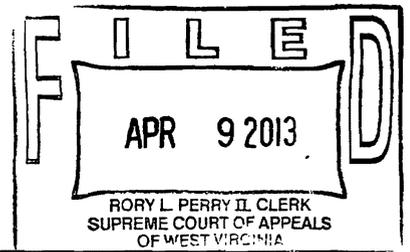


No. 130281



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

STATE EX REL. SELECT SPECIALTY HOSPITAL – CHARLESTON, INC. and
SELECT MEDICAL CORPORATION,

Petitioners,

v.

THE HONORABLE JUDGE JAMES C. STUCKY,
Judge of the Circuit Court of Kanawha County,

Respondent.

From the Circuit Court of Kanawha County
Civil Action No. 10-C-1947

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

C. Benjamin Salango (WVSB #7790)

Patrick J. Salango (WVSB # 11873)

PRESTON & SALANGO, P.L.L.C.

P.O. Box 3084

Charleston, WV 25331

Telephone: (304) 342-0512

Fax: (304) 342-0513

bsalango@wvlawyer.com

*Counsel for Donald C. Hunley, Administrator of the
Estate of Patricia R. Hunley, Plaintiff below*

TABLE OF CONTENTS

TABLES OF AUTHORITIES.....3, 4

STATEMENT OF THE CASE.....5

SUMMARY OF THE ARGUMENT.....7

STATEMENT REGARDING ORAL ARGUMENT AND DECISION8

ARGUMENT.....8

I. STANDARD OF REVIEW.....8

II. THE CIRCUIT JUDGE PROPERLY EXERCISED HIS DISCRETION WHEN HE RULED THAT THE MEDICAL NEGLIGENCE AND NEGLIGENT CREDENTIALING CASES COULD BE TRIED TOGETHER AND THAT ANY POTENTIAL PREJUDICE COULD BE REMEDIED WITH LIMITING INSTRUCTIONS TO THE JURY.....8

III. BIFURCATION OF THE MALPRACTICE AND NEGLIGENT CREDENTIALING CLAIMS WILL RESULT IN A WASTE OF JUDICIAL RESOURCES AND INCREASED EXPENSE TO ALL PARTIES AND THE COURT.....14

CONCLUSION.....19

CERTIFICATE OF SERVICE.....20

TABLE OF AUTHORITIES

Andrews v. Reynolds Memorial Hosp., Inc.
201 W.Va. 624, 499 S.E.2d 846 (1997).....9, 11, 12, 19

Barlow v. Hester Industries, Inc.
198 W.Va. 118, 479 S.E.2d 628 (1996).....9

Bennett v. Warner
179 W.Va. 742, 372 S.E.2d 920 (1988).....8, 9, 15, 17

Bowman v. Barnes
168 W.Va. 111, 282 S.E.2d 613 (1981).....9, 15

Cavender v. McCarty
198 W.Va. 226, 479 S.E.2d 887 (1996).....8, 9, 15, 16, 19

Corrigan v. Methodist Hosp.
160 F.R.D. 55 (E.D. Pa. 1995).....11, 13, 17

Davis v. Immediate Med. Servs., Inc.
5th Dist. No. 94 CA 0253, 1995 WL 809478 (Ohio App. Dec. 12, 1995).....10

Estate of Burton v. Trover Clinic Foundation, Inc., Nos.
2009-CA-001595-MR, 2009-CA-001726-MR, 2009-CA-001735-MR,
2011 WL 8318231 (Ky. App. June 10, 2011).....10

Hinkle v. Black
164 W.Va. 112, 262 S.E.2d 744 (1979).....8

Neeble v. Sepulveda,
No. 01-96-01253-CV, 1999 WL 11710 (Tex.App. Aug. 13, 1993).....10

Patrick v. Sharon Steel Corp.
549 F.Supp. 1259 (N.D. W.Va. 1982).....14

Rabelo v. Nasif
No. WOCV201102329C, 2012 WL 6970543 (Mass.Super. Dec. 27, 2012).....14

Roberts v. Consolidation Coal Co.
208 W.Va. 218, 539 S.E.2d 478 (2000).....9

Rohrbaugh v. Wal-Mart Stores, Inc.
212 W.Va. 358, 572 S.E.2d 881 (2002).....18

<i>State v. LaRock</i> 196 W.Va. 294, 470 S.E.2d 613 (1996).....	9
<i>State ex rel. DeFrances v. Bedell</i> 191 W.Va. 513, 446 S.E.2d 906 (1994)	8
<i>Schelling v. Humphrey</i> 916 N.E.2d 1029 (Ohio 2009)	10, 11
<i>State ex rel. Tinsman v. Hott</i> 188 W.Va. 349, 424 S.E.2d 584 (1992).....	16
<i>Stottlemeyer v. Ghramm</i> 597 S.E.2d 191 (Va. 2004).....	10
<i>West Virginia Rules of Civil Procedure</i>	
Rule 42(c).....	7, 9, 15, 18
<i>West Virginia Rules of Appellate Procedure</i>	
Rule 19.....	8
<i>West Virginia Rules of Evidence</i>	
Rule 105.....	16

STATEMENT OF THE CASE

This matter is set for trial beginning August 5, 2013. Petitioners seek to utilize this Court's original jurisdiction to prohibit The Honorable James C. Stucky from exercising his sound discretion in denying Petitioners' Motion to Bifurcate. Petitioners' argument is not supported by the relevant case law, the West Virginia Rules of Civil Procedure, or the facts of the case.¹

In the Complaint filed in this action, Donald C. Hunley, Administrator of the Estate of Patricia R. Hunley, and Plaintiff below ("Plaintiff"), asserted claims against Petitioners and Defendants below, Select Specialty Hospital – Charleston, Inc. and Select Medical Corporation (hereinafter referred to collectively as "Defendants" or "Petitioners"), and against Majester Abdul-Jalil ("Dr. Abdul-Jalil) relating to negligent medical treatment received by Patricia Hunley while under their care. Select Specialty Hospital is a 32 bed long-term care facility located on the third floor of St. Francis Hospital in Charleston, West Virginia. Select Medical Corporation is the parent corporation for Select Specialty Hospital. Dr. Abdul-Jalil was granted temporary privileges to practice at Select Specialty Hospital in early October 2008.

