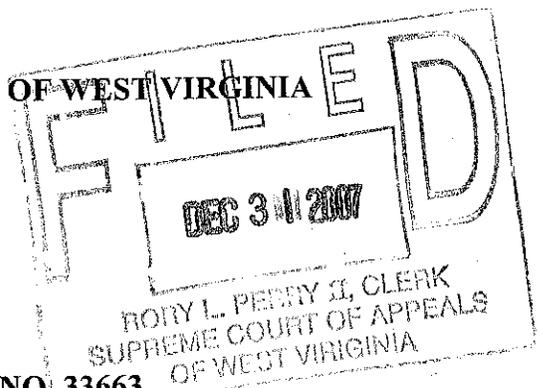


BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**THERESA D. MESSER,**

**Appellant,**

**v.**

**CASE NO. 33663**

**From the Circuit Court of**

**Cabell County, Case No. 02-C-0635**

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

**Appellees.**

**BRIEF OF APPELLEES DR. MARK NEWFELD,  
DR. D. GRANT SHY, AND DR. STANISLAV STRIZ**

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## I. INTRODUCTION

On January 11, 2007, over four (4) years after Appellant filed her Complaint against her employer, Huntington Anesthesia Group, Inc. (hereinafter referred to as "HAGI") and the individual shareholder/physicians of HAGI, including Drs. Newfeld, Shy and Striz, the Circuit Court granted Appellees' Motions for Summary Judgment.<sup>1</sup> In granting the motions, the Circuit Court in a detailed order, clearly sets forth the factual and legal basis for its ruling. As is discussed below, and as a review of Appellant's Responses to Appellees' Motions for Summary Judgment and a transcript of the oral argument regarding the motions, clearly indicate the Circuit Court had absolutely no choice in this matter but to grant summary judgment.

The case had been returned to the Circuit Court for further proceedings after this Court affirmed in part and reversed in part Appellant's earlier appeal of the Circuit Court's August 18, 2003 Order, which granted Appellees' Motion to Dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. The Circuit Court had granted Appellees' Motion to Dismiss on the legal basis that "[t]he [WVRA] does not create a cause of action for work place injuries, and [a]ny injuries alleged and sustained are the exclusive jurisdiction of the Workers' Comp Act." *Messer v. Huntington Anesthesia Group, Inc.*, 620 S.E.2d 144, 160 (W.Va. 2005).

Although this Court affirmed the Circuit Court's dismissal as it relates to a claim for physical injuries resulting from a work related injury, it decided that "an employee's claim against an employer for violation of the [WVHRA] and resulting non-physical injuries, such as mental and emotional distress and anguish, directly and proximately resulting from such violation and not associated with a physical injury or the aggravation or worsening thereof, are

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<sup>1</sup> Two separate Motions for Summary Judgment were filed - one on behalf of HAGI, Drs. Abadir, Gabriel, Rivas, Ramos, and Vega and one on behalf of Drs. Newfeld, Shy and Striz. However, both Motions requested summary judgment on all of the claims asserted in Appellant's Complaint on essentially the same basis.

not barred by the exclusivity provisions of the Workers' Compensation Act." *Messer*, 620 S.E.2d at 160-161. Thus, this Court held that Appellant cannot recover for any physical injuries and/or exacerbation thereof inasmuch as such claims are barred by the workers' compensation exclusivity, but Appellant may be entitled to pursue a claim for any non-physical injuries which are a direct and proximate result of any alleged violations of the WVHRA.

This Court's prior decision in *Messer* simply clarified a legal principle and did not find that Appellant had a viable claim under the WVHRA inasmuch as that issue was not before the Court. In fact, the Court went out of its way to unequivocally state that it "... expresses no opinion as to whether Appellant's Complaint states a cause of action against Appellees for violation of the [WVHRA]." 620 S.E.2d at 161. The question of whether Appellant had asserted a viable claim was properly left to be decided by the Circuit Court after the case was remanded.

Appellant's Complaint alleges that her employer, HAGI, and the individual shareholders of HAGI, violated the WVHRA by allegedly failing and refusing to engage in the interactive process to determine if reasonable accommodation of Appellant's restrictions was possible (*Appellant's Complaint* ¶12), and by allegedly failing to reasonably accommodate her disability under the WVHRA (*Appellant's Complaint*, ¶7-13). Appellant also alleges in her Complaint that the corporate veil should be pierced inasmuch as "the legal formalities required by law for recognition as a corporate entity" have been disregarded and that "[t]he personal assets of the individual [Appellees] should be held liable for any judgment in this matter ...." (*Appellant's Complaint*, ¶15-16.)

In their respective Motions for Summary Judgment, Appellees addressed each of these conclusory allegations, citing and discussing the applicable law, and referring to and citing admissible evidence in support of their contention that summary judgment is appropriate,

including multiple affidavits, excerpts from Appellant's deposition, and various other documents produced during discovery. Although Appellant filed two responses shortly before the hearing on the motions, those responses completely failed to address Appellees' arguments and the evidence cited and relied upon to support the requests for summary judgment on Appellant's claim of failure to engage in interactive dialogue and claim that the corporate veil should be pierced. Additionally, Appellant did not address in any meaningful way these issues during oral argument before the Circuit Court. Thus, Appellees' Motions for Summary Judgment involving Appellant's claims of failure to engage in interactive dialogue and piercing the corporate veil claim were essentially unopposed. The Circuit Court below, or any Circuit Court for that matter, would not have been justified in doing anything else but granting Appellees' motions on these claims.

With respect to Appellant's remaining claim that her employer, HAGI, and its individual shareholders, had failed to reasonably accommodate her work restrictions, the Appellant's responses were limited. Appellant basically argued that there were disputed facts that precluded summary judgment. However, Appellant's responses failed to satisfy her burden of coming forward and presenting specific evidence admissible at trial that actually demonstrated that there was a genuine issue of material fact. W.Va. R. Civ. P. 56(e); *Crain v. Lightner*, 364 S.E.2d 778 (W.Va. 1987). Rather, Appellant simply argued, without factual and/or legal support, that a genuine issue of material fact exists, but failed to identify the genuine issue of material fact, and failed to cite to any admissible evidence that would support the conclusion that there is a genuine issue or dispute over any material fact. Instead, Appellant attempted to rely on unsupported factual allegations and unsupported conclusions, and "mere speculation or the building of one inference upon another" which is insufficient to withstand a motion for summary judgment.

*Harleysville Mutual Ins. Co. v. Packer*, 60 F.3d 1116, 1119-20 (4<sup>th</sup> Cir. 1995). Accordingly, the Circuit Court had no choice but to grant Appellees' Motions for Summary Judgment.

## II. STATEMENT OF CASE

### A. **Procedural History**

Appellant's Complaint was originally filed on August 1, 2002, almost two (2) years after she ceased working for HAGI. Thereafter, the Appellees filed a Motion to Dismiss, arguing that Appellant's claims were barred by the exclusivity provision of the West Virginia Workers' Act. By Order entered on August 18, 2003, the Circuit Court granted the Appellees' motion and dismissed Appellant's claims. Appellant appealed the Circuit Court's ruling to this Court, which affirmed the Circuit Court's August 18, 2003 ruling in part and reversed in part. As stated above, this Court in its decision simply clarified a legal principle and did not find that the Appellant had a viable claim under WVHRA inasmuch as that issue was not before the Court. That question was left to the Circuit Court when the case was sent back for further proceedings.

