

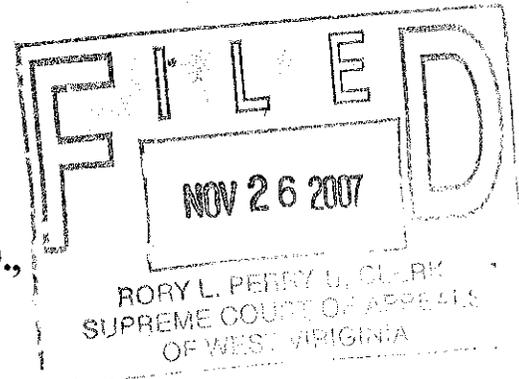
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 33666

**BRENDA L. STANLEY,
Plaintiff Below, Appellant**

vs.

**SUTHIPAN CHEVATHANARAT, M.D.,
Defendant Below, Appellee**



APPELLANT'S BRIEF

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I. KIND OF PROCEEDING AND NATURE OF RULING IN THE LOWER TRIBUNAL

Petitioner Brenda Stanley filed a medical malpractice action against Respondent Suthipan Chevathanarat, M.D. ("Dr. Chevy") in the Circuit Court of Logan County, West Virginia on January 27, 2000. In this action, Mrs. Stanley alleged a breach of the standard of care by Dr. Chevy related to his treatment care of her during the summer of 1998 and, particularly, his failure to meet the standard of care regarding "informed consent" and his decision to perform a total abdominal hysterectomy with bilateral salphingoophyorectomy ("TAH") on July 20, 1998. TAH is a very intrusive surgery where the uterus, fallopian tubes and ovaries are removed. It carries risks of a very serious and debilitating nature. The surgery directly caused the formation of a vesicovaginal fistula and ureterovaginal fistula which led to seven (7) additional surgeries and permanent injury to Brenda Stanley.

Plaintiff alleges that Dr. Chevy failed to obtain informed consent from her. Although he was negligent on several relevant aspects, of paramount significance was his failure to offer Hormone Replacement Therapy ("HRT") as an alternative method of treatment.

Trial began before Judge Eric O'Briant on November 1, 2005. The sole issue was informed consent.¹ At the close of all evidence, plaintiff moved for judgment as a matter of law on the issue of negligence because Dr. Chevy failed to obtain informed consent. The following went unrebutted: (1) Dr. Chevy testified that he did not offer Brenda Stanley a required alternative method of treatment to the surgery, to-wit, Hormone Replacment Thearapy ("HRT"); (2) Brenda Stanley testified that HRT was not offerd as an alternative method of treatment; (3)

¹ In his response to Appellant's Petition, the Appellee went to great lengths to direct the Court's attention to the fact that a prior trial resulted in a defense verdict and that the jury found in favor of Dr. Chevy on issues unrelated to the question before the Court on this appeal. Of course, those matters, along with questions of errors in the prior trial are irrelevant and serve no point in the discussion here.

the informed consent form was silent on HRT as an alternative method of treatment; (4) Dr. Robert Dien, Plaintiff's expert, testified that failing to offer HRT as an alternative to TAH constituted negligence; and (5) Dr. Charles March, defense expert, testified that failure to offer HRT as an alternative to TAH constituted negligence. Informed consent was also not obtained because the risks of the TAH, including the formation of fistulas, were not explained to her.

Plaintiff's brief shows that Dr. Chevy failed to obtain adequate informed consent to the surgery. The jury, therefore, should have been submitted only the issues of causation and damages. However, the trial court refused to grant Plaintiff's motion for judgment as a matter of law on the issue of negligence and the entire case was submitted to the jury. The jury thereafter answered the first question (negligence) in the negative and never addressed the issues of causation or damages.

Plaintiff filed a timely motion for judgment as a matter of law and a new trial on causation pursuant to *West Virginia Rule of Civil Procedure 50* based upon the denial of the earlier denial of her motion for judgment as a matter of law. The trial court denied plaintiff's motion by its Order of December 1, 2006.

Plaintiff submits that the case should be remanded with directions to enter judgment in favor of the Plaintiff on the issue of negligence and order a new trial on causation and damages.

II. STATEMENT OF FACTS

Trial testimony centered on the issue of whether Dr. Chevy met the standard of care regarding informed consent, and primarily whether or not he offered Hormone Replacement

Therapy ("HRT") as a reasonable alternative to the surgical procedure of Total Abdominal Hysterectomy ("TAH").

