

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
AT CHARLESTON

No. 33525

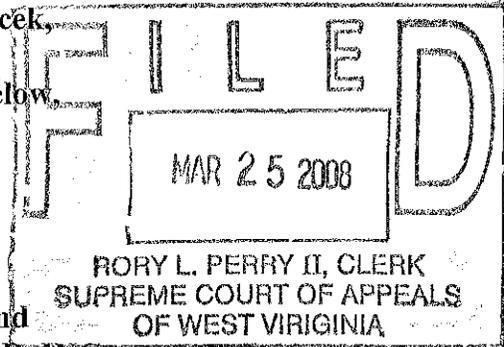
ROBERT MACEK AND LAWRENCE MACEK,
Individually and as Co-Executors
Of the Estate of Phyllis Macek,

Appellants and Plaintiffs Below

v.

CARL R. JONES, D.O. and
WEIRTON MEDICAL CENTER, INC.,
A West Virginia Corporation,

Appellees and Defendants Below.



BRIEF OF APPELLEE WEIRTON MEDICAL CENTER, INC.

FROM THE CIRCUIT COURT OF BROOKE COUNTY
CIVIL ACTION NO. 01-C-238

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

I.	KIND OF PROCEEDING AND NATURE OF THE RULINGS IN THE LOWER TRIBUNAL	1
II.	STATEMENT OF FACTS	2
III.	RESPONSE TO APPELLANTS' ASSIGNMENT OF ERROR.....	3
	The Trial Court Did Not Commit Error With Regard To The Denial of Appellants' Motions To Strike Prospective Jurors David George and Glen Stolberg.	
IV.	STANDARD OF REVIEW.....	3
	a. Standard of Review Of Appellants' Assignment of Error	
	b. Standard of Review Of Appellees' Cross Assignment of Error	
V.	DISCUSSION OF LAW.....	5
	1. The Trial Court Did Not Err With Regard To The Denial Of Petitioner's Motion To Strike Prospective Juror David George.	
	2. The Trial Court Did Not Err With Regard To The Denial Of Petitioner's Motion To Strike Prospective Juror Glen Stolburg.	
	3. Appellants Waived Any Right To A New Trial Based On The Unsupported Allegation That Juror Glen Stolburg Provided False Answers In Jury Selection.	
V.	CROSS-ASSIGNMENT OF ERROR	11
	The Trial Court Erred In Denying Appellee's Motion For Judgment As A Matter Of Law During Trial On The Issue Of Vicarious Liability of Weirton Medical Center, Inc. For The Conduct Of Appellee Carl Jones, D.O.	
VI.	CONCLUSION.....	15

TABLE OF AUTHORITIES

West Virginia Cases

Burless v. West Virginia University Hospitals, Inc., 215 W.Va. 765, 601 S.E. 2d 85 (2004)

Doe v. Wal-Mart, 210 W.Va. 664, 558 S.E.2d 663 (2001)

Flesher v. Hale, 22 W.Va. 44 (1883)

McGlone v. Superior Trucking Company, 178 W.Va. 659, 363 S.E.2d 736 (1987)

Mikesinovich v. Reynolds Memorial Hospital, 640 S.E.2d 560 (W.Va. 2006)

O'Dell v. Miller, 221 W.Va. 285, 565 S.E.2d 407 (2002)

Phares v. Brooks, 211 W.Va. 346, 566 S.E.2d 233 (2002)

Phares v. Brooks, 214 W.Va. 442, 590 S.E.2d 370 (2003)

Pleasants v. Alliance Corporation, 209 W.Va. 39, 543 S.E.2d 320 (2000)

Sanders v. Georgia-Pacific Corp. 159 W.Va. 621, 225 S.E.2d 218 (1976).