Plaintiff contends that his wife, while being treated at Defendants' hospital, was provided negligent medical care by Dr. Abdul-Jalil which proximately caused her injury and death. In particular, Plaintiff claims that Dr. Abdul-Jalil ordered excessive fluids, causing Mrs. Hunley's condition to deteriorate and put her into "fluid overload," all without ordering diuretic medication in a timely and appropriate manner. Plaintiff further alleges that Defendants were negligent by granting temporary privileges to Dr. Abdul-Jalil to practice medicine at Select Specialty Hospital.

¹ Petitioners will certainly file numerous motions *in limine* to prevent the jury from hearing evidence related to Dr. Abdul-Jalil's past. Importantly, Petitioners claim prejudice from evidence that the lower court has not yet even deemed admissible. Petitioners are merely trying to get "two bites at the apple."

In May 2012, the parties participated in Court ordered mediation. At that time, Plaintiff resolved the claims against Dr. Abdul-Jalil. Plaintiff and Defendants were, however, unable to reach a resolution. By Order dated July 12, 2012, the circuit court approved the settlement between Plaintiff and Dr. Abdul-Jalil. The court also specifically preserved any and all remaining claims against Defendants. In his remaining claims against Defendants, Plaintiff seeks damages for physical pain and suffering prior to decedent's death, wrongful death damages, medical expenses, and punitive damages. As found by the circuit court and agreed to by Plaintiff without objection (or a cross-claim) by the Select Defendants. Plaintiff must prove medical negligence by Dr. Abdul-Jalil at trial as a predicate to recovery for the negligent credentialing claims asserted against Defendants. *See* Order dated Feb. 11, 2013, ¶ 6 (App. 126). In connection with this negligence claim, Plaintiff and Defendants have retained experts in the field of critical care medicine to address the standard of care and purported deviations from the standard of care along with the issue of proximate causation. *Id.*

On December 28, 2012, Defendants moved to bifurcate the medical negligence and negligent credentialing claims. *Id.* at ¶ 7 (App. 126). On January 30, 2013, the parties appeared before the circuit court for a hearing on Defendants' Motion to Bifurcate. At that time, after considering the Motion filed by Defendants, Plaintiff's Response to the same, and the arguments by counsel for both parties at the hearing, the circuit court, properly exercising its discretion in deciding the matter, denied Defendants' Motion. *Id.* It is from this Order that Defendants seek the extraordinary relief sought in their Writ of Prohibition.

SUMMARY OF THE ARGUMENT

Defendants have failed to establish that bifurcation is clearly necessary as to overcome the recognized preference for a unitary trial of all claims asserted in a civil action. In their Petition, Defendants ask this Court to find that the circuit court abused its discretion in denying Defendants' Motion to Bifurcate Plaintiff's claims for medical negligence relating to the medical care provided by Dr. Abdul-Jalil from the negligent credentialing claim against Defendants. The circuit court was within its discretion in this case in ruling against bifurcation and finding that Defendants failed to establish compelling prejudice if the issue of medical malpractice – for which Defendants are not liable – is determined in the same proceeding in which the negligent credentialing claims against Defendants are decided.

In particular, the circuit court, after considering the issues raised in connection with the Motion to Bifurcate and the evidence anticipated to be offered at trial, found that any perceived prejudice or potential for jury confusion in proceeding with a single trial can be remedied with limiting instructions. As with other civil actions involving multiple issues and defendants, the jury in this case can be trusted to properly consider and apply evidence relating to different issues and claims. Defendants have, therefore, failed to establish compelling prejudice if the medical malpractice and negligent credentialing issues are tried in a single proceeding.

Moreover, there has been no dispute that witnesses and other evidence expected to be offered at trial will be largely duplicative if separate trials are ordered. In particular, Plaintiff will present the same witnesses for both the medical negligence and negligent credentialing claims. Under these circumstances, bifurcation of these claims will undoubtedly delay the litigation, cause inconvenience and increased expense to the parties, witnesses and the court, and undermine the very purpose of Rule 42(c). As discussed in this Memorandum, no abuse of

discretion in denying the Motion to Bifurcate has occurred and Defendants' Petition should be denied.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Plaintiff respectfully requests oral argument pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure. A Rule 19 argument is appropriate because Defendants' Petition alleges assignments of error in the application of settled law.

ARGUMENT

I. STANDARD OF REVIEW

As recognized by Defendants in their Petition, the issuance of an extraordinary writ is not a matter of right but a matter of discretion sparingly exercised. *See* Petition, p. 6. Accordingly, this Court will use prohibition to correct only "substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance." Syl. pt. 1, *State ex rel. DeFrances v. Bedell*, 191 W.Va. 513, 446 S.E.2d 906 (1994), *quoting*, Syl. pt. 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979). For the reasons discussed, herein, a Writ of Prohibition is unnecessary here, where the circuit court properly exercised its discretion in denying Defendants' Motion to Bifurcate.

