounds on the left, ronchi or fluid on the right. Abdomen full and rigid." The fact that there were breath sounds in at least one lung is a clear indication that the endotracheal tube was properly inserted in the trachea and that the patient was being mechanically ventilated. Additionally, Dr. Zamora did not hear any breath sounds over the stomach. Had Dr. Zamora heard breath sounds in the stomach, it would have been evidence the endotracheal tube had been inserted into the esophagus instead of the trachea. Tr. Vol. 7, p. 88. Traci Booth, the emergency room nurse who performed an assessment on Jason Kominar, also did not hear breath sounds when she listened over the stomach. "Once you hear this [breath sounds over the stomach] one time in our training, there is no mistaking somebody blowing air down the esophagus and into the stomach. It is an unmistakable sound. If it is going on, you know it is happening. She did not hear that." Tr. Vol. 7, p. 93.

Other evidence relied upon to show that the tube was properly placed was that Mr. York, the paramedic who performed the intubation saw the endotracheal tube pass through Jason

Kominar's vocal cords. Tr. Vol. 7, p. 90. Doug Goolsby, the other paramedic who treated Jason Kominar heard breath sounds over the lungs and did not hear them over the stomach. The breath sounds were diminished on the left side which is the side upon which Mr. Goolsby had to perform a needle decompression due to a collapsed lung. Tr. Vol. 7, pp. 90, 91. Had the endotracheal tube been in the esophagus instead of the trachea, Goolsby would not have heard breath sounds on the right and diminished breath sounds on the left. He also would have heard breath sounds when he listened over the stomach. Tr. Vol. 7, p. 91.

The chance of surviving a blunt force traumatic arrest is very small. If you look at all pre-hospital traumatic arrest from blunt trauma, the statistics show that one percent or less survive. Tr. Vol. 8, p. 85. If you specifically look at patients who have no vital signs at the time the medics first assess them, then it is far less than one percent that actually survive traumatic arrest. Tr. Vol. 8, p. 86. Jason Kominar had no vital signs when the paramedics arrived at the scene. His Glasgow Coma Scale Score and Trauma Score indicated he was not viable. Tr. Vol. 8, p. 86. Unfortunately, Mr. Kominar died at the scene of the accident, and despite the heroic attempts of the paramedics and the emergency room staff, he could not be resuscitated.

IV. RESPONSE TO ASSIGNMENTS OF ERROR

Assignments of Error C and D, apply only to Appellee, Williamson Memorial Hospital.

Consequently, this Appellee will only be addressing Errors A, B, E, F and G.

A. THE CIRCUIT COURT DID NOT ERR BY PERMITTING EACH APPELLEE SEPARATE PEREMPTORY CHALLENGES DUE TO THE FACT THAT APPELLEES WERE POTENTIALLY ANTAGONISTIC TOWARD ONE ANOTHER.

B. THE CIRCUIT COURT DID NOT ERR BY REFUSING TO GIVE APPELLANT'S SPOILIATION OF EVIDENCE INSTRUCTION BECAUSE IT WAS NOT SUPPORTED BY THE EVIDENCE.

- E. **THE CIRCUIT COURT DID NOT ERR BY DENYING APPELLANT'S MOTION FOR NEW TRIAL BECAUSE DEFENSE COUNSEL DID NOT VIOLATE AN ORDER IN LIMINE**
- F. **THE COURT PROPERLY ALLOWED EACH APPELLANT SEPARATE EXPERTS.**
- G. **THE CIRCUIT COURT PROPERLY DENIED APPELLANT'S REQUEST TO CALL THE EMBALMER TO TESTIFY REGARDING MEDICAL CAUSATION ISSUES.**

V. LAW AND ARGUMENT

- A. **The Trial Court Properly Ruled that Each Appellee was Entitled to Three Jury Strikes.**

Rule 47 of the West Virginia Rules of Civil Procedure states in pertinent part,

The plaintiff and the defendant shall each have two preemptory challenges which shall be exercised one at a time, alternately, beginning with the plaintiff. Several defendants or several plaintiffs may be considered as a single party for the purpose of exercising challenges or the court may allow additional preemptory challenges and permit them to be exercised separately or jointly.