Thereafter, the parties engaged in discovery and proceeded to develop the case for trial. Ultimately, the parties engaged in some settlement negotiations that included mediation and apparently reached a tentative settlement. Subsequently, a dispute subsequently arose as to whether a binding settlement had in fact been reached by all of the parties.

Appellant thereafter filed a Motion to Enforce the Settlement and the parties filed briefs in support and in opposition to that motion. As required under West Virginia law, on August 21, 2006, the Circuit Court conducted an evidentiary hearing on the issue. After oral argument was completed, the Judge in open court directed all counsel, including Appellant's counsel, to submit proposed findings of fact and conclusions of law and the Court would prepare and enter its own

order. The Circuit Court further indicated that the parties were not to serve their submissions on opposing counsel since he did not wish any further argument on this issue. The Circuit Court set a deadline for the submissions of August 25, 2006, and indicated that a ruling would follow soon thereafter.

Per the Circuit Court's direction, counsel for Drs. Newfeld, Shy and Striz, and separate counsel for HAGI and the other individual Appellees, followed the Court's direction and submitted proposed findings of fact and conclusions of law on August 25, 2006. According to Appellant's counsel, he did not comply with the Circuit Court's direction, and did not file any proposed findings of fact and conclusions of law on or before August 25, 2006, nor at any time thereafter. The Circuit Court entered an order on September 21, 2006 denying the Appellant's Motion to Enforce Settlement. Instead of filing the proposed findings of fact and conclusions of law as directed by the Circuit Court, counsel for Appellant apparently waited for receipt of a transcript of the August 21, 2006 hearing, which he indicates he received on September 25, 2006, at the same time he received the Circuit Court's September 21, 2006 Order denying the Appellant's Motion to Enforce Settlement.

Thereafter, counsel for Appellant requested a scheduling and status conference which was held on November 14, 2006. At that time, Appellant's counsel indicated that he was prepared for trial and requested a trial date as soon as possible. During that conference, there was no mention of any additional discovery that Appellant felt was necessary, and accordingly, the Circuit Court, with agreement of all counsel, scheduled the matter for trial on February 12, 2007. The Circuit Court also, without objection from Appellant's counsel, set a deadline for filing dispositive motions of December 15, 2006, and directed the parties to schedule a hearing

on any such motions for the first week of January, 2007.<sup>2</sup> Again, at no time did Appellant's counsel indicate that December 15, 2006 was not a realistic date for filing dispositive motions nor to respond prior to the hearing which was to be scheduled for the first week of January, 2007.

Pursuant to the Circuit Court's Scheduling Order, the Appellees filed their respective Motions for Summary Judgment on December 15, 2006. After consultation with other counsel, the Motions for Summary Judgment were scheduled for hearing on January 4, 2007 at 9:00 a.m., as reflected in the Notice of Hearing which was filed and served on the respective parties. On December 28, 2006, Appellant filed an initial Response to the Motions for Summary Judgment, simply indicating that there was some discovery yet to be completed.<sup>3</sup> At approximately 6:00 p.m. on January 2, 2007, Appellant served a second Response to the Motions for Summary Judgment.

The hearing on the Motions for Summary Judgment was conducted on January 4, 2007, and all parties were given an opportunity to fully argue their positions and to respond to questions from the Circuit Court. After full argument on the issues, the Circuit Court directed counsel for the respective parties to submit by January 9, 2007 proposed findings of fact and conclusions of law without serving the same on other counsel. Again, in compliance with the Circuit Court's direction, counsel for the various Appellees submitted proposed findings of fact and conclusions of law. Again, Appellant's counsel apparently ignored the Circuit Court's direction. Rather than submitting proposed findings of fact and conclusions of law, Appellant's counsel submitted a one page proposed order simply denying the Motions for Summary

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<sup>2</sup> A Scheduling Order, ultimately entered by the Circuit Court on December 11, 2006, reflecting all of these deadlines was prepared by the undersigned counsel and was circulated and approved by all counsel, including counsel for Appellant.

<sup>3</sup> The response did not include a Rule 56(f) affidavit indicating additional time was necessary to obtain and present additional discovery.

Judgment.

On January 11, 2007, the Court granted Appellees' Motions for Summary Judgment. It is from this Order that Appellant now appeals. On appeal, Appellant asserts that the Circuit Court erred by (1) refusing to enforce the settlement allegedly reached between the parties, (2) granting summary judgment on the basis of the exclusivity of the West Virginia Workers' Compensation Act, and (3) inviting and relying on *ex parte* submissions in preparing orders on the settlement and summary judgment issues. Drs. Newfeld, Shy and Striz assert that Appellant's assignment of errors one and three above are red herrings intended to distract this Court from the substantive issue of whether or not the Circuit Court appropriately granted summary judgment in this case. Accordingly, Dr. Newfeld, Shy and Striz will address the substantive issue before addressing the other issues raised by Appellant.

**B. Relevant Facts**

Appellant/Plaintiff below, Theresa D. Messer, was actively employed by HAGI from September 1988 until September 2000. (*Appellant's Complaint* ¶¶2-3.) Appellant suffered a work related back injury on or about August 7, 1997. (Mot. Ex. A, Appellant's deposition, Vol. 1 at 89.) Appellant was off work as a result of this injury from August 21, 1997 until August 1998 when she was able to return to work. Approximately six months later, on or about February 10, 1999, and again on May 1, 2000, and June 26, 2000, Appellant's treating physician stated that Appellant should not work more than eight (8) hours per day as a result of her injuries. (*Appellant's Complaint* ¶¶7, 9, and 10.) In his letter of June 26, 2000, Appellant's treating physician added that she should "not lift more than 25 lbs." (*Appellant's Complaint* ¶10.)

Appellant was employed as a Certified Registered Nurse Anesthetist ("CRNA").

Appellant worked only a part-time schedule of two (2) days per week and was primarily scheduled to work at St. Mary's Medical Center ("St. Mary's"). (Mot. Ex. B, Affidavit of Mark Newfeld, M.D.) CRNAs are not assistants to anesthesiologists, helping and working with them during a surgical procedure. *Id.* Rather, CRNAs work independently and have primary responsibility for providing anesthesia services to a patient during surgery and are usually the only anesthesia provider in the operating room for a majority of a surgical procedure. *Id.*

As is more fully set forth in the Affidavit of Mark Newfeld, M.D., attached to the Motion for Summary Judgment on Behalf of Drs. Newfeld, Shy and Striz as Exhibit B, HAGI's anesthesiologist on-call on a given evening had the responsibility to prepare the schedule for the following day based on the surgical procedures scheduled to take place at St. Mary's and Cabell Huntington Hospital. *Id.* This was done from surgical schedules typically received from the hospitals between 4:00 p.m. and 7:00 p.m., but, even after the hospitals provided the schedules, they remained subject to change. *Id.* HAGI had no control over the surgery schedule, nor when it received the information. *Id.* Although the surgery schedule indicated the scheduled start time for the first procedure in each operating room, the procedure may not start at the scheduled time based upon the schedule of the surgeon and/or various other factors which were completely outside of HAGI's control. *Id.* Subsequent procedures would commence upon the completion of the preceding procedure, the timing of which also depended on various factors outside of HAGI's control. *Id.* Additionally, emergency procedures also arose which would further necessitate changes to the schedule. *Id.*