II. THE CIRCUIT JUDGE PROPERLY EXERCISED HIS DISCRETION WHEN HE RULED THAT THE MEDICAL NEGLIGENCE AND NEGLIGENT CREDENTIALING CASES COULD BE TRIED TOGETHER AND THAT ANY POTENTIAL PREJUDICE COULD BE REMEDIED WITH LIMITING INSTRUCTIONS TO THE JURY

It is well-settled under West Virginia law that courts should order separate trials only when "clearly necessary." *Cavender v. McCarty*, 198 W.Va. 226, 230, 479 S.E.2d 887, 891 (1996), *quoting*, *Bennett v. Warner*, 179 W.Va. 742, 748, 372 S.E.2d 920, 926 (1988). This is

because “a single trial lessens the delay, expense and inconvenience involved in separate trials [.]” *Cavender*, 198 at 231, 479 S.E.2d at 892, quoting, *Bowman v. Barnes*, 168 W.Va. 111, 117, 282 S.E.2d 613, 617 (1981). *Accord*, *Bennett*, 179 W.Va. 742, 748, 372 S.E.2d 920, 926 (1988).

Critically, the decision to grant a separate trial is within a trial court’s discretion and is made by balancing the equities involved. See W.Va. R. Civ. P. 42(c); *Andrews v. Reynolds Memorial Hosp., Inc.*, 201 W.Va. 624, 634, 499 S.E.2d 846, 856 (1997); *Cavender v. McCarty*, 198 W.Va. 226, 230, 479 S.E.2d 887, 891 (1996); *Bennett v. Warner*, 179 W.Va. 742, 748, 372 S.E.2d 920, 926 (1988). In particular, Rule 42(c) of the West Virginia Rules of Civil Procedure allows the trial court, in “furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy” to order the separate trial of any claim or issue upon a motion to bifurcate. W.Va. R. Civ. P. 42(c).

Defendants have the burden of proving that bifurcation of the trial for the malpractice and negligent credentialing claims is *clearly necessary* in this case to promote the recognized goals of judicial economy, convenience of the parties, and the avoidance of prejudice. See *e.g.* Syl. pt. 2, *Cavender*, 198 W.Va. 226, 479 S.E.2d 887; Syl. pt. 6, *Bennett*, 179 W.Va. 742, 372 S.E.2d 920; *Andrews*, 201 W.Va. at 634, 634, 499 S.E.2d at 856; *Roberts v. Consolidation Coal Co.*, 208 W.Va. 218, 238-239, 539 S.E.2d 478, 499-500 (2000). As recognized by this Court,

[t]o demonstrate that the trial court abused its discretion [in denying the Motion to Bifurcate], **a showing of ‘compelling prejudice’ is required.** ‘Compelling prejudice’ exists where a [party] can demonstrate that without bifurcation he or she was unable to receive a fair trial ... and that the trial court could afford no protection from the prejudice suffered. In short, this Court will grant relief only if the appellant can show prejudice amounting to fundamental unfairness.

Barlow v. Hester Industries, Inc., 198 W.Va. 118, 128, 479 S.E.2d 628 637 (1996), quoting, *State v. LaRock*, 196 W.Va. 294, 315, 470 S.E.2d 613, 634 (1996) (emphasis added). *Accord*, *Roberts*, 208 W.Va. at 239, 539 S.E.2d at 499. Defendants are unable to meet this burden.

Here, Defendants argue that bifurcation of the following issues is necessary: (1) whether Defendants negligently granted staff privileges to Dr. Abdul-Jalil and permitted him to treat patients and practice medicine at the hospital, and, (2) whether the medical care provided by Dr. Abdul-Jalil to Plaintiff's wife in this instance was negligent and failed to meet the applicable standard of care. *See* Petition, pp. 7-13. Defendants cite to no West Virginia case holding that bifurcation of medical negligence claims from negligent credentialing claims is necessary much less *clearly necessary*. Instead, Defendants cite to a number of cases from other jurisdictions that are factually and/or legally distinct from this case. Indeed, in all but one of these cited cases, the court's decision to bifurcate was made to avoid prejudice to the *physician* who was a party to the case and against whom the medical negligence claim was asserted. *See* Petition, pp. 7-17; and, *see Neeble v. Sepulveda*, No. 01-96-01253-CV, 1999 WL 11710, *6 (Tex.App. Aug. 13, 1993); *Estate of Burton v. Trover Clinic Foundation, Inc.*, Nos. 2009-CA-001595-MR, 2009-CA-001726-MR, 2009-CA-001735-MR, 2011 WL 8318231 (Ky. App. June 10, 2011); *Stottlemyer v. Ghramm*, 597 S.E.2d 191 (Va. 2004); *Davis v. Immediate Med. Servs., Inc.*, 5th Dist. No. 94 CA 0253, 1995 WL 809478, *7 (Ohio App. Dec. 12, 1995), *reversed in part on other grounds*, 684 N.E.2d 292 (Ohio 1997). Dr. Abdul-Jalil is no longer a party to this suit; therefore, the concern of prejudice to him does not exist.

