

Docket No. 33386

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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**CHARLESTON, WEST VIRGINIA**

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**IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA**

**RUTH ANN DOUGLASS, WVDHHR  
by the STATE OF WEST VIRGINIA,**

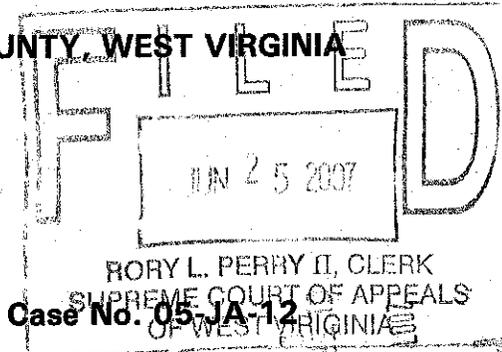
**Petitioner,**

**v.**

**IN THE INTEREST OF SUMMER D.,  
a child under the age of 18 years**

**and**

**APRIL J. T, her mother, and  
DOUGLAS D, putative father.**



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**RESPONSE OF THE WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN  
RESOURCES TO BRIEF OF THE APPELLANT, GUARDIAN AD LITEM, FOR  
THE INFANT RESPONDENT, SUMMER D.**

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## **INTRODUCTION**

Now comes the West Virginia Department of Health and Human Resources (hereinafter referred to as the Department), and provides this Honorable Court with a response to the Brief of the Appellant, Guardian ad Litem for infant, Summer D., also requesting that this Honorable Court deliberate what a substantial impact the lower court's decision would have on the infant, Summer D., if the decision were to be upheld.

## **KIND OF PROCEEDING AND NATURE OF RULING**

This is a civil child abuse and neglect proceeding that was initiated after the Department was contacted by the Missouri Department of Social Services and advised that Appellee, April T., had previously had her parental rights terminated to two (2) children by an Order entered on April 15, 2005, in Taney County, Missouri. The Department of Social Services also indicated that there was a possibility that she had subsequently given birth to another child in the State of West Virginia. Based on this information and confirmation that Appellee, April T., had given birth to another child, the Department filed a Petition on April 26, 2005, alleging a previous termination of parental rights and continued concerns regarding her ability to parent a child.

On December 2, 2005, Appellee, April T., entered Admissions to the Petition and was subsequently granted an improvement period. A Family Case Plan, including the objectives of a post-adjudicatory improvement period, was accepted by the Court on April 27, 2006. On September 11, 2006, the Guardian

ad Litem filed a Motion to Terminate the Improvement Period of Appellee, April T., and a Motion to Amend the Petition to include allegations against the biological father of Summer D., Appellee, Douglas D.

A hearing was scheduled to consider the Motions on December 20, 2006, at which time Court bifurcated the issues. The Motion to Terminate the Improvement Period was addressed first by the Court, and testimony was presented regarding Appellee, April T.'s, lack of progress, and the safety and appropriateness of placement of the child. The Court did not hear testimony on the Motion to Amend the Petition. By Order entered on January 18, 2007, the Court granted the Motion to Terminate the Improvement Period and denied the Motion to Amend the Petition. The Court further Ordered that custody of Summer D. shall be returned to Appellee, Douglas D.

On March 20, 2007, the Guardian ad Litem filed a Petition to Appeal the lower Court's Order. This Court granted said Petition to Appeal on April 19, 2007. A Brief was subsequently filed by the Guardian ad Litem on May 23, 2007.

#### **STATEMENT OF FACTS**

On April 26, 2005, the Department filed a child abuse and/or neglect Petition specifically alleging that Appellees, April T., and Douglas D., were the parents of the infant respondent, Summer D., who was born on December 27, 2004. The Petition further alleged that Appellee, April T., had previously had her parental rights to two (2) of her biological children terminated by a Court Order entered on April 15, 2005, in Taney County, Missouri. This Petition was a result

of the Department being contacted on April 23, 2005, by the Missouri Department of Social Services regarding the previous termination of Appellee, April T.'s parental rights, and concerns the Department of Social Services continued to have about any child in her custody being in danger, due to her inability to parent. The Petition was accepted by the Court and the infant respondent was placed in the Department's custody.