Because the starting time for each individual procedure subsequent to the initial procedure could not be determined, it was not possible to assign CRNAs to specific procedures. *Id.* Rather, each CRNA who was scheduled to work on a given day would be assigned to an operating room

and would be responsible for the procedures that were scheduled to be performed therein. *Id.* By the very nature of the type of work anesthesiologists and CRNAs perform, it was and is simply not possible for them to adhere to a strict time schedule. *Id.* In making the schedule, the on-call anesthesiologist would consider the type of surgery or procedure being performed and the experience and qualifications of the anesthesiologists and CRNAs. *Id.* The on-call anesthesiologist would also consider the anesthesiologist and CRNAs preferences for certain types of procedures, the preferences of the surgeons to work with certain anesthesiologist and/or CRNAs, the conflicting schedules of the anesthesiologist and CRNAs, and any physical restrictions of the anesthesiologist and CRNAs. *Id.*

HAGI made every effort to accommodate Appellant's work restrictions and her preference only to be assigned to certain types of procedures and to work with certain surgeons. *Id.* When such was reasonable and did not jeopardize the patient's health and/or safety, Appellant was allowed to go home early when she felt that her pain was such that she could not continue to work. *Id.* HAGI also gave Appellant the option of not starting a procedure if she felt that the procedure would not be completed by the end of her scheduled shift, if another CRNA was or would be available to replace her. *Id.* If all other CRNAs on duty were engaged in other procedures, Appellant could not be replaced and would have to complete the procedure. *Id.*

HAGI did not have a CRNA position which would guarantee in all instances that Appellant would never have to work past 3:00 p.m. or never have to work more than 8 hours in a given day. *Id.* HAGI did not employ floaters or extra CRNAs to be available to fill in or substitute for Appellant or any other anesthesia provider who was for some reason unable to complete their work schedule. *Id.* At times, no one was available to substitute or they were already assisting or filling in and accommodating someone else. *Id.* If there ever was such an instance where Appellant was not

allowed to leave prior to or at 3:00 p.m., and/or she worked more than 8 hours in a day, it was due to the fact that surgeries were in progress and there was no substitute or replacement CRNA available, or when to substitute a CRNA in the middle of a surgical procedure would have been contrary to good medical practices and/or would place the patient in jeopardy. *Id.*

Appellant continued to work with these accommodations in place until September of 2000, when she ceased working, claiming that she was totally disabled. (*Appellant's Complaint* ¶¶2.)

### III. LAW AND ARGUMENT

**A. With regard to the Circuit Court's grant of summary judgment, there was no genuine issue of material fact and Appellees were entitled to judgment as a matter of law.**

The Circuit Court had no choice but to grant the Appellees' Motions for Summary Judgment based on the evidence that was before the Court. The Judgment Order entered by the Circuit Court is in full compliance with the requirements and directives of this Court in that it sets out specific factual findings sufficient to permit a meaningful appellate review, including the facts which the Court found to be relevant, determinative of the issues and undisputed. *Easterling v. American Optical Corp.*, 529 S.E.2d 588, 598 (W.Va. 2000); *P.T.P. v. Board of Education of the Jefferson County*, 488 S.E.2d 61 (W.Va. 1997); *Fayette County National Bank v. Lilly*, 484 S.E.2d 232 (W.Va. 1997). Certainly, the Order clearly explains what the Circuit Court did and why, and demonstrates that the Circuit Court's grant of summary judgment is well supported by the record.

It is apparent from a review of the Appellant's Brief that rather than addressing the Court's Findings of Fact and Conclusions of Law, Appellant's presents what amounts to a

dramatic and entertaining closing argument with limited reliance on or adherence to the actual evidence in the record. Appellant makes multiple, broad generalities and conclusory statements, most without any effort to provide factual or legal support. When efforts are made to support certain factual allegations, many of the references and citations are incorrect or non-supportive of the factual allegations made. These failings occurred below in both briefs and oral argument and may represent a reason for the Circuit Court's ultimate holding. To defeat a motion for summary judgment, the non-moving party must cite to specific factual support in the record. "...As pointed out by Justice Cleckley, "[j]udges are not like pigs, hunting for truffles buried in briefs [or somewhere in the lower court's files]..." *Easterling v. American Optical Corp.*, 529 S.E.2d 588, 595 n. 10 (W. Va. 2000), citing *State v. Honaker*, 454 S.E.2d 96, 101 n. 4 (W. Va. 1994) (quoting *Teague v. Bakker*, 35 F.3d 978, 985 n.5 (4<sup>th</sup> Cir. 1994)). See also *Mayhew v. Mayhew*, 519 S.E.2d 188, 201 n. 35, (W. Va. 1999)("[A] skeletal 'argument', really nothing more than an assertion, does not preserve a claim....").

In this case, the Motions for Summary Judgment filed on behalf of the Appellees cited specific admissible evidence showing that there was no genuine issue of material fact and that they were entitled to judgment as a matter of law on the claims raised in Appellant's Complaint. While Appellant attempts to argue that she did cite evidence showing the existence of a genuine issue of material fact, a review of her Responses to Appellees' Motions for Summary Judgment and Appellant's Brief reveal otherwise. In fact, Appellant instead cites the allegations in her own Complaint and her own unsupported deposition testimony in an attempt to establish that there is a genuine issue of material fact. However, as set forth below, there is no genuine issue of material fact and the Circuit Court was correct to grant summary judgment.

### **1. Appellant's disability discrimination claims**

The Circuit Court was entirely correct to grant summary judgment on Appellant's disability discrimination claims. Appellant's Complaint asserts two disability discrimination claims: (1) failure to engage in the interactive process, and (2) failure to provide a reasonable accommodation. However, Appellant's Complaint makes no specific allegations against any of the individual Appellees with regard to either of these claims, but simply states that they were shareholders of HAGI. However, Appellant nevertheless contends that she is asserting claims against both HAGI and all of the individual Appellees.

The WVHRA imposes an affirmative obligation upon employers to provide qualified individuals with disabilities with reasonable accommodations. *Skaggs v. Elk Run Coal Co., Inc.*, 479 S.E.2d 561, 575 (W.Va. 1996). As part of this obligation, employers and the affected employee are required to engage in an interactive process to identify the individual's restrictions and potential accommodations thereof. *Id.* at 577. This interactive process is nothing more than informal discussions between the employer and the employee and there are no formal requirements regarding who must attend, where it must be held, and/or that the parties even know that they are engaging in the process. It is enough that the employer and the employee meet and discuss the employees' limitations and possible accommodations thereof.

As indicated above, Appellant failed to respond to the argument that Appellees were entitled to summary judgment on the claim of failure to engage in the interactive process either in her responses to the motions or in oral argument and the request for summary judgment was essentially unopposed. However, Drs. Newfeld, Shy and Striz nevertheless address this claim below.

- a. Appellant cannot assert a claim of “failure to engage in the interactive process” against the individual Appellees.

In her Complaint, Appellant alleges that the Appellees “...failed and refused to engage in the interactive process required by the [WVHRA] to determine whether a reasonable accommodation of the [Appellant’s] restrictions was possible.” (*Appellant’s Complaint* ¶12.) However, Appellant’s Complaint makes no specific allegation and Appellant did not testify at her deposition that any of the individual Appellees, including Dr. Newfeld, Dr. Shy, and/or Dr. Striz, at any time refused to meet with her to discuss her restrictions and/or possible accommodations thereof. While an employer is clearly obligated under the law to engage in the interactive process/dialogue with an employee who is an individual with a disability, there is no authority extending such a duty to the employee/shareholders of a corporate employer.

In this matter, it is undisputed that Appellant was employed by HAGI and not by any of the individual Appellees. Accordingly, to the extent that Appellant asserts or attempts to assert a claim for failure to engage in the interactive process against Dr. Newfeld, Dr. Shy, and/or Dr. Striz, such claim fails as a matter of law, and the Circuit Court appropriately granted summary judgment on such claim.