Moreover, the Ohio court's decision to bifurcate claims for malpractice and negligent credentialing in *Schelling v. Humphrey*, 916 N.E.2d 1029 (Ohio 2009), which is primarily relied upon by Defendants to support their contentions, also provides little instruction for the determination of whether the circuit court judge *in this case* properly exercised his discretion in denying Defendants' Motion to Bifurcate. As stated by Defendants in their Petition, the court in *Schelling* ruled that "bifurcating the determination of whether [the physician] committed medical

malpractice and the Schellings' negligent-credentialing claim against the hospital" was appropriate to avoid the potential of "jury confusion or prejudice that may result from admitting evidence of prior acts of malpractice in a combined trial on both claims." *Id.* at 1036-37.

The *Schelling* opinion provides, however, no discussion of whether the court considered whether limiting instructions, special interrogatories with respect to the issues of malpractice and negligent credentialing, or any other cautionary warnings or instructions were considered and/or found to be inadequate to cure the potential for confusion or prejudice. Conversely, here, the circuit court, after considering the evidence anticipated to be offered at trial, found as follows:

Any perceived prejudice to the Select Defendants can be remedied with limiting instructions. A jury can be expected to use the evidence in an appropriate manner and the court can give proper guidance to ensure any spill-over has minimal effect. *Corrigan*, 160 F.R.D. 55, *see also Andrews v. Reynolds Memorial Hosp., Inc.*, 201 W.Va. 624, 635, 499 S.E.2d 846, 857 (1997) (holding that trial court did not abuse its discretion by initially denying motion to bifurcate medical negligence claims and negligent credentialing retention claims because limiting instructions were given during the course of the trial).

Id. at ¶ 17 (App. 126). Additionally, unlike the Ohio court in *Schelling*, the circuit court here found - for a number of reasons that are discussed below - that bifurcation was improper as "[j]udicial economy would not be promoted by separate trials because the same witnesses would be called in both cases" *See* Order dated July 12, 2012, ¶ 16 (App. 126). The circuit court was within its discretion in ruling against bifurcation and finding that Defendants failed to establish compelling prejudice if the issue of medical malpractice - for which Defendants are not liable - is determined in the same proceeding in which the negligent credentialing claims against Defendants are decided.

Indeed, as noted by the circuit court in its July 12, 2012 Order, this Court, addressing an issue similar to the one here, found that the circuit court acted properly within its discretion in refusing to bifurcate claims for physician malpractice and negligent hiring and retention by a

hospital. *See Andrews*, 201 W.Va. at 635, 499 S.E.2d at 857. In ruling that the circuit court's denial of bifurcation was proper, this Court (in addition to finding that the defendants' motion to bifurcate was untimely) noted that the circuit court properly took steps to cure any potential confusion or prejudice resulting from the admission of evidence relevant only to the negligent hiring and retention claims by giving "limiting instructions to the jury concerning" this evidence.

Id. In particular, the court stated to the jury:

I caution you that in considering the question of negligence on the part of Dr. Spore, you cannot consider any of the evidence that has been presented regarding complaints and medical license proceedings. That evidence is not relevant at all to the manner of treatment by Dr. Spore of Gina Andrews on July 6, 1990. That evidence is relevant only to the issues of negligent hiring and/or retention, a claim only against the Reynolds Memorial Hospital, not Dr. Spore.

Id. Given these circumstances, this Court held that the circuit court acted within its discretion in its initial refusal to grant the motion to bifurcate the allegations of negligent hiring and retention from the remaining issues at trial. *Id.*

As this Court may recall, the issue in this case was also recently considered by the Honorable Judge Tod. J. Kaufman in a case styled *Burgess v. Select Specialty Hospital, et al.*, Civil Action No. 10-C-1948, involving these identical Defendants and Dr. Abdul-Jalil. On December 10, 2012, the same Defendants in this case presented the same Motion to Bifurcate in *Burgess*. That case also involved negligent medical care provided by Dr. Abdul-Jalil wherein the patient gained nearly 70 pounds of fluid and ultimately passed away on May 22, 2009. The circuit court denied Defendants' Motion to Bifurcate, also finding that any "potential prejudice that may result from combined trials can be remedied with various protective measures including

limiting instructions and other instructions to the jury.” See Order Denying Defendants’ Motion for Bifurcation, ¶ 14, attached hereto as Exhibit A.²

Courts from other jurisdictions have similarly found that limiting instructions and/or other cautionary measures can remedy any perceived prejudice or jury confusion in proceeding with a single trial on the issues of medical malpractice and negligent credentialing. The court’s reasoning and holding in *Corrigan v. Methodist Hosp.*, 160 F.R.D. 55 (E.D. Pa. 1995) is particularly instructive. In *Corrigan*, a patient brought medical malpractice and negligent credentialing claims against physicians and the hospital where she was treated. The defendant physicians moved to bifurcate the trial of these claims. Recognizing that the “decision to grant a separate trial is within a trial court’s discretion” and that “the mere possibility of some prejudice does not justify separate trials where such prejudice is not substantial and there are strong countervailing considerations of economy,” the court held that the defendants had failed to meet their burden of showing that they would be substantially prejudiced sufficient to warrant separate trials on the plaintiff’s claims. *Id.* at 57. In particular, the court noted that “there are three defendants with different claims against them, but with the same evidence relevant to each defendant” and that the defendants provided “no evidence that the proof and witnesses in each issue [were] different and easily separable” *Id.* Instead, as here, the “witnesses and other evidence” relevant to the malpractice and negligent credentialing claims “would be largely duplicative.” *Id.* Also instructive is the court’s consideration and discussion regarding the possibility of jury confusion or prejudice:

‘[T]he mere possibility of some prejudice does not justify separate trials where such prejudice is not substantial and there are strong countervailing considerations of economy.’