The importance of that inquiry is underscored because both experts agreed that offering HRT was necessary in order for Dr. Chevy to meet the standard of care for informed consent.

In describing HRT, Dr. Robert Dein, Plaintiff's expert, explained to the jury that Premarin and Provera, which are often used in HRT, were brand names for the natural hormones, Estrogen and Progesterone. Premarin is a brand of Estrogen. There are many dosages of Premarin that may be effective and many Estrogens that come from soybean. He thereafter explained that Provera is a type of Progesterone, another natural hormone that may lose effectiveness after menopause. (Dein Testimony Page 56-57). HRT, by the use of hormone replacement drugs, is utilized by physicians to resolve the symptoms of menopause in women after child bearing years when ovaries stop working. Insomnia and hot flashes are symptoms that can accompany menopause. Premarin "replaces" estrogen, a natural hormone produced by healthy ovaries. Provera "replaces" progesterone, another natural hormone. Each individual is different and the dosages of each replacement drug will vary depending upon the person. Bleeding, one of Brenda Stanley's symptoms can be caused by Premarin. (Chevy Trial Testimony Pgs. 218- 222). Premarin stimulates the endometrium, while Provera counterbalances that in order to combat menopause symptoms. (Dein Trial Testimony Page 59).

The evidence again revolved around whether HRT was offered by Dr. Chevy.

A. The Duty of Informed Consent

Dr. Chevy agreed that he had a duty to obtain informed consent. (Dr. Chevy Trial Transcript page 235-236).

Dr. Charles March testified as Defendant's expert witness. He wasn't present for Dr. Chevy's testimony and didn't know what he said to Brenda Stanley when telling her that the TAH was necessary. (March Testimony Trial Transcript Page 161). March agreed that it was *absolutely* the duty of a physician to make sure that a patient makes an intelligent decision, whatever the course of treatment. (March Trial Transcript Page 163).

He testified:

- Q. Would you agree that it's the prerogative of the patient, not the doctor, to ultimately determine what's in the patient's best interest?
- A. Yes, sir.
- Q. The doctor makes recommendations and provides information to the patient, but ultimately it's the patient's choice. Correct?
- A. Yes, sir.
- Q. And that is the doctor's responsibility to provide the patient with all information material to the patient's choice. Correct?
- A. Yes, sir.
- Q. The patient doesn't have the responsibility to go to the library or get on the internet. That's the doctor's responsibility. Correct?
- A. Yes, sir.
- Q. And then it's up to the patient to weight (sic) the risks of the proposed surgery or the alternatives or the benefits and how all that plays into their own treatment. Correct?
- A. Yes, sir.

(Dr. March Trial Testimony Pg. 170-172).

Dr. Dein testified that the informed consent stage of the physician/patient relationship is just as important as the treatment itself because, without it, "you can't appropriately treat the patient". (Dr. Dein Trial Transcript Page 38-42).

B. The Informed Consent Document

Dr Dein opined that, in order to meet the duty of informed consent, the patient needs to understand his or her medical issue, the possible causes of the problem and the *acceptable treatment options*. He stressed that these topics need to be explained by the physician in a way the patient can understand, given their limitation of education. He testified that informed consent is an important process, a discussion between doctor and the patient that must be in a way the patient can understand. It is much more than just a *piece of paper*. He stated that just having a document, without discussion and patient understanding, falls below that standard of care. The patient's educational level also must be taken into account. (Dein Trial Transcript Page 43-45). That is relevant because Brenda Stanley only has a twelfth (12th) grade education. (Stanley Trial Transcript Page 127).

Dr. Chevy agreed that the imposed standard of care is not met by simply having the patient sign a "consent form". He testified:

- Q. You agree that informed consent is a standard of care that a physician has a duty to comply with in treating a patient, don't you?
- A. Yes, I do.
- Q. And that standard of care isn't set by you or any particular doctor. It's set by the medical community, is that right?
- A. Yes.
- Q. You agree with me that you cannot comply with your duty of informed consent simply by having someone sign off on a form. Do you agree with that?
- A. I do.

(Dr. Chevy Trial Transcript page 235-236).

