

---

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

---

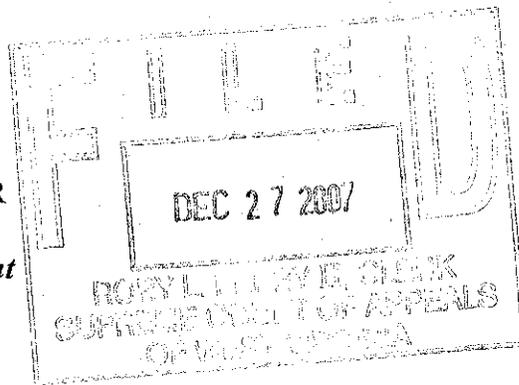
**CASE NO.: 33663**

---

**THERESA D. MESSER**

*Appellant*

v.



**HUNTINGTON ANESTHESIA GROUP, INC.,  
DR. FAROUK ABADIR, DR. HOSNY GABRIEL, DR. MARK NEWFELD,  
DR. RICARDO RAMOS, DR. ALFREDO RIVAS, DR. D. GRANT SHY,  
DR. STANISLAV STRIZ, and DR. MICHAEL VEGA**

*Appellees*

---

**BRIEF OF APPELLANTS**

**HUNTINGTON ANESTHESIA GROUP, INC. AND  
DOCTORS ABADIR, GABRIEL, RIVAS, RAMOS, AND VEGA**

**William D. Levine  
717 Sixth Avenue  
Huntington, West Virginia 25701  
(304) 529-3030  
WV Bar No. 2190**

---

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

---

CASE NO.: 33663

---

THERESA D. MESSER

*Appellant*

v.

HUNTINGTON ANESTHESIA GROUP, INC.,  
DR. FAROUK ABADIR, DR. HOSNY GABRIEL, DR. MARK NEWFELD,  
DR. RICARDO RAMOS, DR. ALFREDO RIVAS, DR. D. GRANT SHY,  
DR. STANISLAV STRIZ, and DR. MICHAEL VEGA

*Appellees*

---

<sup>ees</sup>  
BRIEF OF APPELLANTS

HUNTINGTON ANESTHESIA GROUP, INC. AND  
DOCTORS ABADIR, GABRIEL, RIVAS, RAMOS, AND VEGA

## Table of Contents

Table of Authorities .....	3
Introductory Statement .....	6
Facts .....	8
Preliminary Comments .....	8
The Employer and its Accommodation .....	9
The Non-Settlement .....	12
The Purported Procedural Peccadillos .....	15
Standards of Review .....	17
Summary Judgment .....	17
Enforcement of Settlements .....	18
Argument .....	18
Summary Judgment was Appropriate .....	18
No Violation of the West Virginia Human Rights Act Occurred .....	20
Facts to Support a Claim for Damages Do Not Exist .....	22
The Individual Defendants Are Not Culpable .....	26
Farouk Abadir .....	27
Ricardo Ramos .....	28
Alfredo Rivas .....	28
Michael Vega .....	28
Hosny Gabriel .....	28
No Settlement Was Authorized .....	29
Conclusion .....	36

## Table of Authorities

### Cases

<i>Alley v Charleston Area Medical Center</i> , 602 S.E.2d 506 (WV 2004) .....	21
<i>Baisden v West Virginia Secondary Schools Activities Commission</i> , 568 S.E.2d 32 (WV 2002) .....	21
<i>Clint Hurt &amp; Associates, Inc. v. Rare Earth Energy, Inc.</i> , 480 S.E.2d 529 (WV.1996) .....	34
<i>Coffman v West Virginia Board of Regents</i> , 386 S.E. 2d 1 (WV 1988) .....	22
<i>Dawson v Allstate Ins. Co.</i> , 433 S.E.2d 268 (WV 1993) .....	9
<i>DeVane v. Kennedy</i> , 519 S.E.2d 622 (WV 1999) .....	18
<i>Dzinglski v Weirton Steel Corp.</i> , 445 S.E.2d 219 (WV 1994) .....	24
<i>Few v. Hammack Enters., Inc.</i> , 132 N.C.App. 291, 511 S.E.2d 665, 669-70 (1999) .....	28
<i>Floyd v. Watson</i> , 163 W.Va. 65, 68, 254 S.E.2d 687, 690 (1979) .....	29
<i>General Electric Credit Corp. v. Fields</i> , 133 S.E.2d 780 (WV 1963) .....	34
<i>Guthrie v. Northwestern Mutual Life Insurance Co.</i> , 208 S.E.2d 60 (WV 1974). .....	18
<i>Holstein v Norandex</i> , 461 S.E. 2d 473 (WV 1995) .....	26
<i>Hosaflook v. Consolodation Coal Company</i> , 497 S.E. 2d 174 (WV 1997) .....	24
<i>Jackson v Putnam County Bd. of Ed.</i> , No. 33038 (May 24, 2007) .....	17, 19
<i>L. G. Burdette v. Burdette Realty Improvement, Inc.</i> , 590 S.E.2d 641, 646 (WV 2003) .....	29
<i>Martin v. Ewing</i> , 112 W.Va. 332, 164 S.E. 859 (1932) .....	30
<i>Messer v. Huntington Anesthesia Group, Inc.</i> , 620 S.E.2d 144 (WV 2005) .....	6, 20, 22, 23
<i>Mueller v. American Electric Power Energy Services</i> , 589 S.E.2d 532, 534-35 (WV 2003) .....	17
<i>O'Connor v. GCC Beverages</i> , 182 W.Va. 689, 691, 391 S.E.2d 379, 381 (1990) .....	29, 30

<i>Philyaw v. Eastern Associated Coal Corp.</i> , 633 S.E. 2d 8 (WV 2006) .....	24
<i>Powderidge Unit Owners Association v. Highland Properties</i> , 474 S.E.2d 872 (WV 1996) .	18, 19
<i>Public Citizen, Inc. v. First Natl. Bank in Fairmont</i> , 480 S.E.2d 538 (WV 1996) .....	18
<i>Raber v Eastern Associated Coal Corp.</i> , 423 S.E.2d 897 (WV 1992) .....	9
<i>Ramey v Ramey</i> , 395 S.E.2d 230 (WV 1990) .....	9
<i>Redden v Comer</i> , 488 S.E. 2d 645 (WV 1997) .....	17
<i>Riner v. Newbraugh</i> ; 563 S.E.2d 802 (WV 2002) .....	18, 29, 30
<i>Sanders v. Roselawn Memorial Gardens</i> , 152 W.Va. 91, 159 S.E.2d 784 (1968) .....	30
<i>Sanson v Brandywine Homes</i> , 599 S.E.2d 730 (WV 2004) .....	35
<i>Scaggs v Elk Run Coal Company, Inc.</i> , 479 S.E.2d 561 (WV 1996) .....	20, 21
<i>State ex rel. Evans v. Robinson</i> , 197 W.Va. 482, 475 S.E.2d 858 (1996) .....	30
<i>Stewart v SMC, Inc.</i> , 452 S.E.2d 899 (WV 1994) .....	9
<i>Travis v Alcon Laboratories</i> , 504 S.E. 2d 419 (WV 1988) .....	24
<i>Triad Energy Corporation of West Virginia v. Renner</i> (600 S.E.2d 285, 288 (WV 2004) .....	29
<i>Vande Zande v. Wisconson</i> , 44 F.3d 538 (7 <sup>th</sup> Cir. 1995) .....	22
<i>West Virginia Department of Health and Human Resources ex rel. Wright v. Doris S.</i> , 475 S.E.2d 865 (WV 1996) .....	17
<i>Wheeling Downs Racing Association v. West Virginia Sportservice</i> , 157 W.Va. 93, 199 S.E.2d 308 (1973) .....	30
<i>Woodrum v. Johnson</i> , 210 W.Va. 762, 771, 559 S.E.2d 908, 917 (2001) .....	30

**Statutes, Rules & Regulations**

Rule 5(d) of the Rules of Appellate Procedure .....7  
Rule 56 © of the West Virginia Rules of Civil Procedure ..... 16  
77 CSR § 4.5.....20, 25

**Treatises**

15A C.J.S. *Compromise & Settlement* § 7(1) (1967) ..... 28

## Introductory Statement

Theresa Messer claims that her employer, Huntington Anesthesia Group, ("HAGI")<sup>1</sup> failed to effectively accommodate her physical limitations. According to her, this resulted in the exacerbation of a pre-existing medical condition. It was undisputed, however, that HAGI did accommodate her limitations. It undisputed that after HAGI learned of her limitations, its business manager engaged in an interactive discussion with Ms. Messer and the Department of Rehabilitation, and that all had agreed upon an appropriate accommodation. It was undisputed that Ms. Messer told the Department of Rehabilitation that HAGI's accommodation was effective. Finally, it was undisputed that Ms. Messer was able to continue to perform her duties as a certified nurse anesthetist (CRNA)<sup>2</sup> until she became totally disabled in 2000.