² On January 18, 2013, Defendant Select filed a Petition for Writ of Prohibition in the *Burgess* matter (Appeal No. 13-0071). The case was settled before this Court could rule on the Petition.

Prejudice can be shown ‘where evidence as to the specific injuries suffered by plaintiffs might influence the jury’s consideration of other issues.’ ... This is known as the “spill-over” effect. Because of this concern, separate trials are usually only granted when the matters are unrelated or involve different evidence...

To remedy any prejudice resulting from combined trials, courts have established various protective measures. These include cautionary warnings, limiting instructions and other instructions to the jury.

Id. at ¶¶ 5-8 (citations omitted). *See also, Rabelo v. Nasif*, No. WOCV201102329C, 2012 WL 6970543 (Mass.Super. Dec. 27, 2012) (a copy of which is attached hereto as Exh. B) (denying the defendant hospital’s motion to bifurcate the negligent credentialing claim from the malpractice claim, noting that the hospital had failed to demonstrate that it, as opposed (potentially) to the defendant physician, would be prejudiced by having the claims against it tried with the malpractice claim).

The circuit court in this case considered whether bifurcation of the medical malpractice and negligent credentialing claims in this action is clearly necessary and properly found that Defendants failed to establish compelling prejudice if the issues are tried together in a single proceeding. Contrary to Defendants’ contentions, no abuse of the circuit court’s discretion has occurred and Defendants’ Petition should be denied.

III. BIFURCATION OF THE MALPRACTICE AND NEGLIGENT CREDENTIALING CLAIMS WILL RESULT IN A WASTE OF JUDICIAL RESOURCES AND INCREASED EXPENSE TO ALL PARTIES AND THE COURT

Generally, a separate trial should not be ordered where, as here, instead of furthering convenience or promoting expedition or economy, the separate trial would more likely provoke great inconvenience and require the expenditure of additional time. *See e.g.* 75 Am. Jur. 2d Trial § 69, *citing Patrick v. Sharon Steel Corp.*, 549 F.Supp. 1259, 1268 (N.D. W.Va. 1982) (finding that no real benefit would be gained by a severance because neither the number of issues

involved nor the number of witnesses required to be called to prove liability would be reduced). *Accord, Bowman v. Barnes*, 168 W.Va. 111, 120, 282 S.E.2d 613, 619 (1981) (recognizing the general policy favoring consolidation of issues and parties in a single trial to save expense and encourage judicial economy); *Cavender*, 198 W.Va. at 231, 479 S.E.2d at 892 (unitary trials are generally preferable over separate trials). Consistent with this principle, it is well-settled under West Virginia law that,

Parties moving for separate trials of issues pursuant to West Virginia Rule of Civil Procedure 42(c), or the court if acting *sua sponte*, must provide sufficient justification to establish for review that informed discretion could have determined that the bifurcation would promote the recognized goals of judicial economy, convenience of the parties, and the avoidance of prejudice, the overriding concern being the provision of a fair and impartial trial to all litigants.

Syl. pt. 2, *Cavender*, 198 W.Va. 226, 479 S.E.2d 887, quoting, Syl. pt. 6, *Bennett*, 179 W.Va. 742, 372 S.E.2d 920.

Recognizing this principle in *Cavender*, this Court held that there were no compelling factors that warranted bifurcation of the issues of liability and damages in an action involving personal injuries suffered by the purchaser of an electrical meter box against the box's seller. There, the defendants argued that bifurcation of the issues of liability and damages was necessary "because, if the [plaintiffs] failed to establish liability, a substantial amount of time would be saved and the parties could avoid the expense of obtaining expert medical testimony." *Id.* at 229, 479 S.E.2d at 890. The plaintiffs further "asserted that, in view of the serious injuries sustained by Mr. Cavender, bifurcation would eliminate any possible prejudice adverse to the [defendants] which might otherwise occur during the liability phase of the litigation." *Id.* In granting the petitioner's writ of prohibition, this Court held that the circuit court's ruling to bifurcate the liability and damages claims "was in contravention of law and, thus, constituted an abuse of discretion." *Id.* at 232, 479 S.E.2d at 893. In so holding, this reasoned as follows:

In this proceeding, a close examination of the nature of the underlying action reveals that the petitioners are correct in their assertion that no circumstances exist concerning the action which do not exist in most routine or uncomplicated personal injury actions. There are no compelling factors in the litigation to indicate that separate trials are 'clearly necessary' within the context of *Bennett* and *Bowman, supra*. Rather, the action consists of an uncomplicated claim for damages for personal injuries, where the sole issue as to liability is whether Mr. Cavender was a licensee or an invitee. As suggested in [*State ex rel. Tinsman v. Hott*, 188 W.Va. 349, 424 S.E.2d 584 (1992)] and by Rule 105 of the *West Virginia Rules of Evidence*, any impact of the evidence concerning the Cavenders' damages which may be prejudicial to the Foutys, can, no doubt, be restricted through cautionary instructions to the jury.

Id. at 231, 479 S.E.2d at 892.

This Court's reasoning and findings in *Cavender* are instructive here where Defendants contend that bifurcation of the issue of medical malpractice from the issue of negligent credentialing is appropriate on the grounds that: (1) bifurcation will purportedly prevent the purported "needless presentation of irrelevant and unduly prejudicial evidence" and (2) the parties may be able to avoid a trial on the negligent credentialing issue if Plaintiffs are unsuccessful in proving that Dr. Abdul-Jalil's treatment and care of Mrs. Hunley constituted medical negligence. *See* Petition, p. 22. The defendants in *Cavender* made similar arguments that were found unpersuasive by this Court. *Id.* at 231-32, 479 S.E.2d at 892-93.