He then spoke to the contents of the form he used prior to Brenda Stanley's surgery. He then agreed that the form contained the following excerpts:

Q. "The following operation or procedure: the removal of uterus, tubes and ovaries." And then the next line, tell me if you're not following me. That says "and ovaries." Is that right?

A. Yes.

(Chevy Trial Transcript page 239).

Q. Just having the form signed doesn't meet your duty or the standard of care in obtaining informed consent. Do you agree with that?

A. ... yes.

(Chevy Trial Transcript Pg.242).

Q. I think you've already agreed that you don't meet your duty just by having a form signed, so I understand, and that's correct.

A. I'm sorry, I didn't-

Q. You have to verbally communicate with the patient?

A. Definitely, yes.

Q. You also put important things down on medical records, you as a doctor, don't you?

A. Uh-huh.

(Dr. Chevy Trial Testimony, Page 245).

Brenda Stanley signed the form at issue on June 19, 1998. Dr. Chevy was not even present at the time. Rather, the form was presented to her by a nurse. Brenda decided to submit to the TAH because Dr. Chevy had told her she had a tumor in her uterus. She trusted and relied

upon Dr. Chevy's advice. (Stanley Transcript Page 94-95). The pathology after the surgery revealed that Dr. Chevy was mistaken because there was no tumor.

Dr. Chevy never met with Brenda and explained the risks of the TAH, but rather, told her that she would be fine. (Brenda Stanley Trial Testimony Pg. 90). Brenda Stanley testified that, after signing the form, she tried to speak with Dr. Chevy before the surgery, but was unsuccessful. She stated that "I went back to his office to talk to him, and he was running across the railroad tracks to his car going to ER, going to Logan General to deliver a baby, and he told me to go on upstairs and to sign the papers and that he would talk to me Monday before surgery, and he never did talk to me." (Stanley Trial Transcript Page 126).

Dr. Robert Dein was recognized as an expert by the Court, without objection, and testified on the issue of standard of care *vis a vis* informed consent. He opined that informed consent has very little to do with filling out or signing a form. (Dein Trial Testimony Page 64).

The record is void of any evidence that Dr. Chevy did anything other than have Brenda Stanley sign a form and he wasn't even present when that occurred.

C. Alternative Methods of Treatment- HRT Not Offered

Testimony was presented by both parties regarding the necessity of presenting the patient with alternative methods of treatment.

Based upon her communication with Dr. Chevy, Brenda Stanley understood that he decided to do a TAH because he was going to take out a tumor and would "rather go one time and take it all." (Stanley Trial Transcript Page 89). The record is unequivocal that he was mistaken about the existence of a tumor because of the post-operative pathology.

Dr. Chevy testified that the TAH was needed, in essence, as the only available treatment. He thought continuation and/or manipulation of HRT was not an alternative to a TAH, so he did not offer it :

Q: I know that we talked about you offering as an alternative treatment to Brenda the hysterectomy and suggesting the treatment, but the fact is, isn't it, Dr. Chevy, that by this time, that being June 3, 1998, you had determined that indeed the hysterectomy was needed?

A. Yes.

(Dr. Chevy Trial Transcript Page 224-225).

Q. So even though she did receive the surgery on July 20th, the plan was about a month earlier originally for her to have that surgery?

A. Yes.

(Chevy Trial Transcript page 238).

Q. The second page of the form, Dr. Chevy, I believe the first part, "we have also discussed alternative treatment methods and/or risks including vaginal route, risk as same as abdominal route." Is that what that says there?

A. Yes.

Q. Were there any, there's no other alternatives that I see. Are we missing anything?

A. No.

(Dr. Chevy Trial Transcript Pg. 241).

Q. Doctor, getting back to what is required on informed consent, it is your duty in meeting the standard of care and obtaining an informed consent from a patient to describe viable alternative methods of treatment. Correct?

A. Yes.

(Dr. Chevy Trial Transcript Pg. 243).

Q. Mr. Robinson, in asking you questions about when the total abdominal hysterectomy was planned for Brenda, the fact of the matter is and I'm

using his words, you didn't decide that it was a, quote, good idea. You determined it was needed. Isn't that correct?

A. Yes.

Q. You've already told me Premarin can cause bleeding. Right?

A. Yes.

Q. You never offered to stop the Premarin as an alternative method of treatment, you never offered to Brenda that stopping the Premarin was a viable alternative, did you?