In 2002, Ms. Messer commenced this action. In 2003, the Circuit Court dismissed this case reasoning that since she alleged only physical injury her claims were within the purview of the Workers Compensation law. In 2005, in *Messer v Huntington Anesthesia Group, Inc.*, 620 S.E.2d 144 (WV 2005), this Court held that Ms. Messer's claims for physical injuries and the consequences and effects thereof were precluded by the exclusivity of the Workers Compensation law. However, the case was remanded to allow Ms. Messer the opportunity to attempt to develop any claims that might have resulted from a violation of the West Virginia Human Rights Act which were not associated with her physical condition.

---

<sup>1</sup> Ms. Messer listed all of the physician-stockholders of HAGI as defendants. For convenience, all of the parties on whose behalf this brief has been submitted will be included within the term "HAGI."

<sup>2</sup> A CRNA is not an assistant to an anesthesiologist. CRNAs are highly trained medical professionals who are responsible for the administration of anesthesia to the patient during the surgical procedure. There are not directly supervised by anesthesiologists, who usually are not present in the operating room.

Significantly, to avoid any misunderstanding about the intended effect of its decision in *Messer*, this Court specifically noted that it was not holding that Ms. Messer's complaint had stated a claim upon which relief could be granted. The reason for this was obvious: Ms. Messer's complaint only alleged the exacerbation of a pre-existing physical condition. Ms. Messer, however, ignored completely this not too subtle advice and continued to contend only that the conditions of her employment exacerbated her pre-existing physical conditions.

At a status conference in November 2006, the parties advised the Circuit Court that this case was ready for trial. In December 2006<sup>3</sup> the Court entered an order scheduling further proceedings. That Order required dispositive motions to be filed prior to December 15.

In their motions, the defendants claimed that the undisputed facts established that HAGI had accommodated Ms. Messer and that she was able to continue to perform her duties as a CRNA until the progression of her pre-existing condition resulted in her total disability. To support its motion, HAGI and the individual physician defendants submitted affidavits, some documents, and excerpts from Ms. Messer's deposition.<sup>4</sup> Although in her memorandum Ms. Messer referred to a few statements made by her in her deposition, other than HAGI's response to some discovery, she did not submit any affidavits or other evidentiary material to contradict anything that had been submitted by the defendants.

The Circuit Court granted the defendants' motion. Its order listed many undisputed facts, the

---

<sup>3</sup> This order memorialized the schedule that had been agreed upon at the status conference in November.

<sup>4</sup> This material was attached to the defendants' memorandum in support of their motions for summary judgment. This material was expressly incorporated by reference in each individual motion.

most salient ones were that the parties had agreed upon an accommodation, that HAGI had implemented that accommodation to the extent that it was possible to do so, and that Ms. Messer was able to continue to perform her duties as a CRNA until she became physically unable to work.

Now, having lost for substantive reasons in Circuit Court, in what appears to be an attempt to shift this Courts focus away from the substantive issues, Ms. Messer has decided to attack the ethics of opposing Counsel and the Judge who ruled against her. Not only are her accusations not justified and without any basis, but also, the conduct which Ms. Messer claims is objectionable certainly had no effect on the underlying decision<sup>5</sup>. Rather, her accusation is merely a “tempest in a teapot” calculated to divert attention from the only real issue in this appeal; that is, whether based upon the undisputed facts the Appellees were entitled to a judgment as a matter of law. And, as previously stated, these undisputed facts are quite simple: the parties agreed upon an accommodation; Ms. Messer was able to work until she became totally disabled; and Ms. Messer’s only complaint was that performing her duties exacerbated a pre-existing physical condition.

### **Facts**

#### **Preliminary Comments**

As a prefatory observation, from her description of the facts it appears that Ms. Messer is either confused about the nature of a summary judgment or thinks that those standards do not apply to her case. So, rather than basing her argument upon the evidentiary material that was submitted to the Circuit Court, such as excerpts of deposition testimony, affidavits, or documents, she relies upon the allegations in the complaint as if to suggest that she is appealing from a motion to dismiss rather than the granting of a summary judgment.

---

<sup>5</sup> With respect to disregarding procedural Rules, Counsel for the Appellees never received notification of the date when Ms. Messer’s Petition would be presented. This is contrary to the mandate of Rule 5(d) of the Rules of Appellate Procedure.

In a transparent attempt to avoid the well established legal principle that a party may not rely on the mere allegations in a pleading to resist a motion for summary judgment,<sup>6</sup> in her brief, Ms. Messer stated that the Circuit Court accepted all of the allegations in her complaint as true.<sup>7</sup> This claim is false. With respect to her complaint, the Circuit Court merely observed:

During the 18 months that elapsed subsequent to that decision, Plaintiff's complaint has never changed. At this time the only allegations relating to the consequences of HAGI's alleged failure to accommodate the Plaintiff is that her physical condition was exacerbated. **Accordingly, if Plaintiff established every allegation in her complaint, the Court could not grant relief since her claimed damage resulted from her physical conditions and/or the effect her physical conditions had on her inability to remain employed.** According to the Supreme Court, such a claim falls within the exclusivity of the Workers Compensation Act. [Emphasis added]

#### **The Employer and its Accommodation<sup>8</sup>**

Ms. Messer, had been employed by HAGI as a part-time CRNA since 1988. At her request, her work time was limited to two days per week. In 1999, Ms. Messer advised HAGI that as a consequence of her herniated disk, her physician had suggested that her workday be limited to eight hours and that she should not lift more than 30 pounds. (Complaint ¶ 7, 9, and 10). To accommodate this limitation, HAGI agreed with Ms. Messer that she should decline to begin any procedure that she thought could not be completed by the end of her eight-hour shift. However, it was explained to

---

<sup>6</sup> E.g., *Ramey v Ramey*, 395 S.E.2d 230 (WV 1990). See also, *Raber v Eastern Associated Coal Corp.*, 423 S.E.2d 897 (WV 1992); *Dawson v Allstate Ins. Co.*, 433 S.E.2d 268 (WV 1993). Additionally a party may not rely upon their factual assertions in a brief to resist a properly supported motion. *Stewart v SMC, Inc.*, 452 S.E.2d 899 (WV 1994).

<sup>7</sup> Specifically in footnote 3 of her brief, Ms. Messer claimed:

None of the facts attested in Paragraphs 2-11 of the complaint were disputed by Defendants. All were accepted as true by the Circuit Court for purposes of granting Summary Judgment to the Defendants. 1/11/07 Order, p2.

<sup>8</sup> Unless otherwise referenced, the factual material in this section is contained in the affidavits which were submitted by the Appellants in support of their motions for summary judgment.

Ms. Messer that once a surgical procedure began, she would be unable to leave the patient unless a replacement CRNA was available.

To understand the reason for this accommodation, it is important to realize that a CRNA is not merely an assistant who works under the direct supervision of an anesthesiologist. CRNAs are highly trained professionals. Often a CRNA is the only person in the operating room responsible for the administration and monitoring of the anesthesia given to the patient. Because of this, a CRNA cannot leave an operation whenever they want to leave or need to leave. Once a procedure begins, medical standards prohibit a CRNA from leaving the operating room until the procedure has been completed or until they are relieved by another CRNA.

It is also important to realize that although HAGI was responsible for providing a CRNA for each surgical procedure, it did not control the operating room schedule nor could it control the length of time required for the surgeon to complete any particular procedure. Each evening the hospital would advise HAGI of the operative procedures that had been scheduled, the surgeons who would be performing each procedure, the operating rooms that had been assigned for each procedure, and the sequence in which each procedure would be performed. HAGI was not involved with the preparation of this schedule.

