

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

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No. 34747

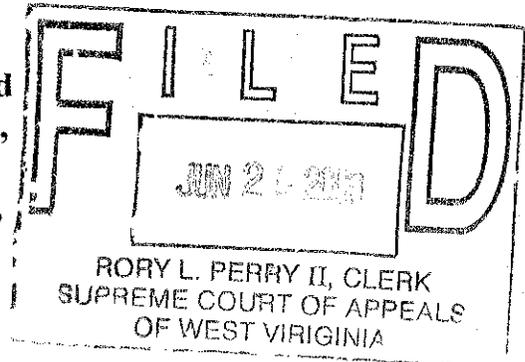
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**ANDREA KARPACS-BROWN,**  
Individually and as Administratrix of the  
Estate of her Mother, Elizabeth Karpacs, and  
of the Estate of her Father, Andrew Karpacs,  
  
Plaintiff Below, Appellee,

v.

**ANANDHI MURTHY, M.D.,**

Defendant Below, Appellant.



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Appeal from the Circuit Court of Wetzel County

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**REPLY BRIEF FOR APPELLANT**

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In principal measure, Appellee declines to meet our contentions directly, opting instead for straw men not of our weaving, and for purple prose suited for inflamed factfinding but not appellate analysis. Without

repeating the arguments of our opening Brief, we offer the following response.

### **I. Invoking The Trial Court**

Appellee's repetitive quotation of the trial Court's post-trial rulings is no defense of those rulings, for the language of the trial Court was Appellee's own, adopted by the Court below. It would be difficult to hypothesize a more transparent example of "bootstrapping." In our view, this Court's independent study of Appellee's positions will expose their lack of merit.

### **II. The "Do Not Resuscitate" Order**

#### **A.**

Nowhere in Dr. Murthy's principal Brief does she argue anything that she conceded or waived below. The question with respect to the "do not resuscitate" order is not whether the Court, before trial, properly precluded the order's affirmative use, by the defense, on causation. Instead, as we discuss and Appellee avoids, the issue is whether, at trial, the Court properly could deny Dr. Murthy the opportunity to refer to the "do not resuscitate" order in the face of testimony, and argument, that Dr. Murthy "abandoned" Mrs. Karpacs. The "do not resuscitate" order

marked the family's direction that extraordinary treatment be withheld and Dr. Murthy -- consistent with the rationale of that order, whether she was aware of it or not -- did not pursue treatment she considered extraordinary and risky. (The risks of the treatment are ignored in Appellee's factual summary, but are summarized in our principal Brief, and recognizing those risks places a much different focus on the alleged "abandonment"). To allow the family to testify that they would have authorized that treatment, without also allowing impeachment by resort to the "do not resuscitate" order, was not fair to the defense.

Appellee emphasized "abandonment" allegedly occurring after the "do not resuscitate" order had been issued, and at a time when, according to Appellee's own expert, Mrs. Karpacs could not be saved. The image created by Appellee's Trial Counsel was that, continuing up to Mrs. Karpacs' death, her family would have taken any measure to prolong Mrs. Karpacs' life. That image cannot exist under a "do not resuscitate" regime, and Dr. Murthy should have been permitted to demonstrate that fact. The Court's error was not its pre-trial ruling; it was the expansion of that ruling permitting its use as justification denying Dr. Murthy impeachment and other answering evidence.

**B.**

A trial Court errs by prohibiting cross-examination or rebuttal regarding otherwise “irrelevant” or “collateral” issues when a party has “opened the door” on direct examination. See cases cited in Appellant’s principal Brief at pp. 28-30 and Tracy v. Cottrell ex rel. Cottrell, 206 W.Va. 363, 384, 524 S.E. 2d 879, 900 (1999) (when the trial Court permitted testimony regarding types of internal injuries a person might suffer in the type of collision at issue, the Court should have allowed rebuttal testimony by an expert “about the types of internal injuries [the decedent] actually sustained”).

Hicks v. Ghaphery, 212 W.Va. 327, 336, 571 S.E.2d 317, 326 (2002), which Appellee cites, in fact supports Dr. Murthy on this point. In Hicks, the Court found that, although the trial Court did not allow impeachment testimony on otherwise irrelevant matters, when the opposing party had opened the door, reversal was not warranted because the prejudiced party was given a choice between a curative instruction and a mistrial. Here Appellant was given no such choice of remedy. Appellant’s objections were simply overruled.