A preliminary hearing was originally scheduled on May 11, 2005; however, counsel for Appellee, April T., moved the Court for a continuance until further documentation was obtained from the State of Missouri. There was no objection made by any party and the motion was granted. The infant respondent continued to be placed in the Department's custody and the Court Ordered that the Appellees should be permitted supervised visits with the infant respondent four (4) times a week for a period of one to one and a half hours.

Upon on its own Motion, the Court appointed a Court Appointed Special Advocate (hereinafter referred to as CASA), on May 24, 2005. By said Order, the CASA volunteer was to complete his/her investigation into the circumstances of the child, to submit reports to the Court, to attend any Court proceedings involving the child, to closely monitor all matters until relieved by the Court, and to be responsible for remaining an advocate for the child throughout the proceedings in such a manner as would affect the child's best interests.

On May 31, 2005, the parties returned to Court for a status hearing. It was

determined at that hearing that a Final Order had been entered by the Taney County Circuit Court terminating the parental rights of Appellee, April T., to two (2) of her biological children. The Court was further advised that the appeal period had expired without an appeal ever being filed. Further information gained from Taney County, Missouri, indicated that Appellee, April T. was low functioning and had difficulty retaining information regarding the care of children. It was reported that Appellee, April T.'s, first child was removed from her care in September, 2001. At that time, she began parenting classes and counseling. Subsequent to her first child being removed from her custody, Appellee, April T., gave birth to a second child. This child was initially placed in foster care but was eventually returned to her custody, while her older child remained in foster care. Appellee, April T., received intensive in-home services when her younger child was returned to her custody.

Unfortunately, Appellee, April T., was unable to utilize the services and skills offered. Her younger child suffered a broken femur while in her custody. Initially, Appellee, April T., provided false information regarding the child's injury. However, at the conclusion of the investigation, it was determined that the child had been abused by his biological father, who was Appellee, April T.'s, husband, and that Appellee had not only failed to protect the child from injury, but that she also failed to seek medical treatment for the child for at least one (1) week. After her younger child was placed back into foster care, Appellee, April T., failed to actively participate in any service in an attempt to have her children returned to her

care. Appellee, April T., moved to West Virginia in September, 2003. Her one (1) and only visit with her children in Missouri occurred in May, 2004, at which time Appellee, Douglas D. accompanied her. It should also be noted that Appellee, April T., was pregnant with the infant, Summer D., at that time.

At the hearing on May 31, 2005, the Court determined that the case should proceed based upon the prior termination in Missouri and additional information obtained from the Missouri Department of Social Services. The Appellee, April T., waived her right to a preliminary hearing on that date. The Court Ordered her to submit to a psychiatric evaluation and further Ordered that Summer D. should remain in the Department's custody, and supervised visitation with the Appellees should continue as previously Ordered.

At the next hearing conducted on December 2, 2005, the Court noted that Appellee, April T.'s, evaluation had been received by all parties and proceeded to inquire of counsel for Appellees if they understood the nature and consequences of the proceedings. Both attorneys answered affirmatively. The Court then inquired of counsel's understanding of Appellee, April T. potential for parenting skills and the lack thereof. Counsel for Appellee, April T., acknowledged his client's understanding of her lack of parenting skills. The Court then questioned Appellee, April T., regarding the nature and consequences of the proceedings and the rules and conditions of the improvement plan. Appellee, April T., admitted that she lacked the present ability to adequately care for the child. The Court then made a finding that Appellee, April T.'s, admission was willingly and voluntarily

made of her own free will with a knowledge and understanding of the consequences. The Court Ordered that Summer D., should remain in the Department's custody and supervised visitation with Appellees should continue.

At the status review hearing on January 30, 2006, it was reported that Appellee, April T., had suffered a miscarriage and that she had also divorced her previous husband and changed her name to Lemasters. Again, the Court Ordered that Summer D., should remain in the custody of the Department and supervised visitation with Appellees should continue.

