



IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA
IN RE: RALEIGH HEART CLINIC LITIGATION CIVIL ACTION NO. 18-C-5000

THIS DOCUMENT APPLIES TO ALL CASES

**ORDER APPROVING SETTLEMENT BETWEEN
PLAINTIFFS AND DEFENDANTS, THAIR BARGHOUTHI, M.D. AND
RALEIGH HEART CLINIC, INC.; PLAINTIFFS CLAIMS AGAINST
DEFENDANT CARDINAL HEALTH 414, LLC SHALL REMAIN PENDING**

FACTS AND PROCEDURAL HISTORY

1. Pursuant to Administrative Order entered on May 1, 2018, Chief Justice Margaret L. Workman referred the Raleigh Heart Clinic Cases to the Mass Litigation Panel. There are approximately one hundred twenty-two (122) of these civil actions currently pending before the Panel.

2. The actions (hereinafter, "Raleigh Heart Clinic Litigation") arise from multiple patients allegedly contracting viral hepatitis B and C following stress test procedures performed by Thair Barghouthi, M.D. and the Raleigh Heart Clinic, Inc. (hereinafter, "RHC Defendants"). It is alleged that Dr. Barghouthi reused syringes and vials of injectable medicine on multiple patients, resulting in the spread of viral hepatitis B and C. The injectable medicine involved in these cases is Cardiolite, and/or generic ^{99m}Tc sestamibi. This nuclear medicine was supplied exclusively by Cardinal Health 414, LLC ("Cardinal Health") during the relevant time period. Cardinal Health prepared, packaged, and distributed Cardiolite/^{99m}Tc sestamibi in such a way as to encourage multiple uses from each vial, resulting in the spread of blood borne pathogens and corresponding injuries to Plaintiffs. The actions were filed against RHC Defendants and Cardinal Health.

3. To date, the Resolution Judges assigned to the Raleigh Heart Clinic Litigation have conducted mediation on one occasion. *Case Management and Scheduling Order* entered October 30, 2018 (Transaction ID 62611705); *Order Continuing January 24-25, 2019 Mediation* entered January 2, 2019 (Transaction ID 62811084); *Order Rescheduling Mediation and Governing Mediation and Mediation Statements* entered March 7, 2019 (Transaction ID 63042604).

4. Prior to the mediation, all Individual Plaintiffs executed a Settlement Authorization consenting to their respective counsel's authority to negotiate and settle all claims they may have arising out of the alleged injuries. Said authorizations were provided to the Panel prior to the mediation.

5. The Raleigh Heart Clinic Litigation did not resolve at mediation. However, Plaintiffs' counsel and counsel for RHC Defendants have continued to work in good faith to negotiate the outstanding claims and have informed this Court that a tentative settlement has been reached as to those parties. To date, the Plaintiffs' claims against Cardinal Health have not been resolved.

ORDER

The Presiding Judges have reviewed and considered *Plaintiffs' Motion to Approve Settlement with Defendants, Thair Barghouthi, M.D. and Raleigh Heart Clinic, Inc.; Plaintiffs Claims Against Defendant Cardinal Health 414, LLC Shall Remain Pending* (Transaction ID 63297049) and *Defendants, Raleigh Heart Clinic, Inc. and Thair Barghouthi, M.D.'s Joinder in Plaintiffs' Motion to Approve Settlement with Defendants, Thair Barghouthi, M.D. and Raleigh Heart Clinic, Inc.; Plaintiffs' Claims Against Defendant Cardinal Health 414, LLC Shall Remain Pending* (Transaction ID 63298139). A hearing was held on June 28, 2019 on these Motions,

and no party asserted an objection to the Motions. Having conferred with one another to ensure uniformity of their decisions, as contemplated by West Virginia Trial Court Rule 26.07(a), the Presiding Judges unanimously **FIND** that:

1. Pursuant to Administrative Order entered on May 1, 2018, Chief Justice Margaret L. Workman referred the Raleigh Heart Clinic Litigation to the Mass Litigation Panel. “An order from the Chief Justice granting a Motion to Refer to the Mass Litigation Panel is a transfer of Mass Litigation to the Panel.” Trial Court Rule 26.07(a).

2. The Supreme Court has adopted “a process for efficiently managing and resolving mass litigation which includes the establishment of a Mass Litigation Panel.” Trial Court Rule 26.01.

