

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CASE NO.: 35593

**FAROUK ABADIR, HOSNY GABRIEL,
RICARDO RAMOS, ALFREDO RIVAS,
MICHAEL VEGA and HUNTINGTON
ANESTHESIOLOGY GROUP, INC.**

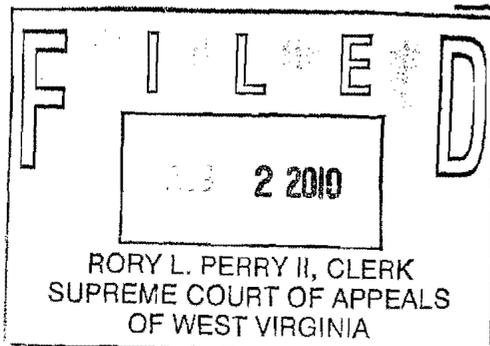
Appellants

v.

**MARK H. DELLINGER and
BOWLES, RICE, McDAVID,
GRAFF & LOVE, LLP**

Appellees

APPELLANTS REPLY BRIEF



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It is obvious from their respective arguments that all parties agree that the resolution of this appeal depends entirely upon this Court's interpretation of its opinion in *Messer v Huntington Anesthesia Group*, 664 S.E.2d 751 (WV. 2008) (hereinafter, *Messer II*).

The HAGI Physicians contend that in *Messer II* this Court dealt primarily with the burden of proof and ruled that they had failed to "establish the clear showing necessary to overcome the presumption" that an attorney who has appeared in litigation lacked the *apparent* authority to bind his clients to a settlement agreement. This decision did not require the Court to make any findings or reach any conclusions about whether Mr. Dellinger had been expressly authorized to settle the matter. This was made clear by this Court's prefatory comment that "the sole pivotal issue before us then is whether, *in the absence of express authority*, the Appellees' attorney had the apparent authority to obligate the doctors and HAGI to the terms of the settlement agreement." [Emphasis added] Consequently, since the *Messer II opinion* accepted for the purpose of the decision the finding of the Circuit Court that Mr. Dellinger did not have actual authority, the HAGI Physicians believe that they are not precluded by *Messer II* from maintaining their claim against Mr. Dellinger for obligating them to a settlement to which they had not agreed.

Mr. Dellinger views *Messer II* quite differently. He contends that in *Messer II* this Court made a *de novo* finding of fact that he had the *actual* authority to settle the litigation with Ms. Messer. This assertion seems to be based solely upon this Court's discussion of a conversation between Mr. Dellinger and one of the individual Physicians, Ricardo Ramos. The HAGI Physicians disagree not only with the manner in which Mr. Dellinger interprets the *Messer II* opinion but also with the effect that he contends its discussion of that conversation has on the pending litigation.

It seems reasonably clear to the HAGI Physicians that in *Messer II* this Court was applying

the law of apparent authority to the undisputed facts, which were that Mr. Dellinger was an attorney who had appeared in litigation representing the HAGI Physicians and that he had informed Ms. Messer's attorney that the case had been settled. To reconcile its opinion with prior decisions which had held that without a "meeting of the minds" or "mutual assent" of all parties there could be no settlement, this Court explained that to fall within the ambit of those cases the HAGI Physicians needed to satisfy a heightened burden of proof which required a "clear showing" that the apparent authority of Mr. Dellinger to settle did not exist. Within this context, contrary to Mr. Dellinger's contention, *Messer II's* discussion of the conversation between Dr. Ramos and Mr. Dellinger,¹ was *dictum*, not a *de novo* finding of fact, and its purpose was to demonstrate that because of conflicting testimony, the HAGI Physicians had failed to satisfy the "heightened burden" to overcome the presumption that Mr. Dellinger had the apparent authority to do what he did.