Although an estimated starting time for each procedure was predicted by the hospital, those times were not accurate. Unforeseen complications, emergency procedures, or other circumstances caused changes and delays. In other words, although the first procedure in each room each day would begin at approximately the scheduled time, subsequent procedures could not commence until the completion of the preceding one. Consequently, the only method of making sure a CRNA was available for each surgical procedure was to make assignments by operating room. So, since Ms. Messer was best able to monitor her schedule and to make decisions about whether the procedures

for which she had been scheduled would be completed within the eight-hour limitation, she was empowered to decline any procedure which in her judgment would not be completed within that limitation.

When HAGI was advised of Ms. Messer's limitations, its president told her that it would do its best to accommodate her time limitations and that he would discuss her other needs with the operating room supervisor at the hospital. Ms. Messer admitted that this occurred. (Messer Vol-2 at 69) Also, HAGI's business manager met with Ms. Messer and representatives of the Department of Rehabilitation to determine how to accommodate Ms. Messer's physical limitations. Ms. Messer admitted that this occurred. (Messer Vol-3 at 7).

According to the Department's notes (Summary Judgment Memorandum - Exhibit 2) HAGI's business manager had indicated that Appellant had been performing physically demanding tasks that were not within her duties but, rather, were the responsibilities of the St. Mary's staff. To accommodate that situation, Ms. Messer was told that she should refuse to do those tasks and that HAGI would deal with the Hospital if any complaints were made.

To accommodate her workday limitations, Ms. Messer was advised that she should refuse to begin any procedure if in her opinion it might not be completed within her 8-hour shift. Ms. Messer conceded that this had occurred. (Messer Vol-3 at 13). A few months later, Ms. Messer advised the Department of Rehabilitation that everything was acceptable with her job. None of this was ever contradicted or disputed.<sup>9</sup>

---

<sup>9</sup> Obviously this was a perfect accommodation since Ms. Messer made the decision when to leave work. She could have left work after only 5 hours or 6 hours, which she did on occasion. The only way that Ms. Messer would ever be obligated to work more than eight hours was if she started a procedure which was not completed by the end of her workday. But, patient care is the paramount consideration and there was never any complaint that Ms. Messer was ineffective or was unable to perform effectively her duties as a CRNA on those occasions that she worked more than eight hours.

It was also undisputed that Ms. Messer continued to perform the duties of her job as a CRNA until the year 2000, when she stopped working. According to her complaint and the Workers' Compensation claim that she filed, (Summary Judgment Memorandum - Exhibit 1) she stopped working because she had become totally disabled due to the aggravation of her pre-existing physical condition.

Two years after she terminated her employment, Ms. Messer filed this action claiming that because of HAGI's failure to accommodate her disability, her "herniated disk at L4-L5 progressed and worsened until the Plaintiff was no longer able to perform her duties as a CRNA for HAG." (Complaint ¶14 & 15) This is the only allegation relating to the consequences of the alleged failure of HAGI to accommodate her limitations. According to this Court's opinion in *Messer* physical consequences and the nonphysical effects thereof are exclusively within the purview of the Workers Compensation laws.

#### **The Non-Settlement<sup>10</sup>**

In May 2006, an attempt to mediate this controversy was undertaken. Ms. Messer and her Counsel were present at the mediation as was Counsel for the defendants. The corporate defendant's president, Hosny Gabriel, appeared on behalf of HAGI as well as on his own behalf. The only other individual defendant that attended was Ricardo Ramos<sup>11</sup>.

---

<sup>10</sup> The factual scenario from which this problem arose was developed during an evidentiary hearing on August 21, 2006. The transcript is part of the record in this appeal. The specific testimony upon which this factual statement is based has been quoted or referenced in the section of this brief entitled "No Settlement Was Authorized."

<sup>11</sup> Initially Dr. Ramos appeared as a corporate representative because its president, Hosny Gabriel, was needed at the hospital. Before the mediation was over, Dr. Gabriel replaced Dr. Ramos as HAGI's representative. Dr. Ramos remained in his capacity as an individual defendant.

Although Counsel for the defendants, Mark Dellinger, had been representing all defendants in the litigation, three individual defendants, Drs. Newfeld, Shy, and Striz, had retained separate counsel. Prior to the mediation, Mr. Dellinger had been notified by counsel for those three defendants that they would not appear and would not contribute to any settlement.

No settlement agreement was reached at the mediation. Rather, it appeared that those in attendance had discussed an amount but were unable to determine if the all individual defendants would agree. Since the amount that had been discussed exceeded the amount available to HAGI, the excess would have to be contributed by the individuals<sup>12</sup>. A handwritten agreement was prepared.

It stated:

The Defendants have not been able to reach all partners that are party Defendants and this agreement will be held in abeyance for 3 weeks pending approval of all partners. *If there is not approval by all within 3 weeks there is no settlement* and the matter may proceed to trial as if no settlement was reached. [Emphasis added]

This document was not signed by any defendant other than Hosny Gabriel.

By letter dated June 6, 2006, Mr. Dellinger notified Counsel for Ms. Messer that "that the settlement is now final as all partners have approved the terms agreed to by the parties at mediation." The defendants denied having settled the matter. Ms. Messer filed a motion to enforce the purported agreement. After listening to the arguments of Counsel, the Court determined that resolution of the issues required an evidentiary hearing, especially the testimony from Mr. Dellinger, whose letter had advised Ms. Messer that a settlement had been agreed upon.

Mr. Dellinger testified that he had written the letter advising that all the defendants had agreed upon a settlement because of a conversation he had with Ricardo Ramos. Dr. Ramos denied ever

---

<sup>12</sup> At the time of the mediation HAGI was not operating. Three of the defendants had left HAGI earlier and the remaining anesthesiologists had become employed by Cabell Huntington Hospital.

advising Counsel that all the defendants had approved the settlement. He testified that he told his Counsel that although they would like to settle, there were problems and some additional time to discuss this matter was needed. To corroborate his testimony, Dr. Ramos produced a copy of an email which he sent to Dr. Gabriel on June 3 after meeting with several individual defendants. In that email he informed Dr. Gabriel that Defendants Abadir and Vega would not agree to anything and that Defendant Rivas would only agree only if everyone else agreed. Also, Defendant Ramos' email advised Dr. Gabriel that he intended to request additional time.

Dr. Ramos further testified that he was never willing to settle anything unless all contributed equally. This included Drs. Newfeld, Shy, and Striz. Dr. Ramos testified that he had broached this matter with Dr. Newfeld prior to the mediation but that he had not been able to discuss this matter with him or the others thereafter.

The other witness who testified was Dr. Abadir, another individual defendant. He denied that he had ever agreed to the settlement and he denied ever discussing the matter with Mr. Dellinger or ever authorizing Dr. Ramos to speak for him or to make any representations on his behalf.

Mr. Dellinger admitted that he had never discussed this matter with any defendant other than Dr. Ramos. Mr. Dellinger conceded that although he thought that Dr. Ramos had the authority to speak on behalf of the defendants, he had never been told this by Dr. Ramos or by any defendant. Mr. Dellinger acknowledged that he knew that Defendants Newfeld, Shy, and Striz had separate counsel and that they had never agreed to the settlement agreement as drafted. Mr. Dellinger admitted that he was aware that the settlement could not be funded entirely by corporate assets and that the individual defendants would need to make a financial contribution. He conceded that even though the agreement made all defendants jointly and severally liable, he did not discuss this with every

defendant nor did he determine if some but not all defendants had agreed to fund the entire settlement.

Based upon this evidence, the Circuit Court concluded that no settlement had been authorized by any of the defendants.

