

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 33215

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

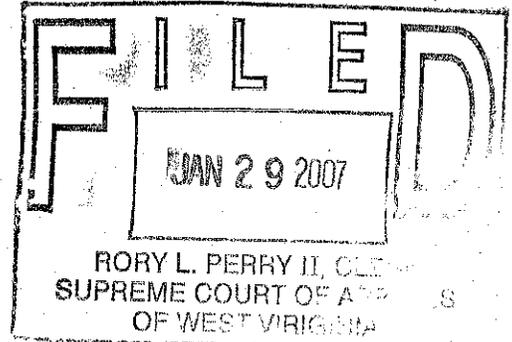
Plaintiff/ Appellant,

vs.

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.

REPLY BRIEF OF APPELLANT, MARY ANN KOMINAR



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

Respectfully submitted,

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INTRODUCTION

All of the Appellees'/Defendants', Health Management Associates of West Virginia, Inc. d/b/a Williamson Memorial Hospital, Inc. (hereinafter "Williamson Memorial Hospital"), Pelagio P. Zamora, Pelagio P. Zamora, Inc., Mingo County Ambulance Service, Inc., arguments are essentially the same. Therefore, Appellant/Plaintiff, Kominar, will respond to all of the briefs in this Reply. To maintain brevity, Plaintiff will rely upon the previously submitted Brief of Appellant, Mary Ann Kominar, as Administratrix of the Estate of Jason Kominar, deceased, and will reply only to issues which Plaintiff believes are significant.

ARGUMENT

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

The fact that the Defendants offered no evidence against each other and were not hostile, but, instead, supportive of each other is stated very clear and concise by the Defendants' themselves in their respective responses to the Plaintiff's argument on this issue. The Defendants agree that they were never hostile to one another during the trial. The Defendant hospital never blamed the Defendant ambulance service or Dr. Zamora of any negligence. The Defendant Dr. Zamora never blamed the Defendant hospital or ambulance service of any negligence. In addition, the Defendant ambulance service never placed any blame of negligence on the Defendant hospital or Dr. Zamora.

Defendants also agree that each of them had a common theory of defense against the Plaintiff, the fact that Jason Kominar died as a result of a blunt force trauma arrest and not due to any negligence on behalf of any Defendant. In fact, each and every expert witness testified that none of the Defendants deviated from the standard of care; in fact, they all testified that the Defendants all exceeded the standard of care required in this case.

The West Virginia Supreme Court has dealt with this issue recently in Price v. Charleston Area Medical Center, et al., 217 W.Va. 663, 619 S.E.2d 176 (2005). In that opinion this Court held that, "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." Syl. Pt. 3, Price v. Charleston Area Medical Center, et al., 217 W.Va. 663, 619 S.E.2d 176 (2005). In addition, this Court set forth factors that should be considered by the lower court in determining whether such interests are hostile between two or more Defendants or Plaintiffs. These factors include, but are not limited to, the following: (1) whether the Defendants are charged with separate acts of negligence or wrongdoing, (2) whether the alleged negligence or wrongdoing occurred at different points of time, (3) whether the negligence, if found against Defendants, is subject to apportionment, (4) whether the Defendants share a common theory of defense, and (5) whether cross claims have been filed. *Id.*

Plaintiff was prejudiced in this case by the fact that Defendants had nine strikes to Plaintiff's three strikes, thus permitting the Defendants to essentially pick the jury of

their choosing. The case at hand is similar to Price in that regard. As in Price, each of the three Defendants were allowed three peremptory strikes each. As mentioned above and in Plaintiff's brief, the law in West Virginia requires that before a Defendant is allowed separate strikes they must demonstrate to the court, by motion made prior to jury selection, that their identities are separate and distinct and that there is a basis for them to be allowed to have more strikes than the Plaintiff. Price v. Charleston Area Medical Center, et al., 217 W.Va. 663, 619 S.E.2d 176 (2005); Tawney v. Kirkhart, 130 W.Va. 550, 44 S.E.2d 634 (W.Va. 1947). Defendants made no offer or showing of any conflict between the Defendants in the case at hand. While the Defendants argued that, since the Plaintiff asserted separate acts of negligence against each Defendant, they were entitled to the additional strikes, they, in fact, were not hostile at all. However, in Price, supra, the Court found that was clearly not enough to allow additional strikes. It is statistically impossible for the Plaintiff to receive a fair trial with a three-to-one strike ratio.