See W.Va. R. Civ. Pro., R. 47

In a recent decision, Price v. Charleston Area Medical Center, 217 W.Va. 663, 619 S.E.2d 176 (2005), the West Virginia Supreme Court of Appeals held that pursuant to Rule 47 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 preemptory challenges, upon motion, and upon a showing that separate preemptory challenges are necessary for a fair trial.

Id at syl. pt. 2.

The Price Court then proceeded to delineate the factors that should be considered by the trial court in determining whether the interests of two or more plaintiffs or defendants are hostile or antagonistic, stating,

[T]he 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 the 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. To warrant separate peremptory challenges, the plaintiffs 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.

Id. at Syl. Pt. 3.

In the present case, the Court indicated at the Pretrial Conference held on May 2, 2005, that each party would have three strikes, reasoning that Appellant had asserted independent theories of negligence against each Appellee and, based on a reading of the pretrial memoranda, Appellees' had divergent interests and theories of defense. Appellant asserted medical professional liability claims against all three Appellees. Against the hospital, she asserted a negligent retention claim and vicarious liability for the alleged acts of negligence of Appellee, Dr. Zamora. Appellant was additionally asserting spoliation of evidence claim against the Appellees. Counsel for Williamson Memorial Hospital offered to waive the Hospital's peremptory strikes if the Appellant would stipulate that the only allegations of negligence against the Hospital were vicarious for the alleged acts or omissions of Co-Appellee, Pelagio Zamora,

M.D. Appellant would not agree to this and proceeded to Trial with independent theories of negligence against each Appellee.

On May 3, 2005, Appellant filed a Motion for Equal Peremptory Strikes between the Appellant and Appellees. Appellee Williamson Memorial Hospital filed a Response to Plaintiff's Motion on May 5, 2005. Accordingly, the allocation of peremptory strikes was revisited by the Court prior to jury selection on May 9, 2005. At that time, the Court reviewed Plaintiff's Motion and Memorandum of Law and the Response filed by Williamson Memorial Hospital and, additionally heard argument on behalf of all parties. The Court again concluded the interests of the Appellees were antagonistic and that Appellant has asserted separate acts of negligence against each of the Appellees. At that time, the Court stated,

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.

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.

Tr. Vol. 2, p. 23. Further discussions on this subject were held off the record.

Applying each of the Price factors to the case at bar, it is clear that the Trial Court's decision to allow each party three strikes was correct. As stated above, the Appellant was asserting independent theories of negligence against each Appellee. Additionally, the alleged

acts of negligence occurred at different times. Specifically, Appellant alleged that the Appellee, Mingo County Ambulance Service Inc's paramedics negligently intubated Appellant's decedent at the scene of the accident, and, failed to recognize the improper intubation and correct it. It was alleged that Appellee, Dr. Zamora and other hospital staff also negligently failed to recognize the improper intubation when Appellant's decedent arrived in the Williamson Memorial Hospital Emergency Room twenty (20) minutes later. While the Appellees did share a common theory of defense, that being that Jason Kominar was dead at the scene, Appellees' positions were antagonistic in many ways. For example, Appellee Dr. Zamora argued that Jason Kominar was dead at the scene but properly intubated; however, if the jury were to find that he was viable at the scene and, in fact improperly intubated, Dr. Zamora could not have done anything to save Jason Kominar as more than twenty (20) minutes had elapsed wherein he had been deprived of oxygen to the brain. These opposing theories of defense had the potential to result in finger-pointing among the Appellees as all counsel were aware the jury could have found Mingo County Ambulance Service, Inc. was negligent but not Dr. Zamora or the Hospital or, could have found that one of the nursing staff was negligent for not recognizing the improper intubation, but not Dr. Zamora.

