

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 HEALTH MANAGEMENT ASSOCIATES, INC.,
D/B/A WILLIAMSON MEMORIAL HOSPITAL**

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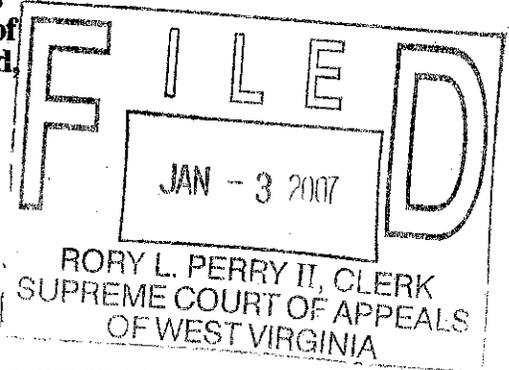


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**KIND OF PROCEEDING AND NATURE
OF RULING IN THE LOWER COURT**

This Appeal arises from a medical malpractice case from the Circuit Court of Mingo County. The Appellant alleges that Appellees in this proceeding, committed medical negligence as a result of treatment provided to Appellant's decedent, Jason Kominar in relation to a motor vehicle accident which occurred on July 12, 1997. The Appellant filed her complaint on July 19, 1999. This case went to trial in May of 2005 and resulted in a verdict for all Appellees. On February 2, 2006, the trial court denied Plaintiff's Motion to Set Aside the Verdict and for a New Trial. Appellant filed a Petition for Appeal that this Court granted on November 6, 2006. Appellant filed her Appeal Brief (hereinafter "Brief") on December 1, 2006.

STATEMENT OF FACTS

On July 12, 1997, Jason Kominar (hereinafter "Kominar"), who was 22 years old, presented to the emergency room at Williamson Memorial Hospital (hereinafter "WMH"), by ambulance transport, following a high-speed single vehicle accident that occurred on Route 119 in Mingo County, West Virginia. Tr. Vol. 2, pp. 57, 95. Kominar arrived at WMH at 9:19 a.m., thirty-nine minutes after the accident occurred at approximately 8:40 a.m. Tr. Vol. 3, p. 158; Tr. Vol. 8, p. 259. When the ambulance personnel (hereinafter sometimes referred to as "MAS") arrived at the accident scene, Kominar had no pulse or blood pressure and was not breathing. Tr. Vol. 3, pp. 187-88. In addition, Kominar was not moving and was unresponsive to pain and other stimuli. *Id.* pp. 222, 228. The ambulance personnel aggressively attempted to resuscitate Kominar at the accident scene and enroute to the emergency room, that included CPR, intubation, mechanical ventilation, and several doses of cardiac stimulating drugs. *Id.* pp. 199-206. However, Kominar still did not have a blood pressure, or pulse, and was not breathing when he arrived at WMH. *Id.* p. 90.

The decedent's mother, Mary Ann Kominar, filed suit against Appellee WMH alleging independent acts of negligence apart from the alleged negligence of Williamson Memorial's emergency medicine physician, Pelagio Zamora, M.D., including negligence of the nursing staff for their alleged failure to detect Appellee Mingo County Ambulance Services's (hereinafter "MAS") alleged improper intubation. Brief at 1-2. Furthermore, Appellant alleged that Dr. Zamora and the WMH nursing staff failed to perform other appropriate medical procedures on the decedent. Id.

The pretrial conference occurred on May 2, 2005. Rec. at 5, p. 2. During the hearing, the trial court and the parties discussed the number of peremptory challenges each party would receive. Id. The trial court permitted each defendant three (3) peremptory strikes, due to the diverse defenses and potentially antagonistic positions of the defendants. Id. However, counsel for WMH offered to waive its separate set of peremptory strikes if Appellant would agree to dismiss her independent allegations of negligence against WMH. Hearing Transcript p. 12. Appellant declined WMH's offer. Id. The following day, Appellant filed a motion requesting equal peremptory strikes between the Appellant and the combined Appellees. Rec. at 5, p. 2. Following review of the Appellant's Motion and the Appellees' responses the court again heard argument concerning the issue of peremptory strikes. Id. The trial court again thoroughly analyzed the positions of the parties and determined that each Appellee should be permitted a separate set of peremptory strikes. Id.

During trial, Appellant continued to pursue her divergent theories against Appellees. Appellant's first expert witness, Dr. Stephen Holbrook, testified to inconsistencies in the evaluations that were documented by Dr. Zamora and WMH Nurse Traci Booth after Kominar arrived at WMH. Tr. Vol. 4, pp. 51-52. Although Appellant's counsel attempted to elicit opinions from Dr. Holbrook to pursue Appellant's theory that the WMH nursing staff committed acts of negligence, independent of the alleged negligence of Dr. Zamora, Appellant voluntarily withdrew those claims during Dr.

Holbrook's direct examination. *Id.* at 62. Therefore, at the close of the plaintiff's case-in-chief, the trial court granted WMH's unopposed Motion for Judgment as a Matter of Law regarding any independent theories of negligence against WMH. Tr. Vol. 7, p. 52. As a result, the dynamics of the defense between WMH and Dr. Zamora changed, as the only remaining allegations against WMH were vicarious for the alleged negligence against Dr. Zamora. However, Appellant continued to pair WMH and MAS against each other with regard to possession and retention of the hospital's copy of the ambulance run sheet and the EKG strips allegedly produced during the ambulance transport. Tr. Vol. 3, p. 154.

Prior to trial, there were numerous evidentiary rulings relevant to this Appeal, some of which are memorialized in the Order Regarding Outstanding Motions, entered on February 14, 2002. Rec. at 2. In response to Appellant's Motion *in Limine* regarding Officer John Hall's testimony, the trial court determined that the opinions of John Hall, the investigating police officer at the accident scene, were not relevant about the cause of the accident or any contributory negligence on the part of the decedent in causing the accident. *Id.*, Order Regarding Outstanding Motions, para 26. However, the trial court specifically found it appropriate for Officer Hall to testify, based on his experience as a police officer, about his personal observations of the decedent and the accident scene. Tr. Vol. 2, p. 55. The court also denied Plaintiff's Motion to Preclude Statistical Evidence as Basis for the Cause of Death, finding that "statistical evidence regarding blunt trauma arrest and fatalities is highly relevant to significant theories in this case" and "may be presented providing a proper foundation is laid" Rec. at 2, Order Regarding Outstanding Motions, para. 9.

The evidence was undisputed that Kominar suffered blunt trauma as a result of the accident. Tr. Vol. 4, p. 86. Appellant's experts admitted that the blunt trauma injuries that Kominar sustained in the accident, included, but were not limited to a hemothorax (blood within the chest cavity), shift of

the position of Kominar's heart and other internal organs within his chest, a head injury, a severely fractured leg and/or pelvis and numerous external cuts and bruises. Id. Tr. Vol. 8, p. 210. Although WMH contacted the State Medical Examiner regarding a postmortem examination of Kominar's body, the medical examiner determined an autopsy was unnecessary, based on the information the police department provided to the medical examiner regarding the accident. Tr. Vol. 8, p. 215.

Appellant also admitted that Kominar died as a result of the accident. Tr. Vol. 4, p. 211. However, Appellant contended that the primary cause of Kominar's death, from the injuries he suffered in the accident, was due to Kominar's improper intubation by the MAS personnel, that caused Kominar's breathing tube to be placed into his esophagus, leading to his stomach, rather than into his lungs. Id. According to Appellant's expert, the improper intubation that occurred twenty-two minutes before Kominar arrived at WMH, resulted in very minimal air into Kominar's lungs and a lack of oxygenation to his brain, heart, and other organs. Id.

Appellant called MAS Paramedic, James York (hereinafter "York") as a witness. York testified that he showed "a piece" of Kominar's EKG monitoring strip from the ambulance transport to the WMH emergency department staff. Tr. Vol. 3, p. 237. York and MAS EMT Don Spaulding, admitted that, typically, any EKG strips produced during ambulance transport were attached to the original copy of the ambulance run sheet, rather than to any copies of the run sheet. Id. Tr. Vol. 8, p. 26. MAS maintained the original run sheet that was available at trial. Tr. Vol. 8, pp. 306-07.

Although York testified that EKG strips were printed during Kominar's transport, MAS Paramedic Doug Goolsby did not recall any EKG strips printed during Kominar's transport. Tr. Vol. 6, p. 175.