THE COURT: You may answer.

THE DEFENDANT: No, because to stop the Premarin, she would have symptom of menopause.

(Chevy Trial Transcript page 280-281).

It is unequivocal that HRT was not offered by Dr. Chevy.

Dr. Dein testified that continuation and/or manipulation of HRT was a viable alternative to a TAH and that the failure to offer this alternative was a deviation from the standard of care.

(Dr. Dein Trial Testimony, Page 66). He opined:

Q. Dr. Dein, let me make sure again that the jury understands. Your criticism and your opinions of a deviation from the accepted care in this case are limited to informed consent and the fact that Dr. Chevy did not offer viable alternative methods of treatments to Brenda, including manipulation or changing hormone replacement therapy or stopping it all altogether.

A. Yes.

(Dr. Dein Trial Testimony, Page 82).

Brenda Stanley testified that Dr. Chevy never explained risks to her of any alternative treatments. (Stanley Page 91). Dr. Chevy never advised her that there might have been other treatments that had less risk of a permanent injury. (Stanley Page 91). There was never a discussion with Dr. Chevy about continuation or manipulation of hormone therapy. (Stanley

Page 92). She was never made aware of any other alternatives and was told that she would be fine from the total abdominal hysterectomy. (Stanley Page 92). She stated that Dr. Chevy only talked to her about a total abdominal hysterectomy. (Stanley Page 93).

Brenda Stanley testified that it would have been absolutely important to her in making her decision if she had known of other alternatives. (Stanley Page 94).

Dr. Charles March, defense expert, did not listen to any trial testimony by Dr. Chevy. When posed with the actual testimony in the case, he agreed that a deviation occurred. He testified that the total abdominal hysterectomy was not Brenda's only alternative. (March Trial Transcript Page 156, 160-161).

He testified:

Q. And you agreed on the record a moment ago that there are viable alternatives to total abdominal hysterectomy. Correct?

A. Correct.

Q. And you would agree that it's important for a patient to understand that there's these other alternative treatments available. Correct?

A. Correct.

Q. Because if a patient doesn't understand that, or hasn't been provided with that information, then the patient can't give informed consent. Correct? And a patient can't make an intelligent choice.

A. Correct.

(Dr. Charles March Trial testimony, Page 171).

Dr. March went on to testify to the following:

Q. In order for a patient to make an intelligent and informed choice about a course of treatment, whether to have a total abdominal hysterectomy and we're talking about Ms. Stanley, of course, would a Doctor necessarily have to present this HRT as an alternative to the surgery?

A. Sure.

Q. So that is something that Dr. Chevy should have talked to her about prior to the total abdominal hysterectomy in order that she would have informed consent or give informed consent. Correct?

A. Sure.

(March Testimony Page 164).

Dr. March went on to say:

Q. If all these things that I've talked about, the alternatives and weighing the risks and benefits, if that is not given to the patient, you do not have informed consent. Correct?

A. Correct.

Q. That would be a deviation from the standard of care and that would be negligence.

A. Yes, sir.

(March Trial Transcript Page 170-172).

Dr. March was asked every question necessary that could have brought testimony creating a question of fact. However, no issue was created as it is uncontroverted that Dr. Chevy did not offer HRT as an alternative method of treatment. He testified:

Q. Do you think-Doctor, also again, you already told me earlier that you felt like offering as an alternative treatment simply discontinuing the HRT, the hormone replacement therapy, wasn't viable because it simply, in your opinion, would not work. Right?

A. Yes.

Q. And that wasn't on there.

A. It's not there.

(Chevy Trial Transcript page 236-247).

Dr. Dein testified that Dr. Chevy failed to offer HRT for Brenda Stanley and, because of that, Dr. Chevy deviated from the accepted standard of care regarding informed consent. (Dein

Trial Transcript Page 58). He testified that failing to offer the continuation of the HRT, with changes in Premarin dosage (perhaps discontinuing it altogether), was a breach in the standard of care. He testified that, had Brenda Stanley been given the opportunity and chosen to continue the HRT, that there were no risks involved. He opined that a viable alternative method of treatment would have been to stop the HRT therapy. (Dein Trial Transcript Page 64-67).

(D) Accepted Risks

The testimony also focused on accepted risks of a TAH. Dr. Chevy testified as follows:

Q. And as part of complying with your duty with a patient, particularly with surgery to provide or obtain, I should say, informed consent, you should tell the patient about accepted risks that are attendant to a procedure. Correct?