### C.

Appellee's other procedural arguments similarly are without merit.

a. Appellant's trial Counsel objected and Appellant's proffer was clear and unambiguous (the trial Record references are cited in our principal Brief at p. 15). The challenged reference in Appellee's closing argument was subject to the same objection, even if Appellant did not object again during closing. See Bennett v. 3 C Coal Co., 180 W.Va. 665, 673, 379 S.E.2d 388, 396 (1989) (an objection need not be renewed when improper comments were made during closing and a specific ruling already had been made unless "there has been a significant change in the basis for admitting the evidence"). The trial Court made its rulings with full knowledge of both the evidence that was excluded and the legal arguments why it should not be. The Court was well aware of the issues, and cut off further discussion, stating, "We're not going to get into the DNR[;] [m]y ruling stands" (Tr., Jan. 24, at 237-238); see also Tr., Jan. 25 (Closing Arguments), at 69-70 ("I'll note your objection[;] [t]he DNR ruling will stand"). The Record is ready for review. See Wimer v. Hinkle, 180 W.Va. 660, 663, 379 S.E.2d 383, 386 (1989).

b. The proffered testimony went directly to the central claim at trial -- whether Dr. Murthy had “abandoned” her patient by not providing certain treatment. The argument that, if there was error it was harmless, is frivolous. See authorities cited at pp. 28-30 of our principal Brief.

### **III. Attorneys’ Fees**

#### **A.**

Mrs. Karpacs similarly distorts our position with respect to the Court’s Order on attorneys’ fees. We do not suggest that Dr. Murthy is not accountable for positions she has taken (Karpacs Br. 16); in our principal Brief we simply quoted Appellee’s own pleading in which she asserts -- contrary to her position in this Appeal -- that Dr. Murthy’s insurer, and not Dr. Murthy, should be compelled to pay attorneys’ fees. For the reasons we have argued, neither Dr. Murthy nor her insurer should be subjected to this extraordinary sanction; Appellee’s labeling of positions or events as “egregious” does not make them so.

#### **B.**

On the appealability of the attorneys’ fees award, Mrs. Karpacs simply ignores the precedent we have cited illustrating this Court’s

review of the propriety of an award even before the precise amount was determined. See West Virginia Educ. Ass'n v. Consolidated Public Retirement Bd., 194 W. Va. 501, 513-515, 460 S.E.2d 747, 759-761 (1995). In view of the litigiousness exhibited below, it would disserve judicial economy to require resolution on amount before reviewing whether any award is justified. This Court's jurisprudence brands Appellee's claim to this sanction as frivolous, and there is no reason to delay application of those precedents. See State ex rel. Ward v. Hill, 200 W.Va. 270, 275, 489 S.E.2d 24, 29 (1997) (this Court may decide to review non-final interlocutory discovery orders "in certain circumstances involving a purely legal issue, a clear cut error, inadequate alternative remedies and judicial economy issues"); see also State ex rel. McGraw v. Telecheck Services, Inc., 213 W.Va. 438, 447 n.12, 582 S.E.2d 885, 894 n.12 (2003) (providing several examples of this Court's exercise of discretionary jurisdiction to review otherwise non-final orders).

#### IV. Damages

##### A.

Whether a plaintiff has presented legally sufficient evidence to support a damage award is a question of law, not judicial discretion. See, e.g., authorities cited at p. 32 of our principal Brief, and Stanley v. Chevanthanasarat, 222 W.Va. 261, 263-264, 664 S.E.2d 146, 148-149 (2008). And, contrary to Appellee's repetitive refrain, a jury does not have "unfettered discretion" to award damages beyond those authorized by statute, or otherwise under the law: In the very case upon which Appellee relies, McDavid v. United States, 213 W.Va. 592, 584 S.E.2d 226 (2003), the Court approvingly quoted Syllabus Point 5 of Turner v. Norfolk & W.R. Co., 40 W.Va. 675, 22 S.E. 83 (1895), for its holding that "no damages allowed by the jury within the limit fixed by the statute can be deemed excessive." McDavid, supra, 213 W.Va. at 601 n.8, 584 S.E.2d at 235 n.8 (emphasis added). A jury's award above the statutory ceiling is, on its face, excessive and without basis in law. So, too, a Court may not award damages for "prejudgment interest" when there have been no "out-of-pocket expenditures" or other

“ascertainable pecuniary loss” -- the prerequisites of the enabling statute and interpretive caselaw.

**B.**

1. In McDavid, supra, this Court identified the necessary basis for a “pain and suffering” award as follows:

“To award damages for pain and suffering, there must be evidence of conscious pain and suffering of the decedent prior to death. Where death is instantaneous, or where there is no evidence that the decedent consciously perceived pain and suffering, no damages for pain and suffering are allowed.” Syllabus Pt. 6, McDavid v. United States, supra, 213 W.Va. at 593, 584 S.E.2d at 227.

See also id., 213 W.Va. at 604, 584 S.E.2d at 238 (citing with approval “Ory v. Libersky, 40 Md. App. 151, 389 A.2d 922 (1978) (no award allowed for pain and suffering because decedent made no verbal communication or movements indicating pain, only labored breathing and gurgling sounds from swallowing blood)”).

