

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.

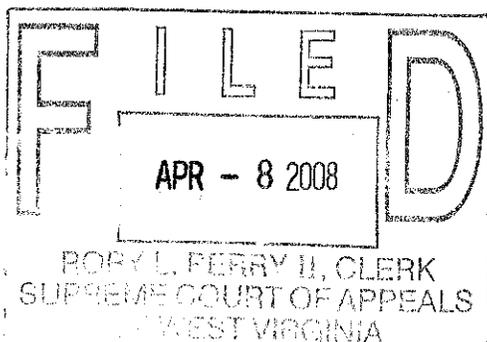
CARL R. JONES, D.O. and
WEIRTON MEDICAL CENTER, INC.
a West Virginia corporation,

Appellees and Defendants
Below.

APPELLANTS' REPLY BRIEF
and
APPELLANTS' RESPONSE TO WEIRTON MEDICAL CENTER'S
CROSS-ASSIGNMENT OF ERROR

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

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I. ISSUES PRESENTED

- A. THE TRIAL COURT ERRED BY REFUSING TO STRIKE JURORS GEORGE AND STOLBURG FOR CAUSE WHEN THEIR RESPONSES TO A WRITTEN QUESTIONNAIRE AND *VOIR DIRE* QUESTIONING INDICATED THE PRESENCE OF A DISQUALIFYING BIAS.**
- B. THE TRIAL COURT WAS CORRECT TO DENY WEIRTON MEDICAL CENTER, INC.'S MOTION FOR JUDGMENT AS A MATTER OF LAW ON THE ISSUE OF VICARIOUS LIABILITY BECAUSE DR. JONES WAS AN AGENT OF WEIRTON MEDICAL CENTER WHEN HE TREATED PHYLLIS MACEK.**

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IV. COUNTER STATEMENT OF FACTS

At just after 9:00 am on February 21, 2000, Phyllis Macek went to the Emergency Room at Weirton Medical Center looking for help because she was bleeding from her rectum. She did not call Dr. Hanson, her family doctor. She did not go to Dr. Hanson's office that morning, either. Instead, she went directly to Weirton Medical Center's emergency room. When she arrived in the hospital, the emergency room staff evaluated her and ordered her first round of testing and treatment.¹

It was no surprise that Mrs. Macek looked to Weirton Medical Center for help that morning. Indeed, Weirton Medical Center's representative at trial was Diane Wiegman, one of its administrators. As Ms. Wiegman freely admitted, at the time Mrs. Macek came looking for help, Weirton Medical Center held itself out to the public as a provider of full medical care.² The defendant, Dr. Jones, agreed. He admitted on the witness stand that Weirton Medical Center held itself out as a provider of full medical care to members of Mrs. Macek's community.³

More than that, Dr. Jones understood that Phyllis Macek, like many patients, presented to Weirton Medical Center that morning looking for a doctor who could treat her.⁴ While it is true that the emergency room staff called Mrs. Macek's family doctor that morning, it is important that Dr. Hanson did not actually come into the hospital himself to treat Mrs. Macek before her consultation with Dr. Jones. Instead, Dr. Hanson's order to consult Dr. Jones came over the telephone.⁵

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¹ See PLTFS' EX 1 - MEDICAL RECORDS (ADM. 6/9/06) (Docket No. 382).

² See Trial Testimony of Diane Wiegman at 17.

³ See Trial Testimony of Carl Jones, D.O. at 10.

⁴ *Id.* at 9.

⁵ See PLTFS' EX 1 - MEDICAL RECORDS (ADM. 6/9/06) (Docket No. 382).

Thus, when Dr. Jones arrived in Mrs. Macek's room later that afternoon, she had every reason to think that he was a Weirton Medical Center physician. In fact, as a mandatory precondition to her admission to Weirton Medical Center, the hospital had Mrs. Macek sign something called the Weirton Medical Center "Authorization and Agreements." That document, signed by Phyllis Macek and a representative of Weirton Medical Center, leaves absolutely no doubt about what the hospital tells its patients regarding the identity of the doctors who will be treating them. As the very first part of the "Authorization and Agreements" reads:

I. CONSENT FOR MEDICAL TREATMENT

I, the undersigned, hereby authorize physicians, agents and employees of the Weirton Medical Center to furnish such emergency care, outpatient care *and/or inpatient care* including but not limited to investigative or diagnostic procedures, examinations, anesthesia, *and medical and/or surgical treatment* which is, in the judgment of the patient's attending physician(s) recommended or necessary for the treatment of the patient's illness or condition.⁶

Ms. Wiegman, the hospital's representative at trial, admitted that Mrs. Macek had to sign this Authorization before she could even get treatment by the physicians at Weirton Medical Center.⁷ Additionally, Ms. Wiegman testified that the "physicians . . . of the Weirton Medical Center" referenced on the form include all of the physicians on staff, including Dr. Jones.⁸ Finally, Ms. Wiegman agreed that even though Weirton Medical Center holds itself out to the community as a provider of full medical care, it does absolutely nothing to inform its patients that the doctors on staff are not actually the employees of the hospital.⁹

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⁶ Attached as part of PLTFS' EX 1 - MEDICAL RECORDS (ADM. 6/9/06) (Docket No. 382).

⁷ See Trial Testimony of Diane Wiegman at 19.

⁸ Id. at 20.

⁹ Id. at 18.

Thus, when Dr. Jones arrived in her Weirton Medical Center room that afternoon, Phyllis Macek had every reason to believe that he was another representative of the hospital, no different than the emergency room doctors who had seen her earlier that morning. As Dr. Jones admitted at trial, his initial consultation took only about ten minutes and he then scheduled Mrs. Macek for a colonoscopy the next morning using Weirton Medical Center's operating room, nurses, supplies, and equipment. When Dr. Jones' negligence before, during, and after that colonoscopy killed Phyllis Macek, this litigation followed.

Ultimately, the case proceeded to jury selection in June of 2006. That morning, the jury panel was sworn in and examined using two phases of the *voir dire* process. The first step of *voir dire* that morning involved the potential jurors filling out a written "Special Juror Questionnaire" that plaintiffs' counsel had distributed in advance to counsel for each of the defendants. The potential jurors were also examined using the more traditional *voir dire* question and answer method.

The Appellees attempt to convince the Court that David George's *voir dire* responses revealed a fair man with an open mind about medical malpractice cases. Nothing could be further from the truth. For example:

- Question No. 4 of the questionnaire asked: "Can you state that if, after you have heard all of the evidence in this case, you find that the defendant, Dr. Jones, was negligent, you will return a verdict against Dr. Jones?" Mr. George's answer indicated grave reluctance on his part when he stated, "If I believe that if his guilt is proven beyond a reasonable doubt, I would probably have no choice." (emphasis added).

- Mr. George expressed an almost instinctive sympathy toward any physician who was being sued, stating: “I know that the defendant, you know, he’s facing something very serious.” TR., 152.
- Question No. 6 related generally to publicity over the alleged malpractice “crisis.” It asked: “Have you read, heard or discussed anything about medical negligence actions, lawsuits or a liability crisis? If so, state what you have read, heard or discussed.” In response, Mr. George wrote, “I heard of a doctor in Wheeling who lost a million dollar negligence suit for refusing to listen to the daughter of a patient who was ordered to go home and died there that night.”
- Mr. George testified that he personally knew the physician who was involved with that lawsuit.
 - As a result, he confessed having “sympathy for him” being subjected to a substantial verdict. TR., 158.
 - At various points, Mr. George confirmed the lasting effects of this verdict on his own, personal views. “It kind of stays with me,” he admitted at the outset. TR., 157.
 - Later, he acknowledged that while he tried to be fair, nevertheless, this incident “had some kind of effect on me simply because I knew [the physician].” TR., 158.
 - Furthermore, he admitted that he “couldn’t just wipe it clean from [his] memory.” TR., 159.

■ Question No. 7 asked: “Have you formed an opinion concerning anything you may have read, heard or discussed about medical negligence actions, lawsuits or a liability crisis? If so, please explain.” In response, Mr. George wrote as follows: “I sometimes can’t help but think that some lawyers take advantage of what become frivolous cases and the premiums doctors have to pay skyrocket and it drives some of them out of the state. On the other hand, I try to be objective about them as well.”

■ Question No. 8 asked: “Have you formed any opinion concerning claims or suits for medical malpractice or about the amount of recovery for damages? If so, please explain.” Mr. George responded as follows: “I will admit that I suspect there can be greed involved with the plaintiffs. However, some do have legitimate cases that stick.”