At the next hearing scheduled on April 27, 2006, the Court received a written plan of improvement which had been recommended by the MDT. The Court, after reviewing the conditions with Appellees, approved and accepted the plan. The goals to be addressed during the improvement period included Appellee, April T. improving her parenting skills to a level sufficient to parent the infant respondent, Summer D. This goal was to be achieved by completing parenting and/or adult life skills classes provided by Wellsprings Family Services. The second goal was for Appellee, April T., to obtain her G.E.D. The third goal was for Appellee, April T., to attend individual therapy sessions with Wellsprings Family Services. Summer D., remained in the Department's custody and supervised visitation with Appellees continued.

At the hearing conducted on August 9, 2006, the Court Ordered that the dispositional hearing was to be scheduled in this matter within 30 days. The Court also made a specific finding that current placement of the infant respondent

was appropriate and in her best interest and should continue. Supervised visitation with Appellees also continued.

On September 11, 2006, the Guardian ad Litem filed a Motion to Terminate the Improvement Period of Appellee, April T., and a Motion to Amend the Petition to include allegations against Appellee, Douglas D., for his failure to recognize April T.'s, impairments and how they placed a child in her care in significant risk of harm.

At the hearing scheduled on December 20, 2006, the Court bifurcated the issues. The Motion to Terminate the Improvement Period was addressed first by the Court, and testimony was presented regarding Appellee, April T.'s, lack of progress, and the safety and appropriateness of placement of the child. The Guardian ad Litem presented the testimony of CASA, Dr. Christi Cooper-Lehki, and Kimberly Justice, a representative of Wellspring Family Services. No additional evidence was introduced by any party. The Court did not hear testimony on the Motion to Amend the Petition. By Order entered on January 18, 2007, the Court granted the Motion to Terminate the Improvement Period and denied the Motion to Amend the Petition. The Court further Ordered that custody of Summer D. shall be returned to Appellee, Douglas D.

Throughout the pendency of this case, CASA had consistently reported the status of the case to the Court. CASA had reported that although the parties had been cooperative, concerns remained regarding their overall commitment to having their child returned to their custody. CASA Reports had been filed with the Court

providing specific instances when Appellee, Douglas D., continued to voice his frustration with many people involved in the case and his feelings about some things being unreasonable. CASA had reported that although Appellee, Douglas D., was supportive of Appellee, April T., that he continued to present an attitude of belief that she would be capable of protecting a child, even though both time and records reflect that her ability to protect a child was seriously in question. CASA had reported to the Court that Appellee, Douglas D., continued to make statements about the proceedings being unnecessary and what little to no effort he had made to any changes in his circumstances. CASA had reported that while the Petition did not contain allegations against him, that Appellee, Douglas D., minimized the serious allegations in the Petition overall and had allowed his daughter to remain in foster care, although he had stated numerous times that he could just take custody of her. CASA reported to the Court how Appellees undertook a large remodeling project at their home that was absolutely unnecessary. Walls had been torn down and ceilings removed, rendering the home unsafe for visitation and in-home services. Yet, Appellees complained when the location of the visitation and services had to be moved. Overall, CASA had reported to the Court that both Appellees loved their daughter but both continued to lack insight and judgment, and that the infant respondent deserved more stability and safety than Appellees were capable or willing to offer her.

Ironically and erroneously, the Court by Order entered January 18, 2007, considered the same factors as CASA and the GAL; however, the Court did

not categorize the behavior of Appellee, Douglas D., as concerning, but as patient, supportive, and commendable.

### **ASSIGNMENTS OF ERROR**

- I. THERE WAS INSUFFICIENT EVIDENCE BEFORE THE COURT TO SUPPORT THE FINDINGS OF FACT REGARDING APPELLEE, DOUGLAS D.'S, ABILITY TO PARENT AND HIS CONDUCT DURING THE CASE
- II. THE COURT ERRED BY FAILING TO ACT IN THE BEST INTEREST OF SUMMER D. BY RETURNING CUSTODY TO APPELLEE, DOUGLAS D.
- III. THE COURT HAD A DUTY TO FURTHER INVESTIGATE THE CONCERNS OF ABUSE AND/OR NEGLECT RAISED BY THE GUARDIAN AD LITEM FOR SUMMER D.

