No. 33335 Allison J. Riggs and Jack E. Riggs, M.D. v. West Virginia University Hospitals, Inc.

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OF WEST VIRGINIA

Davis, Chief Justice, concurring:

I concur in the majority opinion's determination that the doctrine of judicial estoppel precluded the Appellants from changing their theory of liability after the jury returned its verdict. I have chosen to write separately to discuss the issue of whether or not the cause of action filed against WVUH *could have been* brought outside the MPLA,[1] and to respond to the flawed arguments of the dissents.

A. The Appellants Should Have Asserted Prior to Trial That Their Cause of Action Against WVUH Was Not Governed by the MPLA.

The majority opinion has meticulously pointed out the following relevant facts: (1) Appellants pled their claim against WVUH under the MPLA; (2) Appellants argued during a pretrial conference that if they prevailed they would attempt to get around the

[1]I wish to make clear that the majority opinion did not address the question of whether or not the Appellants' cause of action had to actually be commenced and litigated under the MPLA. The majority opinion was narrowly focused upon the issue of whether or not the Appellants should be judicially estopped from asserting that the MPLA did not apply, even though they commenced and litigated their claim under the MPLA.

MPLA's cap by asserting that WVUH was self-insured; (3) Appellants proffered a jury instruction based upon the MPLA; and (4) the trial judge instructed the jury to determine liability based upon the standards set out under the MPLA. It was only after the Appellants obtained a favorable jury verdict that they alleged their case was actually a pure negligence claim that was outside the scope of the MPLA. This tactical manipulation of the judicial system is precisely the reason for the creation of the judicial estoppel doctrine, *i.e.*, it is simply wrong to permit a party to mislead the court and the opposing party on a dispositive issue and, after prevailing on that issue, take a position that is in conflict with the dispositive issue upon which he/she prevailed.

Even though I agree with the majority opinion that judicial estoppel prevented the Appellants from prevailing on the post-trial argument that their claim was not covered by the MPLA, I ultimately believe that the Appellants' claim was not covered by the MPLA. That is, I believe the Appellants should have pled their claim against WVUH as one that did not fall under the MPLA.[2]

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[2]Even if the Appellants did not realize until after discovery was completed that their cause of action fell outside of the MPLA, they should have thereafter timely filed a motion to amend their complaint to state a non-MPLA cause of action against WVUH. Under either situation, as an original pleading or amended pleading, the circuit court would have been given an opportunity prior to trial to decide whether the case would be presented to the jury as an MPLA claim or a cause of action brought outside the MPLA. After such a pretrial ruling the party adversely affected thereby could have challenged that ruling to this Court for a definitive decision as to whether or not the claim fell outside the scope of the MPLA. *See Blankenship v. Ethicon, Inc.*, No. 33224, ___ W. Va. ___, ___ S.E.2d ___ (Oct. 12, 2007) (affirming pretrial decision by circuit court that claim for injuries resulting from use of

It has been correctly observed that "[t]he fact that the alleged misconduct occurs in a healthcare facility does not, by itself, make the claim one for malpractice. Nor does the fact that the injured party was a patient at the facility or of the provider, create such a claim." *Madison Ctr., Inc. v. R.R.K.*, 853 N.E.2d 1286, 1288 (Ind. Ct. App. 2006). *See also Atlanta Women's Health Group v. Clemons*, No. A07A1093, 2007 WL 2367544, at *1 (Ga. Ct. App. 2007) ("Of course, not every suit which calls into question the conduct of one who happens to be a medical professional is a medical malpractice action. We must look to the substance of an action against a medical professional in determining whether the action is one for professional or simple negligence."); *Perkins v. Susan B. Allen Mem'l Hosp*., 146 P.3d 1102, 1107 (Kan. Ct. App. 2006) ("Not every claim for negligence against a healthcare provider constitutes malpractice."); *Draper v. Westerfield*, 181 S.W.3d 283, 290 (Tenn. 2005) ("Cases involving health or medical entities do not automatically fall within the medical malpractice statute."). Thus, "when the complaint does not allege negligence in furnishing medical treatment to a patient, but rather the failure of a medical provider in fulfilling a different duty, the claim sounds in negligence." *Rodriguez v. Saal*, 841 N.Y.S.2d 232, 235 (2007).

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contaminated sutures fell under MPLA); *Phillips v. Larry's Drive-In Pharmacy, Inc*., ___ W. Va. ___, 647 S.E.2d 920 (2007) (answering pretrial certified question by indicating claim against pharmacy did not fall under MPLA); *Gray v. Mena*, 218 W. Va. 564, 625 S.E.2d 326 (2005) (holding that circuit court's pretrial ruling correctly found that claim for assault and battery came under MPLA).

Pursuant to Code §55-7B-2(i) (2006) (Supp. 2007),[3] a cause of action for medical professional liability is defined as "any liability for damages resulting from the death or injury of a person for any tort or breach of contract *based on health care services rendered, or which should have been rendered,* by a health care provider or health care facility to a patient." (Emphasis added). The Legislature has defined health care services to "mean[] any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to or on behalf of a patient during the patient's medical care, treatment or confinement." W. Va. Code § 55-7B-2(e) (2006) (Supp. 2007).[4] Applying the latter definitions to the facts of the instant case, it is clear to me that the Appellants' cause of action against WVUH fell outside the MPLA.