### **The Procedural Peccadillos**

On two occasions, after the issues had been briefed, after all arguments had been made, after all the evidence had been introduced, and after the matter had been submitted, the Court requested that Counsel submit proposed findings of fact and conclusions of law which need not be served on the opposing Counsel. Counsel for Ms. Messer never objected to this procedure, which he now characterizes as inviting improper *ex parte* contacts. Such accusations are, to use a common expression, like "the pot calling the kettle black." If procedural peccadillos could be the basis for substantive rulings, this appeal must be dismissed because Counsel for Appellant failed to notify opposing Counsel of the date upon which he would orally present his petition for appeal. This is required by Rule 5(d) of the Rules of Appellate Procedure. Obviously failing to provide a required notice to opposing parties is a far more significant transgression than the purported failures of opposing Counsel who only complied with the Courts instruction

As to the particular instances, according to the transcript of the settlement enforcement proceeding, the Court, after instructing Mr. Levine to "send in a proposed order" stated "Mr. Auvil, if we were in plaintiffs' utopia, if you would send in a proposed - - he doesn't need to see it." Mr. Auvil suggests that somehow Counsel for the defendants misunderstood that the proposed order was not required to be exchanged. The problem with this assertion is that it was apparent to everyone that the Court was not directing that instruction only to Mr. Auvil, (i.e., that he did not need to serve opposing counsel but that opposing counsel was obligated to serve him). In fact, the transcript does

not reflect to whom the comment was made. The reporter set off the statement with two dashes. Obviously there was a pause. Considering that the next comment came from Mr. Levine, it is likely that the instruction was made in a comment to him. But it does not matter - the Circuit Court intended that proposed findings not to be served on opposing counsel and that is what everyone understood.<sup>13</sup> But, to the extent that Mr. Auvil failed to perceive its meaning at the time the comment was made, he could have asked for clarification, he could have voiced an objection, or he could have filed a motion thereafter.

Perhaps Mr. Auvil is somewhat chagrined because, according to his brief, he neglected to file anything. His rationale is that he had not been given a deadline. But that is nonsense. The court stated that it planned to rule within the next week. (Hearing 8/21/2006 - Tr. page 209) The Court further told counsel to submit their proposals "as quickly as possible" *Id.* at 211 If Mr. Auvil wanted more time to submit his proposed findings and conclusions he could have asked for more time or filed a motion or done something. But that was his fault, not the fault of those whose conduct he is impugning.

With respect to the summary judgment, the Court stated that he had told all Counsel that proposed orders did not need to be exchanged. This is not on the record because the Court reporter did not record it, not because it was not said. According to the Court after the hearing had concluded: "As I was leaving the bench someone inquired something and I said they need not or should not be sent to opposing counsel, because I want to get them quickly." (Hearing 3/6/2007 - Tr. page 4) Once

---

<sup>13</sup> Counsel for defendants never received anything from Mr. Auvil. At the time it seemed like everyone had done what the Judge had directed. Now, it appears that Mr. Auvil did not submit anything because he had ordered a transcript even though the Judge said he would try to rule on the issue within a week. This is difficult to believe and there is nothing in the record to even establish when Mr. Auvil ordered the transcript.

again, Mr. Auvil did not object and, obviously followed the procedure because he never sent anything to the undersigned.

But, none of this really matters. The Circuit Court explained its reasons: "Counsel were obeying the instructions of the Court in not sending - - because I didn't want to have to fight over objections to wordings on proposals." So what - the Circuit Court ruled on the issues and Ms. Messer has appealed, so it would seem that there is no real reason to address those issues.

### Standards of Review

#### Summary Judgment

Rule 56(c) of the West Virginia Rules of Civil Procedure provides that the Court may grant a summary judgment if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Mueller v. American Electric Power Energy Services*, 589 S.E.2d 532, 534-35 (WV 2003) The standard of review by this Court of an order granting summary judgment is *de novo*. *Redden v Comer*, 488 S.E. 2d 645 (WV 1997). However, that review is limited to the record as it was presented to the Circuit Court in connection with the motion. It is the obligation of the parties to submit to the Circuit Court all of the evidence which they considered to be relevant to their respective positions. As this Court recently observed in *Jackson v The Putnam County Board of Education*, No 33038 (May 24, 2007): "the parties have an obligation to 'make sure that evidence relevant to a judicial determination be placed in the record before the lower court' so that this Court may properly consider it on appeal. *West Virginia Department of Health and Human Resources ex rel. Wright v. Doris S.*, 197 W.Va. 489, 494 n. 6, 475 S.E.2d 865, 870 n. 6." The Circuit Court is not obligated to scrutinize any material that was not presented to determine the existence of any possible disputes. *Powderidge Unit Owners Association v. Highland Properties*, 474 S.E.2d

872 (WV 1996). Moreover, summary judgment cannot be defeated "on the basis of factual assertions contained in the brief of the party opposing a motion for such judgment." *Guthrie v. Northwestern Mutual Life Insurance Co.*, 208 S.E.2d 60 (WV 1974).

### **Enforcement of Settlements**

Abuse of discretion is the standard used by this Court when reviewing a circuit court order declining to enforce a settlement agreement. *DeVane v. Kennedy*, 519 S.E.2d 622 (WV 1999); *Riner v. Newbraugh*; 563 S.E.2d 802 (WV 2002). Findings of fact which are made by the trial court are reviewed on a clearly erroneous standard. *Public Citizen, Inc. v. First Natl. Bank in Fairmont*, 480 S.E.2d 538 (WV 1996).

## **Argument**

### **Summary Judgment was Appropriate**

Before addressing the legal issues involved in this appeal, it is important to reiterate the following points:

First, this case is not about whether HAGI accommodated Ms. Messer. It did. It was undisputed that HAGI engaged in an interactive process involving Ms. Messer, the Department of Rehabilitation, and its business manager. As a result, an accommodation was implemented which empowered Ms. Messer to refuse to begin any surgical procedure if she thought it might result in her working more than eight hours. Ms. Messer conceded that this had occurred. (Messer Vol-3 at 13). Also, the record established that Ms. Messer had advised the Department of Rehabilitation that the accommodation was effective. Moreover, it was never disputed that on every occasion that Ms. Messer asked to leave before the conclusion of her eight-hour shift when she was not engaged in an operative procedure, that permission was not given. Also, there was never any evidence to establish that while engaged in an operative procedure she was ever denied the right to leave if a replacement CRNA was

available to relieve her. There was nothing in the record to establish that on those occasions when Ms. Messer voluntarily chose to begin a procedure which was not completed within her eight-hour shift she was unable to perform the duties of her position. Finally, it was undisputed that Ms. Messer was able to perform her duties as a CRNA until her pre-existing condition made it physically impossible for her to perform any duties.

Second, although Ms. Messer's brief contains numerous references to her deposition testimony, neither her deposition transcript nor the excerpts to which she referred were made part of the record. There were a few references to Ms Messer's deposition testimony in her summary judgment response. But, almost without exception, those references her appellate brief were never presented to the Circuit Court. Recently in *Jackson v The Putnam County Board of Education*, No 33038 (May 24, 2007) this court ruled that material not presented to the Circuit Court should not be considered in reviewing the propriety of a summary judgment. Rather based upon *Jackson* and the cases cited therein, this appeal must be decided upon the record available to the Circuit Court. That record was the material attached to the motions for summary judgment and/or the exhibits to the memoranda, which were incorporated by reference in those motions. It also included the defendants' written responses to a notice of deposition, which was the only non-argument material submitted by Ms. Messer in response to the summary judgment motion. As previously pointed out, a circuit court is not obligated to scrutinize the entire record to determine the existence of any possible disputes - it may base its decision upon the material presented in support of and in opposition to the motion. *Powderidge Unit Owners Association v. Highland Properties*, 474 S.E.2d 872 (WV 1996).

Third, the only allegation in the complaint relating to the consequences of HAGI's accommodation was that Ms. Messer had a physical condition which was exacerbated by her

employment. In its earlier decision in this matter, *Messer v Huntington Anesthesia Group, Inc.*, 620 S.E.2d 144 (WV 2005) this Court held that claims for physical injuries and the consequences and effects thereof are precluded by the exclusivity of the Workers Compensation law. There is nothing in the record to indicate that anything other than an alleged exacerbation of a pre-existing medical condition resulted from Ms. Messer's employment.