With respect to the claim of possible confusion and/or prejudice, as found in *Cavender* - as well as the circuit court in this case - any impact that the evidence concerning Plaintiff's negligent credentialing claim may have on the medical negligence claim can be remedied through cautionary/limiting instructions to the jury. *Id.* at 231, 497 S.E.2d at 892; *see also*, July 12, 2012 Order (App. 126). This case does not involve unique issues that do not exist in virtually every other case involving physicians, hospitals and other medical care providers in which several and alternative claims are asserted against multiple defendants, all of which relate to injuries sustained as a result of negligent medical treatment. As discussed in the preceding

section and as found by the circuit court, the jury in this case “can be expected to use the evidence [relating to the negligent credentialing claims] in an appropriate manner and the court can give proper guidance to ensure any spill-over has minimal effect.” *See* July 12, 2012 Order, ¶ 17 (App. 126).

Critically, as was also found by the circuit court in this case, “[j]udicial economy would not be promoted by separate trials because the same witnesses would be called in both cases.” *See* July 12, 2012 Order, ¶ 16 (App. 126). Where, as here, the issues to be adjudicated are related and will involve overlapping evidence, bifurcation is not appropriate. For example, in *Bennett, supra*, this Court held that the trial court abused its discretion in bifurcating the liability and damages issues where the judge failed to adequately consider the goal of judicial economy. In particular, this Court noted that there was no discovery or preparation time saved by bifurcation and that the additional trial that would have been required if the appellants had prevailed on the issue of liability would have necessarily involved extensive overlap of witnesses and testimony. *Bennett*, 179 W.Va. at 748-49, 372 S.E.2d at 926-27. This is the exact situation in this case where there are overlapping witnesses, testimony and evidence. *See also*, Order Denying Defendants’ Motion for Bifurcation in *Burgess, supra*, in which Judge Tod. J. Kaufman declined to bifurcate the plaintiff’s malpractice and negligent credentialing claims, recognizing that there would be a significant overlap in the evidence of both claims and there would be no benefit to bifurcating the claims as a result of the same witnesses being called to testify in both claims. *See* Order Denying Defendants’ Motion for Bifurcation, attached hereto as Exhibit A.

The federal court’s reasoning in *Corrigan, supra*, is also instructive. As previously discussed, that case involved “three defendants with different claims against them, but with the same evidence relevant to each defendant.” *Corrigan*, 160 F.R.D. at 57. The court held that

separate trials for the plaintiff's claims of medical malpractice against a physician and negligent credentialing against a hospital were not warranted where the witnesses and other evidence would be largely duplicative and a single trial would promote judicial economy. The court further found that the claims of medical malpractice and negligent credentialing are ones which the jury can distinguish. *Id.* at 58. The court further reasoned that separate trials were unwarranted as follows:

First, separate trials would only further the convenience of the defendants, but not [plaintiff]. While defendants would be relieved of the burdens associated with a joint defense, [plaintiff] would be put to the cost of two separate trials, and would suffer delay in resolution of her claims." Second, separate trials would not promote judicial economy because a single trial would take less time and be resolved sooner than separate trials.

*Id.*³

Here, the same witnesses will be called to provide evidence relating to both the malpractice and the credentialing claim. These witnesses include: Dr. Abdul-Jalil, Dr. Charles Grodzin, Toni Sanchez, Cheri Call, Mark Kopacz, Ron Deel, Jason Byrd, Tamra Ford, Kurt Nellhaus, and Donald Hunley. These witnesses will provide testimony regarding both claims. If separate trials were to be ordered, the witnesses would have to appear and testify in 2 separate proceedings, repeating much of their testimony. This will undoubtedly prolong the proceedings in this case, delay final adjudication of Plaintiff's claims, and significantly increase the time and expense to the parties and the court in resolving this matter. Accordingly, bifurcation of the medical malpractice and negligent credentialing claims runs contrary to the recognized goals of judicial economy, convenience of the parties.

³ *Rohrbaugh v. Wal-Mart Stores, Inc.*, 212 W.Va. 358, 572 S.E.2d 881 (2002), which is cited in Defendants' Petition is distinguishable. See Petition, pp. 22-24. That opinion merely states that the circuit court's basis for bifurcation was *consistent with its discretion* under Rule 42. There is, however, no discussion of whether limiting instructions and/or other cautionary measures were considered or found to be ineffective or the extent, if any, to which overlapping witnesses and evidence would have been offered on the bifurcated issues.

CONCLUSION

Defendants have failed to establish that bifurcation is *clearly necessary* in this case so as to overcome the recognized preference for a unitary trial of all claims asserted in a civil action.⁴ Conversely, it is undoubtedly clear that bifurcation will neither promote expedition, economy or the convenience of the parties or court, but will, in fact, more likely provoke great inconvenience, expense and delay. The circuit court's denial of Defendants' Motion to Bifurcate was properly decided within the court's discretion and no abuse of that discretion occurred. Accordingly, Defendants' Petition should be denied and the circuit court's Order dated July 12, 2012 should be affirmed.

**DONALD C. HUNLEY, ADMINISTRATOR OF THE
ESTATE OF PATRICIA R. HUNLEY,,**

By counsel



C. Benjamin Salango (WVSB #7790)

Patrick J. Salango (WVSB # 11873)

PRESTON & SALANGO, P.L.L.C.