The facts in the instant case demonstrate that at the time Ms. Riggs was having knee surgery, WVUH exposed all of its patients, and possibly anyone entering the hospital, to the potential of contracting a serratia bacterial infection. The potential for contracting a serratia bacterial infection was not the reason Ms. Riggs was admitted to the hospital. Ms. Riggs sought medical treatment for her right knee. The duty breached by WVUH was not

[3]Although I quote from the current version of the statute, identical language may be found in the statutory version in effect at the time Ms. Riggs' suit was filed. *See* W. Va. Code § 55-7B-2(d) (1986) (Repl. Vol. 2000).

[4]*See supra* note 3. Language identical to that quoted may be found in the statutory version in effect at the time Ms. Riggs' suit was filed. *See* W. Va. Code § 55-7B-2(a) (1986) (Repl. Vol. 2000).

that of failing to properly treat Ms. Riggs' knee, WVUH breached a general duty it owed to all patients and nonpatients to maintain a safe environment. *See Padney v. MetroHealth Med. Ctr.*, 764 N.E.2d 492 (Ohio Ct. App. 2001) (allowing estate of deceased hospital worker to bring common law tort actions against hospital on theory that hospital failed to employ adequate controls to prevent transmission of tuberculosis to its employees). Breach of the duty by a hospital to maintain a safe environment, which breach causes injury to a patient or nonpatient, simply does not fall under the MPLA.

Courts around the country have formulated various tests to be used in deciding whether conduct by a health care provider must be litigated under medical malpractice statutes, or may be litigated as a claim for common law negligence or a premises liability tort. The following are some examples of tests used by courts.

> [I]n determining whether an action is for medical malpractice or for common law negligence, the issue is whether the alleged negligent conduct bears a substantial relationship to the rendition of medical treatment by a medical professional. If so, the medical malpractice statute applies. If, however, the plaintiff seeks compensation for injuries resulting from negligent conduct not affecting a patient's medical treatment, the claim falls under common law negligence.

Draper v. Westerfield, 181 S.W.3d 283, 290-91 (Tenn. 2005) (internal quotations and citations omitted).

> [T]he relevant considerations in determining whether a claim sounds in medical malpractice are whether (1) the defendants are sued in their capacities as medical professionals, (2) the alleged negligence is of a specialized medical nature that

> arises out of the medical professional-patient relationship and (3) the alleged negligence is substantially related to medical diagnosis or treatment and involved the exercise of medical judgment.

Trimel v. Lawrence & Mem'l Hosp. Rehab. Ctr., 764 A.2d 203, 207 (Conn. App. Ct. 2001).

> [A] court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or medical malpractice: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions.

Bryant v. Oakpointe Villa Nursing Ctr., 684 N.W.2d 864, 871 (Mich. 2004).

> (1) whether the particular wrong is "treatment related" or caused by a dereliction of professional skill,
>
> (2) whether the wrong requires expert medical evidence to determine whether the appropriate standard of care was breached,
>
> (3) whether the pertinent act or omission involved assessment of the patient's condition,
>
> (4) whether an incident occurred in the context of a physician-patient relationship, or was within the scope of activities which a hospital is licensed to perform,
>
> (5) whether the injury would have occurred if the patient had not sought treatment, and
>
> (6) whether the tort alleged was intentional.

Blevins v. Hamilton Med. Ctr., Inc., 959 So. 2d 440, 445 (La. 2007). In my opinion, under any of the above tests, the allegations against WVUH would clearly fall outside the MPLA.

The specific issue of whether or not a disease contracted by a patient, while undergoing surgery, is governed by medical malpractice laws was addressed in *Methodist Hospital v. Ray*, 551 N.E.2d 463 (Ind. Ct. App. 1990), *aff'd*, 558 N.E.2d 829. In *Methodist Hospital*, the plaintiff was a patient at the defendant hospital. The plaintiff was at the hospital to have a kidney stone destroyed. During the plaintiff's treatment, the hospital became infected with a deadly bacteria commonly known as Legionnaire's Pneumonia Virus. The plaintiff sustained injuries from the virus. At the time of the injuries, Indiana had a medical malpractice statute which required all medical malpractice cases be initially filed with a medical review panel. However, because the plaintiff did not believe that his injuries came under the medical malpractice statute, he did not file a complaint with the medical review panel. Instead, the plaintiff filed a premises liability action against the hospital with a trial court. The hospital filed a motion to dismiss the action for failure to comply with the medical malpractice pre-suit requirements. The trial court denied the motion on the grounds that the injuries sustained by the plaintiff did not come under the medical malpractice statute. The hospital appealed. An appellate court agreed with the trial court, ruling as follows:

> The dispositive issue is whether or not the allegations of Ray's complaint sound in ordinary negligence for premises liability or whether they assert a failure to provide the type of care that would bring the claim within the Medical Malpractice Act and thus require dismissal for lack of subject-matter jurisdiction. This framing of the issue, of course, rests upon the assumption that if a complaint sounds in ordinary negligence it does not fall within the purview of the Medical Malpractice Act.
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> . . . .