Similarly, Appellant's spoliation of evidence claim was directed at Mingo County Ambulance Service Inc. and Williamson Memorial Hospital. Throughout the duration of this lawsuit and Trial, Appellees were cognizant of the fact that should the Court allow an adverse instruction regarding the missing heart monitor strips, the jury could have found that Mingo County Ambulance Service Inc. intentionally destroyed the strips because they showed Jason Kominar was alive en route to the hospital or they could have found that the Hospital destroyed the strips because they showed Jason Kominar was alive in the emergency room. This issue had

great potential for finger-pointing among the Appellees, and in fact, caused counsel for the Hospital to elect to impeach the Co-Appellee paramedics at Trial with regard to what they did with the heart monitor strips. Tr. Vol. 8, pp. 25-28.

Further, negligence, if found against the Appellees, was subject to apportionment, another factor, the Price Court indicated should be considered by the trial court. The verdict forms submitted prior to Trial contemplated separate interrogatories to the jury regarding the negligence of each Appellee and then requested the jury apportion the fault of each Appellee. Since Williamson Memorial Hospital was granted a directed verdict on the issue of independent acts of negligence the jury was only required to answer interrogatories regarding the negligence of Dr. Pelagio Zamora, MD and Mingo County Ambulance Service Inc., and, if they found either or both negligent, to apportion the respective negligence. Tr. Vol. 10, pp. 10-12.

Clearly, three out of the five factors that the Price Court stated should be considered by the trial court are satisfied in the present case. It is true that Appellees did share a common theory of defense, and did not file cross claims against each other but there was no guarantee the common defense could be maintained throughout the Trial.

Moreover, the Price Court did not state that all of the factors enumerated had to be present for the trial court to decide the defendants' interests were antagonistic. In the case at bar, defendants have established that three of the Price factors existed at the time this case proceeded to trial. Further, the Court thoroughly looked at this issue not once, but twice, and made a well-reasoned decision to allow each Appellee separate peremptory strikes.

B The Trial Court Properly Found Appellant was not Entitled to an Adverse Instruction or a Spoliation of Evidence Instruction as to the Missing EKG Strips and Missing Copy of the Run Sheet.

Appellant correctly cites to Tracy v. Cottrell, 524 S.E.2d 879 (W.Va. 1999) and Hannah v. Heeter, 594 S.E. 2d 560 (W.Va. 2003) as the authoritative cases on spoliation of evidence in West Virginia. Tracy states in pertinent part,

Before a trial court may give an adverse inference jury instruction or impose other sanctions against a party for spoliation of evidence, the following factors must be considered: (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. The party requesting the adverse inference jury instruction based upon spoliation of evidence has the burden of proof of each element of the four-factor spoliation test. If, however, the trial court finds that the party charged with spoliation of evidence did not control, own, possess or have authority over the destroyed evidence, the requisite analysis ends, and no adverse inference instruction may be given or other sanction imposed.

Tracy at Syl. Pt. 2.

With regard to the Appellee Mingo County Ambulance Service, Inc., the evidence at issue was the EKG strips that were run on Jason Kominar in the ambulance on the way to the emergency room and the pink copy of the run sheet. James York testified that he thought he stapled the strips to the pink copy of the run sheet and left it with personnel in the emergency room. Tr. Vol. 3, pp. 155, 172. Mr. Goolsby testified that it was equally possible, however, that the strips were bloody and had become trampled on the bottom of the ambulance while they were administering CPR and other life-saving methods in an attempt to resuscitate Jason Kominar on the way to the hospital. Tr. Vol. 5, pp. 175-178. Don Spaulding was unsure, but thought the strips and the pink copy of the run sheet were left at the hospital. Tr. Vol. 8, pp. 25-28. This Court listened to all of the evidence prior to making its decision not to give an adverse

instruction. In making this decision, the Court considered, on the record, the factors set forth in Tracy v. Cottrell, *infra.*, and found that Plaintiff had failed to prove each element of the Tracy test, finding, among other things, that there was no legal duty to retain the EKG strips and, the strips were misplaced or destroyed on the day of Jason Kominar's death. The Appellees had absolutely no reason to anticipate litigation at that point in time. Tr. Vol. 8, pp. 299-302.

Appellant further alleges this Appellee altered the ambulance run sheet. While expert testimony established the run sheet had in fact been altered, there was absolutely no evidence that Mingo County Ambulance Service Inc. or any Appellee altered the run sheet. In fact, this Court did not even consider giving an adverse instruction regarding the altered run sheet because the actual alterations did not benefit any of the Appellees and any assertion that any of the Appellees in the lawsuit were responsible for alterations that would be detrimental to them, defied logic. Tr. Vol. 8, pp. 306-309.