State ex rel. Quinones v. Rubenstein, 218 W.Va 388, 624 S.E.2d 825, 833 (2005)

State v. Banjoman, 178 W.Va. 311, 359 S.E.2d 331 (1987)

State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996)

Thomas v. Makani, 218 W.Va 235, 624 S.E.2d 582 (2005)

Walker v. Sharma, 655 S.E.2d 775 (W.Va. 2007)

West Virginia Human Rights Commission v. Tenpin Lounge, 158 W.Va. 349, 211 S.E.2d 349 (1975)

Cases From Other State or Federal Courts

Compton v. Henrie, 364 S.W.2d 179, 182 (Tex.1963).

I. Kind of Proceeding and Nature of the Rulings in the Lower Tribunal

This Brief of Appellee Weirton Medical Center, Inc. is filed in opposition to the “Appellants’ Initial Brief,” submitted by counsel for the Appellants on or about February 21, 2008, and received by Appellee Weirton Medical Center on February 25, 2008. The underlying action was filed by the Appellants against Carl R. Jones, D.O. and Weirton Medical Center, Inc. in the Circuit Court of Brooke County, Judge Martin J. Gaughan presiding, on or about December 11, 2001. The Appellants’ Complaint included allegations of medical negligence and wrongful death against Dr. Jones due to the treatment of Phyllis Macek, and a claim of vicarious liability against Weirton Medical Center, Inc. for the conduct of Dr. Jones. Prior to the trial held on June 6 to June 12, 2006, the Trial Court bifurcated a separate theory against Weirton Medical Center, Inc. and various third-party and fourth-party defendants concerning the Appellants’ allegation that after the death of Mrs. Macek, the release of her remains was improperly delayed beyond the appointed time for the funeral of Mrs. Macek.

The only allegation against Weirton Medical Center, Inc. in the June 2006 trial was based on the theory of vicarious liability for the negligence of Dr. Jones. On the third day of trial and after the close of the Appellants’ case-in-chief, Appellee Weirton Medical Center, Inc. made a Rule 50 motion for judgment as a matter of law on the Appellants’ theory of vicarious liability of the hospital for the allegedly negligent conduct of Appellee Carl Jones, D.O., which was denied by Judge Gaughan.

The trial of this matter ended on June 12, 2006 with a unanimous verdict in favor of the Appellees below. Because the jury found that Dr. Jones was not liable to the Appellants, it did not reach the question of vicarious liability of Weirton Medical Center, Inc.

The Appellants have appealed the Order entered by the Trial Court on October 23, 2006 denying the Appellants' Motion for New Trial that had been filed on June 30, 2006. The Appellants' Motion for New Trial was based on the sole claim that the Trial Court erred in refusing to Appellants' motions to strike two jurors during jury selection.

The Trial Court's denial of the Rule 50 motion for judgment as a matter of law of Appellee Weirton Medical Center, Inc. is the subject of the cross assignment of error below, included in this brief pursuant to Rule 10(f) of the West Virginia Rules of Appellate Procedure.

II. Statement of Facts

The Appellants' allegations of negligence and wrongful death against Appellee Jones, for which Appellee Weirton Medical Center, Inc. is alleged to be vicariously liable, are based on medical treatment rendered by Dr. Jones to Phyllis Macek at Weirton Medical Center, Inc. in February 2000. On February 21, 2000, at the age of 75, Mrs. Macek presented to the Emergency Department at Weirton Medical Center with a chief complaint of rectal bleeding and was evaluated by emergency medicine specialist Edmundo Mandac, M.D. Following a series of tests, Dr. Mandac contacted and conferred with Mrs. Macek's private physician, Gary Hanson, M.D. Dr. Hanson was contacted because of an established physician-patient relationship between Mrs. Macek and Dr. Hanson. Dr. Hanson was not the physician on-call to the Emergency Department on February 21, 2000.