In relation to our decision we deem it appropriate to address an issue presented during oral argument. During that proceeding, Methodist suggested [we] . . . interpret our Medical Malpractice Act as all-inclusive. That is, that the mere allegation of a patient-provider relationship is enough to bring a case within the Act and therefore trigger the need for plaintiff to come forward with facts which would remove the complaint from the scope of the Act. Because Ray's complaint alleges a patient-provider relationship and no supporting affidavits were filed in response to the Motion to Dismiss, Methodist asserts that the trial court was required to dismiss the complaint. In support of its argument, Defendant cited to [a prior case wherein it was said]:

> "Those seeking to avoid coverage under the Act travel a rocky road. The framers of the Act used *broad* language."

While it is true that plaintiffs such as Ray may be required to traverse a difficult path, we decline Methodist's invitation to make the road totally impassable. There is no support for Methodist's interpretation of the Act. Caselaw in Indiana and other jurisdictions consistently acknowledge that certain patient-provider cases fall outside the scope of medical malpractice. . . .

. . . .

Premises liability, however, derives from the common law. Our Medical Malpractice Act provides that:

> "No action against a health care provider may be commenced in any court of this State before the claimant's proposed complaint has been presented to a medical review panel established pursuant to this chapter and an opinion is rendered by the panel." . . . .

As such, it is in derogation of the common law and must be strictly construed. . . .

. . . .

> To extend the reach of the Act beyond its intended scope would necessarily involve extending the scope of our function as a judicial body. Until the legislature says otherwise we cannot hold, as a matter of law, that the Act covers every patient-provider case. . . .
>
> Because we cannot say, as a matter of law, that the case before us comes within the scope of Indiana's malpractice act, we hold that the trial court did not err in denying Methodist's motion to dismiss. . . .

Methodist Hosp., 551 N.E.2d at 465-69 (internal quotations and citations omitted). *But see Cashio v. Baton Rouge Gen. Hosp*., 378 So. 2d 182 (La. Ct. App. 1979) (concluding that injury caused by hospital's failure to provide sterile environment fell under that state's Medical Malpractice Act).

The decision in *Methodist Hospital* is instructive of two things. First, contracting a disease while in a hospital, due to the hospital's failure to maintain a sterile environment, is simply not within the purview of medical malpractice statutes. Second, and most importantly to the instant case, *Methodist Hospital* demonstrates that the proper time for raising and determining the issue of whether a claim falls under medical malpractice statutes is prior to trial on the merits, not through a belated post-verdict assertion.

B. Rule 15(b) Was Not Raised Nor Did it Have Any Application to the Appellants' Case.

Both dissenting opinions contend that Rule 15(b) should have been invoked

to salvage the Appellants' verdict. In the first paragraph of Justice Albright's dissent, he argues that the majority opinion "both obscured and ignored the importance of Rule 15(b) of the West Virginia Rules of Civil Procedure in our jurisdiction." In the second paragraph of Justice Albright's dissent, he stated that "[w]hile Appellants did not rely on Rule 15(b), they could have relied upon it to make their arguments post-verdict[.]" Justice Starcher argued that "it doesn't matter if a party didn't make a motion to amend a pleading under Rule 15." In essence, the dissenters concede that the Appellants failed to argue Rule 15(b) before the trial court and in their brief to this Court. The dissents take the position that, even though Rule 15(b) was never asserted by the Appellants, this Court should have sua sponte invoked the rule. Further, and without any analysis, the dissenters conclude that under Rule 15(b) the Appellants would have been permitted to amend their pleading to take their case out from under the MPLA. As I will demonstrate below, the argument of the dissenters is grounded on improper judicial activism and would lead to the emasculation of the intent and purpose of Rule 15(b). *See Matter of Estate of Pirie*, 492 N.E.2d 884, 898 (Ill. App. Ct. 1986) ("Nor do we think this court should on its own motion order the amendment of plaintiffs' complaint to conform to the proofs. While plaintiffs may be able to recast their complaint to support a judgment in their favor based upon the facts as they exist in the record, a jury would not be required to return such a verdict, and thus, any new theory should be considered by a new jury. Moreover, any verdict returned by a jury in favor of plaintiffs based upon a new theory in an amended complaint likely would result in a different damage award. For these reasons, amendment of plaintiffs' complaint in this court would be inappropriate.").

1. An issue not raised on appeal is deemed waived. The dissenters attempt to lay blame on the majority opinion for not addressing the pleading amendment procedure under Rule 15(b). The dissenters do not understand how Rule 15(b) operates.