E. The Trial Court Properly Found There was No Violation of the Court's Order in Limine in Eliciting Testimony from Officer Hall that he was not Surprised the Decedent did not Survive the Accident.

The Order in Limine specifically stated:

With regard to the Plaintiff's Motions to Exclude the pre-accident investigation and the opinions of John Hall concerning the dynamics of the accident, the Court hereby sustains and GRANTS said motions

The Court notes that any evidence regarding the pre-accident investigation and the opinions of John Hall regarding the dynamics of the accident pertain to theories of contributory negligence on the part of the decedent and are not proper issues for development at trial in this medical malpractice case.

...

The Court finds that evidence of any investigation of the actions of the decedent and any opinions that Mr. Hall might have regarding

the cause of the accident in question and/or the Plaintiff's negligence prior to the injury necessitating medical care are not relevant to whether or not the Defendants' breached the standard of care, were negligent or otherwise played a part in the death of the decedent.

John Hall was not asked to testify regarding his investigation of the accident, his conclusions regarding the cause of the accident or any actions of Jason Kominar. He was merely asked if he was surprised Jason Kominar did not survive the accident. As Appellents themselves stated in their Motion to Set Aside the Verdict, whether or not Jason Kominar could have survived blunt trauma was one of the issues if not the main issue in this case. Certainly the cornerstone of the defense was that Jason Kominar suffered such extensive injuries in the accident he could not have been resuscitated.

According to State v. Nichols, 541 S.E.2d 310 (W.Va. 1999) "in order for a lay witness to give opinion testimony pursuant to Rule 701(1), the witness must have personal knowledge or perception of the facts from which the opinion is to be derived; (2) there must be a rational connection between the opinion and the facts upon which it is based; and (3) the opinion must be helpful in understanding the testimony or determining a fact in issue. 'If these requirements are satisfied, a layman can under certain circumstances express an opinion even on matters appropriate for expert testimony.'" State v. Nichols at 315. "In relation to Rule 710, our cases have used interchangeably the terms 'knowledge' and 'perception.'" Id.

"There are a number of objective factual bases from which it is possible to infer with some confidence that a person knows a given fact. These include what the person was told directly, what he was in a position to see or hear, what statements he himself made to others, conduct in which he engaged, and what his background and experiences were." Id. (*quoting United States v. Rea*, 958 F.2d 1206, 1216 (2d Cir. 1992).

“This Court has also ruled that ‘[t]he determination of whether a witness has sufficient knowledge of the material in question so as to be qualified to give his opinion is largely within the discretion of the trial court, and will not ordinarily be disturbed on appeal unless clearly erroneous.’” *Id.* (quoting Syl. Pt. 4 Cox v. Galigher Motor Sales Co., 213 S.E.2d 475 (W.Va. 1975)). *See also*, Syl. Pt. 3, State v. Haller, 363 S.E. 2d 719 (W.Va. 1987).

In State v. Taft, 110 S.E.2d 727 (W.Va. 1959) “a non-expert witness may express an opinion ‘when the facts from which the witness’ conclusions are drawn cannot be presented to the jury with the same force and clearness as they appear to an observer who is also qualified by his own personal experiences to draw conclusions not apparent to others’” State v. Taft at 734.

Officer Hall is a police officer with over twenty (20) years of experience investigating automobile accidents. He has seen more than one fatality. He was not offering his opinion as to the cause of the accident, the mechanism of injury or the actions of Jason Kominar. He merely testified that based on his experience as a police officer who had investigated many traffic fatalities, and having actually witnessed Jason Kominar’s condition at the scene, he was not surprised to learn that Jason Kominar did not survive his injuries. This testimony in no way violated the Court’s Order in Limine and was perfectly permissible testimony under the West Virginia Rules of Evidence.

Moreover, the opinions elicited from Officer Hall were no different than those Appellant elicited from other witnesses at the scene. Appellant called three witnesses to testify regarding what they observed of Jason Kominar at the scene of the accident. In fact, Appellant’s own experts used these witnesses’ observations as a basis for their expert opinions.