2. We respectfully urge the Court to canvass the evidence, cited in our principal Brief (pp. 10-12), for unlike the bare recitation in Appellee’s Brief, and the trial Court’s Order adopting Appellee’s proposed findings, there was no evidence of pain and suffering

attributable to Dr. Murthy's conduct, rather than to Mrs. Karpacs' preexisting disease process. Nor was there evidence that Mrs. Karpacs' discomfort would have been less had she undergone the open abdominal (or "belly," to use Appellee's colloquialism) surgery that Appellee suggests the standard of care required.

3. Appellee relies, as at trial, on the emotionally charged testimony of family members, rather than on any evidence that Mrs. Karpacs was aware of her impending death or felt any conscious physical pain. But there was absolutely no evidence that Mrs. Karpacs experienced any suffering beyond the initial complaints of preexisting stomach pains, which were treated. Perhaps most tellingly, at trial, when the evidence was freshest, and before Appellee had proposed self-serving "findings," the trial Court agreed that, at the pertinent times, Mrs. Karpacs "did not appear to be in discomfort" (Tr., Jan. 25, at 569).

### C.

Appellee's cavalier regard for the Record is apparent, too, in her discussion regarding the trial Court's award of prejudgment interest and its refusal to apply the statutory ceiling on non-economic loss. Even a casual review of the trial transcript would compel the conclusion that

this case was tried on a theory of noneconomic loss alone. The “services” of Mrs. Karpacs were mentioned in the context of compensation for sorrow or grief or lost companionship; the “services” were not those carrying objective, quantifiable economic value, like those of a tutor, baby-sitter, or housekeeper. The jury received no instructions on economic loss.

It surely will exalt form over substance to apply this Court’s verdict-form waiver rules to this case, in which the notion of quantifiable economic loss arose, for the first time, after the jury’s exorbitant award. The quiet insertion of “loss of services, protection, care and assistance” in the verdict form, without any discussion, should not fairly insulate this verdict from the Commonwealth’s judicial and legislative limitations on the availability of prejudgment interest and recovery for non-economic loss. Appellee’s position on silent “waiver,” if accepted, most assuredly would honor Appellee’s “trap for the unwary defendant” and provide a multi-million dollar “jackpot for the silent plaintiff.”

**D.**

Punitive damages may be awarded upon evidence of “gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others,” “or where legislative enactment authorizes it.” Syllabus Pt. 4, Mayer v. Frobe, 40 W.Va. 246, 22 S.E. 58 (1895). “To sustain a claim for punitive damages the wrongful act must have been done maliciously, wantonly, mischievously or with criminal indifference to civil obligations[;] [a wrongful act done under a bona fide claim of right and without malice in any form, constitutes no basis for such damages.” Syllabus Point 3, Jopling v. Bluefield Waterworks & Improvement Co., 70 W.Va. 670, 74 S.E. 943 (1912).

Appellee has cited no case of medical malpractice in this jurisdiction in which a Court has approved an award of punitive damages, and we are aware of none. In Michael on Behalf of Estate of Michael v. Sabado, 192 W.Va. 585, 601, 453 S.E.2d 419, 435 (1994), a medical malpractice case, the Court affirmed the refusal to give a punitive damages instruction, because the alleged negligence would not support such an award, despite (as in this case) the plaintiff’s use of

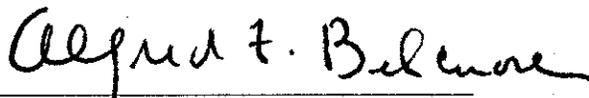
colorful adjectives to characterize the conduct. The result should be no different here.

### CONCLUSION

For the foregoing reasons, and for the reasons stated in our principal Brief, the Judgment should be reversed and the cause remanded (i) for entry of judgment, in Dr. Murthy's favor, on the claim of Mrs. Karpacs' Estate, and (ii) for a new trial on the claims of Mrs. Karpacs' children. In the alternative, the Judgment should be reversed and the cause remanded with instructions to enter judgment for no more than \$1 Million, plus post-judgment interest and ordinary taxable costs. In all events, the Court's order striking the claim for punitive damages should be affirmed.

Respectfully submitted,

MONTEDONICO, BELCUORE & TAZZARA, P.C.