### **POINTS AND AUTHORITIES RELIED UPON AND DISCUSSION OF LAW**

- I. THERE WAS INSUFFICIENT EVIDENCE BEFORE THE COURT TO SUPPORT THE FINDINGS OF FACT REGARDING APPELLEE, DOUGLAS D.'S, ABILITY TO PARENT AND HIS CONDUCT DURING THE CASE

In Syllabus Point 1 of In re Tiffany Marie S., 196 W.Va. 223, 470

S.E.2d 177 (1996), this Court held that:

"[a]lthough conclusions of law reached by a circuit court are subject to de novo review, when an action, such as an abuse and neglect case, is tried upon the facts without a jury, the circuit court shall make a determination based upon the evidence and shall make findings of fact and conclusions of law as to whether such child is abused or neglected. These findings shall not be set aside by a reviewing court on the entire evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirety."

In the Order entered on January 18, 2007, the Court made specific Findings of Fact regarding Appellee, Douglas D., that were not supported by evidence presented at the hearing conducted on December 20, 2006, or at any previous hearing. Specifically, Paragraph 8 of the Order entered on January 18, 2007, states that the Court has confidence in Appellee, Douglas D.'s, ability to parent a child. Paragraph 12 of the Order, states that although the Court denied the Motion to Amend the Petition, evidence on the point was fully developed and the Court was satisfied that Appellee, Douglas D., was aware of the limitations of Appellee, April T., and agreed that the limitations created part of the problem. Based on the same, the Court was of the opinion that Appellee, Douglas D., should have custody Summer D.

As previously stated, on December 20, 2006, the Court did not take any testimony regarding the Guardian ad Litem's Motion to Amend the Petition to include allegations of abuse and/or neglect against Appellee, Douglas D. Rather, the Court after hearing the testimony of Rhonda Stubbs, a representative of CASA, Kimberly Justice, a service provider employed by Wellsprings Services, and Dr. Christi Cooper-Lehki, the doctor employed by West Virginia University's Chestnut Ridge Hospital who conducted the Forensic Psychiatry Evaluation on Appellee, April T., did not afford the Guardian ad Litem an opportunity to present further testimony. Instead, the Court relied upon oral arguments from the parties' counsel to base his decision.

The CASA worker, whom the Court had appointed on its own motion, was not given the opportunity to voice her observations and recommendations when the time came to make one of the most important decisions regarding the case and placement Summer D. Instead, the Court described CASA's testimony as hearsay and made a Finding of Fact that the CASA worker is not qualified to render opinions with regard to the same. If that is the case, what purpose does CASA serve? Why should investigations be conducted, contact with the child be made, attendance at MDT and hearings be required, and reports submitted to the Court? If CASA is not qualified to render an opinion in the case, then CASA should not be involved.

The Court granted custody of Summer D. to Appellee, Douglas D., although he had never submitted to a psychological evaluation or a parental fitness evaluation. Appellee, Douglas D., had never participated in parenting classes with Wellsprings Services. He had only observed when Appellee, April T., was being instructed on how to better her parenting skills. There was never any evidence presented that Appellee, Douglas D., had previously parented any children. In fact, the only information regarding his ability to parent was included in reports filed with the Court that indicated Appellee, Douglas D.'s, ability to parent was better than Appellee, April T.'s. The Court, without ever hearing any testimony regarding the matter, simply made a Finding of Fact and rendered a crucial opinion about custody without having sufficient information to do so. This was clearly erroneous.