To begin, the text of Rule 15(b) provides as follows:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Under this rule there are two ways in which an amendment may occur. The two methods were discussed in *Green Country Food Market, Inc. v. Bottling Group*, 371 F.3d 1275 (10th Cir. 2004), as follows:

> Rule 15(b) contains two mechanisms for amending the complaint to conform to the evidence. First, a complaint may be impliedly amended under Rule 15(b) if an issue has been tried with the express or implied consent of the parties and not over objection. A party impliedly consents to the trial of an issue not contained within the pleadings either by introducing evidence on the new issue or by failing to object when the opposing party introduces such evidence. However, implied consent cannot be

> based on the introduction of evidence that is relevant to an issue already in the case when there is no indication that the party presenting the evidence intended to raise a new issue.
>
> This mechanism for implying an amendment is not available if the opposing party objects to evidence pertaining to a new claim. Instead, upon objection by the opposing party, the party wishing to amend the pleadings must employ the second mechanism of Rule 15(b). Pursuant to that mechanism, the pleadings may be amended if the party files a motion to amend the complaint and the objecting party fails to satisfy the court that it will be prejudiced by the amendment. The party must expressly move under Rule 15(b) for such an amendment.

Green Country, 371 F.3d at 1280-81 (internal quotations and citations omitted).[5]

The decision in *Green Country* teaches that where the parties impliedly or expressly consent to litigate an issue not raised in the pleadings, it is not necessary for a formal motion to be filed to amend the pleading to reflect the new issue. *See* Syl. pt. 4, in part, *Floyd v. Floyd*, 148 W. Va. 183, 133 S.E.2d 726 (1963) ("[I]f an issue [that was not pled in a complaint] is so raised in trial and trial by consent of the parties without such amendment, it is treated as if it had been raised in the pleadings and the failure to amend will not affect the verdict."). However, when a party has objected to an issue being part of the case, it is *mandatory* that a motion to amend be filed under Rule 15(b), and a favorable ruling given for the moving party, before the issue becomes part of the litigation.

[5]The federal Rule 15(b) was amended in 2007 to provide for mere stylistic changes. However, prior to the amendment the federal rule was identical to West Virginia's Rule 15(b).

The dissenters have omitted any discussion of the two ways in which an amendment to the pleadings may occur under Rule 15(b). The dissenters have, in essence, incorrectly argued that under no circumstance is it necessary for a party to file a motion under Rule 15(b) in order to interject a new issue into the litigation. This is simply wrong. Further, and in spite of Justice Starcher's legally unsupported argument to the contrary, no decision of this Court has ever held that Rule 15(b) never requires a motion to be filed before it may relied upon to amend a pleading to interject a new issue.

In the instant proceeding the record is crystal clear in showing that WVUH objected to any attempt by the Appellants to litigate the case outside the MPLA. This objection, as brought out in the majority opinion, came in the context of stipulations made by the parties prior to trial. After the stipulations were made, WVUH forwarded a letter to the trial judge, wherein it was said that "WVUH, Inc. will object . . . to any attempt by plaintiffs' counsel to use the stipulations concerning Dr. Khakoo and Bonny McTaggart to argue plaintiffs' case against WVUH is or was anything other than a medical professional liability [cause] of action." As a result of this letter, the Appellants had to file a motion under Rule 15(b) in order to attempt to amend the complaint to take the cause of action outside the MPLA.

The Appellants did not make either an oral or a written motion to the trial court to amend their pleading under Rule 15(b). *See Hanlon v. Logan County Bd. of Educ.*, 201

W. Va. 305, 315, 496 S.E.2d 447, 457 (1997) ("Long standing case law and procedural requirements in this State mandate that a party must alert a tribunal as to perceived defects at the time such defects occur in order to preserve the alleged error for appeal."); Syl. pt. 6 *Dunning v. Barlow & Wisler, Inc.*, 148 W. Va. 206, 133 S.E.2d 784 (1963) ("In cases within its appellate jurisdiction this Court will not consider or decide nonjurisdictional questions which have not been determined by the trial court."). Further, as previously indicated, the Appellants did not ask this Court to consider Rule 15(b) as a basis for granting the relief they sought. Our case law is quite firm in holding that "[i]ssues not raised on appeal . . . are deemed waived." *Tiernan v. Charleston Area Med. Ctr., Inc.*, 203 W. Va. 135, 140 n.10, 506 S.E.2d 578, 583 n.10 (1998). *See also Canterbury v. Laird*, No. 33132, ___ W. Va. ___, ___ n.9, ___ S.E.2d ___, ___ n.9, slip op. at 9 n.9 (Nov. 21, 2007) ("Mr. Canterbury failed to raise or argue any issue in his brief pertaining to summary judgment on his conspiracy liability theories, we deem the matters to be waived."); *In re Edward B.*, 210 W. Va. 621, 625 n.2, 558 S.E.2d 620, 624 n.2 (2001) ("Because the errors . . . were neither assigned nor argued in the Appellant's brief, they are hereby waived."); Syl. pt. 6, *Addair v. Bryant*, 168 W. Va. 306, 284 S.E.2d 374 (1981) ("Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived."). Thus, to the extent that Rule 15(b) had any application to this case, the Appellants' failure to raise the matter resulted in a waiver. *See Northwood Stone & Asphalt, Inc. v. Occupational Safety & Health Review Comm'n*, No. 94-4327, 1996 WL 160821, at *5 (6th Cir. 1996) ("Rule 15(b) permits a court to amend the pleadings upon motion by a party. We have found no case permitting a court

to amend the pleadings *sua sponte*.").