■ Question No. 9 asked: “Do you believe that negligence lawsuits have interrupted the quality of medical care to the public or have increased the costs of medical care or medical insurance?” Mr. George wrote: “I think it has because of a doctor in Weirton who had to refer me to an interim [doctor] because she was trying to reassess what she was going to do because of the malpractice [situation].”

■ Mr. George expressed a belief that there is a malpractice “crisis.” TR., 164-65. In the same vein, he voiced a concern that “there could be lots of doctors who leave the state because they have to pay so much for their premiums.” TR., 163.

- Mr. George testified that he knew a physician who lived near his parents who “ended up moving to Ohio because he felt like his premiums were going sky high.” TR., 165.
- Mr. George’s own physician in Weirton was giving serious consideration to leaving the state. As he noted in response to Question No. 9, he was actually referred to an “interim” because of his physician’s uncertain future.
 - Mr. George testified that his physician was also “a real good friend” of longstanding. Accordingly, he was “sympathetic with her because...it’s been kind of difficult for her.” TR., 163.
 - He also conceded that because of the personal friendship he was “emotionally involved” with this issue. TR., 164.

The plaintiffs moved to strike Mr. George for cause, indicating that his personal opinions on the subject of medical malpractice were “overwhelming” and, under O’Dell, “it doesn’t matter if [he] say[s] [he] can be fair.” TR., 170. Judge Gaughan conceded that some of the views Mr. George expressed were “disturbing.” TR., 171. However, he concluded that “overall I’m satisfied that he has not indicated that he would carry any bias into the jury box with him.” TR., 173.

The Appellees also attempt to convince the Court that potential juror Glen Stolburg was nothing more than a newspaper delivery man who cannot have been expected to read or understand the information being published by his bosses. Again, the Appellees overlook the fundamental point of the Appellants’ concern with Mr. Stolburg’s *voir dire* responses.

While Mr. Stolburg's *voir dire* responses did reveal an overwhelming bias, the Appellants' principal concern with Mr. Stolburg is that he blatantly misrepresented the extent of his knowledge concerning the "malpractice crisis" on his Special Jury Questionnaire. On his juror questionnaire, Mr. Stolburg represented to the trial court and the parties that he had never once "read, heard or discussed anything about medical negligence actions, lawsuits or a liability crisis." See Stolburg Special Juror Questionnaire at Question 6. This response was directly contradicted by his *voir dire* testimony soon thereafter.

When questioned individually, Mr. Stolburg admitted to having knowledge of Ogden's coverage of medical malpractice issues: "I know it carried some coverage...well, I know it was on the front page a few times." Mr. Stolburg was also knowledgeable concerning the "strike" by Wheeling area physicians, indicating that their insurance rates were running "super high" and that they were seeking a "cap" on damages. TR., 198. When asked his views concerning the "strike," he noted first and foremost that "we need doctors" and that "we don't want [them] to be on strike." TR., 199. Contrary, then, to his written responses, Mr. Stolburg had been exposed to a considerable amount of adverse publicity and had a definite, fixed opinion that physicians should be placated to keep them from striking or leaving the state.

The fact remains that the answers Mr. Stolburg provided on his questionnaire deliberately concealed the extent of his knowledge about a highly critical area of inquiry. As a result, Mr. Stolburg should have been disqualified immediately. Even Judge Gaughan acknowledged at the time that Mr. Stolburg's written response "certainly raises some question" concerning his impartiality. TR., 204. Nevertheless, he concluded that "on the totality I think he'll be a fair and impartial juror." TR., 205. The Appellants respectfully

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submit that Judge Gaughan erred in denying the Appellants' motions to strike Mr. George and Mr. Stolburg for cause.

V. LAW AND ARGUMENT:

A. JUDGE GAUGHAN'S DOUBT ABOUT MR. GEORGE'S IMPARTIALITY SHOULD HAVE BEEN RESOLVED IN FAVOR OF THE APPELLANTS.

As the Appellants point out several times in their briefing, Judge Gaughan was indeed there to witness the *voir dire* responses of David George. Based on what he saw and heard, Judge Gaughan himself stated, "Of course, it's always disturbing when the Court reads that someone believes that lawyers are taking advantage of frivolous lawsuits. And he [Mr. George] thinks that some of these have driven up healthcare costs." Tr. at 171. Judge Gaughan's observation in this respect is indeed entitled to deference. The Appellants do not take issue with that argument. However, the Appellants respectfully suggest that Judge Gaughan did not act appropriately in light of his finding regarding Mr. George's responses.