In addition, although York believed that he left the hospital's courtesy copy of the ambulance run sheet at WMH at the time of Kominar's presentation to WMH, there was no evidence that the run sheet, or any ambulance EKG strips were ever sent to WMH's medical records department to be made

part of Kominar's permanent record. Tr. Vol. 6, p. 252. Appellant also called Judy Sanger who had been Medical Records Director at WMH for twenty-seven years. Tr. Vol. 7, pp. 7-8. Ms. Sanger testified that WMH was only required to keep medical records that WMH generated from the time of a patient's admission through the time of their discharge. Tr. Vol. 6, p. 251, Tr. Vol. 7, p. 8. WMH was not required to maintain any records from an outside source, including MAS. Tr. Vol. 6, p. 252.

WMH continued CPR on Kominar from the time of Kominar's arrival at WMH at 9:19 a.m. until the CPR was discontinued at 9:30 a.m. Tr. Vol. 3, p. 103. During WMH's CPR, Kominar's heart pattern was monitored on two monitors. *Id.* at 41. Typically, during a Code at WMH, portions of the heart rhythm are printed on paper when CPR is paused long enough to evaluate the patient's own heart rhythm. Tr. Vol. 8, p. 175. However, so that the nursing staff would not have to stop what they were doing during Kominar's resuscitation and press the monitor button to print portions of the heart pattern between CPR compressions, Dr. Zamora ordered the nurses to allow the monitor paper to run continuously and then to evaluate the paper strips and preserve the "best" representations of Kominar's heart rhythm for the medical record. Tr. Vol. 3, p. 42. Accordingly, Kominar's record contained five portions of monitoring strips, each representing approximately six seconds of heart rhythm. Tr. Vol. 8, p. 175. The Appellant's two liability experts, as well as Appellant's causation expert, all testified that the EKG strips that were preserved showed electrical activity of Kominar's heart that provided sufficient evidence for the experts to opine that Kominar was viable at the time of his arrival to WMH. Tr. Vol. 4, pp. 80-83, 215, Tr. Vol. 5, p. 15.

At trial, Appellant presented a total of three expert witnesses: Dr. Stephen Holbrook, Dr. Alex Zakharia, and Dr. Peter Bernad. Dr. Holbrook's specialty was emergency medicine; Dr. Zakharia's specialty was chest trauma surgery and Dr. Bernad was a neurologist. Tr. Vol. 4, pp. 18, 188, Tr. Vol.

5, pp. 6-7. Appellant was also permitted to call a fourth expert, Dr. Lewis Rothman, a radiologist, to testify as a rebuttal witness. Tr. Vol. 8, p. 295.

MAS' expert witnesses were Dr. David Seidler, Dr. Jeffrey Young, Kenneth Blake and Dr. William Morse. Dr. David Seidler's specialty was emergency medicine. Tr. Vol. 8, p. 79. Dr. Seidler also worked with paramedics as the director for a paramedic program in West Virginia. *Id.* at 80. Kenneth Blake was a document examiner who was called to testify regarding the alterations that were made to the original ambulance run sheet. *Id.* p. 63. Dr. Morse, a radiologist, was the only witness who was asked to testify on behalf of all defendants. Tr. Vol. 7, p. 81. Dr. Morse was called to address 1) whether Kominar was correctly intubated by the ambulance personnel, and 2) whether the chest film that was taken of Kominar at WMH demonstrated life-threatening injuries and proper placement of Kominar's endotracheal tube. *Id.* at 81-82. MAS also called Dr. Jeffrey Young, a general surgeon and Director of the Trauma Center at the University of Virginia. *Id.* p. 268. In addition, Dr. Young had experience as an EMT and paramedic. *Id.* at 270. Therefore, Dr. Young was specially qualified to testify as to whether the MAS emergency medical providers met the standard of care with regard to Kominar's treatment. *Id.* at 274-75.

Appellee Dr. Zamora called two expert witnesses to testify. Dr. Steven Stapczynski an emergency medicine physician, was specifically retained by Dr. Zamora to testify as to whether Dr. Zamora met the standard of care in treating Kominar. Tr. Vol. 6, pp. 76, 88. Dr. Zamora also called Dr. David Livingston, a trauma surgeon and critical care specialist, to rebut Dr. Zakharia's criticisms. Tr. Vol. 7, pp. 185-86. As WMH was vicariously liable for the acts of Dr. Zamora at the time that WMH presented its evidence, WMH called Dr. Roger Barkin, an emergency medicine specialist, to put on WMH's defense of Dr. Zamora. Tr. Vol. 9, p. 27.

Immediately prior to commencement of opening statements, a bench conference was held regarding some of the pretrial motions and to clarify what was permissible for counsel's opening statements. Tr. Vol. 2, pp. 50-65. The court specifically noted, "We're going to see the 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." Id. at p. 55. In addition, regarding references in the accident report and records characterizing the accident as a "high speed impact", the court stated that "[f]rom a police officer that has some expertise, he could say that. Even a passerby can say it was going fast or going slow. But nobody is going to give it miles per hour." Id. at p. 56.

During Appellant's opening statement, Attorney Marvin Masters discussed the testimony of bystanders who observed the course of the decedent's vehicle as it approached the rock cliff before impact and the bystanders' observations of the decedent before the ambulance personnel arrived. Id. pp. 95-97. During the opening statement made on behalf of MAS, Attorney Victor Flanagan showed the jury a photograph of the location of the accident scene, including the highway Kominar crossed and the rock embankment where the collision occurred. Id. at 110. MAS also showed the jury photographs of the decedent's truck following the collision and discussed Officer Hall's personal observations of the accident scene, including observations of the decedent and the decedent's vehicle. Id.

During Dr. Zamora's opening statement, Attorney Jeffrey Wakefield showed the jury photographs depicting the front of the decedent's truck. Id. at 129. Mr. Wakefield also previewed the testimony of an eyewitness who did not see Kominar's brake lights come on, as he observed the vehicle, immediately before the accident. Id.

WMH gave its opening statement last. Id. at 150. Attorney William Mundy showed the jury the same photographs of the front of the decedent's vehicle that was previously shown to the jury in Co-Appellees' opening statements. Id. at 153. WMH also showed the jury a diagram contained on the accident report that Officer Hall prepared as a part of his duties as the investigating officer. Id. at 152-153. The diagram showed the course of the decedent's vehicle, prior to the collision, that was consistent with the bystander's testimony. Id. Furthermore, Mr. Mundy discussed evidence the jury would hear of statistics regarding traffic accident fatalities in 1997. Id. at 155.

Officer John Hall, the investigating officer for Kominar's accident, testified during Dr. Zamora's case. Tr. Vol. 8, p. 256-57. Officer Hall had been a patrolman for the City of Williamson for fourteen years and was involved in investigating hundreds of accidents. Id. at 256, 260, 268. Officer Hall's accident report was shown to the jury during his testimony and Officer Hall testified to the contents of that report regarding his investigation. Id. at 256-59. Officer Hall discussed statements he took, as part of his official duties, from witnesses at the accident scene, and he also testified regarding his observations of Kominar's vehicle and the accident scene, in general. Id. at 260-69. With regard to Kominar's truck, Officer Hall testified regarding his personal observations of the truck, but offered no opinions as to the cause of the accident, and did not express an opinion as to whether Kominar was at fault in causing the accident. Id. at 256-77.

The trial court's Time Frame Order required written disclosures for expert testimony. Appellant disclosed Greg Spaulding, a mortician, as a lay witness, but never disclosed Mr. Spaulding as an expert or provided any disclosure of any expert opinions that Mr. Spaulding would offer at trial. Mortician Spaulding was permitted to testify as a lay witness, based on his personal

observations of Kominar's body. Id. p. 162. However, Mortician Spaulding was prohibited from testifying as a medical expert regarding the nature of any of Kominar's internal injuries. Id.

Immediately prior to trial and at various stages during the trial, Appellants requested permission to introduce postmortem photographs taken of Kominar's body, showing injuries to Kominar's face and chest. Id. pp 151-54. The court denied Appellees' requests, finding that there was sufficient testimony of the injuries, so that "gruesome" photographs were not necessary to demonstrate those injuries. Id. p. 153. During deposition testimony, Mortician Spaulding recalled that Kominar sustained only minor facial injuries from the accident. The trial court made Appellant aware that if Spaulding, or any witness, minimized Kominar's injuries, so that the testimony contradicted the injuries shown in the photographs the postmortem pictures that the Appellees wanted to introduce, would likely become relevant for impeachment purposes. Id. p 156. Appellant never called Mortician Spaulding to testify and never asked permission of the court to read Mortician's Spaulding's deposition testimony to the jury. Id. at 163.