In addition, the Court made contradictory Findings of Fact. In Paragraph 12 of the Order, the Court made the Finding of Fact that Appellee, Douglas D., was aware of the limitations of Appellee, April T. However, in Paragraph 11 of the same Order, the Court's Finding of Fact states that failure of Appellee, Douglas D., to acknowledge the impairment of Appellee, April T., is not sufficient legal basis to seek termination of parental rights and therefore the Guardian ad Litem's Motion to Amend the Petition is DENIED. It is unclear whether the Court did or did not believe Appellee, Douglas D., acknowledged Appellee, April T.'s, limitations. It may have been that the Court was not prepared to grant the Motion to Amend the Petition and proceed to termination. However, based on the testimony of Dr. Christi Cooper-Lehki of West Virginia University's Chestnut Ridge Hospital, that Appellee, April T., was not capable of parenting a child independently and that it was critical for a person assisting her in parenting to understand her limitations, it is extremely important that this issue is clarified. It is impossible to determine the rationale of the Court, because of the lack of evidence introduced. Regardless, when the record is viewed in its entirety, there is no question that the Court's Findings of Fact regarding Appellee, Douglas D.'s, ability to parent was clearly erroneous.

**II. THE COURT ERRED BY FAILING TO ACT IN THE BEST INTEREST OF SUMMER D. BY RETURNING CUSTODY TO APPELLEE, DOUGLAS D.**

This Court has consistently held that the best interest of the child is the polar star by which this or any child abuse/neglect case is to be judged. In re Erica, 214 W.Va. 375, 589 S.E.2d 517 (2003). It is uncontested that on

December 20, 2006, that Summer D., who was born on December 27, 2004, had been in the legal and physical custody of the Department for approximately 20 months. It is also uncontested that she had been in her current foster placement for 15 of the 20 months. Finally, it is uncontested that Appellee, Douglas D., had not sought the return of his child through the Court proceedings or otherwise although no allegations had been previously brought against him. Yet, the Court did not consider these uncontested facts when Ordering that custody of Summer D. should be returned to Appellee, Douglas D.

As pointed out in the Brief of the Appellant, Guardian ad Litem, in In re Brandon, 183 W.Va. 113, 394 S.E.2d 515 (1990), this Court considered that:

if a child has resided with an individual other than a parent for a significant period of time such that the non-parent with whom the child resides serves as the child's psychological parent, during a period when the natural parent had the right to maintain continuing substantial contact with the child and failed to do so, the equitable rights of the child must be considered in connection with any decision that would alter the child's custody. To protect the equitable rights of a child in this situation, the child's environment should not be disturbed without a clear showing of significant benefit to him, notwithstanding the parent's assertion of a legal right to the child.

It is extremely clear that the Circuit Court in this case gave no deference to the holding in In re Brandon. The Circuit Court did not consider the fact that Summer D. had been in the same foster home for the last 15 months. The Circuit Court did not consider how Summer D.'s environment would be disturbed if custody was returned to Appellee, Douglas D. The Circuit Court made

no finding as to how returning custody of Summer D. to Appellee, Douglas D., would significantly benefit her.

Instead, the Circuit Court focused on Appellee, Douglas D., and made complimentary Findings of Fact of how supportive a father he had been to the child, Summer D., and supportive companion to Appellee, April T. The Court further made a Finding of Fact in Paragraph 10 of the Order, that Appellee, Douglas D., should be commended for his patience in not seeking the return of the child since she has been in placement in an effort to parent the child in a traditional sense. Not only are these Findings of Fact set forth by the Court clearly erroneous, as there was no basis for said Findings, but those Findings of Fact do not come close to telling the complete story in this case.

If one was to give Appellee, Douglas D., the benefit of the doubt in the beginning of the case, his actions may have been considered to be supportive of Appellee, April T. He remained by her side while she attempted to improve her parenting skills. One (1) of the main goals in abuse and neglect cases is to keep a family together. It is never the intention of the Department to pit one parent against the other. However, Appellee, Douglas D., was already aware that Appellee, April T, had her parental rights terminated to two (2) other children in another jurisdiction. In fact, Appellee, Douglas D., accompanied her to her final visitation with those two (2) children.