After finding that Mr. George's *voir dire* responses were "disturbing," Judge Gaughan went on to find that Mr. George's bias was not disqualifying because it was not "linked . . . directly to any financial interest that he has." Based in part on that rationale, Judge Gaughan denied the Appellants' motion to strike.

By doing so, Judge Gaughan conflated two related, but separate concepts. It is clearly true that an individual with a financial stake in the litigation cannot serve as a juror. However, a financial stake in the outcome of the litigation is not a mandatory prerequisite to disqualification where other forms of bias clearly exist.

David George was not prejudiced against the Appellants (just) because he believed that he had a financial stake in the litigation. Instead, and as Judge Gaughan himself

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observed, Mr. George was biased because he “believe[d] that lawyers are taking advantage of frivolous lawsuits” and that if he participated in returning a verdict in the plaintiffs’ favor he would be contributing to “skyrocketing” insurance costs and to driving his own doctor out of the state. Having recognized correctly that these views were disturbing, Judge Gaughan should have stricken Mr. George from the jury.

In Rine v. Irisari, 187 W. Va. 550, 420 S.E.2d 541 (1992), this Court reaffirmed the holdings in State v. West, 157 W. Va. 209, 200 S.E.2d 859 (1973) and State v. Matney, 176 W. Va. 667 (1986) when it held that “[a]ny doubt the Court might have regarding the impartiality of a juror must be resolved in favor of the party seeking to strike the potential juror” and that the purpose of *voir dire* is to seat jurors “who are not only free from prejudice, but who are also free from the suspicion of prejudice.” Rine, 187 W. Va. at 556 & n. 13. See also, Mikesinovich v. Reynolds Memorial Hospital, 220 W. Va. 210, 211 n.3, 640, S.E.2d, 560, 561 n.3 (2006) (“the discretion of the trial judge in deciding juror disqualification issues must resolve any uncertainty and doubts as to a juror’s qualification in favor of excluding the juror”).

The Appellees also attempt to argue that Mr. George said some things that tend to balance out his otherwise “disturbing” views. Of course, that stands the logic of O’Dell v. Miller, 211 W. Va. 285, 565 S.E.2d 407 (2002) and State v. Miller, 197 W. Va. 588, 476 S.E.2d 535 (1996) on its head. Once Mr. George admitted his bias, it was no longer appropriate to weigh those statements against his other statements on other issues, including his pledges to be fair and objective, no matter how many times he made those promises.

David George’s personal experiences led him to believe that “lawyers take advantage of what became frivolous cases and the premiums doctors have to pay sky rocket.” He

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attributed this situation, at least in part, to the “greed involved with the plaintiffs.” Having rightly recognized these views as “disturbing,” it was error for Judge Gaughan to have refused the Appellants’ motion to strike Mr. George for cause.

B. A TRIAL COURT SHOULD EXCUSE FOR CAUSE ANY PROSPECTIVE JUROR WHO GIVES FALSE AND MISLEADING ANSWERS TO LEGITIMATE *VOIR DIRE* INQUIRY.

While Glen Stolburg did express clear and disqualifying bias, the Appellees overlook the primary reason why Mr. Stolburg should have been stricken from the jury. On his Special Juror Questionnaire, submitted under oath, he represented that he had never read, see, or even heard of anything having to do with negligence actions, lawsuits, or a medical liability crisis. Within hours, Mr. Stolburg admitted, while still under oath, that his response to that question was not the truth. In fact, he had read about the medical liability crisis. He admitted that he knew such stories were on the front page of the very newspaper he delivers for a living. More than just knowing that such stories existed, Mr. Stolburg admitted that he understood a great deal about the issues involved with the “crisis” and believed that the doctors in the Northern Panhandle had gone on strike because their insurance rates were “super high.” TR., 198. Mr. Stolburg’s attempted subversion of the *voir dire* process is reason enough to have mandated his removal from the panel. See Syl. Pt. 3, West Virginia Human Rights Commission v. Tenpin Lounge, Inc., 158 W. Va. 349, 211 S.E.2d 349 (1975); Phares v. Brooks, 214 W. Va. 442, 446-47, 590 S.E.2d 370, 374-75 (2003).