After conferring with Dr. Mandac, Dr. Hanson ordered that Mrs. Macek be admitted as an inpatient to Weirton Medical Center, Inc. under his service. At that time, Dr. Hanson also ordered following consultation: "Consult Dr. Jones/Tibaldi" (referring to Appellee Jones, and his partner, Dr. Tibaldi). Dr. Jones and Dr. Tibaldi were gastroenterologists in practice

together in February 2000, with staff privileges at Weirton Medical Center, Inc. Dr. Jones and Dr. Tibaldi were not the gastroenterologists on call to the Emergency Department on February 21, 2000, and were specifically chosen by Dr. Hanson. Fulfilling Dr. Hanson's request for the consultation, Dr. Jones evaluated Mrs. Macek on the afternoon of February 21, 2000 after she had been admitted to Weirton Medical Center, Inc. to the service of Dr. Hanson. In his initial order that afternoon, Dr. Jones recommended the colonoscopy that would be performed the following day. The colonoscopy on February 22, 2000 and the bowel perforation subsequently discovered was the subject of the Appellants' claims of negligence and wrongful death against Appellee Jones.

III. Response to Appellants' Assignment of Error

The Trial Court Did Not Commit Error With Regard To The Denial of Appellants' Motions To Strike Prospective Jurors David George and Glen Stolburg.

IV. Standard of Review

a. Standard of Review Of Appellants' Assignment of Error

With regard to the Appellants' assignment of error regarding Judge Gaughan's denial of their motion for new trial, the standard of review applicable to this case was concisely stated in the decision of Thomas v. Makani, 218 W.Va. 235, 624 S.E.2d 582 (2005): "Although the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence." (citing Syllabus Point 4, Sanders v. Georgia-Pacific Corp. 159 W.Va. 621, 225 S.E.2d 218 (1976). The determination of whether a juror should be excused to avoid bias or prejudice in the jury

panel is a matter is within the sound discretion of the trial judge. O'Dell v. Miller, 211 W.Va. 285, 565 S.E.2d 407 (2002).

In the decision of Mikesinovich v. Reynolds Memorial Hospital, 640 S.E.2d 560 (W.Va. 2006), the Court recited the following standard of review as to the qualifications of jurors: "In reviewing the qualifications of a jury to serve in a criminal [or civil] case, we follow a three-step process. Our review is plenary as to legal questions such as the statutory qualifications for jurors; clearly erroneous as to whether the facts support the grounds relied upon for disqualification; and an abuse of discretion as to the reasonableness of the procedure employed and the ruling on disqualification by the trial court." (citing Doe v. Wal-Mart, 210 W.Va. 664, 670, 558 S.E.2d 663, 671 (2001), quoting State v. Miller, 197 W.Va. 588, 600-01, 476 S.E.2d 535, 547-48 (1996)).

b. Standard of Review Of Appellee's Cross Assignment of Error

In this brief, Appellee Weirton Medical Center, Inc. asserts a cross assignment of error pursuant to Rule 10(f) of the West Virginia Rules of Appellate Procedure with respect to the Trial Court's denial of its motion for judgment as a matter of law on the issue of vicarious liability for the alleged acts or omissions of Appellee Jones.

The standard of review for a motion for judgment as a matter of law was recently reaffirmed in Syllabus Point 1 of Walker v. Sharma, 655 S.E.2d 775 (W.Va. 2007):

1. "The appellate standard of review for the granting of a motion for a directed verdict pursuant to Rule 50 of the West Virginia Rules of Civil Procedure is *de novo*. On appeal, this court, after considering the evidence in the light most favorable to the nonmovant party, will sustain the granting of a directed verdict when only one reasonable conclusion as to the verdict can be reached. But if reasonable minds could differ as to the importance and sufficiency of the evidence, a circuit court's ruling granting a directed verdict will be reversed." Syl. Pt. 3, Brannon v. Riffle, 197 W.Va. 97, 475 S.E.2d 97 (1996).