It may be possible that Appellee, Douglas D., was unaware of the specific facts that led to the termination of her parental rights at the time he accompanied her to the visit. However, during the course of this case, Appellee,

Douglas D., was made aware of exactly what had transpired in Missouri that led to the termination of Appellee, April T.'s, parental rights. Appellee, Douglas D., through his counsel, received the documentation verifying that one (1) child was removed from Appellee, April T., and placed in foster care. He was informed that her second child was placed into foster care shortly after birth but later returned to her custody. Appellee, Douglas D., was informed that her younger child suffered a broken femur, that Appellee, April T., was not truthful regarding how the child was injured, because she chose to protect her husband, who is serving time in prison for injuring the child, rather than protecting her own biological child, and that Appellee, April T., failed to seek medical treatment for the child for at least one (1) week. Appellee, Douglas D., was present in Court when it was revealed that Appellee, April T., did not follow through with all services being provided to her to regain custody of her children and that after her parental rights were terminated that she did not appeal that Court's decision.

With all of that being said, where is the evidence to support the Finding of Fact that Appellee, Douglas D., had been a supportive father to Summer D.? His child was removed from his custody when she was four (4) months old and 16 months later she continued to remain placed out of the home in foster care. This Court held in In re Lacey., 189 W.Va. 580, 433 S.E.2d 518 (1993), that courts are not required to exhaust every speculative possibility of parental improvement before terminating parental rights where it appears that the welfare of the child will be seriously threatened; this is particularly applicable to children under the age of three years who are more susceptible to illness, need consistent

close interaction with fully committed adults. Summer D. was four (4) months old when she was first placed into the custody of the Department. She clearly met the definition of a child that was in need of consistent and close interaction with fully committed adults. Unfortunately, that is not what she received from her biological parents.

As for commending Appellee, Douglas D., for his patience in not seeking the return of the child since she has been in placement in an effort to parent the child in a traditional sense, how can a parent ever be commended for not taking the appropriate action to have his child removed from foster care and returned to his custody? The Department asserts that patience is not the appropriate way to describe Appellee, Douglas D's, behavior or inaction in this case.

Appellee, Douglas D., indicated to the Court at the hearing on December 2, 2005, that he understood the consequences of these proceedings. He was fully aware what improvements Appellee, April T., needed to make before Summer D. could be returned to their care. He accompanied Appellee, April T., to her Forensic Psychiatry Evaluation on September 29, 2005, and remained with her during the interview. He indicated to the Court at the hearing on December 2, 2005, that he had received a copy of the evaluation. He was fully aware that Dr. Christi Cooper-Lehki was of the opinion that Appellee, April T.'s, ability to parent independently was significantly impaired. However, month after month, he continued to witness the fact that Appellee, April T., was not making improvements. Rather than making a conscious decision to do what was in the

best interest of Summer D. and seek custody of his daughter on his own, Appellee, Douglas D., chose to leave Summer D. in foster care, being raised and bonding to individuals, other than her biological parents. Appellee, Douglas D., knew that strides were not being made to correct the conditions that led to the removal of the child. Again, he did nothing but continue to make excuses for Appellee, April T., or to make idle threats of what action he was going to take in order to regain custody.

Even with the knowledge that Appellee, April T., did not successfully complete her parenting classes and that she would not benefit from any further services that could be provided by the Department, Appellee, Douglas D., did nothing. This Court held in In the Interest of Carlita B., 185 W.Va. 613, 408 S.E.2d 365 (1991), that "despite the responsibility of the D.H.S. and the court to provide interventive resources and to aid the parents, the rehabilitation envisioned for an improvement period is not a task which anyone can accomplish for the parent. The natural parental instinct is to do the work necessary to regain full custody of the child. Obviously, Appellee, Douglas D., did not possess that natural parental instinct and his behavior should be considered anything but patient or commendable.

As for the goal of wanting to raise Summer D. in a traditional family, the Department is dumbfounded about what the Court meant. What is Appellee, Douglas D.'s or the Court's definition of a traditional family? At the time Summer D. was conceived, her mother was married to another man, who was serving time in prison for abusing her half-sibling. Her mother was also in the process of having

her parental rights terminated to Summer D.'s, two (2) half-siblings. During the course of these proceedings, her mother was divorced but did not marry her father. This scenario is anything but what one would consider to be traditional. In addition, with one (1) child already in foster care and the prospect of the child being returned to Appellee, Douglas D.'s, custody, he continued his efforts to procreate. Summer D. had been in foster care for nine (9) months when Appellee, April T., suffered a miscarriage. Appellee, Douglas D., continued to observe that no progress was being made in the present case; however, he was ready to bring another child into the world that would possibly and most likely also be placed in foster care. This does not meet the definition of a traditional family.