A. Yes.

Q. That's your duty, isn't it?

A. Yes.

(Chevy Trial Transcript page 237).

Q. Okay, thank you. And then the next section here, "he/she has explained that the risks of this procedure include." Now tell me again if something is translated wrong here. "The anesthetic risk is infection, aspiration or drug reaction."

A. Yes, that's correct.

Q. Now the next group of wording here, and I'll read again here, "surgical risk is infection, bleeding, injury to bowel, bladder, hernia, blood clot, abscess, blood collection inside abdomen."

A. Yes.

Q. Please tell me, is that complete?

A. It's complete, yes.

- Q. It is your duty in meeting the standard of care on informed consent to describe the risks that are attendant to the surgery that you're talking about, in this case, the total abdominal hysterectomy. Is that correct?
- A. Yes.
- Q. And it is your duty to describe and communicate with the patient all accepted risks with the alternative treatments that may be available for the problem that a patient has?
- A. Yes.
- Q. Regardless of that, back in 1998 when you were communicating with Brenda in an attempt to obtain informed consent, this form nowhere on it describes the accepted risk of a vesicovaginal fistula, does it?
- A. No.
- Q. It does not describe the accepted risks of a ureterovaginal fistula, does it?
- A. No, but you have to know this, too. The bladder is what lay people now (sic). The ureter, how many people would know, so when we talk, I usually talk more than just writing. Talking is faster. You get more information, but you can't put everything in writing.
- Q. Isn't a vesicovaginal fistula or a fistula that communicates the bladder with the vagina an acceptable risk to a total abdominal hysterectomy?
- A. Yes, it is.
- Q. And isn't an ureterovaginal fistula, which is a connection between a ureter and the vagina, an acceptable risk to surgery?
- A. Yes, it is.

(Chevy Trial Transcript page 237).

Dr. Dein testified about the risks associated with continuing HRT and/or stopping HRT:

- Q. And the risks of both of those would have been perhaps symptoms related to menopause or some continued bleeding that we would deal with later?
- A. Yes.

(Dein Trial Transcript Page 82).

Dr. Chevy never mentioned risks of TAH and told Brenda that she would be fine. (Stanley Trial Transcript Page 90-91). As a result of the TAH, she underwent seven (7) surgeries in the course of two (2) years because of the fistulas.² The scarring, both physically and mentally, is degrading and embarrassing. She stated that, if she had been given an alternative to the TAH, including non-surgical treatment, she would never have accepted Dr. Chevy's decision to perform it. (Stanley Trial Transcript Page 114).

At the close of the evidence, Brenda's counsel moved, pursuant to Rule 50 of the *West Virginia Rules of Civil Procedure*, for judgment as a matter of law on the issue of standard of care based on the unequivocal evidence that Dr. Chevy did not offer hormone replacement therapy as a reasonable alternative method of treatment.

The plaintiff requested that the jury not be given a special interrogatory relating to whether there was a deviation from the standard of care but only be given a special interrogatory relating to causation, that is, whether or not a reasonable person under like circumstances would have refused the total abdominal hysterectomy had the standard of care regarding informed consent been met.

The Court denied that motion and submitted, as the first question to the jury, the issue of deviation from the standard of care. The jury returned a verdict in favor of the defendant by answering that question in the negative.

The trial court denied plaintiff's post trial motion for judgment as a matter of law by entering an Order on December 1, 2006. In the Order, the Court found as follows:

Further, the Court notes that Dr. Chevy candidly admitted that in his testimony at the trial of this matter that he did not recall discussing matters regarding informed consent, but that it was his normal, customary practice to discuss all points contained in the

² Although not in the record, Brenda has undergone several additional surgeries since the trial.

informed consent document which was introduced in evidence at the trial of this matter.

The record contains no such testimony and it is clear that Dr. Chevy did not offer HRT as an alternative method of treatment.