### **No Violation of the West Virginia Human Rights Act Occurred**

Based upon her arguments it appears that Ms. Messer either fails to comprehend the basis for the Circuit Court's ruling or is deliberately trying to obfuscate the relative simplicity of this case by raising matters in this appeal that are were never raised in the Circuit Court and which are immaterial to its resolution. The gravamen of the HAGI's summary judgment motion was that it engaged in an interactive discussion which resulted in an agreed upon accommodation and that Ms. Messer was able to continue to perform her duties until her pre-existing condition rendered her totally disabled. None of this was disputed - and the reason is simple - it was factually accurate.

Ms. Messer, however, seems to suggest even though the accommodation allowed her to continue to work, she has a right to claim that the accommodation made by her employer was not sufficiently accommodating and to receive money as a consequence. This is not the current law on accommodation and it should not be the law.

According to *Scaggs v Elk Run Coal Company, Inc.*, 479 S.E.2d 561 (WV 1996), even though the West Virginia Human Rights Act did not expressly mandate that an employer make a reasonable accommodation to a disabled employee who otherwise would be qualified for employment, by implication, reasonable accommodation was required. The duty to make a reasonable accommodation does not obligate the employer to accede to the demands of an employee or empower a jury to decide

whether the accommodation was sufficiently accommodating and award monetary damages if it was not. Rather, the employer is only required to make whatever modifications may be needed to enable the employee to perform the essential functions of their job. *Baisden v West Virginia Secondary Schools Activities Commission*, 568 S.E.2d 32 (WV 2002); *Alley v Charleston Area Medical Center*, 602 S.E.2d 506 (WV 2004).

This duty is reflected in the regulations that have been promulgated by the Human Rights Commission: 'an employer shall make reasonable accommodation . . . where necessary to enable a qualified individual with a disability to perform the essential functions of the job. " 77 CSR § 4.5.

In a previous section of this brief, HAGI pointed out that although it had an obligation to provide a CRNA for each procedure, it had no control over the operating room schedule. Since this was the work environment, to accommodate Ms. Messer's eight-hour limitation, it needed to arrive at a solution that would permit her to leave after eight-hours but which would not adversely impact patient care. So, to accommodate Ms. Messer, HAGI authorized her to refuse to begin any procedure if she thought that the procedure could not be completed before the end of her 8-hour shift. Ms. Messer agreed to accept this accommodation, reported to the Department of Rehabilitation that it had been effective, and she continued to work.

In *Scaggs v Elk Run Coal Company, Inc.*, 479 S.E.2d 561 (WV 1996) this Court observed that reasonable accommodation is a process that requires flexibility, courtesy, and cooperation between both the employer and the employee. It requires only that an employer "be willing to consider making changes in its ordinary work rules, facilities, terms, and conditions in order to enable a disabled individual to work" *Id.* at 577 fn. 14 quoting, *Vande Zande v. Wisconsin*, 44 F.3d 538 (7<sup>th</sup> Cir. 1995). Perhaps there were times when Ms. Messer underestimated the time to complete a

procedure which resulted in her having to remain on duty more than eight-hours. But, the accommodation does not have to be perfect; all that is required is that the employer make a reasonable attempt to enable an employee be able to continue to be employed. In this case HAGI chose to accommodate Ms. Messer by relieving her of any requirement to complete an eight-hour shift - she could leave at will. This was the accommodation that she agreed to accept and which she exercised when she chose to do so. In fact, it was a perfect accommodation because it allowed Ms. Messer to be the sole judge of whether she would be able to perform her duties without having any impact upon patient care. Moreover, it was apparently a successful accommodation since there was never any complaint about Ms. Messer's performance of her duties as a CRNA and she was able to continue to function effectively as a CRNA until she became disabled.

#### **Facts to Support a Claim for Damages Do Not Exist**

The Supreme Court's decision in *Messer v Huntington Anesthesia Group, Inc.*, 620 S.E.2d 144, 153 (WV 2005) was intended to clarify the issue which had been pointed out by Justice Miller in his dissenting opinion in *Coffman v West Virginia Board of Regents*, 386 S.E. 2d 1 (WV 1988). That issue was whether the exclusivity provisions of the Workers Compensation Act shield an employer from claims arising under the Human Rights Act. In reconciling the application of these two acts, the Supreme Court determined that the Workers Compensation Act barred any recovery for physical injuries including any consequences, including nonphysical damage resulting from physical conditions. It held that damages "such as mental and emotional distress and anguish, directly and proximately resulting from such violation and **not associated with the physical injury or the aggravation or worsening thereof**" [emphasis added] may be recovered by an employee for violations of the Human Rights Act. *Id.* at 145, *syl. pt. 5*.

Additionally, what is quite significant to this case, is that the Court specifically stated that it had expressed no opinion on the viability of Plaintiffs claims under this Act. *Id.* at 161.

As previously stated, the only allegation of damages that ever have been made by Ms. Messer is that a pre-existing physical condition was exacerbated. More important, Ms. Messer admits that her nonphysical mental and emotional suffering resulted from her physical condition.<sup>14</sup> Clearly this admission brings her case within the purview of this *Syllabus Point 4* in *Messer v Huntington Anesthesia Group, Inc.*, 620 S.E.2d 144, 153 (WV 2005)

To the extent that a worker's injuries are of the type cognizable under W. Va. Code § 23-4-1 for which workers' compensation benefits may be sought, including aggravations and physical and non-physical conditions which flow directly and uniquely from such injury, the exclusivity provisions of the Workers' Compensation Act, W. Va. Code §§ 23-2-6 and -6a, prohibit recovery outside of the mechanisms set forth in the West Virginia Workers' Compensation Act. To the extent that a worker's injuries are directly and proximately caused by the unlawful discriminatory acts of his or her employer, and are of a type not otherwise recoverable under the Workers' Compensation Act, we hold that the exclusivity provision of the Workers' Compensation Act is inapplicable.

However, even though Ms. Messer never alleged any non-physical injuries and even though Ms. Messer admits that any emotional injuries she sustained emanated from her physical condition, she, non-the-less, suggests that she has a claim against HAGI which is not within the purview of Workers Compensation. Obviously it is difficult to address such a contention because it lacks any factual basis in the record.

HAGI suggests that with respect to any distress and anguish not related to physical conditions

---

<sup>14</sup> In her Brief, Ms. Messer admitted:

There is no question but that some of the mental and emotional distress which the Plaintiff has suffered is a result of the physical injuries which the Plaintiff has suffered. Plaintiff's treating physician, Dr. Deer, and a counselor who treated the Plaintiff related some psychological symptoms to her work-related injury. Plaintiff does not dispute that there was a connection between her depression and the work-related physical injuries which she sustained. Appellant's Brief at p.45

that could possibly exist as a consequence of a failure to accommodate.<sup>15</sup> *Hosaflook v Consolodation Coal Company*, 497 S.E. 2d 174 (WV 1997) provides the proper standard for evaluating the issue. In *Hosaflook* a disabled employee claimed that the termination of his employment violated the Human Rights Act. Among other things, Plaintiff in that case sought damages for the mental and emotional distress he claimed resulted from his wrongful termination. In its opinion, the Court, citing *Dzinglski v Weirton Steel Corp.*, 445 S.E.2d 219 (WV 1994), pointed out that an employment discrimination claim can support an action for emotional distress. However, the Court further observed that such a claim requires more than the mental anguish and emotional distress that would be expected from the embarrassment accompanying the loss of a job and from the resulting financial insecurity. Rather, the Plaintiff must establish that the mental anguish and emotional distress resulted “from the outrageous manner in which the employer effected the discharge.” *Hosaflook* at 185.

The teachings of *Hosaflook* were reaffirmed in *Philyaw v. Eastern Associated Coal Corp.* 633 S.E. 2d 8 (WV 2006). In *Philyaw* an employee claimed that he sustained emotional distress and mental anguish because his employer had required him to engage in conduct that he thought was improper. In affirming the dismissal of Plaintiffs claim in that case, the Supreme Court reaffirmed its earlier holding in *Travis v Alcon Laboratories*, 504 S.E. 2d 419 (WV 1988) in which it observed that in evaluating claims for mental anguish “the role of the trial court is to first determine whether the defendant’s conduct may reasonably be regarded as” extreme and outrageous. *Philyaw* at 14. In that opinion the Court cited *Hosaflook* for the proposition that a claim for mental anguish and

---

<sup>15</sup> On would think that if an accommodation was not effective, the disabled employee would not be able to work. Conversely, if the employee continued to perform the duties of the job, either the accommodation was effective or was unnecessary. In other words, the purpose of an accommodation is to enable an employee to continue to work not provide another cause of action against an employer because it was not sufficiently accommodating.

emotional distress requires “a strong showing of misconduct.” *Id.*

Here, Ms. Messer, like the Plaintiff in *Hosaflook*, claims that her employer violated the Human Rights Act. Likewise both Ms. Messer and the *Hosflook* plaintiff claimed that they sustained mental anguish<sup>16</sup> because of this violation. But, unlike the Plaintiff in *Hosaflook*, Ms. Messer was accommodated not discharged.<sup>17</sup> However this difference should be irrelevant to the threshold legal analysis that a trial court must make.