During trial, Appellant wanted to show the jury WMH's discovery responses wherein WMH identified Michael Jude and Cathy Cline as respiratory therapists who were involved in Kominar's treatment on July 12, 1997. Tr. Vol 5, p. 120. The court permitted Appellant to call Mr. Jude and Ms. Cline to testify and to ask them: 1) whether they were employed at WMH on July 12, 1997; 2) whether they were on duty that day; 3) whether they assisted in the treatment of Kominar; and 4) whether either of their names appeared on the medical record as having been involved in Kominar's treatment. Id. at 125. Both Mr. Jude and Ms. Cline were expected to testify, if called as witnesses, that they had no independent memory of being involved in Kominar's treatment, although according to WMH's scheduling records, they were on duty on July 12, 1997. Tr. Vol 7, at 33. In addition, the therapists were expected to testify that normally in a "Code", or resuscitation, in the

emergency department, members of the respiratory therapy treatment were called to assist with CPR. Id. Appellee WMH was also willing to stipulate that neither Ms. Cline nor Mr. Jude's names, nor any other respiratory therapists' names appeared on Kominar's medical record. Id. at 34. In addition, Dr. Zamora testified during Appellant's cross examination, that respiratory therapists were involved in Kominar's resuscitation efforts, but that Kominar's record did not identify the names of any therapists. Tr. Vol 3, p. 25.

Appellant also asked to read to the jury WMH's response to Appellant's June 2000 request for a copy of Kominar's medical records, in which Kominar's triage sheet was omitted. Id. at 25, 35. The triage sheet was produced to Appellant in 2002 when the omission was discovered. Id. at 26; Tr. Vol. 5, p. 137.

RESPONSE TO ASSIGNMENTS OF ERROR

- A. THE CIRCUIT COURT DID NOT ERR BY PERMITTING EACH APPELLEE A SEPARATE SET OF PEREMPTORY CHALLENGES, WHERE THE APPELLEES HELD POTENTIALLY ANTAGONISTIC POSITIONS AND THE APPELLANT WAIVED HER RIGHT TO OBJECT TO WILLIAMSON MEMORIAL HOSPITAL'S SEPARATE CHALLENGES.**
- B. APPELLANT'S INSTRUCTION ON SPOILIATION OF EVIDENCE WAS NOT SUPPORTED BY THE EVIDENCE AND THE CIRCUIT COURT DID NOT ERR BY REFUSING APPELLANT AN ADVERSE INFERENCE INSTRUCTION REGARDING THE ALLEGED LOSS, ALTERATION AND/OR DESTRUCTION OF MEDICAL RECORDS.**
- C. THE CIRCUIT COURT DID NOT ERR BY DENYING THE APPELLANT'S REQUEST TO READ SOME OF WMH'S DISCOVERY RESPONSES TO THE JURY.**
- D. THE CIRCUIT COURT PROPERLY DENIED APPELLANT'S REQUEST FOR A MISTRIAL, AS COUNSEL FOR DID NOT VIOLATE ANY ORDER AND APPELLANT "OPENED THE DOOR" TO DISCUSSING PRE-ACCIDENT EVENTS.**
- E. THE CIRCUIT COURT DID NOT ERR BY DENYING THE APPELLANT'S REQUEST FOR A NEW TRIAL AS DEFENSE COUNSEL DID NOT VIOLATE ANY MOTION *IN LIMINE*.**

- F. **THE CIRCUIT COURT DID NOT ERR BY ALLOWING APPELLEES TO HAVE SEPARATE EXPERTS IN THE MEDICAL SPECIALTIES OF APPELLANT'S EXPERTS.**
- G. **THE CIRCUIT COURT DID NOT ERR IN DENYING THE APPELLANT'S REQUEST TO ALLOW A LAY WITNESS TO TESTIFY REGARDING MEDICAL CAUSATION ISSUES.**

STANDARD OF REVIEW

"As long recognized, this Court's standard of review concerning a ruling upon such a motion [for a new trial] is whether the circuit court abused its discretion." Price v. Charleston Area Med. Ctr. Inc., 217 W.Va. 663, 668, 619 S.E.2d 176, 181 (2005) (internal citations omitted). "A trial judge should rarely grant a new trial. Indeed, a new trial should not be granted unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done." Morrison v. Sharma, 200 W. Va. 192, 194, 488 S.E.2d 467, 469 (1997) (internal citations omitted).

"Thus, in reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review." Williams v. Charleston Area Med. Ctr., 215 W.Va. 15, 18, 592 S.E.2d 794, 797 (2003) (internal citations omitted).

LEGAL ARGUMENT

- A. THE CIRCUIT COURT DID NOT ERR BY PERMITTING EACH APPELLEE A SEPARATE SET OF PEREMPTORY CHALLENGES, WHERE THE APPELLEES HELD POTENTIALLY ANTAGONISTIC POSITIONS AND THE APPELLANT WAIVED HER RIGHT TO OBJECT TO WILLIAMSON MEMORIAL HOSPITAL'S SEPARATE CHALLENGES.**

The Appellant's first alleged error is that each of the Appellees was permitted three (3) peremptory strikes, for a total of nine (9) combined strikes, compared to the Appellant's three (3) strikes. Brief at 14. The parties briefed and argued the issue before trial commenced and the trial court found, based on the briefs and arguments, prior to jury selection, that each defendant was entitled to a separate set of peremptory challenges. Rec. at 5, Order Denying Plaintiff's Motion To Set Aside Verdict Or For A New Trial, p. 2.

Rule 47 of the West Virginia Rules of Civil Procedure, with respect to multiple defendants, authorizes the trial court to allow additional peremptory challenges over and above the two (2) peremptory strikes or challenges typically allowed for each side and also authorizes the trial court to permit the peremptory challenges to be exercised separately in the case of multiple defendants. W.Va. R. Civ. P. 47(b).

The trial court properly considered all of the information available to it, prior to presentation of evidence at trial, regarding the number of peremptory challenges each party should receive. First, during the Pre-Trial Conference held on May 2, 2005, the trial court heard oral argument regarding the number of peremptory challenges that would be granted to each party. Rec. at 5, Order Denying Plaintiff's Motion To Set Aside Verdict Or For A New Trial, p. 2. At that hearing, counsel for WMH informed Appellant's counsel that if Appellant would dismiss the allegations of independent acts of

negligence asserted against any agent or employee of WMH, other than for the allegations of vicarious liability asserted for the alleged negligence of Pelagio Zamora, M.D., WMH would not pursue a separate set of peremptory challenges. Hearing Transcript p. 12. Immediately following that hearing, on May 3, 2005, Appellant filed a formal Motion and Memorandum of Law requesting equal peremptory strikes between the Appellant and all Appellees. Id. On May 5, 2005, WMH filed a Memorandum in Opposition to the Appellant's request for equal peremptory strikes. Id.

On the morning of May 9, 2005, prior to selection of the jury, after the trial court reviewed the written pleadings, the trial court again heard oral argument regarding the issue of peremptory strikes. Id. Based on the information available at that time, and applying that information to the factors this Court set forth for consideration in Tawney v. Kirkhart, 44 S.E.2d 634 (W.Va. 1947) the court determined that:

- a) the plaintiff alleged alternate theories and claims against each of the defendants;
- b) the defenses asserted were divergent and potentially antagonistic; and
- c) there was evidence that indicated that some of the defense experts could testify that there had been an improper intubation.

Rec. at 5, Order Denying Plaintiff's Motion To Set Aside Verdict Or For A New Trial, p. 2.

Accordingly, the trial court properly analyzed and denied the Appellant's Motion for equal strikes and permitted each party to have a separate set of strikes.

Moreover, Appellant presented evidence at trial in an attempt to pit one defendant against the other. At an early stage of the trial, Appellant's expert, Dr. Stephen Holbrook, testified that the ambulance records and the hospital records were inconsistent regarding the evaluation of Kominar's breath sounds. Tr. Vol. 4, pp. 45-46. Furthermore, Dr. Holbrook attempted to pair WMH and Dr. Zamora against each other, wherein Dr. Holbrook testified to the apparent inconsistencies that Dr.