As mentioned above, the Defendants in this case demonstrated no animosity and/or conflict toward each other. Their defenses were the same; there were no cross-claims in the case; there was no finger pointing in the case. Each and every defense expert testified on behalf of one another that no Defendant in this case deviated from the standard of care thereby supporting each other's defenses. Furthermore, in each of the Defendants' opening statements and closing arguments the counsel for the parties reiterated each other's theories and defenses. *See e.g.*, Trial Tr., Volume 8, May 18, 2005. The interests of the Defendants were clearly not antagonistic. With all the above-

mentioned facts in this case, Plaintiff was severely prejudiced and could not have had a fair trial with this three to one ratio.

By law, in order for the Defendants to each have three separate peremptory challenges an offer of showing of conflict of interests between the Defendants must be provided to the Court. "A mere statement that conflicting interests exist between the Defendants, without more, does not require the trial judge to take initiative in inspecting pleadings to determine whether to call larger panel of jurors in order to allow Defendant four separate peremptory challenges." W. Va. Code §56-6-12 (2002); Tawney v. Kirkhart, 130 W.Va. 550, 44 S.E.2d 634 (W.Va. 1947); Price v. Charleston Area Medical Center, et al., 217 W.Va. 663, 619 S.E.2d 176 (2005). The parties who request additional strikes must demonstrate to the court that they indeed have a real need for the strikes because they have hostile interests. Here, the Defendants made no real showing of conflict and hostility. If the claims of conflict and hostility prove to be merely a strategy to gain an advantage over the opposing party, then the party should be granted a new trial regardless of hearings with reference to the jury strikes. Defendants in this case gained an unfair advantage in jury selection with a three to one ratio. Therefore, the Plaintiff was prejudiced and a new trial is warranted.

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

Plaintiff contends the trial court erred in failing to give Plaintiff's requested instruction concerning Defendants' spoliation of Mr. Kominar's cardiac monitor strip

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

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

Before a trial court may give an adverse inference jury instruction or impose other sanctions against a party for spoliation of evidence, the following facts 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 on 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.

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

In focusing on the four factors listed above, the facts are such that all of the elements of a spoliation claim were met in this case proving that Defendants Williamson Memorial Hospital and Mingo County Ambulance Service had a legal duty to preserve the cardiac monitor strip evidence and the ambulance run sheet. Plaintiff submits that the jury should have had the opportunity to conclude whether the Defendants, either separately or collectively, negligently or deliberately failed to record or retain (1) the original ambulance run sheet, unaltered, (2) the ambulance cardiac monitor strips, and (3) the hospital's copy of the ambulance run sheet, and/or (4) the hospital cardiac monitor strips. The facts supported the burden of proof being shifted to the Defendants in this case. The Plaintiff was entitled to the rebuttable presumption that the run sheets and monitor strips, if available, would have supported Plaintiff's position.

Defendants have attempted to confuse the issues on which party was responsible for which document and further to confuse the issues by claiming there was no responsibility by any party to maintain particular documents. In revisiting the four factors listed above, the facts still show that all of the elements of a spoliation claim were clearly met in this case, proving that Defendants had a legal duty to preserve the

medical records of Jason Kominar and that it had lost, altered, and/or destroyed those highly relevant documents in its possession.