V. Discussion of Law

1. **The Trial Court Did Not Err With Regard To The Denial Of Appellants' Motion To Strike Prospective Juror David George.**

In the Appellants' brief, there are numerous references to responses of David George to the Juror Questionnaire prepared by Plaintiffs' counsel and submitted (over objection by Weirton Medical Center, Inc.) to each of the jurors on the first day of trial, June 6, 2006, immediately before the start of jury selection. As Appellants' entire argument is based on an allegation of bias and prejudice on the part of prospective jurors David George and Glen Stolburg, it is worth quoting the definitions of "bias" and "prejudice" from the opinion in O'Dell:

"Bias, in its usual meaning, is an inclination toward one side of an issue rather than to the other, but to disqualify, it must appear that the state of mind of the juror leads to the natural inference that he will not or did not act with impartiality. Prejudice is more easily defined, for it means prejudgment and consequently embraces bias; the converse is not true." Compton v. Henrie, 364 S.W.2d 179, 182 (Tex.1963).

O'Dell, 211 W.Va. at 288, 565 S.E.2d at 410. The Appellants' retrospective analysis of Judge Gaughan's refusal to grant the Appellants' motions to strike these prospective jurors for cause fails to support a finding that either of these gentlemen were not "free from the suspicion of improper prejudice or bias" or were not "free of the taint of reasonably suspected prejudice or bias," as the standard is defined in O'Dell. In both instances, the totality of information provided by Mr. George and Mr. Stolburg never reached the threshold for bias and prejudice that justifies a characterization of questioning of either of them as "rehabilitation." "Without the demonstration of such disqualifying prejudice or bias, the rule in O'Dell is not implicated." State ex rel. Quinones v. Rubenstein, 218 W.Va 388, 624 S.E.2d 825, 833 (2005).

With regard to prospective juror David George, the Appellants cite several passages

from the juror questionnaire filled out by Mr. George immediately prior to voir dire, plus a few carefully selected comments from the trial transcript. None of these answers or comments justifies any reasonable suspicion of prejudice or bias on the part of Mr. George. Hence, the questioning of Mr. George in chambers did not rise to the level of “rehabilitation” as alleged by the Appellants. To the contrary, the written and verbal answers cited by the Appellants reflect the common sense of Mr. George, rather than any hint of bias or prejudice.

Appellants attack Judge Gaughan’s failure to strike Mr. George based on his written answer to the question about his ability to find Dr. Jones negligent. On his questionnaire, Mr. George responded that he would in fact find against Dr. Jones if his “guilt” was proven “beyond a reasonable doubt.” This written answer did not reflect any bias or prejudice, but rather, the preconceived and incorrect assumption (commonly shared by prospective jurors) that the standard of proof in a malpractice case is the same as in a criminal case. In chambers, After Mr. George was properly educated as the proper standard of proof, and he clearly stated that he would follow the instructions of Judge Gaughan. Mr. George eliminated any possibility of “bias” or “prejudice” once the matter was clarified for him. In this passage of Appellants’ brief at page 3, is found an incomplete quote from their cross-examination of Mr. George in chambers, at which time Mr. George stated: “I know that the defendant, you know, he’s facing something very serious.” (Transcript of voir dire at page 152). However, in the same answer, Mr. George also volunteered that “maybe sometimes I might be a little too much of a bleeding heart for someone and -- but at the same time I want to be honest.” (Transcript of voir dire at page 152). In almost the same breath, Mr. George stated as follows:

Like if I think it’s absolutely a hundred percent, then even though I said probably, as I said sometimes when I say things like that sometimes I can be maybe – **I tend to be kind of sympathetic with people at the same time and – but there could be a good chance I’d say he’s guilty, too.**

(Transcript of voir dire at page 153, emphasis added). This second part of this passage was omitted from Appellant's brief.