Finally, in issuing the ultimate ruling, the Court Ordered that custody of Summer D. should not be returned immediately to Appellee, Douglas D., due to the fact that he had been prevented from having regular contact with her during the pendency of this action. The Department had not prevented increased regular visitation and the Guardian ad Litem had not prevented increased regular visitation. The only person that prevented increased regular visitation between the Appellee and the infant was the Appellee himself. As previously stated, it is uncontested that Appellee, Douglas D., had not sought the return of his child through the Court proceedings or otherwise although no allegations had been previously brought against him. The parties appeared before the Court on numerous occasions and Appellee, Douglas D., never moved the Court to increase his visitation. In fact, it would be fair to say that Appellee, Douglas D.'s, actions actually reduced the amount of quality time spent with his child. The fact that Appellee, Douglas D.,

decided to undertake a major remodeling project at his residence that was unnecessary led to the location of visitation having to be changed because the home was rendered unsafe for visitation to continue.

In this case, Douglas D., in effect, abandoned his daughter, Summer D. As previously stated, there were no allegations made against him in April, 2005. Summer D. taken from his custody based on his girlfriend, Appellee April T.'s, previous termination of parental rights and her inability to adequately care for a child. The only obstacle in Appellee, Douglas D.'s, way for the return of custody of Summer D. was to provide a safe and stable home, where she would not be left in Appellee, April T.'s, care. Appellee, Douglas D., could have continued to support Appellee, April T., in her attempts to gain better parenting skills, while raising Summer D. in his home and bonding with her during this very crucial formative years. Rather, Appellee, Douglas D., chose to continue to reside in the same home with his girlfriend, Appellee, April T., while his infant daughter was placed in four (4) different homes being raised by others. Although, Appellee, Douglas D., made comments to numerous individuals involved in the proceedings of how he was going to regain custody, he failed to act. He remained by Appellee's April T.'s, side, while witnessing the fact that she was not making progress and his daughter was continuing to bond with her foster parents. Appellee, Douglas D., had every opportunity to act in the best interest of his child, specifically by moving to a new residence, requesting additional visitation, not undertaking a major remodeling project that hindered parenting and visitation in the home, but he did nothing.

III. THE COURT HAD A DUTY TO FURTHER INVESTIGATE THE CONCERNS OF ABUSE AND NEGLECT RAISED BY THE GUARDIAN AD LITEM FOR SUMMER D.

Rule 19 of the West Virginia Rules of Procedure for Child Abuse and Neglect Proceedings provides that an abuse/neglect petition may be allowed to be amended at any time before the final adjudicatory hearing begins. The Rule further provides that when the modification is sought, the circuit court should grant such petition absent a showing that the adverse party will not be permitted sufficient time to respond to the amendment. In this case, amending the original Petition may have not been the proper legal manner to address the concerns before the Court. There is no clear interpretation of Rule 19's reference to the beginning of the final adjudicatory hearing. A number of attorneys may argue that amending the Petition in this case would be impermissible because an adjudicatory hearing for Appellee, April T., had already commenced and she was previously adjudicated. While others may argue that each named respondent in a Petition is entitled to an adjudicatory hearing and regardless if one adjudicatory hearing is held six (6) months after another respondent's adjudicatory hearing is held, Rule 19 applies to each respondent at his/her stage of the proceeding. Regardless of one's interpretation of Rule 19, it seems that the intent is clear. If a Petition is filed and upon further investigation or as the case proceeds, it is discovered that further abuse and/or neglect has occurred, those acts should not simply be ignored or

accepted because the allegations were not included in the original Petition.