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

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

Element Number 1: Defendant Mingo County Ambulance Service had total control, ownership, possession and authority of the altered run sheet and destroyed EKG strip evidence, as well as a legal duty to maintain it. Trial Tr. Vol. 3, May 11, 2005, at pp. 114, 152, 157. Defendant admits that the run sheet is altered. The Defendant ambulance service were the only ones who had possession of the original record and could have altered it. However, Defendant argues that it is unaware of who altered the run sheet and that the alterations to the run sheet are harmless to the Plaintiff. Nevertheless, they had the duty and responsibility to maintain the original record and to enter into his chart all portions of the medical records concerning Jason Kominar, which did not occur in the case at hand. *Id.* The original run sheet for Jason Kominar should have been placed in his chart unaltered.

Element Number 2: The Plaintiff was highly and substantially prejudiced by Defendant Mingo County Ambulance Service as a result of the missing and/or destroyed evidence. Plaintiff's ability to meet her burden of proving medical malpractice was hindered by the Defendant's failure during a critical period of Plaintiff's treatment to either retain the ambulance run sheet, unaltered, in his original medical records. In contrast to Defendant's argument, the run sheet and missing EKG strips were extremely important to the Plaintiff's case, as the alteration of the run sheet hindered Plaintiff's experts' ability to offer testimony on the issues of the Defendant's negligence and causation. Trial Tr. Vol. 4, May 12, 2005, at pp. 215, 253-254.

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

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

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

All Defendants agree that an employee for the ambulance service, James York, testified that he filled out the run sheet and signed the run sheet. All Defendants agree that the ambulance run sheet has separate carbon copies attached. They further agree that Mr. York testified that he then stapled the EKG monitor strips to the Defendant hospital's copy of the run sheet, which is the pink copy, and left it with the hospital in the emergency room. Trial Tr. Vol. 3, May 11, 2005, at pp. 154-155. The record custodian for the hospital testified that once the hospital receives the run sheet, its procedure is for it to be made a part of the original hospital record. The Defendant hospital was never able to produce their copy of neither the run sheet nor the EKG strips. Trial Tr. Vol. 7, May 17, 2005, at p. 10.

It is important for this Court to remember that since the original run sheet was altered, the hospital's copy of the sheet was the only copy that could tell what was on the original. Mrs. Kominar approached the hospital shortly after Jason's death and requested a copy of his medical records making the hospital aware that litigation was possible. Once more, the Plaintiff's proposed instruction should have been given to the jury, as questions of fact were present pertaining to the missing records.

Element Number 1: Defendant hospital had total control, ownership, possession and authority of the destroyed evidence, as well as a legal duty to maintain it. Although the Defendant hospital argues to this Court that there was no duty on their part to maintain any portion of the run sheet or EKG strips, the testimony at trial proves

just the opposite. Plaintiff presented testimony that the hospital had the duty and responsibility to maintain the medical chart and records and to enter into the chart all portions of the medical records concerning Mr. Kominar. Trial Tr. Vol. 7, May 17, 2005 at p. 9. The hospital's copy of the run sheet as well as the attached EKG strips should have been placed in Mr. Kominar's medical chart. *Id.* Although the duty existed, the hospital never produce their copy of the run sheet nor the EKG strips from the ambulance. These records are not within Jason Kominar's hospital file and therefore were destroyed. Trial Tr. Vol. 7, May 17, 2005 at p. 10.

Element Number 2: Defendant, as a result of all the missing and/or destroyed evidence mentioned above, highly and substantially prejudiced the Plaintiff. Plaintiff's ability to meet her burden of proving medical malpractice was hindered by the Defendant's failure during a critical period of Defendant's treatment to conduct, record or retain the results of his cardiac status and monitor results in his original medical records and to maintain the hospital's copy of the run sheet. Regardless of Defendant's unsupported arguments to this Court, Plaintiff's expert did testify that the absence of such records within the original medical chart and the further alteration of the run sheet hindered his ability to offer testimony on the issues of the Defendants' negligence and causation. Trial Tr. Vol. 4, May 12, 2005, at pp. 215, 253-254.

Element Number 3: Defendant was quite aware of the reasonableness of anticipating the evidence would be needed for litigation. This is a medical malpractice case concerning the care Mr. Kominar received at the scene and at the Defendant hospital. Mrs. Kominar approached Defendant Mingo County Ambulance Service and

Williamson Memorial Hospital and requested the medical records of her son, Jason. It was reasonable to anticipate the medical records would be considered throughout the duration of the litigation.