Post Office Box 3084

108 ½ Capitol Street, Suite 300

Charleston, West Virginia 25331

Phone: (304) 342-0512

Fax: (304) 342-0513

Counsel for Plaintiff

⁴ *Cavender*, 198 W.Va. at 231, 479 S.E.2d at 892; *Andrews*, 201 W.Va. at 6354, 634, 499 S.E.2d at 857.

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

**WILLIAM B. BURGESS, Administrator
of the ESTATE OF THELMA V. BURGESS**

Plaintiff,

v.

**CIVIL ACTION NO. 10-C-1948
The Honorable Tod J. Kaufman**

**SELECT SPECIALTY HOSPITAL – CHARLESTON, INC.,
a foreign corporation; and
SELECT MEDICAL CORPORATION,
a foreign corporation,**

Defendants.

ORDER DENYING DEFENDANTS' MOTION FOR BIFURCATION

On December 10, 2012, appeared the parties, by counsel, for a pretrial conference and for argument of various motions filed by the parties. Defendants moved the Court to bifurcate the medical negligence and negligent credentialing claims in this case. The Court has heard the argument of counsel and has reviewed all of the pertinent pleadings, and finds as follows:

1. Plaintiff's decedent, Thelma Burgess, was admitted to Select Specialty Hospital in October 2008 with a variety of medical issues. Select Specialty Hospital is a 32 bed long-term acute care facility located on the third floor of St. Francis Hospital in Charleston, West Virginia. One of the physicians caring for Ms, Burgess was Majester Abdul-Jalil, M.D. Dr. Abdul-Jalil was granted temporary privileges to practice at Select Specialty Hospital in approximately October 2008.
2. Plaintiff alleges that Thelma Burgess was provided negligent medical care by Dr. Abdul-Jalil proximately causing her harm and eventually resulting in her death. Plaintiff alleges that Dr. Abdul-Jalil ordered excessive fluids and caused Ms. Burgess to gain nearly 70 pounds in

FILED
2012 DEC 13 PM 2:06
CATHY S. BARTON, CLERK
KANAWHA COUNTY CIRCUIT COURT

EXHIBIT

A

tabbles

a two week period resulting in a substantial deterioration in her condition. Plaintiff claims that Dr. Abdul-Jalil put Ms. Burgess into "fluid overload" and did not order diuretic medications in a timely and appropriate manner. Defendants deny the medical negligence claims.

3. Plaintiff also alleges that Defendants Select Specialty Hospital – Charleston, Inc., and its parent corporation, Select Medical Corporation, were negligent by granting temporary privileges to Dr. Abdul-Jalil to practice medicine at Select. Plaintiff claims that the Select Defendants violated their own medical staff bylaws and improperly granted temporary privileges to Dr. Abdul-Jalil. Plaintiff alleges that Dr. Abdul-Jalil's suspect background and inadequate training should have resulted in the Select Defendants denying privileges to him. The Select Defendants likewise deny the negligent credentialing claims asserted against them.

4. In May 2012, the parties participated in Court ordered mediation. Plaintiff amicably resolved the claims against Dr. Abdul-Jalil and his employer, Mountain Emergency Physicians, Inc. Plaintiff and the Select Defendants were unable to reach a resolution.

5. Because Plaintiff alleged wrongful death, the matter was brought before the Court for approval on June 14, 2012 in accordance with W. Va. Code §55-7-6. By Order dated June 22, 2012, the Court approved a settlement between Plaintiff, Dr. Abdul-Jalil and Mountain Emergency Physicians of the medical negligence claims. The Court specifically preserved any and all remaining claims against Select Medical Corporation and Select Specialty Hospital – Charleston, Inc. *See Order Approving Settlement and Distribution.*

6. Even though Plaintiff and Dr. Abdul-Jalil settled their differences, Plaintiff agrees that he must prove medical negligence at trial as a predicate to the negligent credentialing claims. Plaintiff and the Select Defendants have retained experts in the field of critical care medicine to address the standard of care and purported deviations from the standard of care, along with

proximate causation. Thus, even though Dr. Abdul-Jalil is no longer a party to the case the parties will be able to present evidence with regard to the applicable standard of care.

7. On October 29, 2012, Defendants moved to bifurcate the medical negligence and negligent credentialing claims and argued that trying both cases together could potentially create confusion of the issues and unfair prejudice against them. *See* Defendants' Motion for Summary Judgment or, in the Alternative, Motion to Bifurcate.

8. Defendants had the burden to prove that bifurcation would promote judicial economy. As recognized by the West Virginia Supreme Court of Appeals, parties moving for separate trials of issues pursuant to Rule 42(c) "must provide sufficient justification to establish for review that informed discretion could have determined that the bifurcation would promote the recognized goals of judicial economy, convenience of the parties, and the avoidance of prejudice, the overriding concern being the provision of a fair and impartial trial to all litigants." Syl. pt. 2, *Cavender v. McCarty*, 198 W.Va. 226, 230, 479 S.E.2d 887, 891 (1996); *See accord*, Syl. pt. 4, *Bennett v. Warner*, 179 W.Va. 742, 748, 372 S.E.2d 920, 926 (1988); *See Andrews v. Reynolds Memorial Hosp., Inc.*, 201 W.Va. 624, 634, 499 S.E.2d 846, 856 (1997); *Roberts v. Consolidation Coal Co.*, 208 W.Va. 218, 238-239, 539 S.E.2d 478, 499-500 (2000).

9. The decision of whether to grant separate trials pursuant to Rule 42(c) rests within the discretion of the trial court. *See Andrews*, 201 W.Va. at 634, 499 S.E.2d at 856; *Cavender*, 198 W.Va. at 230, 479 S.E.2d at 891; *Bennett*, 179 W.Va. at 748, 372 S.E.2d at 926.