The decisions in *Travis*, *Hosaflook*, and *Philyaw* require a trial court as a threshold matter, to scrutinize the conduct of the employer to determine if it acted in an outrageous manner in effectuating the activity which the Plaintiff claims was improper. Clearly, none of the defendants acted in any manner which could be considered to be “atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of human decency,”<sup>18</sup> which is the standard by which a claim of mental anguish is measured. *Philyaw* at 13. It would be strange indeed if HAGI could escape liability

---

<sup>16</sup> As was pointed out in earlier, Plaintiffs complaint does not contain these allegations. Accordingly, for discussion purposes only, HAGI will address that issue.

<sup>17</sup> Rather although she continued to be employed, she claims that HAGI did not reasonably accommodate her physical limitations to enable her to be employed.

<sup>18</sup> For example it was undisputed that Ms. Messer had absolutely no personal interaction with Drs. Abadir, Ramos, Rivas and Vega. The only involvement of those individuals with Ms. Messer was occasionally to prepare a schedule from the information that was provided by the hospital. Even if that scheduling was ineffective, deficient scheduling, as a threshold matter, can not be considered to be conduct that is intolerable in a civilized society. With respect to Dr. Gabriel, Ms. Messer seemed to suggest that although he allowed her to leave early when she requested, he did not appear to be enthralled. (Messer Vol-3 at 82) Her exact testimony was “He kind of flipped his wrist and his hand and said go home.” Obviously a “wrist flip” can not be construed to exceeds “the bounds of human decency.”

for mental anguish if it had terminated Ms. Messer in a non-offensive manner but incur that liability if it tried to accommodate her needs but its accommodation was not sufficiently accommodating.

### **The Individual Defendants Are Not Culpable**

In Paragraphs 8 and 12 of her complaint, Ms. Messer appears to suggest that each individual defendant<sup>19</sup> is jointly and severally liable for every problem that she claims resulted from the fact that occasionally she worked more than 8 hours in a day. If this is her contention, she has misread the law.

The West Virginia Human Rights Act requires that employers make reasonable accommodations to enable a qualified individual to perform their job. 77 C.S.R. §4.5. An employer is defined as "any person employing twelve or more persons . . ." Clearly none of the individual defendants could be considered to be the Ms. Messer's employer. In fact, Ms. Messer has not even suggested that she was employed by the individual defendants. Rather, she states in Paragraph 2 of her complaint that HAGI was her employer.<sup>20</sup> In fact, other than determining a preliminary schedule, most of the individual defendants had little, if any, contact with Ms. Messer.

As it relates to the hours which the Ms. Messer may have been expected to work, each individual anesthesiologist would have on occasion been responsible for her initial assignment. However, only those anesthesiologists that were at St Mary's Hospital during the time when she was working<sup>21</sup> were responsible for making decisions that influenced the amount of time she was on duty.

---

<sup>19</sup> Although this memorandum is being filed on behalf of only five of the eight individual defendants, the analysis contained herein applies equally to all individuals.

<sup>20</sup> Defendants are aware of *Holstein v Norandex*, 461 S.E. 2d 473 (WV 1995) which held that an individual that committed a discriminatory act on behalf of the employer could be personally liable. Failing to accommodate is not the commission of an unlawful act which could only be effectuated by another person. It is a failure to consider changing the conditions of employment, which could only be effectuated by the employer, not a fellow employee, even if that employee was a stockholder.

<sup>21</sup> Ms. Messer was a part time employee who worked only two days per week.

The scheduling of anesthetists who were assigned to work at St. Mary's was described by Dr. Ramos in his affidavit. Each individual defendant averred that they tried to assign Ms. Messer to an operating room in which they reasonably believed that all scheduled procedures would be completed within an 8-hour shift. With respect to those initial assignments, this was all that anyone at HAGI could do since scheduling the procedures was not an activity over which it had any control. Most important, with respect to accommodating her work hours, initial scheduling was irrelevant since it was inaccurate and because she had been told that she did not have to accept any assignment that would not be completed within her 8-hour shift. (Messer Vol-3 at 13) Clearly as a matter of law, this was a reasonable accommodation since by exercising her right to refuse assignments, Ms. Messer would have been able to effectively avoid having to ever work more than an 8-hour shift. She cannot use her failure to accept the accommodation to suggest that others are liable.

The undisputed facts about each of the individual defendants are:

**Farouk Abadir**

With respect to active supervision of the Messer, Dr. Abadir in his affidavit stated that primarily his practice was at Cabell Huntington Hospital. He was at St. Mary's Hospital only in the evening hours but he did not recall ever working there while Ms. Messer was on duty. He further stated that Ms. Messer never requested that she be reassigned, be relieved of her duties, or be given any assistance. In her deposition, Ms. Messer agreed that all that Dr. Abadir had ever done with respect to her accommodation was to participate in the scheduling process (Messer Vol-4 at 89-90)

**Ricardo Ramos**

In his affidavit Dr. Ramos stated that on occasion he would be at St. Mary's Hospital during the time that Ms. Messer was working but that he did not recall any day when he was at St. Mary's

when Ms. Messer worked more than 8 hours. This was consistent with Ms. Messer's deposition in which she testified that Dr. Ramos did nothing with respect to her work except participate in the assignment process. (Messer Vol-4 at 96)

**Alfredo Rivas**

According to Dr. Rivas other than make assignments, he allowed Ms. Messer to leave early when she requested it. Ms. Messer admitted that Dr. Rivas had allowed her to leave early. (Messer Vol-3 at 86) Other than this, Ms. Messer's only complaint about Dr. Rivas was that he was involved with making assignments.

**Michael Vega**

With respect to her active supervision, in his affidavit Dr. Vega stated that because his practice primarily was at Cabell Huntington Hospital he could not recall having had any contact with Ms. Messer. Ms. Messer concurred. According to her, his only involvement with her claim is that he made assignments. (Messer Vol-4 at 105-07)

**Hosny Gabriel**

Unlike Drs. Abadir, Ramos, Rivas, and Vega, Dr. Gabriel did work at St Mary's Hospital. In his affidavit, he explained the work environment at St Mary's Hospital and the standard of care which prohibited allowing an anesthetist from leaving an ongoing procedure without a replacement. Dr. Gabriel further stated that Ms. Messer had been told to decline any procedure that could not be completed by the end of her shift. In her deposition, Ms. Messer admitted that when she had refused an assignment from Dr. Gabriel due to pain, he allowed her to leave before the end of her shift. (Messer Vol-4 at 22-23) The only other complaint that Ms. Messer made about Dr. Gabriel was that on occasion when she asked for relief during a procedure she would be told that none was available.

(Messer Vol-4 at 99) Ms. Messer, however, conceded that she had been told that she should not accept an assignment that could not be completed before the end of her shift. (Messer Vol-3 at 13) So, if she chose to begin a lengthy procedure, she should not complain about the lack of accommodation because a replacement was unavailable at the time she requested relief.