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

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

Element Number 1: Defendant hospital had total control, ownership, possession and authority of the destroyed evidence, as well as a legal duty to maintain their own cardiac monitoring strips during which were printed and recorded during their treatment of Jason Kominar. Plaintiff brought forth testimony that proved the Defendant hospital had the duty and responsibility to maintain Jason Kominar's medical chart and records and to enter into the chart all portions of the medical records. Trial Tr. Vol. 7, May 17, 2005, at p. 9. Dr. Zamora testified that the strips were run constantly. Trial Tr. Vol. 3, May 11, 2005, at p. 44. He testified that he and the hospital staff cut the strips, put certain strips in Jason's medical chart and destroyed the rest of the strips. Trial Tr. Vol. 3, May 11, 2005, at p. 44. Defendant hospital was the only entity who had total control, ownership, possession and authority over the destroyed cardiac monitor strip evidence.

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

have been placed in his original chart with the hospital. Instead, the Defendant physician and hospital picked and chose which portions of the strips would be placed in his record and destroyed the others. *Id.* By doing this, Plaintiff was deprived of pertinent medical information concerning Jason's medical condition.

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

Element Number 4: Through trial testimony, it had become clear that Defendant hospital is the only Defendant, which maintains the medical record in its entirety, including but not limited to the EKG strips run at the hospital. Therefore, in regard to those documents its degree of fault would be substantial. This put the Plaintiff at a disadvantage in proving her case; therefore an adverse instruction is warranted.

There was absolutely no evidence to support the accuracy or legitimacy of the altered records. Plaintiff was entitled to the rebuttable presumption that the Defendants were negligent and that such negligence proximately caused Mr. Kominar's death. The jury was never allowed to give Plaintiff the rebuttable inference that she was entitled.

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

Plaintiff will rely upon her arguments set forth in the Brief of Appellant, Mary Ann Kominar, as Administratrix of the Estate of Jason Kominar, deceased, previously filed with this Honorable Court.

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

The Court erred in failing to grant Plaintiff's motion for a mistrial after opening statements wherein defense counsel violated the motion *in limine* specifically holding that there could be no argument or evidence presented concerning the wreck in question insofar as the survivability of the collision. The Court, at the pre-trial, made clear rulings in that regard, holding that Defendants could demonstrate the physical condition of Jason Kominar after the wreck, but could not focus the case on whether the wreck was so severe that Jason Kominar could not survive.

As mentioned previously, a deliberate and intentional violation of a trial court's ruling on a motion *in limine*, and thereby the intentional introduction of prejudicial evidence into a trial, is a ground for reversing a jury's verdict. Honaker, 552 S.E.2d at 790. Defendants are correct that the lower court had ordered, shortly prior to trial, that "We're going to see pictures of the truck. You are going to have witnesses and police officers there on the scene tell what they observed. So certainly we're going to see this was a horrible accident." Tr. Vol. 2. pp. 50-65. However, this does not entitle

the Defendant to discuss in his opening statement the issue regarding severity of the accident or the survivability of the accident. The main issues did not consist of whether or not Mr. Kominar hit his brakes prior to the accident, whether it was a high-speed accident or whether it was a survivable accident. Defense counsel, in his opening statements, continued to argue that Plaintiff's accident was not survivable, even citing auto death statistics. These statements prejudiced the Plaintiff and created jury confusion, as the most significant allegation in this case is that Mr. Kominar was improperly intubated and died as a result. Without a doubt, the Court's previous ruling on motion *in limine* excluded any and all such testimony. Trial Tr. Vol. 2, May 10 2005, at pp. 240-241.

This statement to the jury was deliberately introduced in opening statements, during testimony and in closing arguments to establish a theory in the case without proper evidence to support it. Therefore, Plaintiff was prejudiced by the trial court not granting a mistrial in opening statement and after other violations of the motion as described in "Statement of Facts" in Appellant's/Plaintiff's appeal brief.