Finally, Appellant’s counsel failed to timely object when defense counsel asked Officer Hall if he was surprised when he learned Jason Kominar had not survived the accident.

Appellant's counsel requested permission to approach the bench after counsel for Mingo County Ambulance Service completed his questioning of Officer Hall. "To preserve an issue for appellate review, a party must articulate it with such sufficient distinctiveness to alert a circuit court to the nature of the claimed defect. The rule in West Virginia is that parties must speak clearly in the circuit court on the pain that, if they forget their lines, they will likely be bound forever to hold their peace." State ex rel. Cooper v. Caperton, 470 S.E.2d 162, 170 (W.Va. 1996). *See also*, Hanlon v. Logan County Bd. of Educ., 496 S.E.2d 447, 457 (W. Va.1997) ("Long standing case law and procedural requirements in this State mandate that a party must alert a tribunal as to perceived defects at the time such defects occur in order to preserve the alleged error for appeal.") Consequently, Appellant waived her objection on this issue.

F. The Court Properly Allowed Each Appellee to Present Expert Testimony on Their Behalf.

The West Virginia Rules of Evidence Rule 702 states "[t]he admissibility of testimony by an expert witness is within the sound discretion of the trial court, and the trial court's decision will not be reversed unless it is clearly wrong." Citing Tracy v. Cottrell ex rel., 524 S.E.2d 879, (W.Va. 1999); City of Wheeling v. Public Service Com'n of W.Va., 483 S.E.2d 835 (W.Va. 1997); Shrewsberry v. Aztec Sales & Service Co., Inc., 445 S.E.2d 253 (W.Va. 1994); State v. Leadingham, 438 S.E.2d 825 (W.Va. 1993).

The number of experts who may be called to testify at trial is within the trial court's discretion. *See*, Morris v. Poppana, 387 S.E.2d 302 (W. Va. 1989); *See also*, Frederick v. Woman's Hosp. of Acadiana, 626 So.2d 467 (La, App. 1993) (in medical malpractice cases involving numerous medical issues courts routinely allow each party to present testimony from one or more experts in each medical specialty; rather than limit the number of experts, the court

found that an instruction that informed the jury that “it is not the number of the experts, but the relevance, credibility and proper value of their testimony which is the proper concern.”)

In State v. LaRock, 470 S.E.2d 613 (W.Va. 1996). Justice Cleckley opined that “[t]ypically, appellate courts give trial judges a wide berth of respect with regards to these kinds of discretionary judgments. In note 6 of Gentry v. Magnum, 466 S.E.2d 171, 179 (W.Va. 1995), we made clear that an abuse of discretion standard is not appellant friendly: ‘We review these rulings only for an abuse of discretion. Only rarely and in extraordinary circumstances will we, from the vista of a cold appellate record, reverse a circuit court’s on-the-spot judgment concerning the relative weighting of probative value and unfair effect. Our review, however, must have some purpose and that is why we review under the abuse of discretion standard. In general, an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court makes a serious mistake in weighing them.’” LaRock at 625.

In their respective expert witness disclosures, Appellees collectively named thirteen (13) experts. In an effort to eliminate cumulative testimony, Appellees pared down their experts prior to Trial. Accordingly, at Trial, Appellee Mingo County Ambulance Service, Inc. called only two (2) of its four (4) experts: Dr. Young, a trauma surgeon and Dr. Seidler, an emergency medicine specialist who offered opinions that Jason Kominar could not have survived the blunt trauma and that the paramedics who treated him at the scene and the hospital staff who treated him in the emergency room did not deviate from the standard of care. Appellee Williamson Memorial Hospital called one of its four (4) experts, Dr. Roger Barkin, who testified that none of the Appellees deviated from the standard of care and Appellee Dr. Zamora called only two (2) of its four (4) experts, Dr. Stephen Stapczynski, an emergency medicine physician and Dr. David

Livingston, a trauma surgeon, who testified the Appellees¹ did not deviate from the standard of care. The Appellees collectively called Dr. Morse, a radiologist, to testify regarding the extent of the injuries shown on the chest x-ray taken of Jason Kominar.