### **No Settlement Was Authorized**

The law relating to the enforcement of a purported settlement agreement appears to be well established and without dispute. A settlement agreement is merely a contract. It is no different from other contracts and must "be construed as any other contract." *Triad Energy Corporation of West Virginia v. Renner* (600 S.E.2d 285, 288 (WV 2004). *Riner v Newbraugh*, 563 S.E.2d 802 (WV 2002) held that the enforcement of an unsigned agreement requires "sufficient evidence concerning the attainment of an agreement and the mutually agreed upon terms of the agreement. *See, Few v. Hammack Enters., Inc.*, 132 N.C.App. 291, 511 S.E.2d 665, 669-70 (1999)" *Id.* at 806. More particularly, this Court observed:

We stated further in *O'Connor v. GCC Beverages, Inc.*, 182 W.Va. 689, 391 S.E.2d 379 (1990): "It is well-understood that '[s]ince a compromise and settlement is contractual in nature, a definite meeting of the minds of the parties is essential to a valid compromise, since a settlement cannot be predicated on equivocal actions of the parties' 15A C.J.S. *Compromise & Settlement* § 7(1) (1967)"

These principles were again emphasized in *L. G. Burdette v. Burdette Realty Improvement, Inc.*, 590 S.E.2d 641, 646 (WV 2003). There, this Court after reiterating the well-established law on settlements<sup>22</sup> refused to enforce a settlement agreement which some but not all of the shareholders

---

<sup>22</sup> As this Court reaffirmed in *Woodrum v. Johnson*, 210 W.Va. 762, 771, 559 S.E.2d 908, 917 (2001), the law favors and encourages the resolution of controversies by contracts of compromise and settlement, rather than by litigation. Syl. pt. 1, *Sanders v. Roselawn Memorial Gardens*, 152 W.Va. 91, 159 S.E.2d 784 (1968). Nevertheless, settlement agreements are to be construed "as any other contract," *Floyd v. Watson*, 163 W.Va. 65, 68, 254 S.E.2d 687, 690 (1979), and, as noted in syllabus

of a small corporation had signed:

As the authorities cited above establish, the meeting of the minds requirement<sup>23</sup> of contract law is applicable to settlement agreements such as the one now before this Court. Here, the record demonstrates by clear and convincing evidence that appellant Burdette, an indispensable signatory to the agreement, and the appellees failed to reach a meeting of the minds concerning a settlement of their dispute regarding the family business.

Here, the only document that was signed by any defendant was the one prepared at the conclusion of the mediation. By its terms, that document was never intended to be a settlement agreement. Rather, it was a memorandum of understanding which needed the approval of all individual defendants before it would become a settlement agreement. That is clear from Paragraph 7 of that document:

The Defendants have not been able to reach all partners that are party Defendants and this agreement will be held in abeyance for 3 weeks pending approval of all partners. ***If there is not approval by all within 3 weeks there is no settlement*** and the matter may proceed to trial as if no settlement was reached. [Emphasis added]

It is undisputed that by letter dated June 6, 2006, Mark Dellinger, who was the attorney for all of the defendants, notified Ms. Messer's attorney "that the settlement is now final as all partners have approved the terms agreed to by the parties at mediation." If, however, this representation was

---

point 1 of *Martin v. Ewing*, 112 W.Va. 332, 164 S.E. 859 (1932): "A meeting of the minds of the parties is a *sine qua non* of all contracts." Syl. pt. 4, *Riner v. Newbraugh*, 211 W.Va. 137, 563 S.E.2d 802 (2002); syl. pt. 1, *Wheeling Downs Racing Association v. West Virginia Sportservice*, 157 W.Va. 93, 199 S.E.2d 308 (1973).

<sup>23</sup> The meeting of the minds requirement has been recognized by this Court as specifically applicable to settlement agreements. See, *Riner*, *supra*, 211 W.Va. at 144, 563 S.E.2d at 809; *State ex rel. Evans v. Robinson*, 197 W.Va. 482, 475 S.E.2d 858 (1996), *cert. denied*, 519 U.S. 1121, 117 S.Ct. 971, 136 L.Ed.2d 855 (1997), "a court may only enforce a settlement when there has been a definite meeting of the minds." 197 W.Va. at 485, 475 S.E.2d at 861. In *O'Connor v. GCC Beverages*, 182 W.Va. 689, 691, 391 S.E.2d 379, 381 (1990), this Court stated: "It is well understood that '[s]ince a compromise and settlement is contractual in nature, a definite meeting of the minds of the parties is essential to a valid compromise, since a settlement cannot be predicated on equivocal actions of the parties.' 15A C.J.S. *Compromise & Settlement*, sec. 7(1) (1967).

incorrect because not all of the individual defendants approved the agreement and Mr. Dellinger had never been authorized to make that representation, there was no settlement. Nothing that Mr. Dellinger could have said or done could have created an agreement if none existed.

When he testified about the settlement, Mr. Dellinger stated that it was contemplated that unanimity among all defendants was a prerequisite: (Hearing 8/21/06 - Tr. page 52)

- A. Well, there - - it was contemplated there would be agreement among all parties and that the release would go to all of the defendants in the case. The term "partners" was used in this particular agreement, I believe, at the urgence of Dr. Gabriel for any of the partners who were unable to attend that day because they were out of state or I believe one may have been out of the country.
- Q. So it was contemplated that those who were not in attendance would get to vote on whether or not to accept this agreement?
- A. That's correct.
- Q. And unanimity was required?
- A. Yes.

Mr. Dellinger further admitted that he had never discussed the settlement with either Dr. Abadir or Dr. Vega (Id.)

- Q. Now, subsequent to that agreement, did you ever have a conversation about that agreement with Dr. Abadir?
- A. No.
- Q. Did Dr. Abadir ever tell you that he had agreed to settle the matter?
- A. No, Dr. Abadir did not tell me that.
- Q. Did you ever have a conversation subsequent to that agreement with Dr. Vega?
- A. No.
- Q. Did Dr. Vega ever tell you that he had agreed or someone else tell you on behalf of Dr. Vega - - I don't want to say it that way. You never had a conversation with Dr. Vega, correct?
- A. That's correct.
- Q. And Dr. Vega never told you he agreed?
- A. He did not tell me that, no.

Mr. Dellinger had predicated his June 6 letter upon a misunderstanding of a discussion he had with

from Dr. Ramos on June 5. Dr. Ramos denied that he had ever advised Mr. Dellinger that all of the defendants had agreed (Id. at 152):

- Q. Can you describe your conversation with Mr. Dellinger on that point at --- on that date?
- A. What I told Mr. Dellinger was we would like to settle and get it over with. We still have Dr. Abadir not agreeing to the settlement. We would like to see the thing settled and get it over with in a few chosen words.
- Q. So you told him -- the words you chose were we would like to settle and get it over with?
- A. Right.
- Q. Now, you would prefer, if everyone agreed, to settle and get it over with?
- A. Correct.
- Q. But that Dr. Abadir would not agree?
- A. Correct.
- Q. But you never told him that everyone had agreed?
- A. No. I told him Dr. Abadir did not agree. We had a heated discussion on Saturday, but Hosny was going to work on him.

To corroborate his version of the conversation, Dr. Ramos introduced a copy of an email he had sent to Dr. Gabriel immediately after the meeting. (Id. at 150):

Hosny, today, Saturday, I met with Dr. Rivas, Michael, Farouk and discussed the problem with the Messer case and all ramifications of it. Michael said he had nothing to do with it, because he was not a partner and that he signed something he is not liable for anything. Farouk says he's not paying for nothing. Rivas says he will go with whatever we decide. I'm going to call our attorney on Monday and ask to see if we can delay this until the 16th, which is Friday, and see what happens. Farouk is saying let's go to court and fight, but he doesn't know the ramifications of an appeal, et cetera, et cetera. If you read this email, write me back. Richard

Of equal importance is that even though the agreement required unanimity, three of the defendants had refused to contribute. Non-the-less the purported agreement made each defendant liable for the entire amount: (Id. p118-19):

- Q. The mediation agreement itself, which I think came about as a consequence or a final result of a mediation referred to all defendants?
- A. That's correct, the defendants. It didn't specify any of the particular defendants by name or even by designation?
- A. That's correct.
- Q. Okay. But yet you testified that prior to the mediation three of the defendants

- stated that they would not contribute any money to the settlement?
- A. That's correct.

Yet, Mr. Dellinger had made no attempt to discuss this matter subsequent to the mediation with any individual other than Dr. Ramos (Id. at 53)

- Q. And as I understand, the only individual with whom you had any conversation, subsequent to the settlement, that was a defendant -- the only defendant that you had a conversation with subsequent to that May 18th agreement was with Dr. Ramos?
- A. That's correct.