III. ASSIGNMENTS OF ERROR

The lower court erred when it refused to enter judgment as a matter of law that the standard of care was breached and Dr. Chevy was negligent in failing to obtain informed consent. The Trial Court should have ruled that negligence had been proven and only submitted the jury a special interrogatory on the issue of causation, and allowed it to assess damages in the event it decided that a reasonable person would have refused the surgery had the standard of care been met regarding informed consent.³

IV. DISCUSSION OF LAW AND RELIEF PRAYED FOR

A. THE COURT SHOULD APPLY THE *DE NOVO* STANDARD OF REVIEW TO THE CIRCUIT COURT'S DECISION TO NOT GRANT JUDGMENT AS A MATTER OF LAW.

³ It is important to note that the issue does not involve disturbing a jury verdict, but rather, goes to the decision of the Judge to submit the question of negligence to the jury in the first place. The Jury should have never been given the opportunity to answer a question that was proven by the record. Interestingly, the Jury returned the verdict in the defendant's favor after asking the Judge whether the plaintiff's medical bills had been paid. The Judge correctly refused to answer the question but the Jury's thought process underscores the fact that decisions are sometimes influenced by forces from outside the courtroom that have nothing to do with the evidence or law.

The appellate standard of review of a Motion for Judgment as a Matter of Law pursuant to Rule 50 of the *West Virginia Rules of Civil Procedure* is *de novo*. *Pipemasters, Inc. v. Putnam County Commission*, 625 S.E.2d 274 (W. Va. 2005).

B. THE COURT ERRED IN FAILING TO GRANT JUDGMENT AS A MATTER OF LAW ON THE ISSUE OF NEGLIGENCE.

Rule 50 of the *West Virginia Rules of Civil Procedure* reads as follows in pertinent part:

(a) Judgment as a Matter of Law.

(1) if during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the Court may determine the issue against that party and may grant a Motion for Judgment as a Matter of Law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

The record in this case falls squarely within the scope and meaning of Rule 50 because there is no sufficient evidentiary basis for a reasonable jury to find for Dr. Chevy on the issue of negligence because he failed to obtain informed consent by all accounts.

Upon the whole, where evidence did not appreciably tend to support a case, a verdict against defendant could not rightly have stood on a motion to set the same aside. In such a case, not turning on conflicting oral testimony involving the credibility of witnesses, the court may properly instruct the jury to return a verdict for the party in whose favor the evidence plainly and decidedly preponderates. *White v. Hoster Brewing Co.*, 51 W. Va. 259 (1913). That is exactly the case here.

The rule governing the direction of verdicts by a trial court as established by the Supreme Court "is that where the evidence is undisputed, or of such conclusive character that if a verdict

were returned for one party, whether plaintiff or defendant, it would have to be set aside in the exercise of a sound judicial discretion, a verdict may and should be directed for the other party.” *Small Co. v. Lamborn & Co.*, 267 U.S. 248, 254 (1925). Or, as stated in a later case, “it is the duty of the trial judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury reasonably may draw therefrom would be insufficient to support a different finding.” *Chicago, M. & St. P. Ry. v. Coogan*, 271 U.S. 472 (1926). This rule has been repeatedly followed in this court. Of the more recent decisions, see *Anderson v. Southern Ry. Co.*, 20 F.2d 71 (4th Cir. 1927); *Lamborn v. Woodard* 20 F.2d 635 (4th Cir. 1927); *Flannagan v. Provident Life & Accident Insurance Co.* 22 F.2d (4th Cir. 1927); *Livingston v. Atlantic Coast Line R. Co.* 28 F.2d 563 (4th Cir. 1928); *Standard Oil Co. v. Cates* 28 F.2d 718 (4th Cir. 1928).

There are not sufficient facts in the record that would allow the Jury to even *infer* that Dr. Chevy offered HRT. However, assuming *arguendo* that Dr. Chevy did not admit his fatal flaw, an inference is a deduction that a Jury may make drawing from proven facts. The Jury would have to deduce two (2) things: (1) that Dr. Chevy’s usual course during the informed consent process was to offer HRT when a TAH was being considered; and (2) that he actually offered it to Brenda Stanley. To do this is to draw an inference from an inference. The law of evidence does not permit the building of one inference upon another inference. *State of West Virginia v. Frank Corbin*, 186 S.E. 179 (W.Va. 1936); *Crotty v. Railroad Co.*, 115 W.Va. 558, 177 S.E. 609; *U.S. v. Ross*, 92 U.S. 281. This is an unnecessary exercise since Dr. Chevy admitted HRT was not offered but is made in anticipation Appellee may suggest the Jury somehow inferred what is plainly not in the record.