2. Rule 15(b) was not applicable to this case. The dissenters argued that Rule 15(b) applied to this case and that the rule would have allowed the Appellants to remove their case from under the MPLA. Although the dissents made this argument, they totally failed to perform any analysis of Rule 15(b) to determine whether the facts of this case satisfied the rule's criteria. As I will demonstrate, the Appellants did not raise the issue of Rule 15(b) at trial nor on appeal because they clearly understood that they could not satisfy the rule's requirements.

"'Rule 15(b) provides that when issues not raised by the pleadings are tried by express or implied consent of the parties, such issues must be treated in all respects as if they had been raised in the pleadings.'" *State ex rel. Packard v. Perry*, No. 33214, ___ W. Va. ___, ___ n.9, ___ S.E.2d ___, ___ n.9, slip op. at 28 n.9 (Nov. 21, 2007) (quoting Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 15(b)[1], p. 460 (2d ed. 2006)). In Syllabus point 1 of *Miller v. City of Morgantown*, 158 W. Va. 104, 208 S.E.2d 780 (1974), we held the following regarding Rule 15(b):

> Where it is clear from the record that issues not raised by the pleadings were not tried by the express or implied consent of the parties, they cannot be treated as if they had been raised in the pleadings under the provisions of Rule 15(b).

The decision in *Miller* illustrates the application of Rule 15(b) when a party attempts to change his/her theory of the case after a jury verdict. In *Miller*, the City of Morgantown was sued by Mr. and Mrs. Miller as a result of injuries received by Mrs. Miller when she slipped and fell on a sidewalk.[6] The complaint set out a cause of action for strict liability, and the case was tried on that theory. The jury returned a verdict in favor of the Millers. The City appealed.

In the appeal the City contended that a prior statute imposed strict liability upon municipalities for injuries caused to anyone falling on a sidewalk. However, at the time the Millers' action arose, the statute had been amended and required liability be shown through negligence on the part of a municipality. This Court agreed with the City that a negligence standard of liability had been imposed by the amended statute. Nevertheless, the Millers argued that "even though negligence was not relied on in the complaint for recovery against the City for the injury suffered as a result of the defective sidewalk, this issue was tried by the implied consent of the parties under Rule 15(b)." *Miller*, 158 W. Va. at 107, 208 S.E.2d at 783. Based upon the evidence in the record, this Court rejected the Millers' argument as follows:

> This position is not well taken because it is abundantly clear from the record that neither the plaintiffs nor the defendant City thought the case was tried on the theory of negligence

[6]There were other defendants in the case, but the issues involving them are not relevant to this discussion.

> against the City. There was no express or implied consent by either party. The attorney for the plaintiff stated unequivocally in his opening statement that he was trying the case on the basis of absolute liability against the City and at the conclusion of the plaintiffs' evidence he reiterated that he was trying it on such basis. The attorney for the City moved for a directed verdict because the case was not pleaded or tried on the proper theory against the City. The complaint alleged absolute liability on the part of the City and the City in its answer asked to have the case dismissed because of the pleading against it. The motion for a directed verdict was made immediately after the attorney for the plaintiffs stated that he was trying the case under the theory of absolute liability against the City. Apparently this situation came about by virtue of a misapprehension on the part of the attorney for the plaintiffs relative to the statute having been amended in 1969. Under these facts there could be no express or implied consent to try this case on the issue of negligence which was not raised in the pleading and no attempt was made at any time to amend the pleading.

Miller, 158 W. Va. at 108, 208 S.E.2d at 783.

Assuming, for the sake of argument, that the Appellants in the instant case had raised the issue of Rule 15(b), under *Miller* they would not have prevailed. The majority opinion has ably demonstrated that this case was pled under the MPLA, tried under the MPLA, and the jury was instructed to make its finding based upon the law applicable to the MPLA. In other words, there was not a scintilla of evidence to show that the parties expressly or impliedly consented to litigate this case on any theory other than a statutory medical negligence cause of action. Consequently, the Appellants could not have prevailed on the Rule 15(b) issue that was raised sua sponte by the dissenters. Indeed, if this Court followed the dissenters' tortured interpretation of Rule 15(b), "a losing party, by motions to