The Appellee, Weirton Medical Center, argues that the Appellants have waived this error by not requesting a separate hearing to develop the record regarding Mr. Stolburg’s misconduct. However, the record regarding Mr. Stolburg’s false and misleading responses was fully developed and called to the trial court’s attention during the *voir dire* process.

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As West Virginia law makes clear, no separate hearing is required in all cases of juror misconduct. All that is required is that “the party requesting the new trial call[] 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 proceedings would permit.” Syl. Pt. 5, McGlone v. Superior Trucking Co., 178 W. Va. 659, 363 S.E.2d 736 (1987). This is exactly what the Appellants did here.

Obviously, in most instances, the parties do not uncover false *voir dire* answers as quickly as Mr. Stolburg’s misconduct was discovered. In those instances, a separate hearing after the trial would be required. Here, however, no such additional hearing was required and would have added nothing to the record.

As set forth above, Mr. Stolburg exhibited clear, disqualifying bias. More importantly, he provided false and misleading responses to legitimate and material *voir dire* inquiry. Judge Gaughan erred by denying the Appellants’ motion to strike Mr. Stolburg for cause.

C. DR. JONES WAS THE APPARENT AGENT OF WEIRTON MEDICAL CENTER WHEN HE TREATED PHYLLIS MACEK.

As Weirton Medical Center concedes, the question of the hospital’s liability for Dr. Jones’ malpractice is determined according to Syl. Pt. 7, Burless v. West Virginia Univ. Hosp., Inc., 215 W. Va. 765, 601 S.E. 2d 85 (2004), which reads:

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.

Syl. Pt. 7, Burless. It is clear that the test for apparent agency established by Burless is satisfied here and Judge Gaughan was right to deny Weirton Medical Center's motion for judgment as a matter of law.

1. WMC's Acts And Omissions Created A Circumstance That Would Allow A Reasonable Person To Believe That Dr. Jones Was An Agent Of The Hospital:

The first part of the Burless test asks whether or not the hospital's acts and omissions create a circumstance that would allow a reasonable person to believe that the physician in question was an agent of the hospital. In examining the underpinnings of apparent agency, this Court appropriately observed that "[t]he public's confidence in the modern hospital's portrayal of itself as a full service provider of health care appears to be at the foundation of the national trend toward adopting a rule of apparent agency to find hospitals liable, under the appropriate circumstances, for the negligence of physicians providing services within its walls." Burless, 215 W. Va. at 773, 601 S.E. 2d at 93.

In applying this first prong of the test, this Court held, "This portion of the test focuses on the acts of the hospital and is generally satisfied when 'the hospital 'holds itself out' to the public as a provider of care.'" Burless, 215 W. Va. at 776, 601 S.E.2d at 96, *quoting* Mejia v. Community Hosp. of San Bernardino, 99 Cal. App. 4th 1448, 1453 (2002). Further, "[i]n order to prove this element, it is not necessary to show an express representation by the hospital.... Instead, a hospital is generally deemed to have held itself out as a provider of care, unless it gave the patient contrary notice.'" Id., *quoting* Mejia, 99 Cal. App. 4th at 1454. Burless recognized that "[t]he 'contrary notice' referred to by the Mejia court generally manifests itself in the form of a disclaimer. As one court has acknowledged, '[a] hospital generally will be able to avoid liability by providing *meaningful written notice* to the patient, acknowledged at the time of

admission.” Id., quoting Sword v. NKC Hosps., Inc., 714 N.E.2d 142, 152 (Ind. 1999). Burless concludes:

Thus, a hospital’s failure to provide a meaningful written notice may constitute “failing to take an action” and thereby allowing a reasonable person to believe that a particular doctor is an agent of the hospital.

Id.

Here, there is no doubt that Weirton Medical Center holds itself out to the public as a provider of care. Weirton Medical Center’s own corporate representative at trial admitted as much, as did Dr. Jones. The first prong of Burless is clearly satisfied here.