- b. Even assuming that Appellant can assert a claim against the individual Appellees for failure to engage in the interactive process, the Circuit Court was correct to grant summary judgment on this claim.

Even assuming that Appellant can assert a claim of failure to engage in the interactive process against the individual Appellees rather than and/or in addition to her employer, such claim nevertheless fails inasmuch as Appellant has not alleged that Dr. Newfeld, Dr. Shy, and/or Dr. Striz ever refused to meet with her to discuss her restrictions and/or possible accommodations thereof. Additionally, Appellant did not testify to such at her lengthy

deposition where she was asked repeatedly what evidence she had to support her claims. As a result, there is no evidence to establish that Dr. Newfeld, Dr. Shy, and/or Dr. Striz failed to engage in the interactive process.

Moreover, the undisputed evidence in this case shows that representatives of HAGI actually met with Appellant and/or other parties multiple times to discuss Appellant's restrictions and possible accommodations. In fact, according to Appellant's deposition testimony, she met with Dr. Hosny Gabriel, HAGI's President at the time, in February 1999 to discuss her restrictions and possible accommodation thereof. (Mot. Ex. A, Vol. 2 at 67-69; Mot. Ex. A, Vol. 3 at 51-53.) Appellant also acknowledged in her deposition that HAGI's Office Manager David Easter met with her alone and also with her and representatives from the West Virginia Division of Rehabilitation Services in September 1999 to discuss her restrictions and possible accommodations. (Mot. Ex. A, Appellant's deposition, Vol. 3 at 5-14; Mot. Ex. F, West Virginia Division of Rehabilitation Services Counselor Comments.) Moreover, Appellant informed the West Virginia Division of Rehabilitation Services that the accommodations that HAGI provided were effective and as a result, the West Virginia Division of Rehabilitation Services closed its file on this issue. *Id.* Additionally, in a letter dated November 26, 2000 that Appellant wrote to HAGI after she ceased working, Appellant acknowledges that there were at least two separate meetings with Mr. Easter at which her work restrictions and accommodation thereof were discussed. (Mot. Ex. G, November 26, 2000 letter from Appellant to HAGI.) Thus, there is no dispute that HAGI engaged in the interactive process with Appellant by meeting with her regarding her limitations and discussing and offering accommodations. Accordingly, the Circuit Court was correct to grant summary judgment on this claim.

- c. Appellant cannot assert a “failure to accommodate” claim against the individual Appellees.

In her Complaint, Appellant also alleges that the Appellees failed to accommodate her alleged disability, which caused her personal physician to recommend that she be limited to an eight (8) hour work day and later he added a 25 pound lifting restriction and that the Appellees ignored those restrictions. (*Plaintiff's Complaint* ¶¶7-11.) Appellant's Complaint simply refers to the Appellees collectively, and fails to make any specific allegation that any of the individual Appellees, including Dr. Newfeld, Dr. Shy, and Dr. Striz, ignored her restrictions.

The regulations promulgated by the West Virginia Human Rights Commission titled “Rules Regarding Discrimination Against Individuals with Disabilities” specifically state that “[a]n **employer** shall make reasonable accommodation to the known physical or mental impairments of qualified individuals with disabilities where necessary to enable a qualified individual with a disability to perform the essential functions of the job.” W.Va. C.S.R. §77-1-4.5 (emphasis added). The regulations further provide that “[r]easonable accommodation requires that an **employer** make reasonable modifications or adjustments designed as attempts to enable an individual with a disability to remain in the position for which she/he was hired. W.Va. C.S.R. §77-1-4.4 (emphasis added). Thus, while an “employer” is clearly obligated to provide employees who qualify as an individual with a disability with reasonable accommodations, there is no authority extending such a duty to the employee/shareholders of a corporate employer. This is completely logical in that if this duty extended to the individual employee/shareholders there would be the possibility of multiple inconsistent accommodations.

As stated above, it is undisputed that Appellant was employed by HAGI and not by any of the individual Appellees. Accordingly, to the extent that Appellant is asserting or attempting

to assert a claim for failure to provide reasonable accommodation against Dr. Newfeld, Dr. Shy, and/or Dr. Striz, such claim fails as a matter of law and the Circuit Court was correct to grant summary judgment on such claim.

- d. Even assuming that Appellant can assert a failure to accommodate claim against the individual Appellees, the Circuit Court was correct to grant summary judgment on this claim.

Even assuming that Appellant can assert a claim of failure to accommodate against Dr. Newfeld, Dr. Shy, and Dr. Striz, there is no evidence that Dr. Newfeld, Dr. Shy, and/or Dr. Striz failed to reasonably accommodate Appellant's restrictions. In fact, the undisputed evidence in this matter is to the contrary, inasmuch as it shows that HAGI and the individual Appellees took affirmative steps to accommodate Appellant's restrictions.

This Court has held that in order "[t]o state a claim for breach of the duty of reasonable accommodation under the [WVHRA], ... a plaintiff must allege the following elements: (1) the plaintiff is a qualified person with a disability; (2) the employer was aware of the plaintiff's disability; (3) the plaintiff required an accommodation in order to perform the essential functions of a job; (4) a reasonable accommodation existed that met the plaintiff's needs; (5) the employer knew or should have known of the plaintiff's needs and of the accommodation; and (6) the employer failed to provide the accommodation." *Stone v. St. Joseph's Hospital of Parkersburg*, 538 S.E.2d 389, 398 (W.Va. 2000) quoting *Sy. Pt. 2, Skaggs*, 479 S.E.2d 561.

Regulations under the WVHRA state that '*reasonable accommodation*' means "reasonable modifications or adjustments to be determined on a case-by-case basis which are designed as attempts to enable an individual with a disability to be hired or to remain in a position for which he was hired. ..." Reasonable accommodations include, but are not limited to: making facilities ... readily accessible to and useable by individuals with disabilities; job

restructuring, part-time or modified work schedules, reassignment to a vacant position for which the person is able and competent ..., acquisition or modification of equipment or devices ....” W.Va. C.S.R. §77-1-4.4 and 4.5(emphasis added). However, an employer is not necessarily required to offer the precise accommodation an employee requests, if employer has offered some accommodation that permits the employee to fully perform the job’s essential functions. *Skaggs*, 479 S.E.2d at 580. Despite Appellant’s arguments, the types of accommodations listed in the applicable regulations are not “mandatory” accommodations that must be made in each and every instance. This is the exact reason that the regulations state that reasonable accommodations must be made on a case-by-case basis. Thus, an employer’s obligation is only to provide an employee with accommodation or accommodations that allow the employee to continue to perform his or her job.

In this case, the undisputed evidence shows that Appellant was given the only accommodations that were reasonable in light of the nature of HAGI’s business, i.e., a surgical anesthesiology practice. First, after being informed of Appellant’s restrictions, HAGI attempted to schedule and/or assign Appellant to an operating room where the scheduled procedures were most likely to be completed within her scheduled shift. Dr. Newfeld, Dr. Shy, and Dr. Striz stated in their Affidavits that they made such attempts each and every time that they served as the on-call anesthesiologist responsible for making assignments for the following work day. (Mot. Ex. B; Mot. Ex. H, Affidavit of D. Grant Shy, D.O.; and Mot. Ex. I, Affidavit of Stanislav Striz, M.D.) The Affidavits of the other individual Appellees indicate that they did the same. However, there were multiple factors that affected their ability to do so which were outside the on-call anesthesiologists’ control, including the surgery schedule which was made by the hospital and subject to change, emergency procedures that would often arise, when procedures would start,

and/or how long procedures would last. (Mot. Ex. B.) Moreover, Appellant limited the types of procedures and the surgeons with who she wanted to work, which further limited the on-call anesthesiologist's ability to schedule her. *Id.* Accordingly, there were instances when Appellant worked beyond her eight (8) hour work day, but such was due to the nature of a surgical anesthesiology practice in general and factors outside of HAGI's control. Thus, there is and can be no dispute that despite HAGI's multiple efforts, it was impossible to absolutely guarantee that the procedures being performed in the operating room to which Appellant was assigned would be completed within her scheduled shift.