Appellants also chastise Judge Gaughan for failing to strike Mr. George based on his answers to questions about the alleged malpractice "crisis," the status of medical malpractice insurance premiums in West Virginia and the departure of numerous physicians because of this state of affairs. To accept the Appellants' argument requires that one make the patently and undeniably false assumptions (1) that no frivolous malpractice cases have ever been filed in West Virginia, (2) that there is no relationship between frivolous malpractice cases and the cost of defending these cases, (3) that increased costs of defending malpractice cases are not passed on to insured physicians in the form of higher malpractice premiums, (4) that no physicians have ever relocated their practices out of West Virginia because of the favorable cost and availability of malpractice insurance in other states, and (5) that Mr. George is not only foolish for holding these allegedly debatable beliefs, but actually was biased and prejudiced against the Appellants for holding these beliefs. To the contrary, the answers given by Mr. George were truthful, reasonable and devoid of bias or prejudice. The Court properly denied Plaintiffs' motion to strike for cause.

Third, a complete review of the trial transcript pertaining to the questioning of Mr. George in chambers reflects no actual or potential bias or prejudice in favor of either of the Respondents or against the Appellants. Further, the trial transcript reveals no "rehabilitation" undertaken by the Court as alleged by the Appellants to have been improper under the decisions of O'Dell and Makani, *supra*. To the contrary, the responses of Mr. George to the questioning by Judge Gaughan and counsel confirmed that Mr. George was free of bias or prejudice, without any "rehabilitation" whatsoever.

2. The Trial Court Did Not Err With Regard To The Denial Of Appellants' Motion To Strike Prospective Juror Glen Stolburg.

The Appellants' claim of error by the Court with regard to Juror Glen Stolburg reflects a pernicious myth perpetuated by the plaintiffs' bar in this state that medical malpractice plaintiffs like the Macek family cannot get a fair trial in any of the counties of the First Judicial Circuit, due in part to publications of Ogden Publishing such as the Wheeling Intelligencer. This dubious claim requires that one accept the opinion of Appellants' counsel that anything that was ever published in the Wheeling Intelligencer about subjects such as the alleged malpractice "crisis," the status of medical malpractice insurance premiums in West Virginia and the departure of numerous physicians because of the situation, has been false. Further, the allegation of error by Appellants' counsel implies that anyone that works for Ogden Publishing or has ever read the Wheeling Intelligencer has been irreversibly "brainwashed" on this subject and is therefore automatically biased and prejudiced against plaintiffs like the Maceks. This is typical of the self-serving propaganda hysterically fomented by Appellants' counsel regarding their specious plight.

Based on his verbal answers in chambers, Mr. Stolburg is simply a district sales manager for Ogden Publishing. He is not involved in the substance or content of the Wheeling Intelligencer, and only reads the paper occasionally. The Appellants' charge that his written answers to the questionnaire (hastily filled out by all jurors on the morning of trial due to the failure of Plaintiffs' counsel to timely submit the questionnaires) are evidence of intent of Mr. Stolburg to purposefully deceive the Court, the parties and their counsel. The Plaintiffs' implication is clear - that Mr. Stolburg must be an "operative" involved in a grand conspiracy to deny medical malpractice plaintiffs like the Maceks their right to a fair trial and

their privilege of obtaining an award of monetary damages irrespective of the merits of their case.

A review of the entire juror questionnaire filled out by Mr. Stolburg reveals that all of his answers were nothing more than “yes” or “no.” Mr. Stolburg is obviously a man of few words, as he did not elaborate in any of his answers. Although it is clear in hindsight that Mr. Stolburg’s written answer to Question 6 regarding anything he read or heard regarding medical negligence actions was incorrect, his verbal explanation in chambers about the answer reflects an innocent misunderstanding or indifference regarding Question 6, rather than the corrupt motive now attributed to him by the Plaintiffs.

As in the case of Mr. George, review of the trial transcript pertaining to the questioning of Mr. Stolburg in chambers reflects no actual or potential bias or prejudice in favor of either of the Appellees or against the Appellants. In chambers, counsel for the Appellants thoroughly questioned Mr. Stolburg about any information to which he had been exposed regarding medical negligence actions. Based on those forthright answers, the Appellants cannot reasonably claim or imply any bias or prejudice on the part of Mr. Stolburg. The record before this Court, it is clear that the Trial Court did not err in refusing to grant the Appellants’ motion to strike for cause as to Mr. Stolburg.