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

Defendants argue that the Plaintiff waived her objection on this issue by failing to timely object. Plaintiff's counsel did timely object and requested to approach the bench to discuss the particular question and answer. This objection dealt with a violation of a motion in limine and Plaintiff's counsel desired to approach the bench to appropriately place his entire objection on the record. The question and answer was

quite dramatic. Defendant pointed the witness directly into an area, which was clearly prohibited by a previous order. The question at issue is a clear violation of a previous motion in limine. Defense counsel asked Officer John Hall if he was surprised that Jason Kominar died in this wreck, to which Officer Hall opined that he was not. Trial Tr. Vol. 8, May 18, 2005, at p. 269.

The motion *in limine* which was violated concerned a previous ruling that John Hall was not an accident reconstructionist and could not testify to whether Plaintiff could have survived this collision. Trial Tr. Vol. 8, May 18, 2005, at p. 278. Defendants argue that John Hall could testify regarding the survivability of the accident based on his opinion as a layperson pursuant to Rule 701(1) of the West Virginia Rules of Evidence. No matter how the Defendant attempts to dance around this issue in an effort to introduce such evidence, the evidence is still a violation of the previous court's motion *in limine*. The cause of the accident, the dynamics of the accident, as well as any opinions Mr. Hall opined from his investigation, including the cause of Mr. Kominar's death, were clearly inadmissible.

As mentioned in Plaintiff's previous brief, prior to giving this opinion, Mr. Hall performed a pre-accident investigation and developed opinion concerning the dynamics of the accident. From that investigation, Mr. Hall developed his opinions regarding Mr. Kominar's chance of survivability from the accident. Mr. Hall admitted he was not qualified to render such opinion evidence. He then, by the question posed to him by defense counsel, revealed his opinions regarding Mr. Kominar's survivability of the accident derived from his investigation to the jury during his trial testimony.

This testimony clearly violated the Court's previous motion *in limine*.

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

In the case at hand, the Defendant deliberately solicited the testimony of Mr. Hall, there is no argument by Defendant that the question posed did not intend to illicit such testimony from the witness. This testimony was not simply a lay witness opinion. The opinion was undoubtedly based upon his experience as a police officer that had investigated many traffic fatalities, but rather his investigation of Mr. Kominar's actual accident.

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

severity of the accident.

The testimony solicited from Mr. Hall was inadmissible pursuant to a previous motion *in limine* and highly prejudicial to the Plaintiff. Therefore, a new trial is warranted based upon this violation.

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

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

In the case at hand, Defendants offered four (4) days of duplicative testimony all calculated to exonerate all Defendants. Defendants admit in their response briefs that each and every expert called to testify by the Defendants testified that none of the Defendants deviated from the standard of care. Specifically, all six experts called to testify on behalf of the Defendants opined that neither the EMTs nor Dr. Zamora

deviated from the standard of care in this case. In fact, these six defense experts testified that the care rendered to Jason Kominar exceeded the standard of care. Trial Tr. Vol. 6 at pp. 91, 128, 183, 184; Trial Tr. Vol. 7, May 17, 2005 pp. 85, 196, 206, 218, 252, 274, 275; Trial Tr. Vol. 8, May 18, 2005, at p. 83.

In this case, the cumulative evidence was colossal, since each expert was testifying on behalf of every Defendant. The jury heard the same testimony delivered through six medical experts on the defense side. Defendants called: (1) Dr. Jeffery Young, a trauma surgeon; (2) Dr. David Livingston, a trauma surgeon; (3) Dr. David Seidler, an expert in emergency medicine; (4) Dr. Stephen Stapczynski, an expert in emergency medicine; (5) Dr. Roger Barkin, an expert in emergency medicine; and (6) Dr. James Morse, a radiologist. This massive amount of identical testimony was extremely prejudicial to the Plaintiff. The jury heard the same opinions six different times by six different experts on the Defendants behalf. The experts involved testified not only to standard of care but also to causation. Trial Tr. Vol. 6 at pp. 91, 128, 183, 184; Trial Tr. Vol. 7, May 17, 2005, at pp. 85, 196, 206, 218, 252, 274, 275; Trial Tr. Vol. 8, May 18, 2005, at p. 83. Plaintiff is, therefore, entitled to a new trial based on the unduly amount of cumulative evidence during this trial.