amend and rehear, could keep a case in court indefinitely, trying one theory of recovery or defense after another, in the hope of finally hitting upon a successful one. Courts draw a dividing line between this use of amendment and those uses aimed at conformity." *Hart v. Knox County*, 79 F. Supp. 654, 658 (E.D. Tenn. 1948). *See also Dependahl v. Falstaff Brewing Corp*., 653 F.2d 1208, 1218 (8th Cir. 1981) ("'The purpose of an amendment to conform to proof is to bring the pleadings in line with the actual issues upon which the case was tried; therefore, an amendment after judgment is not permissible which brings in some entirely extrinsic issue or changes the theory on which the case was actually tried, even though there is evidence in the record introduced as relevant to some other issue which would support the amendment.'" (quoting *Gallon v. Lloyd-Thomas Co.*, 264 F.2d 821, 825 n.3 (8th Cir. 1959))); *Cleary v. Indiana Beach, Inc*., 275 F.2d 543, 546-47 (7th Cir. 1960) ("The complaint sounded on negligence. The case was tried, submitted to the jury, and, by the jury considered on the theory of negligence. After the verdict, plaintiff filed a motion, assertedly on authority of [Rule 15(b)], to amend his complaint to allege that defendant had been guilty of wilful and wanton misconduct. . . . If Rule 15(b) were applied in the manner in which it is here sought to be used, litigation might never end. We think it obvious that the Rule was not intended to permit a party to amend his pleadings after verdict and, thereby upset the verdict by asserting a new theory which was not included in the original pleadings, and upon which the case was not tried."); *Wilmot v. Racine County*, 382 N.W.2d 442, 447 (Wis. Ct. App. 1985), *rev'd on other grounds*, 400 N.W.2d 917 (Wis. 1987) ("This case was tried on the theory of negligence, not agency liability. . . . Once the case was tried and

submitted to the jury on a theory of negligence, it would have been improper for the trial court to decide the case on a theory of respondeat superior, especially since agency was neither argued to the jury nor included in the instructions.").

C. Justice Starcher's Dissent.

In addition to the Rule 15(b) issue, Justice Starcher's dissent postures two other flawed arguments in an attempt to undermine the well-reasoned and legally sound majority opinion. I will address each of his unsound meanderings separately.

1. The dissent has tortured the facts to reach an unsupported conclusion.

It is ironic, though not surprising, that Justice Starcher argues that the majority "opinion is one of the most factually misleading . . . cases to be produced by this Court." The irony here, of course, is that Justice Starcher's dissent has embarked on a journey of cut and paste voodoo that has cast the record of this case in a light that even the Appellants would not recognize. In fact, if the record had spoken in the voice that Justice Starcher has mystically given it, my commitment to fairness would have compelled me to vote differently in this case. Suffice to say, Justice Starcher's dissenting "opinion is one of the most factually misleading . . . [opinions] to be produced by [him]."

To understand the smoke and mirrors argument made by Justice Starcher, one need merely reflect on the facts which he failed to address. The following matters, which are

set out in the majority opinion, were not attacked by Justice Starcher as being inaccurate or created out of thin air by the majority:

> (I) The Complaint asserted that the alleged damages were caused "as a direct and proximate result of the negligent failure of the Defendants to exercise the proper degree of skill, care and learning required of reasonably prudent healthcare providers."
>
> (ii) After the Appellants settled their case against the Board of Governors and entered into a few stipulations with WVUH, a letter was written to the trial judge by WVUH wherein it was said that, "WVUH, Inc. will object . . . to any attempt by plaintiffs' counsel to use the stipulations concerning Dr. Khakoo and Bonny McTaggart to argue plaintiffs' case against WVUH is or was anything other than a medical professional liability [cause] of action."
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> (iii) Appellants summarized their allegations in their pre-trial memorandum as follows: "As a direct and proximate result of the negligent failure of the Defendants to exercise the proper degree of skill, care and learning required of reasonable prudent healthcare providers, Plaintiff, Allison J. Riggs, was required to incur medical bills and suffer agonizing physical pain and suffering, mental anguish and anxiety and permanent physical injury. As a direct and proximate result of the negligent failure of the defendants to exercise the proper degree of skill, care and learning required of reasonable prudent healthcare providers, Plaintiff, Jack E. Riggs, incurred expenses and costs which were unnecessary and burdensome."
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> (iv) In their supplemental discovery disclosures the Appellants stated that Grant O. Westenfelder, M.D., FACP ("Dr. Westenfelder"), would be their expert "in this medical professional negligence case." The Appellants stated that Dr. Westenfelder would "testify to a reasonable degree of medical probability" that WVUH "deviated from the standard of care" by failing to adequately inform and warn physicians, staff and patients regarding an "ongoing endemic/epidemic Serratia problem" In a subsequent supplemental disclosure the Appellants admitted that "[t]his medical malpractice action

arises out of an intra-operative infection[.]" It was further stated that each expert was expected to testify "to a reasonable degree of medical probability" that WVUH "deviated from the standard of care" in (1) determining the source of serratia infections; (2) investigating, remediating and monitoring a serratia epidemic "which proximately resulted in Ms. Allison Riggs' contracting a nosocomial serratia infection"; (3) "failing to implement appropriate standards to locate, identify, isolate and remediate a nosocomial serratia epidemic"; and/or (4) "failing to take appropriate affirmative actions to locate, identify, isolate and remediate a nosocomial serratia epidemic[.]"

(v) During voir dire, Appellants informed the jurors that their injuries and damages were "a result of the hospital failing to meet the applicable standard of care in monitoring the infectious disease control procedures within the hospital and perhaps in some other ways that they were guilty of medical negligence[.]"