3. Appellants Waived Any Right To A New Trial Based On The Unsupported Allegation That Juror Glen Stolburg Provided False Answers In Jury Selection

By virtue of the Appellants’ Initial Brief, Juror Glen Stolburg is a victim of an unjustified character assassination by Appellants’ counsel, with charges that Mr. Stolburg perjured himself in hasty answers to the jury questionnaire that was foisted upon the jury on the first day of trial and at the last minute because of counsel’s failure to submit the final

version of the to the Court in a timely manner. The fictional plot thickens as Appellants' counsel suggests that the perjury ripened in the course of their cross-examination of Mr. Stolburg in chambers (see Appellants' Initial Brief, pages 11-13). In support of their assertion that the alleged perjury warrants a new trial, Appellants cite the following cases for the argument that Judge Gaughan erred in refusing to dismiss Mr. Stolburg: West Virginia Human Rights Commission v. Tenpin Lounge, 158 W.Va. 349, 211 S.E.2d 349 (1975); Phares v. Brooks, 211 W.Va. 346, 566 S.E.2d 233 (2002) ("Phares I"); and Phares v. Brooks, 214 W.Va. 442, 590 S.E.2d 370 (2003) ("Phares II"). It should be understood that these three cases cited by the Appellant were applied to jurors that were actually selected for the underlying trials, rather than prospective jurors that were excused from the panel.

Before it can be claimed on appeal that a new trial is warranted by false answers given by a juror, a hearing should be requested by the aggrieved party so that the Court may investigate the allegation:

2. Upon an allegation before a trial court that a juror falsely answered a material question on voir dire, and where a request is made for a hearing to determine the truth or falsity of such allegation it is reversible error for the trial court to refuse such hearing.

Tenpin Lounge, Syl. Pt. 2. As confirmed in McGlone v. Superior Trucking Company, 178 W.Va. 659, 363 S.E.2d 736 (1987), the failure to request the hearing contemplated in Tenpin Lounge amounts to a waiver of any claim to a new trial based on the allegedly false answers of the juror:

5. Where a new trial is requested on account of alleged disqualification or misconduct of a juror, it must appear that the party requesting the new trial called the attention of the court to the disqualification or misconduct as soon as it was first discovered or as soon thereafter as the course of the proceedings would permit; and if the party fails to do so, he or she will be held to have waived all objections to such juror disqualification or misconduct, unless it is a matter which could not have been

remedied by calling attention to it at the time it was first discovered. Flesher v. Hale, 22 W.Va. 44 (1883).

McGlone, Syl. Pt. 5. This conclusion was reaffirmed in Pleasants v. Alliance Corporation, 209 W.Va. 39, 543 S.E.2d 320 (2000):

FN7. While there is no question that a party's failure to request the type of hearing envisioned by Tenpin Lounge prevents them from raising the issue on appeal, the mere request for such a hearing, absent the necessary factual showing of false testimony, does not entitle a party to a reversible error finding. See McGlone v. Superior Trucking Company, 178 W.Va. 659, 363 S.E.2d 736 (1987) (stating that reliance on Tenpin Lounge was misplaced since no request for hearing on juror testimony was made); State v. Banjoman, 178 W.Va. 311, 318, 359 S.E.2d 331, 338 (1987) (finding that party, by failing to request hearing, had failed to preserve objection as to allegedly false voir dire answers).

Pleasants, footnote 7, 209 W.Va. at 43, 543 S.E.2d at 324.

If, as argued by the Appellants, Tenpin Lounge, Phares I and Phares II are applicable to the circumstances surrounding the Trial Court's denial of the motion to strike Juror Glen Stolburg for cause, this claim was waived by the Appellants' failure to request a hearing pursuant to Tenpin Lounge, based on McGlone and Pleasants.