An additional reason why the HAGI Physicians' interpretation is more reasonable is that in *Messer II's* discussion of the standard of review, this Court observed that "findings of fact are reviewed for clear error and conclusions of law are reviewed *de novo*." It is only when findings of fact constitute legal judgments that the *de novo* standard of review applies. Measured by this standard, had this Court intended to reverse the Circuit Court's findings, it would have used the "clearly erroneous" standard and so stated in its opinion. But, it did not do this. Rather, it concluded that because Dr. Ramos had indicated that his memory was not entirely clear, the credibility of his version was not sufficient to satisfy the "heightened burden" of rebutting the

According to Dr. Ramos, he told Mr. Dellinger that although he thought that the case could be settled, more time was necessary because some of the individual defendants would not agree. Mr. Dellinger's version of the conversation was slightly different. He claimed that Dr. Ramos told him that although several of the defendants had been unwilling to settle, eventually, albeit reluctantly, all had agreed.

presumption of apparent authority. Not only is this heightened burden of proof standard not applicable to the HAGI physicians' in establishing their claim against Mr. Dellinger but also in connection with that issue Mr. Dellinger is not entitled to a presumption that everything he did was authorized.

The folly of Mr. Dellinger's argument also seems apparent from his introductory comments. On page 3 of his Brief, Mr. Dellinger states that "this Court's discussion of the doctrine of *apparent authority* was necessitated by appellants' denial that Mr. Dellinger acted with *actual authority* in binding them to a settlement with Ms. Messer." He then goes on to suggest that "because appellants denied that Mr. Dellinger had actual authority, it was necessary for this Court to invoke the doctrine of apparent authority" to determine if the HAGI physicians had met their greater burden of proof. The HAGI Physicians concede that there is merit to these observations, but not in the way the Mr. Dellinger contends. Rather, it seems obvious to the HAGI Physicians that if this Court believed that Mr. Dellinger had been given the express authority to bind them to the settlement, it would have said so and it would have been unnecessary for its opinion to have discussed the concept of apparent authority. In other words, because this Court concluded that Mr. Dellinger did not have actual authority, it was necessary for it to invoke the concept of apparent authority to reach its decision.

The final point which Mr. Dellinger argues to support his contention that *Messer II* absolves him from liability is that this Court ordered the HAGI Physicians to pay attorney fees. He suggests that this must mean that this Court determined that he had acted within the scope of his authority. The HAGI Physicians disagree and suggest that Mr. Dellinger is reading too much into that aspect of the *Messer II* opinion. Had this Court intended to do what Mr. Dellinger suggests, it would have stated that it was reversing the Circuit Courts imposition of fees against Mr. Dellinger because Mr. Dellinger had acted within the scope of his authority. The *Messer II* opinion did not mention Mr.

Dellinger in awarding attorney fees to Ms. Messer. Presumably since Mr. Dellinger was not a party to the *Messer II* appeal, this Court would have lacked the jurisdiction to have granted Ms. Messer a judgment against him. But, to the HAGI Physicians, what is most significant is that without some discussion in the *Messer II* opinion, it does not seem reasonable to construe the award of attorney fees against them as an absolution of Mr. Dellinger.

In *State v. Miller*, 459 S.E.2d 114 (WV 1995) this Court held that collateral estoppel will preclude a claim if “the issue previously decided is identical to the one presented in the action in question.” The only issue decided by this Court in *Messer II* was that the HAGI Physicians failed to carry the “heightened burden” necessary to rebut the presumption that an attorney who has appeared in litigation had the apparent authority to settle a case on behalf of his clients. It did not, as Mr. Dellinger claims, hold that the HAGI Physicians had expressly authorized him to settle that case. Accordingly, the doctrine of collateral estoppel should not preclude the HAGI Physicians from stating a claim against Mr. Dellinger.

For the foregoing reasons as well as those discussed in their initial Brief, the Appellants submit that this Court should reverse the decision of the Circuit Court and remand the case for further proceedings.

Respectfully submitted.

ST CLAIR & LEVINE

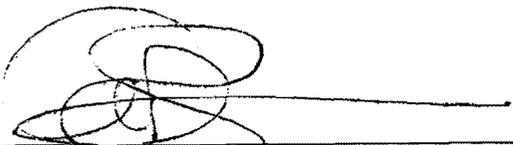
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CERTIFICATE OF SERVICE

William D. Levine, does hereby certify that the foregoing **Appellants Reply Brief** was served upon counsel of record on July 30, 2010 by depositing a copy in the United States Mail, postage prepaid, addressed as follows:

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