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

The Court erred in failing to permit Plaintiff to call James Spalding on the issue of whether there were any leaks of embalming fluid at the time of Jason Kominar's embalming. Trial Tr. Vol. 7, May 17, 2005, at pp. 19, 22. Mr. Spaulding was the

embalmer for Jason Kominar. As an embalmer with years of experience, Mr. Spaulding was capable of rendering opinions concerning Mr. Kominar's embalming. If the court had allowed Mr. Spaulding to testify, he would have testified that there was no major artery lacerations noted upon embalming; that normally, if there were any such major lacerations, embalming fluid would leak into the body cavity and could be detected by him. *Id.* This testimony was clearly admissible and relevant inasmuch as the defense experts indicated that Mr. Kominar had totally bled out before the ambulance arrived at the scene.

Under W. Va. R. Evid. 701, the opinion testimony of a lay witness is admissible. The opinions are limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue. *Id.* The West Virginia Supreme Court in State v. Jameson, addressed the issue wherein the state in the trial court did not attempt to qualify an investigator for the fire department and an assistant state fire marshal as expert witnesses. The Court held that through their experience, it was apparent that they were in a position to have peculiar knowledge about "poor patterns" that jurors would not ordinarily have and thus their testimony was admissible. State v. Jameson, 194 W. Va. 561, 461 S.E.2d 67 (1995).

Defendants argue that Mr. Spaulding is not qualified to give such an opinion, regardless if it is considered a lay opinion or an expert opinion. In applying the West Virginia Rules of Evidence and relevant case law, Mr. Spaulding opinions were clearly and rationally based upon his perception of Jason at the time of his embalming.

Without a doubt, Mr. Spaulding was clearly qualified as mentioned above. In addition, his testimony regarding the embalming would have been helpful to clearly understand his testimony as well as a determination of a fact in issue.

The defense in this case, brought forth by each Defendant, focused on the fact Jason could not survive the blunt trauma arrest with his severe internal injuries. Trial Tr. Vol. 6, at pp. 183, 199; Trial Tr. Vol. 7, May 17, 2005, at pp. 103, 104, 110, 142, 208, 228, 230, 276, 277, 305, 311. Each medical expert called to testify on behalf of the Defendants all testified that the cause of Mr. Kominar's death was blunt trauma. *Id.* Mr. Spaulding's testimony would have contradicted the Defendant's theories that Jason bled out from his injuries and therefore posed a question of fact for the jury. Mr. Spaulding's testimony regarding his embalming methods and what embalming procedures he performed of Jason was clearly relevant.

Rule 402 of the West Virginia Rules of Evidence states that "all relevant evidence is admissible." Mr. Spaulding's testimony was clearly admissible. In addition, Plaintiff's experts relied upon Mr. Spaulding's deposition testimony in forming some of their opinions. The Court erred in placing limitations on Mr. Spaulding's testimony and therefore the Plaintiff is entitled to a new trial.

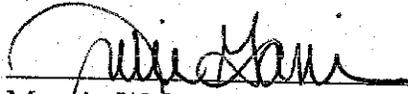
CONCLUSION

For all the foregoing reasons as well as reasons set forth in Plaintiff's appeal brief previously filed, Plaintiff respectfully prays this Honorable Court reverse the circuit court's ruling which denied Plaintiff's Motion to Set Aside the Verdict and Award a New Trial.

Respectfully submitted,

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

By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 33215

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

Plaintiff/ Appellant,

vs.

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

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

Defendants/ Appellees.

CERTIFICATE OF SERVICE

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

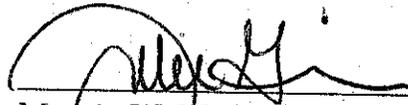
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