V. Cross-Assignment of Error

The Trial Court Erred In Denying Appellee's Motion For Judgment As A Matter Of Law During Trial On The Issue Of Vicarious Liability of Weirton Medical Center, Inc. For The Conduct Of Appellee Carl Jones, D.O.

In cases involving medical negligence committed by a non-employee staff physician on the grounds of a West Virginia hospital, the "independent contractor rule" is a general bar to hospital liability for the acts or omissions of that physician who is not an actual agent or employee of the hospital. The exception to that rule involves situations where the physician in question is deemed to be an agent of the hospital under the legal fiction of "apparent

agency.” The “apparent agency” exception and Appellant’s theory of vicarious liability¹ against Weirton Medical Center, Inc. are based on the 2004 decision of Burless v. West Virginia University Hospitals, Inc., 215 W.Va. 765, 601 S.E. 2d 85 (2004). The elements of a claim for vicarious liability under these circumstances are set forth in Syllabus Point 7 of Burless:

7. For a hospital to be held liable for a physician’s negligence under an apparent agency theory, a plaintiff must establish that: (1) the hospital either committed an act that would cause a reasonable person to believe that the physician in question was an agent of the hospital, or, by failing to take an action, created a circumstance that would allow a reasonable person to hold such a belief, and (2) the plaintiff relied on the apparent agency relationship.

With application of the elements in Syllabus Point 7 of Burless to the incontrovertible facts and evidence at trial, the Trial Court plainly should have granted Appellee’s Rule 50 motion for judgment as a matter of law. The evidence (or lack thereof) that cannot reasonably be disputed by the Appellants is as follows:

1. Dr. Jones was not an employee or an actual agent of Weirton Medical Center, Inc. during Phyllis Macek’s hospital admission that began on February 21, 2000. (Trial testimony of Dr. Jones, page 3).
2. Dr. Jones became involved in the care of Phyllis Macek in response to a consultation ordered on February 21, 2000 by her private primary care physician, Gary Hanson, M.D. (Trial testimony of Dr. Jones, page 4).
3. The medical record clearly indicates that Dr. Hanson’s consultation and referral specified Dr. Jones in the order for the consultation. (Trial testimony of Dr. Jones, page 4-5).
4. Dr. Jones was not on call at the time of Dr. Hanson’s consultation on February 21, 2000. (Trial testimony of Dr. Jones, pages 6-8).
5. The selection of Dr. Jones as the consultant was made by Dr. Hanson and had absolutely nothing to do with the call schedule at Weirton Medical Center. (Trial testimony of Dr. Jones, page 7).

¹ Because the treatment at issue occurred in February 2000, the Legislature’s conditional elimination of hospital vicarious liability in the 2002 amendment to West Virginia Code §55-7B-9(g) is inapplicable to this case.

6. The selection of Dr. Jones was not made by any hospital employee or anyone in the Emergency Department at Weirton Medical Center (Trial testimony of Dr. Jones, page 11, lines 1-4)
7. At trial, there was no evidence that Dr. Hanson was ever specifically identified by name or disclosed to Phyllis Macek as an employee or actual agent of Weirton Medical Center, Inc. before or during Phyllis Macek's hospital admission that began on February 21, 2000.
8. At trial, there was no evidence that Dr. Jones was ever specifically identified by name or disclosed to Phyllis Macek as an employee or actual agent of Weirton Medical Center, Inc. before or during Phyllis Macek's hospital admission that began on February 21, 2000.
9. At trial, the Appellants offered no evidence that proved that Phyllis Macek actually believed or could have reasonably believed that Dr. Hanson was an employee or agent of Weirton Medical Center, Inc. before or during Phyllis Macek's hospital admission that began on February 21, 2000.
10. At trial, the Appellants offered no evidence that proved that Phyllis Macek actually believed or could have reasonably believed that Dr. Jones was an employee or agent of Weirton Medical Center, Inc. before or during Phyllis Macek's hospital admission that began on February 21, 2000.
11. At trial, the Appellants offered no direct or circumstantial evidence to prove that the Phyllis Macek relied on any statement, document, action or omission to act by any person or entity, including Weirton Medical Center, Inc., for the selection or choice of the gastroenterologist that fulfilled Dr. Hanson's request for the consultation.