HAGI also accommodated Appellant in that she was informed that if she had problems with her back and needed to go home prior to the end of her scheduled shift, she would be allowed to do so as long as HAGI had coverage for the scheduled procedures. (Mot. Ex. B; Mot. Ex. H; and Mot. Ex. I.) In fact, Appellant testified that there were multiple occasions on which Dr. Newfeld, Dr. Shy, and/or Dr. Striz allowed her to go home early when she was in pain. (Mot. Ex. A, Vol. 2 at 86, 87; Mot. Ex. A, Vol. 3 at 55-63, 84, 85; Mot. Ex. A, Vol. 4 at 93, 97.)

Additionally, Appellant was accommodated in that she was informed that if she got toward the end of her shift and it appeared that the procedure that she was scheduled to cover was not going to be completed by the end of her scheduled shift, that she could inform the anesthesiologist on duty and she would be relieved as long as there was an available CRNA to cover that procedure. (Mot. Ex. A, Vol. 3 at 13; Mot. Ex. B; Mot. Ex. H; and Mot. Ex. I.) Similarly, if Appellant was in the middle of a procedure when her scheduled shift ended, Appellant was allowed to leave if there was another CRNA available to relieve her and a personnel transition could be accomplished consistent with patient health and safety. (Mot. Ex. B; Mot. Ex. H; Mot. Ex. I.) However, at times such a change was contrary to sound medical

practice and not in the best interests of the patient's health and/or safety. *Id.* Appellant acknowledged in her deposition that the patients' health and safety came first and was her paramount responsibility. (Mot. Ex. A, Vol. 3 at 70.)

With regard to Appellant's lifting restrictions, Appellant was informed that she was not to lift patients and/or do other lifting that would violate her restrictions, but that she was expected to utilize the hospital's operating room staff for such functions. (Mot. Ex. F.) Appellant was further informed that if the operating room staff would not perform the lifting, she was to let someone at HAGI know so that the issue could be raised with the hospital. *Id.*

Based on the nature of HAGI's business and surgical anesthesiology practices in general, and the lack of control that HAGI and the individual Appellees had over scheduling surgical procedures, there was simply no way that HAGI, or any similar anesthesiology practice, could guarantee that Appellant or any other anesthesia provider would not at some times have to work beyond their scheduled shift. This is simply the nature of the job. Consequently, HAGI could have reasonably and justifiably found that there was no way to accommodate Appellant and she would not have been able to work at all or HAGI could have done what it did here, which was to respond to Appellant's lifting restrictions by pointing out accommodations that already existed and do the best that it could to attempt to reduce the frequency and/or chance that she may have to work past the end of her shift.

Certainly, HAGI should not be punished for attempting to allow Appellant to continue to work. The only thing that HAGI could have done differently, which Appellant mentioned in her deposition as possible accommodations, in order to guarantee that she never had to work past the end of her scheduled shift was to (1) create some new job for Appellant which would have been some type of a relief/floater position; or (2) hire additional CRNAs in order to have a floater

available every day Appellant worked solely so that she would always have a replacement if needed. There is no question that neither of these things is reasonable. Under both West Virginia and federal law, an employer is not required to create work or to create a new position for an individual with a disability and is not required to bump other employees out of their positions. See *Skaggs*, 479 S.E.2d at 579 (“[b]y our ruling today, we do not mean to imply that an employer must create a make-work job or retain someone that it does not need.”); W.Va. C.S.R. §77-1-4.4 and 4.5 (“[r]easonable accommodations include, reassignment to a vacant position for which the person is able and competent ....” W.Va. C.S.R. §77-1-4.4 and 4.5 (emphasis added). Thus, there is no dispute that HAGI reasonably accommodated Appellant’s disability.

*i. Allegations regarding Dr. Newfeld*

At her deposition, Appellant was repeatedly asked to identify evidence she had to support her claims against Dr. Newfeld. Appellant testified that her claim against Dr. Newfeld was based solely on the fact that at times he may make assignments, and that at times when he was the supervising anesthesiologist she was not able to leave by the end of her scheduled shift, if she was in the middle of a surgical procedure. (Mot. Ex. A, Vol. 4 at 88, 93.) Also, she complains that Dr. Newfeld did not respond to her November 26, 2000 letter. *Id.* However, as set forth above it is undisputed that when Dr. Newfeld made assignments, he like the other on-call anesthesiologists attempted to assign Appellant to an operating room where the procedures would likely be completed by the end of her scheduled shift at 3:00 p.m., but there were other factors outside of Dr. Newfeld’s control which made it impossible to guarantee this in all instances. (Mot. Ex. B.) Thus, there were some occasions where Appellant worked past the end of her scheduled shift, but there was no way that Dr. Newfeld and/or HAGI could have prevented this

given the nature of HAGI's business.

With regard to Appellant's November 26, 2000 letter, even assuming that Dr. Newfeld did not respond, such has no bearing on whether Appellant was reasonably accommodated. First of all, the letter was written after Appellant had already ceased working because she claimed to be totally disabled. Second, the letter makes no mention of any need for accommodation; rather, it was simply a response to a letter Dr. Newfeld had sent her regarding her leave time. Accordingly, Appellant has identified no evidence which establishes that Dr. Newfeld failed to reasonably accommodate her alleged disability.

*ii. Allegations regarding Dr. Shy*

At her deposition, Appellant was also repeatedly asked to identify any evidence she had to support her claims against Dr. Shy. Appellant again testified that like the other anesthesiologists, at times Dr. Shy made assignments for the next day's work schedule and that also with her consent he had given her trigger point injections on one occasion to relieve her excruciating pain during her shift when there was no one to replace her. (Mot. Ex. A, Vol. 3 at 99; Mot. Ex. A, Vol. 4 at 25.) However, as the uncontroverted evidence indicates, when he made assignments, Dr. Shy made every attempt to assign Appellant to an operating room where the procedures were most likely to be completed by the end of her shift. However, there were multiple other factors outside of Dr. Shy's control which made it impossible to guarantee this in all instances. (Mot. Ex. H.) Thus, there were occasions where Appellant worked past the end of her scheduled shift, but there was no way that Dr. Shy and/or HAGI could have prevented this given the nature of their surgical anesthesiology practice.

Appellant also testified that Dr. Shy offered to give her an injection due to her claim that she was in excruciating pain and that she consented to the injection. Thus, this in no way

supports a claim that Dr. Shy failed to reasonably accommodate her. In fact, quite the opposite is true. The fact that Dr. Shy offered to give her these injections shows that he was making every effort to accommodate Appellant. Appellant now attempts to characterize this as somehow being evidence of Appellees refusal to follow her work restrictions, but the fact remains that Appellant consented to this injection. Moreover, during her deposition Appellant gives multiple examples of times that Dr. Shy accommodated her by letting her go home prior to the end of her scheduled shift. (Mot. Ex. A, Vol. 3 at 56-61.) Accordingly, Appellant identified and presented no evidence which establishes that Dr. Shy failed to reasonably accommodate her alleged disability.