Apparently, Ms. Messer contends that Dr. Ramos is a liar and that he had the apparent authority to obligate all of the defendants even though none had agreed. With respect to authority, Dr. Ramos was a defendant and Mr. Dellinger was representing him as well as the others. The mere fact that he may have shown a greater interest in the litigation does not mean that the others had abrogated their right to reject a proposed agreement. In fact, Mr. Dellinger admitted that he knew Dr. Newfeld, Dr. Shy and Dr. Striz were represented by separate counsel and had refused to contribute to any settlement: (Id at 125-26):

- Q. So you would agree with me that this particular settlement agreement did not have -- in terms of the payment of the money. Now, let's not talk about agreeing to sign off on something. But this agreement here says the defendants will pay \$225,000? Correct.
- Q. All right. Mr. Scarr's three -- Newfeld, Shy and Striz -- never agreed to pay any portion of that \$225,000
- A. That's correct

When Mr. Dellinger was asked why he thought Dr. Ramos had the authority to commit all the defendants to a settlement, his response was that Dr. Ramos had attended the mediation and that he had post-mediation communications with him about the case (Id, at 127):

- Q. So they had both acted on behalf of the others. But you have a absolutely nothing in -- let me go back. He authorized, you say he initiated -- he initiated settlement discussions or at least suggested to you to initiate settlement discussions?
- A. No. I just said he told me to initiate and the amounts involved.

- Q. And from this, you deduced that he had the authority to commit a bunch of other people to pay a substantial amount of money?
- A. From that, and from other -- the fact that he was a designated representative at the mediation, that he had handled the post-mediation communications to me, I deemed it was reasonable to rely upon his representation that everybody had agreed to it and passed that on.
- Q. You deemed it reasonable, correct?
- A. Correct

Apparent authority requires far more than an inference drawn by the individual who purportedly acts upon an assumption that authority exists. Apparent authority is created when "one who by his acts or conduct has permitted another to act apparently or ostensibly as his agent, to the injury of a third person who has dealt with the apparent or ostensible agent in good faith and in the exercise of reasonable prudence, is estopped to deny the agency relationship." *General Electric Credit Corp. v. Fields*, 133 S.E.2d 780 (WV 1963). It requires statements, conduct, lack of ordinary care, or other manifestations by the principal which reasonably induce a third person to believe that the apparent agent is acting within his authority. *Clint Hurt & Associates, Inc. v. Rare Earth Energy, Inc.*, 480 S.E.2d 529 (WV.1996). There was no evidence that any individual defendant had acted in a manner which implied or from which Mr. Dellinger could have inferred that Dr. Ramos had the authority to commit his co-defendants to a settlement.

After hearing the testimony, the Circuit Court concluded that the defendants had not agreed to settle. In making this determination, the Circuit Court first criticized the manner in which Mr. Dellinger had acted:

The Court is troubled by the manner in which this dispute arose. It is undisputed that the Plaintiff and her Counsel were willing to discuss the issues and attempt to negotiate in good faith. It is also undisputed that prior to the mediation three individual defendants unequivocally stated that they would not appear and negotiate. Apparently their position was that the remaining Defendants could settle if they desired. Of the remaining five individuals, only two appeared at the mediation and based upon the agreement that was negotiated, none had the authority to bind the others and one had refused to sign the document. It was undisputed that their

Counsel, who was counsel for all defendants never had any discussion with anyone until he purportedly was advised by one that all had agreed. Counsel made no effort to corroborate this statement, which the alleged speaker denied making, nor did he make any effort to make sure that those who did not attend the mediation understood the effect of the settlement to which they had purportedly agreed. Instead, he represented to the Plaintiff that all had agreed even though he knew that some (three) had not and had no idea if the others understood that each might have to pay a substantial amount from their personal assets.

Then, after making findings of fact, the Circuit Court ruled that Mr. Dellinger was not authorized to settle the case. In so doing, the Circuit Court observed:

As enunciated by the Supreme Court in *Sanson v Brandywine Homes*, 599 S.E.2d 730 (WV 2004) a decision regarding the enforcement of a settlement agreement requires the exercise of sound discretion by the Court. In this case, although neither the Plaintiff nor her attorney has caused or contributed to the current situation the same can be said of the individual defendants. Clearly Defendants Shy, Newfeld and Striz never authorized Mr. Dellinger to agree to a settlement which by its terms obligates them to pay \$225,000. Yet, although he was aware of this and could have caused the agreement to be drafted to so state, he chose to conceal this fact from the Plaintiff during mediation. Because of this, those defendants were exposed to the economic consequences of a substantial judgment against them. Likewise, although it is undisputed that Defendants Abadir and Vega had refused to settle and Defendant Rivas would agree only if all others likewise agreed, which never happened, if the Court decided to enforce the agreement, those who had expressed an unwillingness to compromise upon the terms suggested will have a judgment entered against them. This is not because of anything they did or said, but because of something done by their lawyer without their consent. So, although Mr. Dellinger may claim that he relied upon the statements of Defendant Ramos which Defendant Ramos denies making, the effect will none-the-less be that those who never agreed to pay will be ordered to pay because of a disagreement between Defendant Ramos and Mr. Dellinger over a conversation to which they were not a party. Defendant Ramos testified that like Defendant Rivas, he was willing to settle only if all defendants contributed to the settlement, which most had refused to agree to do. Finally, although there was no testimony relating to Defendant Gabriel, the mediation agreement itself, which he was the only defendant to sign, specifically required unanimity. So, with respect to him, the evidence is that while he was out of the country on vacation he received an email from Defendant Ramos advising that Defendants Abadir and Vega had refused to agree and that more time for evaluation would be requested but that because of a his attorneys representations that he (Gabriel) never authorized, he was subjected to a substantial judgment. Under these circumstances it can not be said that the exercise of discretion to create this scenario this would not be an abuse.

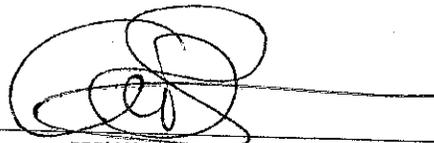
### Conclusion

Based upon her written submission to this Court, it seems that Ms. Messer views her case as a manifestation of the classic struggle between good and evil. That she appears to conceive herself as an injured worker who has been oppressed by affluent physicians merely to fuel their greed. Thus she suggests that HAGI could have hired additional anesthetists to wait outside of the operating room to relieve her if completing a procedure would require her to work more than eight hours but that they failed to do so because they wanted more for themselves.

The only problem with her plan was that HAGI did what the law required. It considered her limitations, discussed them with her and the Department of Rehabilitation, and agreed upon a perfect solution. Ms. Messer was given the absolute authority to control the length of her workday. The only limitation was that patient care could not suffer. She accepted this accommodation, reported to the Department of Rehabilitation that it was effective, and to prove that point, she continued to be able to perform the functions of a CRNA without objection or complaint until a pre-existing physical condition removed her from the workforce.

There were no facts in dispute and the law is clear. Accordingly, the Circuit Court properly granted a motion for summary judgment. Accordingly, for the reasons stated in this Brief, the Appellants request that the decision of the Circuit Court of Cabell County be affirmed.

Respectfully submitted.



William D. Levine (WV Bar 2190)  
717 Sixth Avenue  
Huntington, West Virginia 25701  
(304) 529-3030  
*Counsel for Appellants*

**CERTIFICATE OF SERVICE**

I, William D. Levine, counsel for Defendants Huntington Anesthesia Group, Inc., and Dr. Abadir, Dr. Gabriel, Dr. Rivas, Dr. Ramos, and Dr. Vega, do hereby certify that I have served a copy the foregoing **BRIEF OF APPELLANTS HUNTINGTON ANESTHESIA GROUP, INC. AND DOCTORS ABADIR, GABRIEL, RIVAS, RAMOS, AND VEGA** upon counsel of record, by depositing a copy in the United States Mail, postage prepaid, this 26<sup>th</sup> day of December 2007, addressed to:

Walt Auvil, Esq.  
Rusen & Auvil  
1208 Market Street  
Parkersburg, West Virginia 26101

Thomas Scarr, Esq.  
P.O. Box 2688  
Huntington, West Virginia 25726-2688

  
\_\_\_\_\_  
William D. Levine