Zamora and WMH Nurse Traci Booth documented regarding the decedent's evaluation at WMH. Id. at 51. In an apparent attempt to pursue Appellant's independent theories of negligence against WMH, Appellant's counsel asked Dr. Holbrook what Nurse Booth should have done, based on her evaluation. Id. at 52. Appellant then voluntarily withdrew the question and also chose to withdraw the independent theories of negligence that were previously asserted against WMH. Id. pp 53, 62; Tr. Vol. 7, pp. 51-52. Accordingly, at the close of the Appellant's evidence, the trial court granted WMH's unopposed Motion for Judgment as a Matter of Law regarding any independent theories of negligence. Tr. Vol. 7, p. 52. From the time that Appellant decided not to pursue any theories of independent negligence against WMH, regarding any alleged acts or omissions of negligence committed by the nurses or any other agents or employees of WMH, any evidence pertaining to that issue was irrelevant and the only theory against WMH was vicarious liability for the alleged negligence of Dr. Zamora. Therefore, there was no reason for WMH and Dr. Zamora to be at odds with each other during the remainder of the trial.

If Appellant had continued to pursue her independent theories of negligence against WMH, that were viable theories at the time the court decided whether to give Appellees separate strikes, it is quite likely that Dr. Zamora and the WMH nurses would have pointed fingers at each other regarding whose responsibility it was to perform the duties of which Appellant was critical. The nurses would likely say that it was the doctor's responsibility to order whatever treatment and medications were appropriate for Kominar and Doctor Zamora could blame the nurses for failing to provide sufficient information on which to base his treatment order. However, none of that testimony was relevant after Appellant withdrew her independent allegations, before any of Appellant's experts could offer testimony to support Appellant's theory of independent negligence against WMH.

Nonetheless, there was some antagonism and finger-pointing between MAS and WMH at trial regarding the possession and retention of the hospital's copy of the EMS run sheet and the EKG strips generated during the ambulance transport. Appellant repeatedly "played" the ambulance personnel against WMH, with regard to maintenance of those documents. MAS Paramedic James York testified that he completed the EMS run sheet and left a copy of that document at WMH. Tr. Vol. 3, p. 154. Furthermore, York testified that there was only one copy of the EKG strip generated during the ambulance transport and that he provided that EKG strip to WMH. *Id.* at 155. Accordingly, it was necessary for counsel for WMH to try to discredit York's testimony regarding that issue. *Id.* pp. 235-37.

In addition, Appellant alleged that Appellee MAS inappropriately intubated Kominar, into his esophagus and negligently failed to detect and remedy that situation. Tr. Vol. 4, p. 55. The Appellant further alleged that the Appellees, Dr. Pelagio Zamora and Williamson Memorial Hospital, failed to appropriately detect the alleged negligence of the co-Appellee ambulance service and failed to appropriately treat the decedent. *Id.* at 89-90. The court correctly determined that Dr. Zamora and WMH could take the position that if Appellant was correct that MAS improperly intubated Kominar, then regardless of the extent of the injuries Kominar suffered in the accident, Kominar was so deprived of oxygen that by the time of his arrival at WMH some 22 minutes later, that Kominar was not viable. Tr. Vol. 7, p. 318.

Significantly, Appellant conceded that each defendant had separate defenses, that required Appellant to prove a different case against each defendant, in discussing the apportionment of time for each party's closing argument. Tr. Vol. 9, p. 131. Therefore, the court allowed the Appellant an hour for closing argument, and an additional fifteen minutes for rebuttal, compared to only thirty minutes provided to each Appellee for closing arguments. *Id.* at 132, 134. Accordingly, the court did not err in

finding that there were divergent theories of defense at trial. Id. More importantly, in reviewing the positions of the parties and the allegations asserted against each party before trial commenced, the court found that there was sufficient information to demonstrate that the interests of each of the parties were sufficiently diverse and antagonistic to allow each party a separate set of peremptory challenges. Rec. at 5, Order Denying Plaintiff's Motion To Set Aside Verdict Or For A New Trial, p. 2.

Furthermore, as Appellant refused WMH's offer to forego any separate strikes, in exchange for dismissal of the independent allegations of negligence asserted against WMH, Appellant waived any objection to WMH's separate strikes. Therefore, Appellant's first assignment of error is without merit as to this Appellee.

Appellant relies on this Court's recent decision in Price v. Charleston Area Medical Center, Inc., 217 W.Va. 663, 619 S.E.2d 176 (2005) in support of her argument that the trial court erred in allowing each defendant a separate set of peremptory strikes. Brief at 14-15. The Price opinion was published shortly after the conclusion of the trial in this case. Significantly, in reversing the trial court in Price, this Court was influenced by the fact that the trial court did not conduct a proper investigation regarding the interests of the parties, prior to allowing each party a separate set of strikes. Price, 619 S.E.2d at 185. However, here, the trial court thoroughly and properly evaluated the issue of peremptory strikes, on two separate occasions, and determined that each defendant was entitled to a separate set of peremptory strikes. Rec. at 5, Order Denying Plaintiff's Motion To Set Aside Verdict Or For A New Trial p. 2.

Furthermore, citing to the previous West Virginia cases of Tawney, supra, and Horchler v. Van Zandt, 199 S.E. 65 (W.Va. 1938), the Price Court reiterated that "a fair reading of Rule 47(b) suggests that it provides a circuit court with the degree of flexibility or discretion required in determining the number of additional peremptory challenges to be allowed in a trial involving multiple parties where

the interests of co-plaintiffs or co-defendants are antagonistic or hostile”. Price at 668. The Price Court also relied on the case of Sommerkamp v. Linton, 114 S.W.3d 811 (Ky. 2003) and found it significant in that case that:

The trial judge held a pretrial conference on the issue of peremptory challenges and made a specific finding that antagonism existed between the defendants. The trial judge based his decision on a number of factors that weighed in favor of antagonism. The defendants were charged with separate acts of negligence, were represented by separate counsel and had individual theories of the case and apportionment of fault issues.

Price at 670-671, citing Sommerkamp, 114 S.W.3d at 811. Accordingly, the Price Court held that where “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 showing that separate peremptory challenges are necessary for a fair trial.”

Price at 671 (emphasis added).

In addition to considering the stated positions and assertions of counsel and whether the record indicates that the respective interests are antagonistic or hostile, the Price Court held that the trial court should also consider 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 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. In considering the plaintiff’s Motion to Set Aside the Verdict, or For a New Trial, the trial court reconsidered its decision to allow each defendant a separate set of peremptory strikes. Rec. at 5, Order Denying Plaintiff’s Motion To Set Aside Verdict Or For A New Trial p. 2. The court concluded that

its analysis under Price was similar to its initial analysis under the Tawney standards. Id. at 3. In applying the Price analysis to the same evidence and information that the court had available to it before trial commenced, the court concluded:

- a) the defendants were charged with separate acts of negligence or wrongdoing;
- b) the alleged negligence or wrongdoing occurred at different points in time;
- c) if negligence was found, it could have been subject to apportionment by the jury, if the jury found that something was done improperly by the defendant ambulance service, that could have been corrected if noticed or observed by the defendant emergency room nurses and the defendant doctor;
- d) at the time of jury selection, the defendants did not share a common theory of defense; and
- e) there were no cross claims filed.

Id. Accordingly, the trial court determined that it would have allowed each of the defendants a separate set of peremptory strikes, had it applied the Price factors to its analysis, rather than the Tawney factors. Id. Moreover, the trial court determined that if this Court found any error in its analysis, any error was harmless and Appellant was not unfairly prejudiced “considering the totality of the circumstances and the evidence presented.” Id. at 2-3.

In further support of Appellee WMH’s argument regarding the number of peremptory challenges granted to each party, WMH hereby adopts the arguments made on behalf of Appellee Pelagio Zamora, M.D., regarding the extra-jurisdictional decisions on this issue. See, Dr. Zamora’s Response Brief, pp. 12-13.

Appellant’s entire argument regarding peremptory strikes is based on what ultimately developed during trial. In fact, Appellant asserts that “when a claim is made by a party that they are hostile and conflicting the party should be held to the representations.” Brief at 17. Appellees responded to the evidence that Appellant presented at trial that ultimately did not require the appellees,

particularly Williamson Memorial Hospital and Dr. Pelagio Zamora, to openly point fingers at each other. However, based on the appellant's allegations before Appellant voluntarily withdrew her independent theories of negligence against WMH, the potential for open finger-pointing existed and the trial court could only make its decision regarding peremptory strikes, based on the pre-trial posture of the case.