As previously stated in this Memorandum, Appellant had independent theories of negligence against each Appellee when Trial commenced. Each Appellee is certainly entitled to put on its own expert to defend against Appellant's allegations. Appellant called Dr. Alex Zakaharia, a cardio-thoracic surgeon; Dr. Peter Bernad, a neurologist; and Dr. Stephen Holbrook, an emergency medicine specialist, all of whom testified the Appellees' deviated from the standard of care. Appellees put on no more than two (2) experts each and, in the case of Williamson Memorial Hospital, only one expert to respond to the allegations that they deviated from the standard of care. Certainly the number of defense experts was not disproportionate to the number of Appellant's experts given that Appellant chose to sue three (3) separate Appellees under independent theories of negligence.

Appellant further alleges the Trial Court erred in refusing to allow her to call her radiology expert in her case-in-chief. The Court had previously ruled that Appellant had failed to timely disclose Dr. Rothman, her radiology expert and thus could not call him in her case in chief, but would be permitted to call him in rebuttal. Appellant chose not to call Dr. Rothman at all even though a video-taped evidentiary deposition of him had been taken on October 1, 2001, in anticipation of a previous trial date. Appellant should not be permitted to now claim she was unfairly prejudiced by her own decision.

G. The Trial Court Properly Limited the Embalmer's Testimony to His Personal Observations of Jason Kominar's Body.

¹ Although independent theories of negligence were asserted, Appellees Williamson Memorial Hospital and Dr. Zamora could not defend the allegation that they failed to recognize the alleged improper intubation without having their experts opine that the intubation was properly performed

Appellant's experts, Alex Zakaharia, MD and Peter Bernad, MD both testified they relied on the embalmer, James Spaulding's testimony, that there were no leaks of embalming fluid to support the contention that Jason Kominar did not have any internal injuries, particularly, a ruptured aorta. Tr. Vol. 4, pp. 284-285 and Tr. Vol. 5, pp. 16-19. When Appellant made it known she was going to call Mr. Spaulding to testify regarding the fact there was no leakage of embalming fluid, the Court ruled that based on his personal observations, Mr. Spaulding would be permitted to testify, regarding the external appearance of Jason Kominar's body. Tr. Vol. 7, pp. 19-22. He was prohibited from testifying about any internal injuries as an embalmer is not properly qualified to render such opinions and could not have actually observed the internal organs of the decedent.

Mr. Spaulding was being offered as a lay witness, not an expert witness. Therefore, the Court properly limited his testimony to his own personal observations Tr. Vol. 7, pp. 19-22. Ultimately, Appellant was unable to serve Mr. Spaulding with a trial subpoena and since he would not appear willingly, Appellant decided not to call him as a witness. Accordingly, Appellant was not prejudiced.

IV. CONCLUSION

WHEREFORE, for the reasons set forth above, the Appellee respectfully requests that this Honorable Court enter an ORDER denying Appellant's Petition for Appeal and the Circuit Court's denial of Appellant's Motion to Set Aside Verdict and for New Trial.

MINGO COUNTY AMBULANCE SERVICE, INC.

By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 33215

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

Plaintiff / Petitioner,

v.

Mingo County Civil Action No. 99-C-274
Honorable Darrell Pratt, Special Judge

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 / Respondents.

CERTIFICATE OF SERVICE

The undersigned counsel for Defendant, Mingo County Ambulance Service Inc.,
does hereby certify that a true copy of the foregoing "**RESPONSIVE BRIEF OF APPELLEE**
MINGO COUNTY AMBULANCE SERVICE, INC." was served upon counsel of record

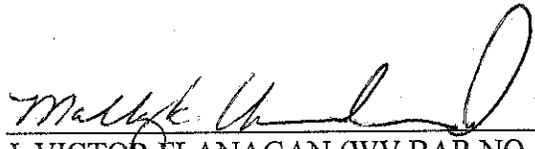
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by placing the same in an envelope, properly addressed with postage fully paid and depositing the same in the U.S. Mail, on this the 2nd day of **January, 2007**.



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