2. Phyllis Macek Reasonably Believed That Dr. Jones Was An Agent Of WMC And Relied On That Fact:

In Burless, this Court held that Ms. Burless established that she believed that her physicians were WVUH employees because, according to her deposition testimony, “[The physicians] were all wearing their coats and name tags and in the building, so, you know they’re – they work there, they’re employees.” Burless, 215 W. Va. at 777, 601 S.E. 2d at 97.

Because Dr. Jones’ malpractice resulted in Phyllis Macek’s death the day after her admission to the hospital, it is impossible to ask her what she believed when Dr. Jones appeared in her room on the afternoon of February 21, 2000. However, we do know that she had never met Dr. Jones before in her life and had just signed a form provided by Weirton Medical Center, which read:

I, the undersigned, hereby authorize physicians, agents and employees of the Weirton Medical Center to furnish such emergency care, outpatient care and/or inpatient care including but not limited to investigative or diagnostic procedures, examinations, anesthesia, and medical and/or surgical treatment which is, in the judgment of the patient’s attending physician(s) recommended or necessary for the treatment of the patient’s illness or condition.

Shortly after Phyllis Macek signed this form, a doctor that she had never met before arrived in her room in the hospital and scheduled her for surgery using the hospital's staff and facilities. Under the circumstances, it is clear that Mrs. Macek did rely on the hospital to provide her with a doctor.

Weirton Medical Center relies heavily on Dr. Hanson's involvement in its briefing before this Court. However, Burless makes Dr. Hanson's involvement irrelevant. In analyzing apparent agency questions, it does not matter that the hospital did not "select" the physician in question. All that matters is that WMC failed to correct, and even encouraged, the perception that Dr. Jones was its agent.

Because Dr. Hanson's orders that morning were communicated directly to the Weirton Medical Center staff over the phone, Phyllis Macek had absolutely no way of knowing that Dr. Hanson selected Dr. Jones. Even if she did know about Dr. Hanson's involvement, she simply would have believed that Dr. Hanson picked one of the hospital's employee-physicians for her.

Construing this evidence in the light most favorable to the Appellants, it is clear that Weirton Medical Center was not entitled to judgment as a matter of law on the apparent agency issue. Judge Gaughan was right to deny the hospital's motion.

VI. CONCLUSION

The answers given by jurors George and Stolburg as part of the *voir dire* process demonstrated clear bias. Contrary to settled law, Judge Gaughan credited promises made by both jurors that they could be fair. The law, however, is clear. Having expressed disqualifying biases in their *voir dire* responses, both jurors were disqualified "as a matter of law."

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Moreover, Mr. Stolburg provided false and misleading answers to material *voir dire* questioning. As such, he should have been stricken from the jury for that reason as well. Accordingly, the Appellants pray that Judge Gaughan's ruling on the new trial motion be REVERSED, and that the case be REMANDED for a NEW TRIAL.

Judge Gaughan was also correct to deny Weirton Medical Center's motion for judgment as a matter of law on the issue of vicarious liability. It was undisputed at trial that the hospital holds itself out as a full service provider of medical care. Additionally, all of the evidence pointed to the fact that Mrs. Macek relied on Weirton Medical Center's representations and looked to the hospital to provide her with a competent gastroenterologist.

Respectfully submitted,

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LAWRENCE MACEK,
Petitioners/Plaintiffs,

By: _____

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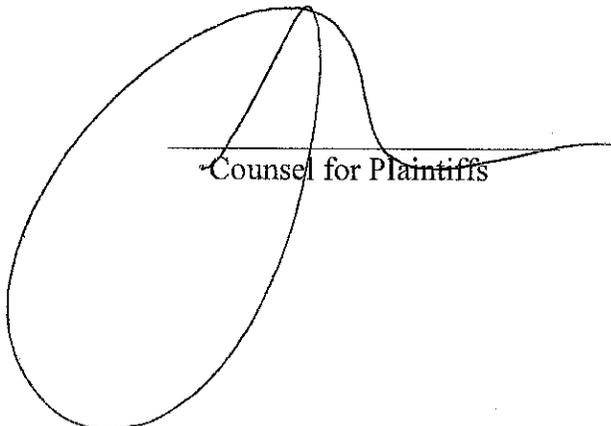
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CERTIFICATE OF SERVICE

Service of the foregoing APPELLANTS' REPLY BRIEF was had upon counsel of record herein by mailing a true copy thereof on this 7th day of April, 2008, to:

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