Furthermore, it is ludicrous for Appellant to suggest that the trial court should require parties to take a hostile position against each other, when a party does not present sufficient evidence at trial to prove the allegations asserted against another party, as occurred in the case at bar. It was the appellant's duty to present her evidence at trial, so as to prove the allegations made against the appellees, that could have placed the appellees "at odds" with each other. However, the appellant failed to present sufficient evidence to maintain an antagonistic position between the appellees, as evidenced by the judgment as a matter of law that was granted to Williamson Memorial Hospital regarding independent acts of negligence.

Obviously, something changed with regard to the evidence the appellant intended to present at trial and what the appellee actually presented. The Appellant would certainly have accepted WMH's offer to give up its separate set of strikes if Appellant knew that she would not be able to establish a prima facie case against WMH for any alleged independent acts or omission that any of Williamson Memorial Hospital's agents or employees committed, separate from the alleged negligence of Dr. Zamora, or if Appellant knew she was not going to pursue those theories at trial.

Significantly, because Appellant refused WMH's offer to give up its separate set of peremptory challenges and because Appellant failed to present sufficient evidence to support her theory of independent negligence against this Appellee, the Appellant cannot claim that the total number of peremptory strikes given to the Appellees resulted in any unfair prejudice, as to this Appellee. As the

trial court correctly determined, if the ruling concerning the peremptory challenges was incorrect, it was harmless, considering “the totality of the circumstances of the case.”

B. APPELLANT’S INSTRUCTION ON SPOILIATION OF EVIDENCE WAS NOT SUPPORTED BY THE EVIDENCE AND THE CIRCUIT COURT DID NOT ERR BY REFUSING APPELLANT AN ADVERSE INFERENCE INSTRUCTION REGARDING THE ALLEGED LOSS, ALTERATION AND/OR DESTRUCTION OF MEDICAL RECORDS.

The Appellant’s second alleged error is that the trial court erred in refusing to give Appellant’s spoliation instruction. Brief at 17. A trial court has broad discretion in formulating its charge to the jury, as long as the charge accurately reflects the law. Tracy v. Cottrell, 206 W.Va. 363, 370, 524 S.E.2d 879, 886 (1999). Appellant correctly states that the factors that the trial court should consider in determining whether a spoliation instruction is warranted are:

- (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;
- (4) if the party controlled, owned, possessed or had authority over the evidence, the party’s degree of fault in causing destruction of the evidence.

Hannah v. Heeter, 213 W.Va. 704, 584 S.E.2d 560 (2003), citing Syl Pt. 2 Tracy, *supra*.

Significantly, before determining that a spoliation instruction was not warranted, the trial court weighed the evidence, based on the four factors that were first set forth in the Tracy opinion, *supra*.

Tr. Vol. 8, pp. 298-301. The evidence presented was as follows:

i. Mingo County Ambulance Service Run Sheet

This Appellee defers to the Response filed on behalf of Co-Appellee Mingo County Ambulance Service regarding this issue.

ii. **Williamson Memorial Hospital's Copy of the Ambulance Run Sheet and the Ambulance Service EKG Strips**

Appellant called Judy Sanger, Director of WMH's Medical Records Department to testify regarding retention of the hospital's copy of the ambulance run sheet and the EKG strips generated during the ambulance transport. Tr. Vol. 6, p. 247. Ms. Sanger was employed as the WMH Medical Records Director for 27 years. Tr. Vol. 7, p. 8. Appellant hypothetically asked and Ms. Sanger answered the following question:

Q. . . . If the EMT deliver [sic] the EMT record, the run sheet and whatever they deliver is attached to it, to the emergency department and it is brought to your office, do you incorporate that into the medical records for that patient?

A. Yes sir.

Id. p 9 (emphasis added). Ms. Sanger stated that WMH followed guidelines for record retention promulgated by the Joint Commission for Healthcare Organizations (JCAHO) as well as State regulations. Tr. Vol. 6, pp. 249, 251. Ms. Sanger explained that JCAHO and the State only required WMH to maintain those records the hospital generated from the time of the patient's admission through the patient's discharge. Id. p. 251. Specifically, Ms. Sanger testified that there was no requirement for WMH to maintain or keep ambulance run sheets or EKG strips from an outside agency, including the Mingo County Ambulance Service. Id. p. 252; Tr. Vol. 7, pp.12-13.

Ms. Sanger explained that the hospital copy of the ambulance run sheet was merely a courtesy copy of the original run sheet. Tr. Vol 6 p. 252. Although Ms. Sanger admitted that the pink "courtesy" copy of the EMS run sheet was made a permanent part of the patient's record, if it was sent to the medical records department, Ms Sanger testified that she had **never** seen or been aware that any EKG monitor strips generated during an ambulance transport had ever been attached with the hospital's courtesy copy of any run sheets. Id.; Tr. Vol. 7, p. 10. In addition, MAS's Paramedic James

York and EMT Don Spaulding, who were involved in Kominar's ambulance transport to WMH, testified that it was the usual practice for the ambulance personnel to attach any EKG strips generated during ambulance transport to the original run sheet that the ambulance service maintained. Tr. Vol 3 p. 237; Tr. Vol. 8, p. 26.

However, even assuming that the jury concluded that the hospital's courtesy copy of the ambulance run sheet and/or any EKG strips generated during the ambulance transport were left at the hospital, Appellant presented no evidence that either the run sheet or the ambulance EKG strips were sent to WMH's medical records department to be made part of Kominar's permanent medical record. Moreover, the original ambulance run sheet was available at trial. Tr. Vol. 8, p. 306-07. Therefore, after hearing all of the evidence, and applying the Tracy factors to that evidence, the trial court correctly concluded that Appellant failed to produce any evidence that WMH had any duty to retain any records generated by an outside source, including the hospital's courtesy copy of the ambulance run sheet and any EKG strips generated during the ambulance transport. Id.

The case Appellant cited of Harrison v. Davis, 197 W.Va. 651, 478 S.E.2d 104 (1996) also fails to support Appellant's argument for an adverse inference instruction. In Harrison, the defendant created and maintained fetal monitoring strips that formed the basis for the plaintiff's allegations of spoliation of evidence. Id. However, in the case at bar, there was no evidence that Williamson Memorial Hospital created the EKG strips generated during the ambulance transport. Furthermore, there was no evidence showing that the hospital had any duty to retain any EKG strips generated during the ambulance transport. Thus, the trial court correctly concluded that no evidence was presented that WMH had any duty to keep the EKG strips generated by the ambulance crew during the ambulance transport; that there was no evidence showing any motive for any party to destroy the EKG strips or the hospital's courtesy copy of the run sheet; and that the plaintiff failed to demonstrate any

prejudice as a result of the absence of the EKG strips and run sheet. Tr. Vol. 8, p. 306; Rec. at 5, Order Denying Plaintiff's Motion to Set Aside Verdict or For a New Trial, pp. 3-4. Significantly, after hearing all of the evidence, in denying Appellant's request for an adverse inference instruction against WMH with respect to the ambulance EKG strips and WMH's courtesy copy of the run sheet, the trial court concluded that the evidence was not "even close" to the evidence required for such an instruction. Tr. Vol. 8 p. 307.

iii. Williamson Memorial Hospital's EKG Strips

With respect to the EKG strips generated during WMH's resuscitation efforts, there were five separate EKG strips that were taken during WMH's resuscitation attempts that were kept as part of Kominar's permanent record. Tr. Vol. 4, p. 79. WMH Nurse Traci Booth was involved with printing the actual EKG monitor strips that were part of Kominar's medical record. Tr. Vol. 8, p. 218. Nurse Booth testified that the five EKG strips that were retained for Kominar's medical record, represented Kominar's heart pattern each time that the CPR chest compressions were stopped during the ten minutes that CPR continued on Kominar in the WMH emergency department. *Id.* at 220. Although Dr. Zamora testified that he ordered the nursing staff to print the entire EKG strip shown on the heart monitor during Kominar's Code, so that the nursing staff would not have to stop to print out EKG strips when CPR was paused to assess Kominar's heart rhythm, there was no evidence that WMH had any duty to retain the entire portion of the EKG strip.

Moreover, assuming, *arguendo*, that there was evidence that WMH had a duty to retain the EKG monitor strip for the entire duration of Kominar's Code, there was no prejudice to the Appellant because of the omission of any portion of the WMH EKG strips. Significantly, Appellant's liability expert, Dr. Stephen Holbrook testified that the EKG strips that were retained showed electrical activity that required the hospital to perform a more "aggressive" resuscitation of Kominar than was done,

including the administration of certain medications. Tr. Vol 4, pp. 80-83, 87-88. Similarly, another of Appellant's expert witnesses, Dr. Alex Zakharia, testified that WMH's EKG strips showed electrical activity indicating that Kominar was viable. *Id.* p. 215. In addition, Appellant's causation expert, Dr. Peter Bernad testified that WMH's EKG strips provided sufficient evidence to allow him to opine that Kominar was viable when he arrived at WMH. Tr. Vol. 5, p. 15.