This case presents an issue that this Court rarely has an opportunity to seize upon. Indeed, case law in West Virginia is practically non-existent where a review has been made of a

trial court's failure to grant Judgment as a Matter of Law for a plaintiff who has established evidence worthy of such a ruling. The great abundance of precedent by this Court, therefore, is couched in terms of a review of rulings in favor of the defendant. However, fairness dictates that the same principles apply and should be adhered to when the record establishes that an issue has been proven by a plaintiff.

A motion under this rule is generally granted when, considered in a light most favorable to the non-moving party, the record fails to establish a legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue. *Yost v. Vascaldo* 408 S.E.2d 72 (W. Va. 1991). In *Yost*, a mechanical engineer who was dismissed pursuant to a Rule 50 motion at trial presented un rebutted evidence that he was not a manufacturer, seller or distributor of a rubber mill that he had assembled and allegedly caused plaintiffs injuries. The record established that the mechanical engineer did not create an unreasonable risk of harm to the operator by failing to modify the placement of a safety bar to enhance the mills safety, that the placement of the bar met OSHA standards and that the mill was assembled as intended by the manufacturer. This Court, in reviewing the evidence, which was unequivocal on the issue of negligence, affirmed the lower court's ruling.

The analysis is even simpler here. The principles of informed consent in medical malpractice case have been firmly established for some time. In the case of surgery, a physician should disclose the following considerations:

- (1) The possibility of the surgery,
- (2) The risk involved concerning the surgery,
- (3) Alternative methods of treatment,
- (4) The risk related to such alternative methods of treatment and

(5) The results likely to occur if the patient remains untreated.

Further, this standard is measured by the "patient need standard" which is defined as the need of the patient for information material to her decision. *Cross v. Trapp* 294 S.E.2d 446 (W. Va. 1982).

In this case, the trial court's decision to deny Judgment as a Matter of Law should be reversed and this matter remanded by an Order that the issue of negligence be entered in favor of the plaintiff and a new trial on causation and damages ensue. This is because it is proven that Dr. Chevy failed to obtain informed consent from Brenda Stanley because he did not discuss (or otherwise provide information to her) the alternative method of treatment of HRT, a method of treatment that both experts testified was necessary to be imparted to her, and which is required under the *Cross* guidelines. Both experts testified that a failure to offer HRT as an alternative method of treatment constitutes negligence. Moreover, it is crystallized in the record that Dr. Chevy did not discuss or offer HRT as an alternative method of treatment. Indeed, Brenda Stanley testified that he did not, even though she went to great lengths to discuss the plan for surgery with Dr. Chevy, who avoided her. Dr. Chevy himself admitted that he did not offer HRT to her.

Even though Dr. Chevy's own expert, Dr. Charles March, testified that it was negligence not to offer HRT, Dr. Chevy's admission is sufficient in and of itself to establish this as fact and remove it from jury consideration. Admissions made by a defendant can be used both to establish the standard of care and its breach. *Conaway v. Eastern Associated Coal Corporation*, 358 S.E.2d. 423, 430 (W. Va. 1987) (recognizing that an employer's admission is sufficient to establish elements in discrimination case). See *Annotation, Medical Malpractice: Physicians Admission of Negligence As Establishing Standard of Care and Breach of That Standard*, 42

A.L.R. 5th, § 7[a]; cf. 7[b] (1996) (and case law cited therein); Annotation, 83 A.L.R.2d 7, at pages 96 to 98; Annotation, 81 A.L.R.2d 597, at pages 625 to 627; 70 C.J.S., *Physicians and Surgeons*, § 122, at pages 557-558; see also *Coltharp v. Carnesale*, 733 So.2d 780 (Miss. 1999); *Meena v. Wilburn*, 603 So.2d 866 (Miss. 1992); *Jarboe v. Harting*, 397 S.W.2d 775, 778 (Ky. 1965) (“[i]t is a generally accepted proposition that the necessary expert testimony may consist of admissions by the defendant doctor.”); *Greenwood v. Harris*, 362 P.2d 85 (Okla. 1961) (extrajudicial admissions of defendant competent to supply expert testimony required to make out prima facie case); *Oswald v. LeGrand*, 453 N.W.2d 634, 640 (Iowa 1990) (admissions of medical malpractice by a defendant physician can constitute the direct expert testimony needed to show malpractice); *Hill v. McCartney*, 590 N.W.2d 52 (1998); *Larson v. Belzer Clinic*, 195 N.W.2d 416 (1972); *Bauer v. Friedland*, 394 N.W.2d 549 (Minn. App. 1986); *Stallcup v. Coscarat*, 282 P.2d 791, 794 (Ariz. 1955); *Thomas v. Merriman*, 337 P.2d 604 (Mont. 1959) (physician’s testimony sufficient to establish standard of care and deviation from standard of care); *Hill v. Squibb & Sons*, 592 P.2d 1383, 1389 (Mont. 1979) (“third party expert testimony is not required if a defendant doctor’s own testimony establishes the standard of care and departure from it”). What this authority stands for is the legal principle that a physician’s admission can provide the basis to establish the standard of care and its breach and, in such a case, third party expert testimony is not required. In the instant case, Dr. Chevy’s testimony corroborates the entire record, which reveals no evidence to the contrary.