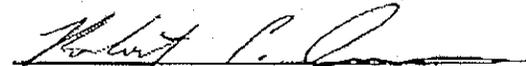


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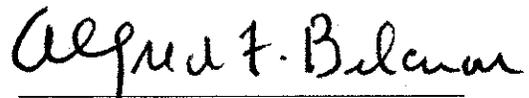
June 2009

CERTIFICATE OF SERVICE

I hereby certify that, on June 25, 2009, I caused the foregoing  
Reply Brief for Appellant to be served upon each of the other parties  
herein by mailing one copy thereof, first-class postage prepaid, each to:

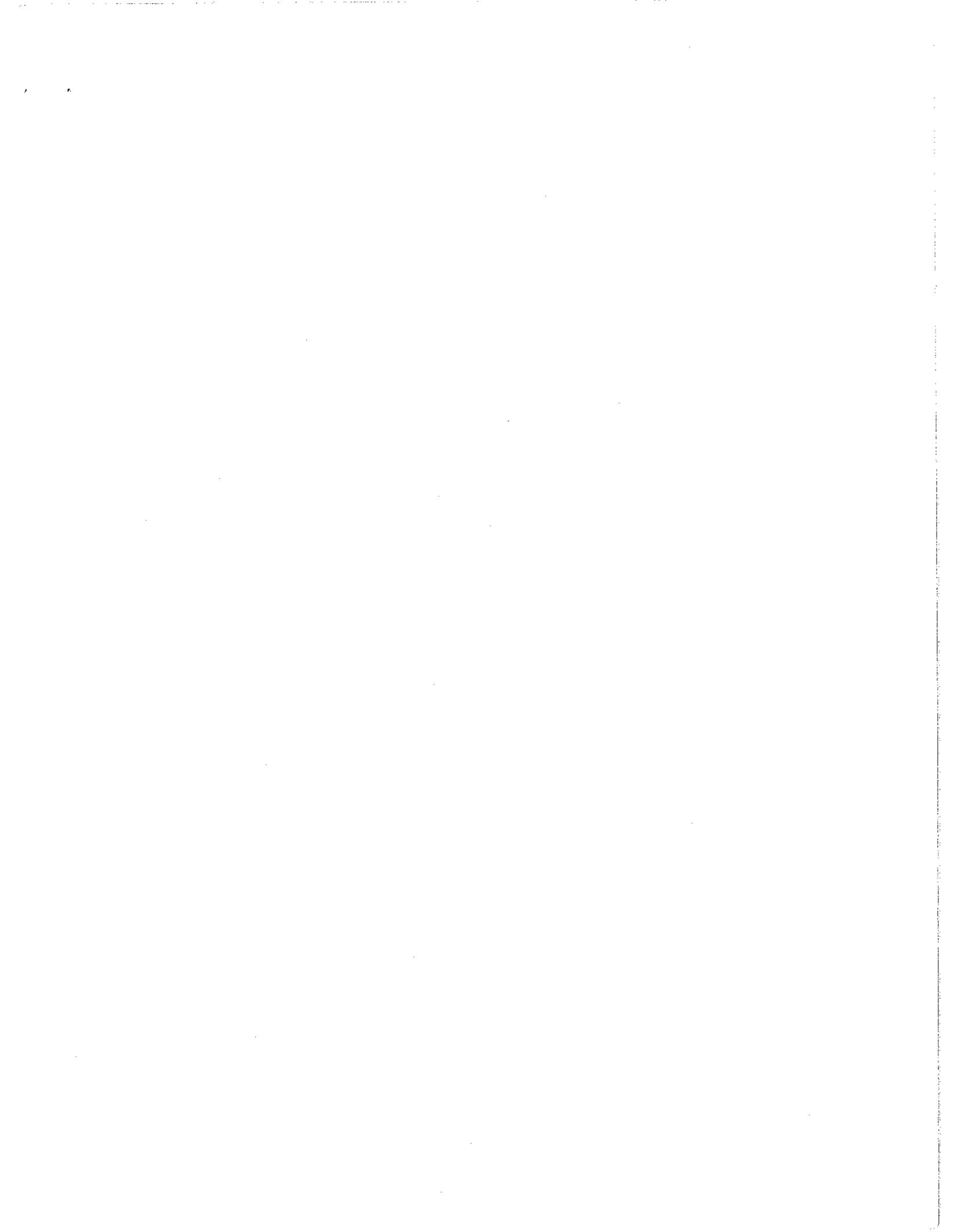
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**COPY**

**IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA**

**IN THE INTEREST OF:**

**EMILY GRACE G [REDACTED]**

**JUVENILE NEGLECT AND  
ABUSE NO:  
08-JA-64**

**ORDER**

Presently pending before the Court is a Petition that has been filed with the Circuit Clerk alleging that Emily Grace G [REDACTED] is an abused and/or neglected child. The Court has reviewed the Petition, along with the exhibits attached thereto. Upon this review, the Court is of the opinion and does accordingly FIND that the Petition does not allege sufficient facts to come within the statutory definition of abuse and neglect. For example, there are no allegations that any of the acts of domestic violence occurred in the presence of the child. It is, therefore, accordingly ORDERED that said Petition be Denied and that this case is accordingly Dismissed.

ENTER: 9-23-08

  
\_\_\_\_\_  
JEFFREY B. REED