Appellant argues that the Florida Supreme Court opinion in Public Health Trust of Dade County v. Valcin, 507 So.2d 596 (Fla. 1987) is supportive of Appellant's argument regarding WMH's EKG strips. However, as the Appellant correctly pointed out, in Valcin, the plaintiff's experts were hindered in their ability to render opinions as to whether the standard of care was met with respect to the surgical procedure at issue, because of insufficient records. Brief at 26. Here, Appellant's experts were not hindered in their ability to offer criticisms of WMH or of the other Appellees

Appellant also relies on the case of Sweet v. Sisters of Providence, 895 P.2d 484 (Alaska 1995). Brief at 27. In Sweet, the documents at issue were informed consent forms and nursing records, that included a graphic sheet, a medication record and nurses' notes narrating the events of the infant's care. 895 P.2d at 487. The Sweet Court, citing to Valcin, *supra*, found that it was appropriate for the trial court to make a preliminary determination as to the importance of any missing records, before shifting the burden of proof to the party whose records were "missing". *Id.* at 491.

Significantly, as in the cases cited on behalf of the Appellant, Judge Pratt carefully considered the significance of the "missing" documents and applied the evidence to the factors that this Court set forth in Tracy, and reasserted in Hannah. Tr. Vol. 8pp. 298-302. Accordingly, the trial court did not abuse its discretion in determining that the evidence regarding the EKG strips generated during the ambulance transport and at Williamson Memorial Hospital, as well as the evidence regarding the

hospital's courtesy copy of the ambulance run sheet, did not support a spoliation, or adverse inference instruction, as to this Appellee.

C. THE CIRCUIT COURT DID NOT ERR BY DENYING APPELLANT'S REQUEST TO READ SOME OF WMH'S DISCOVERY RESPONSES TO THE JURY.

The Appellant's third allegation of error concerns the trial court's refusal to allow the Appellant to read to the jury certain discovery responses of Appellee, WMH. Brief at 28.

I. WMH's Answer to Plaintiff's Interrogatory Number Thirteen

First, the Appellant requested permission from the court to read WMH's response to plaintiff's interrogatory number thirteen that asked WMH to "identify all hospital agents, services [sic] and/or employees involved in the examination, monitoring and/or treatment of plaintiff [sic] decedent on July 12, 1997. Describe the role that is played by each person and the time of the involvement of the plaintiff's decedent's care." Tr. Vol. 5, p. 120. WMH's response to that interrogatory listed, among others, the names of Michael Jude and Cathy Taylor Cline, and identified them as respiratory technicians, without any further description as to either Mr. Jude's or Ms. Cline's role in Kominar's treatment. Id.

Mr. Jude and Ms. Cline were each deposed, prior to trial, and each testified that they had no present memory of being involved in Kominar's care. Id. at 121. Furthermore, in deposition, Ms. Cline testified that she was not familiar with the hospital's policies with respect to documentation during resuscitation procedures, and, therefore, the trial court prohibited Appellant's counsel from questioning the therapists as to whether their names "should" have appeared in WMH's records. Id. at 125. However, the court permitted counsel to call Mr. Jude and Ms. Cline as witnesses at trial and to ask them the following:

1. On July 12, 1997 were you an employee of the hospital?

2. On July 12, 1997 were you on duty?
3. Did you assist in the treatment of Jason Kominar?
4. Was your name on the attending sheet as being a respiratory technician who attended to Jason Kominar?

Id. Moreover, counsel for WMH proffered to the court, outside of the jury's presence, the expected testimony of Mr. Jude and Ms. Cline as follows:

1. Neither Jude nor Cline had any memory of being involved in Kominar's resuscitation;
2. According to WMH's work schedules, Jude and Cline were on duty on July 12, 1997;
3. Typically, when Dr. Zamora called a Code in the emergency room, respiratory therapists attended to perform CPR;
4. Jude and Cline were the only two respiratory therapists scheduled for duty during Kominar's Code, so they would have been the respiratory therapists who would have responded to the Code.

Tr. Vol. 7 p. 33. Furthermore, counsel for WMH offered to stipulate for the record that neither Cline's nor Jude's name appeared on Kominar's medical records. Id. at 34.

Based on Appellant's representations that Dr. Zamora and others had testified during deposition that therapists had been involved in Kominar's resuscitation, the court also permitted Appellant to introduce that evidence through the testimony of witnesses. Id. p. 25. Appellant introduced evidence, through Dr. Zamora, that respiratory therapists were involved in Kominar's resuscitation, but that Kominar's record did not identify any therapists who participated in Kominar's

Code. Tr. Vol. 3 p. 25. Appellant ultimately chose not to call either Mr. Jude or Ms. Cline to testify, although both were available. Id. at 32.

Although Rule 33 of the West Virginia Rules of Civil Procedure provides that interrogatories “may” be used as evidence at trial, a thorough search reveals that the only circumstance in which this Court has addressed the issue and found the use of an interrogatory answer appropriate for use at trial was for impeachment purposes. See, e.g., Ratlief v. Yokum, 167 W.Va. 779, 280 S.E. 2d 584 (1981).

The trial court denied counsel’s request to read WMH’s answer to interrogatory number thirteen, because the discovery responses were prepared for litigation and WMH’s interrogatory answer was not definite as to either of the respiratory technician’s roles in Kominar’s treatment. Tr. Vol 5 p. 126. Furthermore, the court properly determined that omission of the respiratory therapists’ names on Kominar’s medical record was not relevant to the Appellant’s wrongful death claim and, moreover, that evidence was insufficient and too speculative to establish that WMH destroyed any of the decedent’s medical records. Id. at 126-28.

ii. WMH’s Response to Requests for Production of Documents

Appellant also asked the court for permission to read WMH’s Responses to Plaintiff’s Requests for Production of Documents, dated June 6, 2000, and to admit those Responses as evidence. Tr. Vol 7 pp. 25, 35. Specifically, Appellant wanted to introduce into evidence WMH’s copy of Kominar’s medical records that WMH provided in response to Appellant’s June 2000 request for a copy of the decedent’s medical records. Id. Although the initial discovery response did not include a copy of WMH’s triage sheet, the triage sheet was produced to Appellant in 2002, when WMH learned of the oversight. Id. at 26; Tr. Vol. 5, p. 137.

Appellant agreed with the trial court that issues regarding clerical errors and discovery disputes during litigation were not proper issues for the jury. Tr. Vol. 7 p. 28. Nonetheless, the court was

willing to hold an in-camera hearing on the issue of the omission of the triage sheet, provided Appellant could identify an appropriate witness to testify on that issue. *Id.* pp. 28-29. Appellant's counsel conceded that he probably "should have" addressed that particular issue with one of his previous witnesses, but Appellant did not ask the court for permission to recall any witness. *Id.* at p. 30.

Accordingly, the trial court provided Appellant with a fair opportunity to present her evidence to the jury through the testimony of witnesses, rather than through WMH's discovery responses. The Appellant chose not to proceed with that evidence, and therefore, Appellant cannot claim any prejudice now, because the trial court found the discovery responses were not the proper vehicle to present the evidence to the jury. The record demonstrates the lengths to which the trial court went to provide Appellant with an opportunity to present her evidence in an appropriate manner. Thus, the trial court did not err in denying the Appellant's request to read WMH's discovery responses to the jury.