The Trial Court in the instant case, in determining whether to grant a new trial pursuant to plaintiff’s motion on this exact issue, found as follows:

Further, the Court notes that Dr. Chevy candidly admitted in his testimony at the Trial of this matter that he did not recall discussing matters regarding informed consent, but that it was his normal, customary practice

to discuss all points contained in the informed consent document which was introduced in evidence of the Trial of the matter.

The Court simply erred in its recollection of this testimony. A detailed review of Dr. Chevy's testimony contains no testimony about Dr. Chevy's normal, customary practice. Assuming *arguendo*, that such testimony existed, the issue of negligence yet should not have been submitted to the jury. This unavoidable conclusion exists because, when Dr. Chevy was asked point blank whether he offered HRT as an alternative method of treatment, he admitted that he did not. He stated that he did not discuss or offer it because he did not believe it would work. This evidence is unrebutted and flies in the face of Dr. Chevy's own expert testimony that HRT should have been discussed with, and offered to Brenda Stanley, and the failure to do so constitutes negligence. There is no question that the negligence issue is crystallized by the record in this case.

C. A NEW TRIAL SHOULD BE GRANTED ON THE ISSUE OF CAUSATION.

Where liability has been clearly established and error is found to have occurred at the trial court level, a verdict may be set aside and a new trial granted on the single issue of damages. See *West Virginia Rules of Civil Procedure 59(a)*. *Wilt v. Buracker*, 443 S.E.2d 196 (W. Va. 1993). A new trial may be granted to a party on all or part of the issues. Where liability has been resolved in favor of the plaintiff, a new trial may be granted on the single issue of damages. *Gebhardt v. Smith*, 420 S.E.2d 274 (W. Va. 1992).

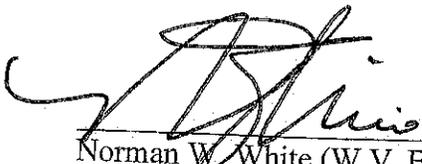
In this case, Brenda Stanley testified that being properly informed would have affected her decision. Plaintiff agrees that the issue is one measured by whether a reasonable person in the patient's position would have withheld consent to the surgery or therapy had all material risks

been disclosed. *Cross v. Trapp*, 294 S.E.2d 446 (WV 1982). The jury did not consider the issue at the close of the evidence because of the erroneous verdict on the question of negligence. Therefore, a new trial must be ordered to address that issue along with damages should the Jury find in favor of the Plaintiff.

D. PRAYER FOR RELIEF

Based upon all the foregoing, your Plaintiff respectfully prays that this Honorable Court reverse the decision of the Circuit Court of Logan County and enter an Order granting judgment as a matter of law on the issue of negligence and grant a new trial on the issue of causation and damages.

BRENDA L. STANLEY,
Plaintiff,
By Counsel



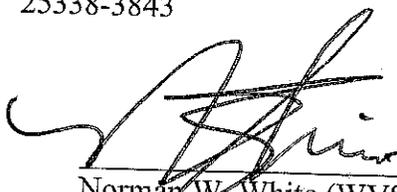
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CERTIFICATE OF SERVICE

This is to hereby certify that on this the 26th day of November 2007, the undersigned have served a true and exact copy of the foregoing "APPELLANT'S BRIEF" via United States Mail, postage properly paid, upon the following:

Mark Robinson, Esquire
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