*iii. Allegations regarding Dr. Striz*

As with Dr. Newfeld and Dr. Shy, Appellant was also repeatedly asked at her deposition to identify any evidence she had to support her claims against Dr. Striz. Appellant again testified that like the other anesthesiologists, at times Dr. Striz made assignments for the next day's work schedule. She testified that there was one occasion when Dr. Striz was the supervising anesthesiologist and he required Appellant to work twenty minutes past her eight (8) hour shift, and another time where Dr. Striz told Appellant to find her own accommodation when she consulted with him regarding lifting a 400-pound patient. (Mot. Ex. A, Vol. 2 at 31-32, 83-84; Mot. Ex. A, Vol. 4 at 98.) However, as set forth above, when Dr. Striz made assignments, he made every attempt to assign Appellant to an operating room where the procedures were most likely to be completed by the end of her shift, although again there were multiple other factors outside of Dr. Striz's control which made it impossible to guarantee this in all instances. With regard to the 400-pound patient issue, Dr. Striz was simply informing Appellant that she needed to make appropriate arrangements with the hospital's operating room staff, given the fact that moving and lifting patients was not and never had been HAGI's responsibility, but was the

hospital operating room staff's responsibility. Accordingly, Appellant has identified no evidence which establishes that Dr. Striz failed to reasonably accommodate her alleged disability.

Accordingly, the undisputed evidence in this case shows that Appellant cannot establish a claim of failure to accommodate against Dr. Newfeld, Dr. Shy, and/or Dr. Striz. Therefore, the Circuit Court's decision to grant summary judgment on Appellant's disability discrimination claims was entirely proper.

## **2. Appellant's "piercing the corporate veil" claim**

Instead of alleging any specific wrongful conduct on the part of any of the individual Appellees, Appellant's Complaint merely claims that the personal assets of the individual Appellees should be held liable for any judgment by piercing the corporate veil inasmuch as she alleges that "the legal formalities required by law for recognition as a corporate entity" have been disregarded. (*Appellant's Complaint* ¶¶15-16.) In the Motions for Summary Judgment submitted by the Appellees, evidence was submitted showing that Appellant's piercing the corporate veil theory is entirely without merit. Despite raising this claim in her Complaint, Appellant's written Responses to Appellees' Motions for Summary Judgment and oral argument failed to in any way address and/or respond to the Appellees' arguments that there was no basis for this claim. Thus, the Appellees' argument that it was entitled to summary judgment on this claim was essentially unopposed.

It is a well established legal principle that "...a shareholder of a corporation is not personally liable for the acts or debts of the corporation except that he or she may become personally liable by reason of his or her own acts or conduct." W.Va. Code §31D-6-622. This Court has held that "... to 'pierce the corporate veil' in order to hold the shareholder(s) actively participating in the operation of the business personally liable ... there is normally a two-prong

test: (1) there must be such unity of interest and ownership that the separate personalities of the corporation and of the individual shareholder(s) no longer exist (a disregard of formalities requirement) and (2) an inequitable result would occur if the acts are treated as those of the corporation alone (a fairness requirement)." Sy. Pt. 3, *Laya v. Erin Homes, Inc.*, 352 S.E.2d 93 (W.Va. 1986)(emphasis added). In that regard this Court has stated that "[g]rossly inadequate capitalization combined with disregard of corporate formalities, causing basic unfairness, are sufficient to pierce the corporate veil in order to hold the shareholder(s) actively participating in the operation of the business personally liable ...." Sy. Pt. 5, *Laya*, 352 S.E.2d 93.

In this case, Ms. Messer testified that she did not have any knowledge as to whether or not HAGI complied with the legal formalities required for recognition as a corporation. Specifically, she testified:

- Q. Do you have any facts that you personally know of that Huntington Anesthesia did not comply with legal formalities required by law for recognition as a corporate entity?
- A. I don't even know what that paragraph actually means.
- Q. Okay. You don't for instance know how often they may have had business meetings as a corporation?
- A. No, sir.
- Q. Don't know whether they kept minutes or anything like that?
- A. No, sir.
- Q. Do you know whether or not they had a corporate attorney during the time that you worked there? In other words, an attorney that provided legal services to the corporation?
- A. Yes, sir, I think they did.
- ...
- Q. Well, I'm just trying to understand do you have any facts to support any claim that you know of ... that they conducted their corporate business in such a way as to basically make it a personal business rather than a legal business venture.
- A. Again, I would refer you to the fact that each and every one of them made up the corporation.
- ...
- Q. ... You really don't know how they conducted their business, do you?
- A. As far as?

- Q. I'm not talking about practicing medicine. I'm talking about how they ran their business. You didn't have access to their books, correct?
- A. No, sir.
- Q. You never attended any of their meetings, correct?
- A. No, sir.
- Q. You don't know how often they had meetings, correct?
- A. Not corporate meetings, no, sir.
- Q. I think you said you don't know whether they kept minutes or not, correct?
- A. No, sir.
- Q. You have never reviewed their – or have you reviewed their articles of incorporation?
- A. No, sir.

(Mot. Ex. A, Vol. 1 at 13-22.)

In reality, HAGI maintained a business office in the Highlawn Medical Building that was used exclusively by HAGI. (Mot. Ex. C, Affidavit of Mark Newfeld, M.D.; Ex. D, Affidavit of Honsy Gabriel, M.D.) None of the individual stockholders, officers, and/or directors engaged in any activities from this location that were not related to HAGI's business. *Id.* HAGI maintained its own bank accounts, which were used exclusively by HAGI in connection with its business activities. *Id.* No personal expenses of any officer, director, and/or shareholder were paid from any of HAGI's accounts. *Id.* The compensation that was paid to all employees, including those who were shareholders, officers, and/or directors, was approved by the Board of Directors. *Id.* HAGI maintained books and records reflecting all business transactions, including its receipt of revenue and its payment of its obligations. *Id.* All assets used by HAGI for its business activities, other than the equipment used by the physicians employed by the corporation for the practice of medicine, were owned and/or leased by HAGI. *Id.* Fees for medical services provided in connection with the practice of medicine by the employees of HAGI was billed by HAGI and payments received were deposited by HAGI into its accounts. *Id.* All contracts to provide medical services were between HAGI and the hospitals to which it provided services. *Id.* Individual shareholders and/or groups of shareholders did not have the authority to control or

the power to exercise control over the business of HAGI. *Id.* Shareholders, directors, and physician/employees had no direct authority over the corporation's employees. *Id.* HAGI had no separate business dealings or arrangements with its shareholders. *Id.* HAGI did not make loans to its shareholders, it did not subsidize their living expenses, and it did not provide any personal or financial benefits to its shareholders except for the payment of compensation and employment related benefits as authorized by the Board of Directors. *Id.* HAGI employed an independent law firm, Frazier & Oxley, L.C., to advise it with respect to corporate formalities and at all times complied with legal requirements relating to those formalities. (*Id.*; Mot. Ex. E, Affidavit of William M. Frazier, Esq.) Moreover, Dr. Newfeld and Dr. Gabriel testified that during the time period that they were shareholders and directors of HAGI, it was adequately capitalized and remained solvent and was able to satisfy its financial obligations to its creditors. (Mot. Ex. C; Mot. Ex. D.)

Accordingly, there is absolutely no evidence in this matter which shows or even suggests that HAGI was not adequately capitalized and/or that it failed to comply with the formalities required by law to preserve and maintain its corporate identity. Therefore, Appellant's claim that the corporate veil should be pierced is without merit and the Circuit Court was correct to grant summary judgment on this claim.