D. THE CIRCUIT COURT PROPERLY DENIED APPELLANT'S REQUEST FOR A MISTRIAL, AS COUNSEL FOR DID NOT VIOLATE ANY ORDER AND APPELLANT "OPENED THE DOOR" TO DISCUSSING PRE-ACCIDENT EVENTS

Following opening statements, Appellant moved the court for a mistrial, based on certain statements made during WMH's opening statement. Tr. Vol .2, p. 237. Appellant contends that Attorney Mundy violated a pre-trial order that "prohibited the investigating officer from testifying as to the cause of death being from the high rate of speed and further, from defendants arguing that Appellant [sic] decedent died from a violent collision and that in essence, medical care would be useless." Brief at 12. In that regard, Appellant objected to Attorney Mundy's statements that:

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

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

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

Id.

i. Diagram and Photographs

The pretrial order at issue is the Order Regarding Outstanding Motions, entered on February 14, 2002. Rec. at 2. Appellant contends that Attorney Mundy violated that Order by showing the jury a portion of Officer Hall's accident report, that contained a diagram of the scene of the accident and by showing a photograph of the truck the decedent was operating. Brief at 11; Tr. Vol 2, p. 238. In the February 14, 2002 Order, the trial court prohibited Officer Hall from offering opinions regarding "the dynamics of the *accident pertaining to any issues of contributory negligence on the part of the decedent.*" Rec. at 2, Order Regarding Outstanding Motions, para. 23, 26 (emphasis added). Furthermore, immediately prior to the commencement of opening statements, the trial court clarified for counsel the limitations of some of the pre-trial rulings and what was permissible for counsel in opening statements. Tr. Vol 2, pp. 50-65. The court specifically noted, "We're going to see the 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." Id. at p. 55. In responding to a request for clarification from counsel about references in the accident report and records characterizing the accident as a "high speed impact", the court stated that "[f]rom a police officer that has some expertise, he could say that. Even a passerby can say it was going fast or going slow. But nobody is going to give it miles per hour." Id. at p. 56. Therefore, the trial court never prohibited the introduction of photographs of the decedent's truck and/or references to the accident as a "high speed impact" collision.

In addition, the information to which Appellant now objects was introduced to the jury before WMH's opening. First, during Appellant's opening statement, counsel discussed the events preceding Kominar's vehicle's impact with the rock cliff. *Id.* at 95-97. Appellant also discussed Kominar's actions after the collision, before the arrival of any ambulance personnel, in an attempt to demonstrate that Kominar was alive, following the accident. *Id.* at 97. Appellee MAS' opening statement followed Appellant's opening. *Id.* at 106. Counsel for MAS showed the jury a photograph of the area of the roadway and cliff where the accident occurred, without any objection. *Id.* at 110. In addition, counsel for MAS showed the jury photographs of Kominar's truck and discussed Officer Hall's observations of the inside of the truck, again without objection. *Id.* Following MAS' opening statement, during the opening statement made of behalf of Appellee, Dr. Pelagio Zamora, counsel showed the jury photographs depicting the front of Kominar's truck after the collision. *Id.* at 129. Attorney Jeffrey Wakefield informed the jury that one of the bystanders would testify that he "never saw any brake lights" as he saw Kominar's truck cross the median and collide with the rock wall. *Id.* Appellant did not raise any objection to the photographs or any of the statements that counsel for MAS and counsel for Dr. Zamora made regarding the course of the decedent's vehicle, immediately prior to the collision.¹ Therefore, Appellant was not unfairly prejudiced by any photographs shown during WMH's opening, nor by Attorney Mundy's references to a "high speed" accident.

Furthermore, Officer Hall's diagram of the accident contained the same information that Appellant first discussed regarding the course of Kominar's vehicle, prior to the collision. Although Officer Hall's accident report was not admitted as evidence in the case, the substance of the information contained within the report was admitted through the testimony of the eyewitnesses that Appellant called

¹ The photographs of Kominar's vehicle that Officer Hall took that were shown to the jury during opening statements by counsel for MAS and Dr. Zamora, during opening statements, were ultimately admitted as evidence. Tr. Vol. VIII B, pp. 286-89.

to testify, and the testimony of Officer Hall regarding information he learned as part of his official duties. Therefore, the court found that the witnesses' testimony provided the best evidence of the accident report. Tr. Vol 8, p. 280-81. Significantly, in discussing whether the accident report would be admitted and given to the jury as evidence, counsel for Appellant stated "I don't mind it [the accident report] going in, as long as it doesn't go to the jury." *Id.* at 280. Therefore, Appellant waived any objection to testimony regarding the accident report or introduction of the accident report to the jury. Accordingly, Appellant cannot claim any prejudice because Attorney Mundy showed the jury Officer's Hall's diagram of the course of Kominar's vehicle prior to the collision.

ii. Statistical Evidence

Appellant also objected to Attorney Mundy's opening statement regarding the statistical evidence of the number of individuals who died as a result of motor vehicle accidents in 1997.

Brief at 12. During Appellant's opening, counsel informed the jury

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. He was basically – could not survive as a result of that accident arrest.

Tr. Vol. 2, p. 105. In addition, before WMH's opening, counsel for Appellee Dr. Zamora informed the jury that the evidence would show that Jason Kominar died "because he was involved in a severe motor vehicle accident." *Id.* p. 128. Furthermore, Appellant's experts admitted that Kominar suffered blunt trauma as a result of the accident. Tr. Vol. 4, pp. 86, 122. Therefore, one of the primary issues for the jury to determine was whether Kominar's cardiac arrest and death was due to blunt trauma, as Appellees contended, or the result of improper intubation, and other alleged negligent medical treatment, as Appellant alleged.

Significantly, in its pre-trial order, the trial court found that “statistical evidence regarding blunt trauma arrest and fatalities is highly relevant to significant theories in this case . . .” Rec. at 2, Order Regarding Outstanding Motions, para. 9. In denying Appellant’s Motion for a Mistrial, the court properly found that Attorney Mundy did not violate any pretrial rulings. Tr. Vol. 2, p. 239. The trial court sustained Appellant’s objection to Attorney Mundy’s opening statements only because the court found that the statement was argumentative and, therefore, not proper for opening statement. *Id.* p. 155. Attorney Mundy’s opening statement did nothing more than to assert WMH’s defense to the Plaintiff’s allegation that Kominar died as a result of improper medical treatment, rather than as a direct result of the motor vehicle accident. Officer Hall’s diagram of the path of Kominar’s vehicle showed the same information that Appellant’s witnesses provided, based on their personal observations as they observed Kominar’s vehicle, immediately prior to the collision. The diagram also depicted the same information that Appellant provided in opening statement regarding the course of Kominar’s vehicle before the crash. The photograph of the truck depicting the effect of the impact was also relevant to the primary issue in the case regarding the severity of the crash and the injuries that Kominar sustained.

However, if this Court finds that Appellee Williamson Memorial Hospital unintentionally violated the trial court’s Order, the Appellant was not unfairly prejudiced and any error was harmless.

E. THE CIRCUIT COURT DID NOT ERR BY DENYING THE APPELLANT’S REQUEST FOR A NEW TRIAL AS DEFENSE COUNSEL DID NOT VIOLATE ANY MOTION *IN LIMINE*.

Appellant’s fifth assignment of error concerns the testimony of police officer, John Hall, in which Officer Hall was asked whether he was “surprised” that Jason Kominar died, as a result of the motor vehicle accident of July 12, 1997. Brief at 13, 30. Appellant contends that defense counsel violated the trial court’s pre-trial order prohibiting Officer Hall from testifying as a reconstructionist.

Brief at 30-31, Tr. Vol 8, p. 278. The Order pertaining to any limitations on Officer Hall's testimony, is the Order Regarding Outstanding Motions, entered on February 14, 2002, discussed in section D, *supra*. The pertinent paragraph of that Order pertaining to Officer Hall's testimony reads as follows:

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 Defendant's [sic] breached the standard of care, were negligent, or otherwise played a part in the death of the decedent.

Rec. at 2, Order Regarding Outstanding Motions, para. 26. Accordingly, the trial court never prohibited Officer Hall from offering opinions regarding the severity of Jason Kominar's injuries, based on Officer Hall's personal observations at the scene of the accident, his observations at the accident scene itself, and based on the information provided to him in his capacity as the investigating officer from witnesses at the scene.

Moreover, during Appellant's opening statement, counsel first raised the issue of Kominar's survivability as a result of the accident. Tr. Vol 2, pp. 96-98. Specifically, Appellant's counsel informed the jury that Kominar suffered an injury, from a "rather severe accident" and that Kominar's parents were informed that Kominar died at the scene. *Id.* pp. 93-94, 96. Appellant then proceeded to represent to the jury the testimony from the eyewitnesses at the scene that Appellant contended was evidence that Kominar survived the accident. *Id.* p. 97. Furthermore, Appellant questioned Appellant's liability expert, Dr. Alex Zakharia, as to whether he formed an opinion as to Kominar's ability to survive the accident, based on the testimony and observations of the eyewitnesses at the scene. Tr. Vol 4, p. 202. Therefore, whether or not Kominar's injuries from the accident were such that he was able to survive those injuries, was a primary issue in the case.