Under Rule 50(a) of the West Virginia Rules of Civil Procedure, a motion for judgment as a matter of law should be granted when the opposing party has been "fully heard" and there is "no legally sufficient evidentiary basis" for a reasonable jury to find for the plaintiff. With regard to the first element of Burless, there was no evidence that Mrs. Macek actually believed that Dr. Jones (the "physician in question") was an employee or agent of Weirton Medical Center. There was also no evidence of any action or lack of action on the part of Weirton Medical Center, Inc. that would cause a "reasonable person" in the

position of Mrs. Macek to believe that Dr. Jones was an employee or agent of Weirton Medical Center.

With regard to the second element of Burless, there was no evidence at trial that supports the Trial Court's finding that a jury could reasonably find "reliance" by Mrs. Macek on the alleged "apparent agency relationship" (assuming one existed). Stated another way, no evidence was offered at trial that Mrs. Macek's acceptance of the referral to and treatment by Dr. Jones was based on a belief that Dr. Jones was acting as an agent of Weirton Medical Center. This clearly distinguishes this case from the underlying factual scenarios in Burless, in which the two unrelated plaintiffs provided testimony by way of deposition or affidavit that created the genuine issue of material fact found by this Court to have been sufficient to defeat summary judgment. Burless, 215 W.Va. at 777, 601 S.E.2d at 85. Reviewing the trial transcript that contains Judge Gaughan's ruling from the bench that denied the motion for judgment as a matter of law, it is clear that the Trial Court failed to properly apply Syllabus Point 7 to the facts of this case. At pages 14-15 of the portion of trial transcript produced from June 8 - 9, 2006, is found the following segment of Judge Gaughan's ruling on this point:

And then when we come to reliance, once again, the initial language that the Court uses basically is that if the individual looked to the hospital for services that that [sic] can constitute reliance. And it's clear in this case that she looked to the hospital initially because she went to the ER without any contact with her personal physician before she went to the ER. However, she was then made aware of the fact that the hospital had contacted her family physician who had selected Dr. Jones to handle her treatment.

When this Court is given guidance on how to interpret it, this brings us to two other parts that are mentioned. You know, does this qualify as the special knowledge that is referred to under the reliance section. That is, does the fact that she knows that the referral has been made out of the emergency room to her family doctor and then from her family doctor to Dr. Jones, does that constitute special knowledge which would take away the fact that she simply looked to the hospital.

And then finally, you know, we are to look at the totality of the circumstances. I think I've set forth the totality of the circumstances and I think it's up to the wisdom of the jury to decide whether these requirements have been met and based on that I'm going to deny the motion.

(See Trial Transcript from June 8-9, 2006, pages 14-15.) This passage clearly shows that the Trial Court did not properly interpret and apply the "reliance" element of the Burless test. With proper application of the second element of Burless to the facts of this case, the motion for judgment as a matter of law of Appellee Weirton Medical Center, Inc. should have been granted.

VI. Conclusion

For the foregoing reasons, Appellee Weirton Medical Center, Inc. respectfully submits that the rulings of Judge Gaughan with regard to Jurors David George and Glen Stolburg were proper, and requests that the denial of the motion for new trial be affirmed.

In the event that the denial of the motion for new trial is not affirmed, Appellee Weirton Medical Center, Inc. requests that this Court reverse the ruling of the Trial Court that denied the motion for judgment as a matter of law on the issue of vicarious liability and apparent agency.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I, Brent P. Copenhaver, hereby certify that a copy of the foregoing **Brief of Appellee Weirton Medical Center, Inc.** has been served upon counsel for the Appellants and counsel for Appellee Carl R. Jones, D.O., by U. S. Mail, postage prepaid this 24th day of March 2008 as follows:

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