**B. Given the applicable legal standard, there was more than sufficient basis for the Circuit Court to deny enforcement of the Settlement Agreement allegedly reached in this matter.**

Appellant raises on appeal the issue of whether the Circuit Court's denial of Appellant's Motion To Enforce Settlement, regarding the settlement that she contends was reached between her and Appellees, was an abuse of discretion and clearly erroneous. Although Drs. Newfeld, Shy and Striz, through counsel, fully participated in the evidentiary hearing on Appellant's

Motion to Enforce Settlement, they took no formal position regarding whether a valid settlement was actually reached. This occurred for two distinct reasons. First, Drs. Newfeld, Shy and Striz took no position in order to be consistent with their position that they have no financial responsibility and/or obligation related to the Messer case and any settlement of it. Second, they took no position on the ultimate issue because Drs. Newfeld, Shy and Striz did not directly, nor through their separate counsel, participate in any of the settlement discussions and negotiations that apparently occurred, and have no first-hand knowledge of what HAGI, or any of its physicians, agreed to or did not agree to.

Drs. Newfeld, Shy and Striz were former employees and shareholders of HAGI. During their time with HAGI, and since leaving in 2004, they have confined their anesthesiology practice to St. Mary's Hospital, principally in the area of cardiac anesthesiology. As part of their withdrawal from HAGI, Drs. Newfeld, Shy and Striz entered into a Settlement Agreement with HAGI in September 2004. Under the terms of that agreement, Drs. Newfeld, Shy and Striz negotiated their withdrawal from HAGI, which included full assumption by HAGI of all liabilities and financial responsibilities relating to pending litigation, including the Messer case. At the time of the September 2004 Settlement Agreement, HAGI had significant assets, including account receivables. HAGI and its officers and shareholders that remained were responsible to operate HAGI in such a way that it maintained sufficient assets and financial resources to satisfy HAGI's obligations to Drs. Newfeld, Shy and Striz, and as a result, HAGI and its remaining physicians have full responsibility for the Messer case.

Following their withdrawal from HAGI, counsel for HAGI, Attorney Mark Dellinger, who had been representing HAGI and all of the individual Appellees in the Messer case, continued to do so, including representing Drs. Newfeld, Shy, and Striz, who remained named

defendants in the case. Separate counsel for Drs. Newfeld, Shy, and Striz, who had been involved in issues related to their withdrawal from HAGI, continued to monitor the Messer case, but otherwise had no involvement or participation inasmuch as Drs. Newfeld, Shy and Striz had no further financial responsibility and/or obligation concerning the case.

Moreover, counsel for Drs. Newfeld, Shy and Striz consistently stated their position with HAGI and its remaining physicians and their counsel, and with Attorney Dellinger that they have no financial responsibility and/or obligation concerning the Messer case. Consequently, Dr. Newfeld, Shy and Striz indicated that they would not participate in settlement negotiations, including the scheduled May 2006 mediation, and that they had no objection to any settlement reached as long as they were not expected or required to make any financial contribution toward the settlement. The uncontradicted testimony of Attorney Dellinger at the evidentiary hearing on Appellant's Motion to Enforce Settlement confirms these facts.

The position of Drs. Newfeld, Shy and Striz concerning the lack of any responsibility or obligation to participate or contribute toward a settlement was not only based on the terms of the September 2004 Settlement Agreement, but was also based on the evidence presented at the hearing of the actual terms of the alleged settlement according to the testimony of Attorney Dellinger. If a valid settlement was actually reached, according to Attorney Dellinger, it had been agreed that the source of the settlement funds totaling \$225,000 was to come from the remaining assets of HAGI, which at that time had been estimated to be approximately \$100,000, and the five remaining physicians of HAGI would each contribute \$25,000 to cover the shortfall. To the extent that Drs. Newfeld, Shy and Striz agreed to the settlement as it had been explained to them, it was based solely on the understanding that they would not be expected or required to contribute any amounts toward the settlement. Clearly, Drs. Newfeld, Shy and Striz never

authorized Attorney Dellinger, or anyone else to agree on their behalf to a settlement which would under its terms obligate them to pay any part of the settlement amount.

At the conclusion of the evidentiary hearing on Appellant's Motion to Enforce Settlement, after all issues had been briefed and fully argued, the Circuit Court directed counsel to submit proposed findings of fact and conclusions of law in support of their respective positions. Counsel was further directed that they did not need to serve their proposals on opposing counsel. This procedure is not uncommon and was apparently based on the Circuit Court's belief that all issues had been fully argued and presented and that the Circuit Court was simply requesting proposed findings of fact and conclusions of law from all parties in order to assist in the preparation of its own order. Given the position or lack of position taken below on behalf of Drs. Newfeld, Shy and Striz, the Circuit Court even commented that it may be difficult for their counsel to submit proposed findings of fact and conclusions of law on their behalf. Nevertheless, in open Court, the Circuit Court directed and counsel agreed, to attempt to do so.

Thereafter, a letter of August 25, 2006 was submitted to the Circuit Court on behalf of Drs. Newfeld, Shy and Striz, which restated the position taken on their behalf at the evidentiary hearing in and set forth certain recommendations/proposed findings should it be determined that a viable settlement had been reached. As directed, this submission was not served on either Appellant's counsel, or on separate counsel for the other Appellees. Similarly, counsel for Drs. Newfeld, Shy and Striz did not receive copies of any proposed findings and conclusions submitted to the Circuit Court by these other counsel.

It appears that both counsel for Appellant and counsel for the other Appellees have accurately set forth for this Court the applicable West Virginia law concerning enforcement of a purported settlement. Obviously, there may be some factual disputes concerning certain events

and communications related to the mediation, settlement negotiations, and authorizations allegedly provided, but Drs. Newfeld, Shy and Striz were neither directly, nor through counsel, involved in nor did they participate in any way in any of these activities or communications. Moreover, as stated above Drs. Newfeld, Shy and Striz did not take any formal position on whether or not a valid settlement agreement was reached. However, given the applicable legal standard to be applied by the Circuit Court and by this Court in its review, it would appear that there was more than sufficient basis for the Circuit Court to conclude that no settlement was authorized and that there was no meeting of the minds.

**C. Appellant's complaints concerning Court directed *ex parte* submissions are irrelevant to the issues before this Court and are entirely without merit.**

Appellant includes as part of her argument on appeal the issue of whether a Circuit Court is permitted, after the issues before it have been fully briefed and argued and all evidence introduced, to direct counsel to submit proposed findings of fact and conclusions of law to assist the Court in preparation of its order, and to direct counsel not to serve copies of the submissions on other counsel. In doing so, Appellant misrepresents the relevant factual circumstances related to the submissions, apparently in an effort to suggest some impropriety, arguing that it renders the Court's ultimate decision in this matter invalid and subject to reversal.

Factually and procedurally, what occurred in this case is neither unusual nor improper, and Appellant takes great liberties with the facts and unfairly impugns the character of both the Circuit Court and counsel. After all of the parties had a full opportunity to brief and to orally argue the issues presented to the Circuit Court by the pending motions, the Court indicated that it would prepare its own order reflecting its ultimate ruling on the motions, but to assist it, the Court requested that the parties each submit proposed findings of fact and conclusions of law supporting their respective positions. Since the issues had already been presented and fully

argued, the Circuit Court did not want any further argument, but instead, simply wanted the parties' suggestions to assist the Court in preparing its own order. Consequently, the Circuit Court directed that the parties submit their proposed findings and conclusions to the Court without serving other counsel. Again, whether or not this is an advisable practice, it is neither unusual nor improper, and it is certainly not limited to Judge Cummings or the Circuit Court of Cabell County; it is a fairly common practice, employed periodically by Circuit Court Judges around the State.