Rule 701 of the West Virginia Rules of Evidence permits lay witnesses to offer opinions as long as the opinions 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. Furthermore, “[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.” State v. Jameson, 194 W.Va. 561, 461 S.E.2d 67 (1995).

Officer Hall did not testify as a reconstructionist as to how the accident occurred. Tr. Vol. 8, p. 278. Officer Hall had special expertise in investigating “hundreds” of accidents and observing accident victims. Officer Hall merely expressed an opinion as to whether, from his observations at hundreds of accident scenes, and his perceptions of those events, he was surprised to learn that Kominar did not survive this accident. Accordingly, the court did not abuse its discretion, much less commit clear error in denying Appellant’s Motion for a New Trial, based on the testimony of Officer Hall.

Counsel for MAS questioned Officer Hall, based on his experience as a police officer in investigating “hundreds of accidents,” whether he was surprised to learn that Jason Kominar did not survive the accident. Tr. Vol 8, p. 269. In addition to the fact that Officer Hall was questioned based on his observations in investigating numerous accidents, rather than as a mere bystander, counsel for the Appellant did not object to defense counsel’s questioning of Officer Hall at the time the question was asked. Id. Instead, Appellant’s counsel waited for counsel for MAS to finish his examination of Officer Hall and then merely asked the court for permission to approach the bench, without alerting the court that Appellant objected to Officer Hall’s testimony. Id. Therefore, it was only after all

counsel completed their examinations of Officer Hall that Appellant made the court aware of the objection to the previous questioning of Officer Hall. *Id.* at 278.

"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 pain that, if they forget their lines, they will likely be bound forever to hold their peace." *State ex rel. Cooper v. Caperton*, 196 W.Va. 208, 216, 470 S.E.2d 162, 170 (1996). See also, *Hanlon v. Logan County Bd. of Educ.*, 201 W.Va. 305, 315, 496 S.E.2d 447, 457 (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."). The Appellant failed to timely object before Officer Hall answered counsel's question and Appellant also failed to timely alert and notify the trial court as to the reason counsel wished to approach the bench, regarding the alleged defect in Officer Hall's testimony and therefore, failed to appropriately preserve any objection to Officer Hall's testimony.

F. THE CIRCUIT COURT DID NOT ERR BY ALLOWING APPELLEES TO HAVE SEPARATE EXPERTS IN THE MEDICAL SPECIALTIES OF APPELLANT'S EXPERTS

The Appellant's sixth assignment of error concerns the fact that appellees collectively called a total of six (6) experts. Brief pp. 32-33; Tr. Vol. 8, pp. 157-58. Appellant called three experts at trial, Dr. Stephen Holbrook, an emergency medicine specialist, Dr. Alex Zakharia, a specialist in trauma and chest surgery and, Dr. Peter Bernad, a neurologist, to testify regarding Kominar's brain injury. Tr. Vol. 4, pp. 18, 188; Vol. 5, pp. 6-7. Moreover, Appellant was granted permission to call a fourth expert, Dr. Lewis Rothman, a radiologist, to testify as a rebuttal witness. Tr. Vol. 8, p. 295. Appellant voluntarily chose not to call Dr. Rothman as an expert. Tr. Vol. 9, p. 6. Appellee WMH called only one (1) expert, Dr. Roger Barkin, M.D., who was qualified as an expert in emergency medicine. *Id.* p.

27. Moreover, the experts retained specifically on behalf of MAS had particular expertise in emergency ambulance transport, treatment of trauma injuries “in the field” and the alteration of the original run sheet that was a unique theory to MAS. Tr. Vol 7 pp. 63, 79, 268. Radiologist Dr. Morse testified regarding the primary issue as to whether the intubation was correctly performed. *Id.* p. 81. Appellees each retained experts in medical specialties that could address the relevant issues pertaining to each Appellee’s defense. Appellant had an equal opportunity to identify and retain appropriate experts to testify in the specialties necessary to pursue Appellant’s theories. Therefore, Appellant cannot claim unfair prejudice because she failed to develop any theories, through experts, that Appellant believed were appropriate.

It is within the trial court’s discretion with regard to the number of experts who may be called to testify at trial. *See, e.g., Morris v. Boppana*, 182 W.Va. 248, 387 S.E.2d 302 (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 primary concern”).

The trial court correctly concluded that each of the three defendants had “an obligation to try to defend their clients the best they can.” Tr. Vol. 8, p. 158. Accordingly, the trial court properly denied Appellant’s Motion, on the basis that each defendant had a right to present its own defense. *Id.* Therefore, the trial court did not abuse its discretion in allowing Appellee WMH to call one expert witness on its behalf and in allowing Appellee MAS and Appellee Pelagio Zamora, M.D., to call experts to testify in similar specialties as Appellant’s experts to rebut Appellant’s criticisms.

Furthermore, the trial court did not err in refusing to allow Appellant to call her radiology expert in her case-in-chief, as Appellant did not timely disclose a radiology expert. Moreover, although Appellant was permitted to call Dr. Rothman as a rebuttal witness, the Appellant chose not to call Dr. Rothman. Tr. Vol. 8, p. 295; Tr. Vol. 9, p. 6. Dr. Rothman's videotaped evidentiary testimony was taken on October 1, 2001. Tr. Vol. 8, p. 295. Even though Dr. Rothman was unavailable to testify at trial, Appellant chose not to play Dr. Rothman's videotaped evidentiary deposition to the jury because it was "very boring and long." Tr. Vol. 9, p. 6. Therefore, Appellant's claim of prejudice, based on the court's refusal to allow Appellant to call Dr. Rothman in Appellant's case-in-chief, is without merit.

G. THE CIRCUIT COURT DID NOT ERR IN DENYING THE APPELLANT'S REQUEST TO ALLOW A LAY WITNESS TO TESTIFY, MEDICAL CAUSATION ISSUES.

Appellant's last assignment of error is in regard to the trial court's refusal to allow Appellant to call lay witness, Greg Spaulding, "on the issue of whether there were any major leaks of embalming fluid at the time of Jason Kominar's embalming." Brief at 34. The trial court allowed Mortician Spaulding to testify, as a lay witness, based on his personal observations of Kominar's body. Tr. Vol. 8, p. 162. The court determined that Spaulding could "testify to his observations just as the witnesses on the scene did or any witness in the hospital or in the ambulance that was not medically trained in some way." Tr. Vol. 4, p. 20. However, because of Spaulding's lack of medical training and the fact that he was not disclosed as an expert witness, the trial court prohibited Spaulding from testifying as a medical expert regarding the nature of any internal injuries. *Id.* Ultimately, Appellant made a decision not to call Mortician Spaulding to testify, apparently because of the potential of "opening the door" to the relevance of pictures taken of Kominar's body that showed injuries to Kominar's face and chest. Tr. Vol 8, pp 155-56.

“Whether a witness is qualified to state an opinion is a matter which rests within the discretion of the trial court and its ruling on that point will not ordinarily be disturbed unless it clearly appears that its discretion has been abused.” State v. Wood, Syl. Pt. 4, 194 W.Va. 525, 460 S.E.2d 771 (1995) (internal citations omitted). Moreover, “the 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.” State v. Jameson, Syl. Pt. 4, 194 W. Va. 561, 461 S.E.2d 67 (1995) (internal citations omitted). Therefore, the trial court did not err in limiting Mr. Spaulding to testifying as a lay witness, regarding his personal observations of Kominar’s body and the court’s decision in that regard should not be disturbed.

CONCLUSION

It is clear that the trial court made correct rulings on all of the issues to which Appellant now assigns error. At a minimum, Appellant has failed to demonstrate that the trial court abused its discretion with regard to the court’s rulings. A reading of the trial transcript will reveal that the trial court carefully and thoroughly considered each issue, as presented, and the trial court did not abuse its discretion with respect to any rulings, nor fail to consider relevant case law. Furthermore, any error that the trial court may have committed, was harmless error, that does not warrant the extreme remedy of setting aside the verdict, nor of granting Appellant’s request for a new trial.

REQUEST FOR RELIEF

This Appellee respectfully requests that this Court deny Appellant's Appeal and uphold the trial court's rulings, and for any such further relief that this Court deems appropriate.

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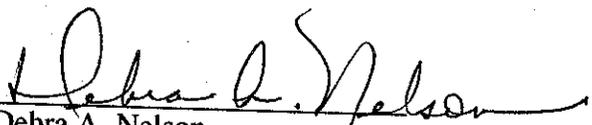


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