This Court held that:

to facilitate the prompt, fair and thorough resolution of abuse and neglect actions, we therefore hold that if, in the course of a child abuse and/or neglect proceeding, a circuit court discerns from the evidence or allegations presented that reasonable cause exists to believe that additional abuse or neglect has occurred or is imminent which is not encompassed by the allegations contained in the Department of Health and Human Resource's petition, then pursuant to Rule 19 of the Rules of Procedure for Child Abuse and Neglect Proceedings [1997] the circuit court has the inherent authority to compel the Department to amend its petition to encompass the evidence or allegations.

In re: Randy H., April G., Brittany T., and Megan H. , 640 S.E.2d 185

(2006). Therefore, although there were no allegations included in the original Petition against Appellant, Douglas D., the Guardian ad Litem in this case, presented more than sufficient evidence to the Court that raised reasonable concerns about Summer D.'s safety if returned to Appellant, Douglas D. If the Circuit Court was of the opinion that the time had passed to amend the Petition, the Court possessed the inherent authority to compel the Department to file a new Petition that included the new concerns and allegations.

The Brief of Appellant, Guardian ad Litem properly cites case law where this Court has previously stated that certain actions, inactions, beliefs, or statements, in abuse and/or neglect cases could properly result in the termination of an individual's parental rights. However, for Appellant, Douglas D., to be held to the standard set forth in that case law, allegations

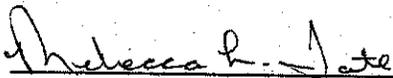
against him must have been adjudicated. The Guardian ad Litem properly fulfilled her duties and responsibilities to act on behalf of Summer D. It was the Circuit Court that failed to properly act and further investigate those concerns. The Court's inaction on the serious concerns raised before him places Summer D. in harm's way.

**PRAYER FOR RELIEF**

Wherefore, the West Virginia Department of Health and Human Resources respectfully requests that this Honorable Court reverse the lower court's Order placing Summer D. in the custody of Appellant, Douglas D., and issue an Order allowing a new Petition, including the allegations against Appellant, Douglas D., be filed and heard in a timely manner so that permanency may be achieved for Summer D.

WEST VIRGINIA DEPARTMENT OF  
HEALTH AND HUMAN RESOURCES

By Counsel  
**Darrell V. McGraw, Jr.**  
**ATTORNEY GENERAL**



Rebecca L. Tate  
Assistant Attorney General  
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Docket No. 33386

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON, WEST VIRGINIA

IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

RUTH ANN DOUGLASS, WVDHHR  
by the STATE OF WEST VIRGINIA,

Petitioner,

v.

Case No. 05-JA-12

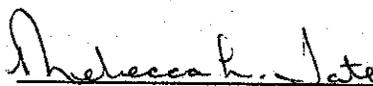
IN THE INTEREST OF SUMMER D.,  
a child under the age of 18 years  
and  
APRIL J. T, her mother, and  
DOUGLAS D, putative father.

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CERTIFICATION OF COUNSEL

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I, Rebecca L. Tate, am counsel of record for the West Virginia Department of Health and Human Resources in the above-styled case. I have reviewed the foregoing Brief of Appellant, Guardian ad Litem, and hereby state that the facts alleged are faithfully represented and that they are accurately presented to the best of my ability.



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Rebecca L. Tate  
Assistant Attorney General  
WVDHHR  
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P.O. Box 2590  
Fairmont, WV 26555-2590

**Docket No. 33386**

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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**CERTIFICATE OF SERVICE**

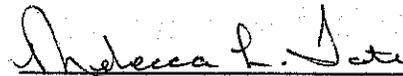
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I, Rebecca L. Tate, Assistant Attorney General and counsel for the West Virginia Department of Health and Human Resources, do hereby certify that I have served a true and accurate copy of the foregoing "Response Of The West Virginia Department of Health And Human Resources To Brief Of The Appellant, Guardian Ad Litem, For The Infant Respondent, Summer D." upon the following individuals on the 22nd day of June, 2007, by United States mail, postage pre-paid, addressed as follows:

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P.O. Box 2111  
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(Guardian ad Litem, Summer D.)

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