10. A trial court's authority under Rule 42(c) is not, however, unlimited and "bifurcation should be granted only when 'clearly necessary ...'" *Cavender*, 198 W.Va. at 230, 479 S.E.2d at 891, quoting, *Bennett*, 179 W.Va. at 748, 372 S.E.2d at 926.

11. Courts are not inclined to order a separate trial where, instead of furthering convenience or promoting expedition or economy, the separate trial would more likely cause great inconvenience and require the expenditure of additional time. 75 Am. Jur. 2d Trial § 69, citing *Patrick v. Sharon Steel Corp.*, 549 F. Supp. 1259, 11 Fed. R. Evid. Serv. 1764 (N.D. W.Va. 1982).

12. "A single trial will generally lessen the delay, expense, and inconvenience to the parties and the courts." *Corrigan v. Methodist Hosp.*, 160 F.R.D. 55 (E.D. Pa. 1995) (citing 5 James William Moore, *Moore's Federal Practice* ¶ 42.03[1], at p. 42-43 (1994).

13. Where, as here, the issues are closely related and the witnesses and other evidence will be largely duplicative, a single trial would promote judicial economy. *Corrigan v. Methodist Hosp.*, 160 F. R.D. 55(E.D. Pa. 1995).

14. Any potential prejudice that may result from combined trials can be remedied with various protective measures including limiting instructions and other instructions to the jury. *Id.* (citing *Wetherill v. University of Chicago*, 565 F.Supp. 1553, 1567 (N.D.III. 1983)).

15. In this case, there is a significant overlap in the evidence on both claims. Specifically, Plaintiff intends to call Charles Grodzin, M.D., Toni Sanchez, RN, Tamra Ford, RT, Kurt Nellhaus, M.D., Mark Kopacz, RN, Jason Bird, RN, Cheri Call, RN, William Burgess, Majester Abdul-Jalil, M.D., and Ron Deel in both the medical negligence and negligent credentialing cases.

16. There would be no benefit to bifurcating the claims because the same witnesses would be called in both cases.

17. Any perceived prejudice to the Select Defendants can be remedied with limiting instructions. A jury can be expected to use the evidence in an appropriate manner and the court can give proper guidance to ensure any spill-over has minimal effect. *Corrigan*, 160 F.R.D. 55.

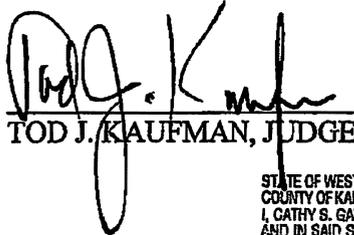
18. Defendants were unable to establish that bifurcation is clearly necessary in this case so as to overcome the recognized preference for a unitary trial of all claims asserted in a civil action. *Cavender*, 198 W.Va. at 231, 479 S.E.2d at 892; *Andrews*, 201 W.Va. at 635, 499 S.E.2d at 857.

It appearing proper to do so, the Court **ORDERS** that Defendants' Motion for Bifurcation is **DENIED**.

The objection of any party adversely affected by the Order is preserved.

The Clerk is directed to forward an attested copy of this Order to the undersigned counsel of record.

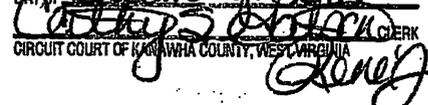
ENTERED this 13th day of December, 2012


TOD J. KAUFMAN, JUDGE

PREPARED FOR ENTRY:



C. Benjamin Salango (WVSB #7790)
PRESTON & SALANGO, P.L.L.C.
Post Office Box 3084
108 ½ Capitol Street, Suite 300
Charleston, West Virginia 25331
Phone: (304) 342-0512
Fax: (304) 342-0513
Counsel for Plaintiff

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT.
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS
DAY OF December 2012 13th

CATHY S. GATSON, CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

FORWARDED FOR REVIEW TO:



Edward C. Martin (WVSB #4635)

Ryan A. Brown (WVSB #10025)

FLAHERTY SENSABAUGH BONASSO PLLC

P.O. Box 3843

Charleston, WV 25338-3843

Phone: (304) 345-0200

Fax: (304) 345-0260

Counsel for Defendants

No. 130281

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston

STATE EX REL. SELECT SPECIALTY HOSPITAL – CHARLESTON, INC. and
SELECT MEDICAL CORPORATION,

Petitioners,

v.

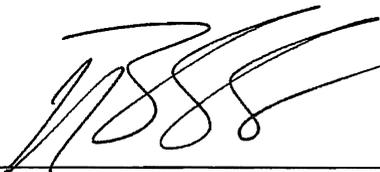
THE HONORABLE JUDGE JAMES C. STUCKY,
Judge of the Circuit Court of Kanawha County,

Respondent.

CERTIFICATE OF SERVICE

I, C. Benjamin Salango, counsel for Plaintiff, do hereby certify that I have served a true and exact copy of the foregoing “**Response to Petition for Writ of Prohibition**” via United States mail, postage prepaid, on this 5th day of April, 2013, addressed to the following:

Edward C. Martin, Esq.
Ryan A. Brown, Esq.
John M. Huff, Esq.
Flaherty, Sensabaugh & Bonasso, PLLC
P.O. Box 3843
Charleston, WV 25338



C. Benjamin Salango (WVSB # 7790)

PRESTON & SALANGO, PLLC
108 ½ Capitol St., Suite 300
Charleston, WV 25301