This situation is distinct from the situation described in the Trial Court Rules, which provide that when a Court directs a party to prepare an order to reflect the Court's ruling on a pending motion, "except for good cause unless otherwise determined by the Judicial Officer," that party is to present the order to and obtain the signature of all counsel and unrepresented parties before submitting it to the Court. Trial Court Rule 24.01(b), *See also*, Standards of Professional Conduct, I, Lawyers Duty to Other Counsel and the Courts; B, Conduct as to Discovery and other Legal Matters; 16, ("When a Draft Order is to be prepared by counsel to embody a Court's ruling, the draft should accurately and completely reflect the Court's ruling. The Draft Order should be promptly prepared and submitted to other counsel. Objections to the Draft Order should be made promptly. A diligent attempt to reconcile any differences should be made before the Draft Order is presented to the Court. [Emphasis added]"). The obvious purpose of this requirement is to allow the parties to discuss and object to the order to the extent it does not accurately reflect the parties' understanding of the Court's ruling.

In the instant case, the Circuit Court did not, at either the August 21, 2006 hearing on Appellant's Motion to Enforce Settlement, nor the January 4, 2007 hearing on Appellees' respective Motions for Summary Judgment, make any ruling or advise the parties on how it

intended to rule. The Circuit Court clearly indicated to the parties that it would take the motions under advisement and would render its own ruling and prepare its own order within a brief period of time. To assist the Court, it requested, and in fact directed, counsel for all of the parties to submit proposed findings of fact and conclusions of law and to do so without serving them on the other parties. (August 21, 2006 Hearing Transcript, pp. 210-211.)

In this particular instance, counsel for the respective Appellees followed the Circuit Court's direction, submitting their proposed findings of fact and conclusions of law concerning Appellant's Motion to Enforce the Settlement and did not serve either the Appellant nor counsel for the other Appellees with a copy of their submissions. On the other hand, Appellant's counsel failed to submit any proposed findings or conclusions to the Circuit Court by the deadline set. Rather, as indicated in Appellant's Brief, Appellant's counsel, without requesting an extension, waited to receive a copy of the transcript of the hearing, which he did not receive until weeks after the Circuit Court's imposed deadline for the submissions.

Similarly, following briefing and full oral argument on Appellees' respective Motions for Summary Judgment, the Circuit Court again indicated that it would consider the motions and would rule and enter its own order. The Circuit Court again directed the parties to submit to the Court proposed findings of fact and conclusions of law for the Court's consideration, and to do so by January 9, 2007, but not to serve them on other counsel. Again, counsel for the respective Appellees complied with the Court's direction. However, Appellant's counsel, instead of submitting proposed findings of fact and conclusions of law to Court, submitted a one-page order simply denying the Motions for Summary Judgment without any proposed findings of fact or conclusions of law.

As confirmed by the Circuit Court, it had told all counsel at the January 4<sup>th</sup> hearing that

the proposed findings and conclusions of law did not need to be exchanged. This may not be on the record because it occurred immediately after the hearing and the Court Reporter simply did not record it, not because it was not said. According to the Circuit Court, after the hearing had concluded: "While I do not believe there were any [ex parte communications]; I will state for the record that ... at the hearing upon the merits, I asked that draft proposed order be sent. 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." (March 6, 2007 Hearing Transcript, pp. 4-5). The Circuit Court also stated "counsel were obeying the instructions of the Court in not sending – because I didn't want to have to fight over objections to wording on proposals." *Id.*

Also, as demonstrated in Appellant's discussion concerning the Circuit Court's procedure and the submissions, there was never any effort to hide the fact that submissions were made at the direction of the Court and counsel for these Appellees readily agreed to provide Appellant's counsel with copies of those submissions, hopefully to eliminate any concern of some impropriety. Certainly, the accusations made by counsel for Appellant against both the Court and defense counsel are unfortunate, although not surprising given the history of this case. Throughout the case, both Appellant and her counsel have viewed every event and circumstance that forms the basis of Appellant's Complaint, and every event that occurred during the course of litigation, with an extreme degree of mistrust, and have made unfounded accusations of impropriety, ascribing and attributing bad motives and improper conduct to all involved. Again, the procedure employed by the Court is not uncommon, nor in violation of any procedural, ethical or trial court rule.

In both instances complained of by Appellant, counsel for Appellant was present, heard

the direction of the Circuit Court and did not voice any objection to the procedure. Even if he had done so, and even if the Court had not directed the parties to submit proposals without serving them on other counsel, the Court made it clear that argument on the issues had been exhausted and that it did not want to receive any additional briefs or arguments. Also, it is apparent upon review of the proposed findings of fact and conclusions of law submitted to the Circuit Court, they contained nothing new. They contained no new evidence, no new arguments or issues that had not been fully presented and argued, both in writing and only at the hearing held on the motions, and there is absolutely no basis to conclude that the submissions had any impact on the Circuit Court's ultimate substantive rulings in this case. Accordingly, Appellant's complaints regarding *ex parte* submissions are irrelevant and without merit.

#### IV. CONCLUSION

Appellant has clearly failed to establish that the Circuit Court committed any error when it concluded that there was no genuine issue of material fact and that she had failed to establish a violation of the WVHRA. It is undisputed and supported by the evidence submitted to the Circuit Court in support of the Appellees' respective Motions for Summary Judgment, that HAGI, Appellant's employer, engaged in multiple discussions with her and representatives of the West Virginia Division of Rehabilitation Services and fulfilled its obligation to engage in an interactive dialogue. Further, the undisputed and uncontested evidence presented to the Circuit Court by the parties clearly established that HAGI, Appellant's employer, made reasonable accommodations to allow her to continue to work as a CRNA. It made multiple modifications to its standard practices and work rules within the practical and medical restrictions that existed, and gave Appellant multiple rights and added flexibility not provided to other employees. The

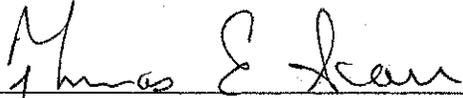
multiple accommodations made by HAGI were successful and achieved their intended purpose to allow Appellant to continue to work and perform her duties for almost two years after she returned to work following her workers' compensation injury.

Based on the nature of HAGI's business, and the lack of control that HAGI and the individual Appellees had over scheduling surgical procedures, there was simply no way that HAGI, nor any surgical anesthesia practice, could guarantee Appellant or any other anesthesia provider that they would not at some times have to work beyond the end of their scheduled shifts. Consequently, HAGI would have been perfectly justified in finding that there was no way to accommodate Appellant and she would not have been able to work at all, or HAGI could have done what it did here, which was to respond to her scheduling and lifting restrictions so that she could continue to work. The only possible thing that HAGI could have done differently in order to guarantee that Appellant did not have to work past her scheduled shift, was to hire additional CRNAs and to maintain them on standby to be available every day that she worked so that there would always be a replacement if and when needed. There is no question that such action and preferential treatment is neither reasonable nor required.

None of Appellant's arguments or unsupported allegations change these fundamental facts, nor do they change Appellant's failure to fulfill her obligations to properly respond and oppose the respective Motions for Summary Judgment. The Circuit Court's Order granting summary judgment on Appellant's claims is fully supported by the factual record and applicable law.

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