

COURT WATCH

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Kominar v. Health Management Associates of W. Va., Inc., et al., No. 33215.

Appeal from the Circuit Court of Mingo County to the West Virginia Supreme Court of Appeals

TOPIC: Whether the trial court properly denied plaintiff's motion for a new trial after a defense verdict was rendered?

Kominar v. Health Management Associates of W. Va., Inc., et al. was originally reported on in the March 7, 2007 edition of Court Watch. On June 7, 2007, the West Virginia Supreme Court rendered its decision in the case. In *Kominar*, the plaintiff alleged that defendants improperly intubated and cared for her son after he was seriously injured in a car accident, which ultimately led to her son's death. Plaintiff sued the ambulance company, hospital and trauma physician. The case proceeded to trial, and the jury found that defendants were not negligent. After the verdict was rendered, plaintiff moved for a new trial, alleging numerous procedural errors. The trial court denied the plaintiff's motion for a new trial. The plaintiff appealed the Circuit Court's decision to the West Virginia Supreme Court, alleging seven procedural errors.

The West Virginia Supreme Court of Appeals reviewed the seven alleged errors and found that the plaintiff was entitled to a new trial. The Court agreed with plaintiff that the trial was unfair because each defendant had been given the right to eliminate certain persons from the proposed jury (the right to 'peremptory challenges' and thus the right to eliminate proposed jurors), which is typical. However, the Court reaffirmed its 2005 decision in *Price v. CAMC*, that each defendant only gets his own right to peremptory challenges when the defendant has satisfied the court, before trial begins, that a serious, genuine hostility or antagonism exists among each defendant as to his position in defending against plaintiff's claims. The Court found that the defendants in this case had not made a sufficient record before the trial that they have antagonistic or hostile positions to each other. Therefore, the Court granted the plaintiff a new trial. The result of this ruling is that each health care defendant must decide before trial whether to reveal adversity among defendants to the trial court judge and, of course, to the plaintiff.

In reviewing two related, alleged procedural errors, the Court examined the plaintiff's contention that the defendants were allowed an unreasonable number of expert witnesses, since each defendant had his own expert witness, for a total of six expert witnesses for the defense. The plaintiff alleged that it was biased by the number of defense expert witnesses. The plaintiff further alleged that the defendants should be limited in cross-examination of another defendant's witness.

The Supreme Court found that it was within the Circuit Court's discretion to allow all or some of the expert witnesses to testify, and to allow or limit co-defendants (or co-plaintiffs) right to cross-examine witnesses, based on the trial court's determination of the adversarial relationship among the co-parties. The Supreme Court stated that "to determine what will be fair to all parties a trial court should weigh and balance such factors as the importance of the

evidence to the party's case, the relevance of the evidence, and the danger of prejudice, confusion, or delay that admission of the evidence may cause.”

The Supreme Court remanded the case to the Circuit Court of Mingo County for a new trial. Further Court Watch updates will be provided as this case develops.