(vi) The Appellants requested that the jury be instructed regarding the legislative purpose behind the MPLA and the elements of a MPLA claim both by their proposed jury instructions and during arguments regarding the trial court's proposed jury charge. In their discussions with the trial court, regarding the jury instructions, Appellants acknowledged that they "tried to state the statutory burden of proof verbatim" in their proposed instructions. After reviewing the trial court's proposed instruction, Appellants' counsel stated "I think that's an accurate statement of medical malpractice or negligence, degree of care, skill and learning. . . I like it."

(vii) During the discussion by Appellants on their proposed instruction involving legislative findings regarding an insurance crisis in this State and the need for the MPLA, Appellants' counsel stated "let's say by some chance we win and we have all these caps that come in to reduce the verdict. If that happens, this hospital is self-insured so all those caps for the benefit of an insurance crisis I'm going to argue are inapplicable to a self-contained limit."

> (viii) The trial court, without objections, instructed the jury under the law applicable to medical malpractice. The trial court did not give "any" instruction on premises liability or a pure negligence theory of liability.

Justice Starcher's dissent avoids any direct confrontation with the above facts. Instead, his dissent patches together a few inconsequential statements, taken totally out of context, in order to try and show that the case was intended to be tried as a non-medical malpractice case. The surrealistic characterization of the record by Justice Starcher invokes the saying, "'[*o*]*h, what a tangled web we weave,* [*w*]*hen first we practice to deceive!*'" *McGraw v. Imperial Mktg.*, 196 W. Va. 346, 359 n.41, 472 S.E.2d 792, 805 n.41 (1996) (quoting Sir Walter Scott, Marmion, Poetical Works 89, 161 (J. Logie Robertson ed. 1967)). Clearly the above undisputed facts reveal to everyone, except Justice Starcher, that all the parties and the trial judge understood that the case was being prosecuted under the MPLA.

2. Judicial estoppel was properly applied. In Justice Starcher's dissent he argues that "[r]arely is the doctrine [of judicial estoppel] invoked to mean legal theories in the same case, because Rule 8(e)(2) of the Rules of Civil Procedure specifically allows competing legal positions." I do not disagree with Justice Starcher that it is rare for judicial estoppel to be applied to prevent a party from changing legal theories. I also do not disagree that Rule 8(e)(2) permits alternative theories to be pled. We pointed out in *West Virginia Department of Transportation, Division of Highways v. Robertson*, that "[t]he doctrine of

judicial estoppel does not conflict with Rule 8(e)(2), which permits a party to plead inconsistent theories, because judicial estoppel does not bar a party from contradicting itself, the doctrine bars contradicting a court's determination that was based on that party's position." 217 W. Va. 497, 504 n.18, 618 S.E.2d 506, 513 n.18 (2005) (quoting Cleckley, Davis, & Palmer, *Litigation Handbook* § 3(f) (Supp. 2005)).

I part company with Justice Starcher's dissent on the issue of the Appellants' obtaining a verdict on a theory of medical malpractice, and then attempting to change legal theories to obtain a verdict they would otherwise not be entitled to receive. Rule 8(e)(2) was not designed to support this type of manipulative tactic. Under this rule, a party may set out alternative legal theories in a pleading and, if the evidence supports the same, have a jury instructed on all of the alternative legal theories. *See Sydenstricker v. Mohan*, 217 W. Va. 552, 563, 618 S.E.2d 561, 572 (2005) (holding that doctrine of judicial estoppel could not be applied to prevent a party from pleading alternative defenses because Rule 8(e)(2) permitted this). However, Rule 8(e)(2) does not sanction sandbagging a party by asserting a post-trial legal theory of recovery that was never raised in the pleadings, nor expressly or impliedly consented to by the parties. This situation is an affront to the integrity of the judicial process, not just the adversely affected party. Consequently, it is appropriate to reaffirm the integrity of the court by applying the doctrine of judicial estoppel to such conduct. *See Helfand v. Gerson*, 105 F.3d 530, 535 (9th Cir. 1997) ("[J]udicial estoppel

applies to a party's stated position, regardless of whether it is an expression of intention, a statement of fact, or a legal assertion. The integrity of the judicial process is threatened when a litigant is permitted to gain an advantage by the manipulative assertion of inconsistent positions, factual or legal.").

It has been correctly observed that "[t]he circumstances under which judicial estoppel may appropriately be invoked are not reducible to any general formulation of principle." *Barringer v. Baptist Healthcare of Oklahoma*, 22 P.3d 695, 699 (Okla. 2001). Even so, it is generally recognized that "[s]ince judicial estoppel precludes parties from misrepresenting the facts in order to gain an unfair advantage, once 'a party has formally asserted a certain version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.'" *Carrigg v. Cannon*, 552 S.E.2d 767, 771 (S.C. Ct. App. 2001) (quoting *Hayne Fed. Credit Union v. Bailey*, 489 S.E.2d 472, 477 (S.C. 1997)). The doctrine was "intended to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories." *Levinson v. United States*, 969 F.2d 260, 264 (7th Cir. 1992). In other words,

> Judicial estoppel is intended to protect the courts from the litigatory shenanigans that would result if parties could, without limitation or consequence, swap litigation positions like hats in successive cases based on simple expediency or self-benefit. Judicial estoppel shields the courts from being the instrument of such misconduct.

Jarrard v. CDI Telecomms., Inc., 408 F.3d 905, 915 (7th Cir. 2005). Indeed, "[t]he basic principle of judicial estoppel . . . is that absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory." *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 358 (3rd Cir. 1996). *See also New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S. Ct. 1808, 1814, 149 L. Ed. 2d 968 (2001) ("'[A]bsent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory.'" (quoting 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 4477, p. 782 (1981))); *King v. Herbert J. Thomas Mem'l Hosp*., 159 F.3d 192, 198 (4th Cir. 1998) ("To allow [plaintiff] to obtain benefits from two sources based on two incompatible positions, simply because the positions aid her claims for remuneration, would reduce truth to a mere financial convenience and would undermine the integrity of the judicial process. In the factual circumstances of this case, we conclude that the district court was well within its discretion in applying judicial estoppel to preclude [plaintiff] from asserting a necessary element of her West Virginia age discrimination case.").

A case that illustrates the application of the doctrine of judicial estoppel to prevent a party from changing his/her legal theory is *Van Deurzen v. Yamaha Motor Corp*., 688 N.W.2d 777 (Wis. Ct. App. 2004). In that case the plaintiff brought an action against

the defendants after a jet ski accident that resulted in the amputation of one of the plaintiff's arms.[7] On the day of trial the plaintiff argued that the case should be litigated under maritime law, and not the substantive laws of Wisconsin. The plaintiff was successful in convincing the trial court that the accident occurred on navigable waters and that maritime law should therefore apply. The defendants moved to dismiss the case on the grounds that the statute of limitations had run under maritime law. The trial court deferred ruling on the motion until after the jury verdict. A jury ultimately returned a verdict under maritime law that was favorable to the plaintiff. However, the verdict was set aside and the case dismissed after the trial court issued a ruling finding the maritime law statute of limitations had run on the claims. The plaintiff appealed on the grounds that maritime law did not apply to the case. The appellate court rejected the argument on the grounds that the doctrine of judicial estoppel prevented the plaintiff from changing his legal theory:

> This case presents a textbook example of judicial estoppel. . . . The [plaintiff] went to great lengths to persuade the court that Little Lake Butte des Morts was a navigable waterway. . . .
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> We hold that judicial estoppel precludes the [plaintiff] from asserting that maritime law was inapplicable to [his] case. When we invoke this doctrine, we determine independently the elements and the considerations involved. . . . Judicial estoppel has three identifiable boundaries: (1) the party's position is

[7]There were two other plaintiffs in the case.

> clearly inconsistent with his or her prior position; (2) the party to be estopped succeeded below in selling its position to the court; and (3) the facts at issue are the same. . . . The [plaintiff's] contention that maritime law is inapplicable because Little Lake Butte des Morts is not navigable clearly contradicts [his] position at trial that maritime law applied because the accident occurred on navigable waters. Moreover, this earlier position succeeded at trial.
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> . . . .
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> We conclude that the trial court's finding that Little Lake Butte des Morts was a navigable waterway constitutes a final historical fact which may not be revisited. Consequently, its application of maritime law was proper. . . . Thus, the doctrine of judicial estoppel applies.

Van Deurzen, 688 N.W.2d at 778-82. *See also Tangwall v. Looby*, 109 Fed. Appx. 12, 15 (6th Cir. 2004) ("[Plaintiff] cannot now assert a contradictory legal theory to prolong this litigation and extract more funds from the defendants personally or from the BFPT. The doctrine of judicial estoppel is designed to forestall precisely this kind of ploy.").

The decision in *Van Deurzen* is consistent with the majority opinion in the instant case. In *Van Deurzen* the plaintiff litigated his case under maritime law. The defendants' defense in the case was based upon maritime law. The trial court instructed the jury to return a verdict based upon principles of maritime law. In the instant proceeding the Appellants litigated their case under the MPLA. The case was defended by WVUH based upon the MPLA. The trial court instructed the jury to return a verdict based upon principles

of the MPLA. In *Van Deurzen* the jury returned a verdict in favor of the plaintiff. However, as a result of an adverse post-trial ruling, the plaintiff sought to change legal theories by arguing that maritime law did not apply to his case. In the instant matter the jury returned a verdict in favor of the Appellants. However, as a result of an adverse post-trial ruling, the Appellants sought to change legal theories by arguing that the MPLA did not apply to their case. The appellate court in *Van Deurzen* held that the doctrine of judicial estoppel precluded the plaintiff from changing his theory of the case. In the instant proceeding the majority also held that the doctrine of judicial estoppel precluded the Appellants from changing their theory of the case.

To summarize, the majority correctly determined that the Appellants are judicially estopped from claiming that the MPLA does not apply to their claim when the Appellants had earlier relied upon the MPLA to prosecute their case and obtain a favorable jury verdict. Because the opinion issued by the majority provides a well-reasoned discussion of the doctrine of judicial estoppel and correctly applies it to the facts of this case, I concur.