3. Pursuant to Trial Court Rule 26.05(a), the Panel has a duty to “develop and implement case management and trial methodologies to fairly and expeditiously resolve Mass Litigation referred to the Panel by the Chief Justice.” The Panel shall “take such action as is reasonably necessary and incidental to the powers and responsibilities conferred by this rule or by the specific directive of the Chief Justice.” Trial Court Rule 26.05(f).

4. After considering the due process rights of the parties, the Presiding Judge assigned to Mass Litigation is authorized “to adopt any procedures deemed appropriate to fairly and efficiently manage and resolve Mass Litigation.” Trial Court Rule 26.08 (d).

5. Pursuant to the Mass Litigation Panel’s inherent authority and duty under Trial Court Rule 26 to fairly and efficiently manage and expeditiously resolve Mass Litigation, the Panel is obligated to protect all Plaintiffs in Mass Litigation referred to the Panel where the amount of damages may exceed the funds available to settle all cases, and to ensure that Mass

Litigation proceedings do not put one Plaintiff or action in a better position in terms of resolution than any other Plaintiff or action referred to the Panel.

6. Recognizing the potential for conflicts of interests and the risk of unfairness to individual litigants, the Panel instituted a procedure for conducting fairness hearings in Mass Litigation cases where there are aggregate settlements. See e.g., *In Re: Flood Litigation*, Civil Action No. MC Flood 7/8/2001; *In Re: Mingo County Coal Slurry Litigation*, Civil Action No. 10-C-5000; and *In Re: Float-Sink Litigation*, Civil Action No. 11-C-5000000.

7. Subsequently, the Supreme Court amended Rule 1.8 of the Rules of Professional Conduct and added a number of Comments, including Comments [13-18], which became effective on January 1, 2015. Rule 1.8(g) provides that, “A lawyer who represents two or more clients shall not participate in making an aggregate or mass tort settlement of the claims of or against the clients...unless each client gives informed consent, in a writing signed by the client.” Comments [13-18] to Rule 1.8 extensively discuss the potential for conflicts of interest and unfairness to individual litigants in aggregate and mass tort settlements. Significantly, Comment [13] to Rule 1.8 provides that “[a] non-class action aggregate or mass tort settlement is a settlement of the cases of two or more individuals in which the settlement of the cases *is not based solely on individual case-by-case settlement negotiations*. In such situations potential conflicts of interest exist, thus posing a risk of unfairness to individual litigants.” (Emphasis added.)

8. An aggregate settlement is not required in all cases assigned to the Mass Litigation Panel, and no order has been entered by the Panel in the Raleigh Heart Clinic Litigation, or any other litigation for that matter, which requires the parties to enter into an

aggregate settlement. That being said, the Panel is advised that RHC Defendants have tendered an aggregate amount for the settlement of all actions.

9. Because it is unclear whether there are sufficient resources, including insurance coverage, to satisfy all of the claims for damages asserted in this litigation, the Panel has a duty to protect the settlement funds for all litigants and to ensure that Mass Litigation proceedings do not put one Plaintiff or action in a better position in terms of resolution than any other Plaintiff or action referred to the Panel.

10. Given the limited nature of the funds at issue, the Panel finds that it is in the best interest of all Plaintiffs to accept the proposed settlement offer negotiated between the above-referenced parties and previously disclosed to the Panel through the *Plaintiffs' Motion to Approve Partial Settlement with Defendants, Thair Barghouthi, M.D. and Raleigh Heart Clinic, Inc.; Plaintiffs Claims Against Defendant Cardinal Health 414, LLC Shall Remain Pending* (Transaction ID 63297049).

11. The Panel finds that is in the best interest of all Plaintiffs to establish certain deadlines to fairly and equitably distribute said monies to Individual Plaintiffs.

Based upon the foregoing, the Court hereby ORDERS that:

12. Within thirty (30) days of entry of this Order, RHC Defendants shall provide a settlement check, made payable to The Segal Law Firm Client Trust Account fbo Hep C clients, in the full settlement amount to Plaintiffs' Lead counsel.

13. Once Plaintiffs' Lead counsel receives the settlement funds, the Plaintiffs' claims against RHC Defendants shall be dismissed with prejudice.

14. The Court finds that the settlement between the Plaintiffs and the RHC Defendants for RHC Defendants' applicable insurance policy limits is a good faith settlement

and, as such, extinguishes the cross-claims of Cardinal Health for contribution and/or implied indemnity. See Board of Education of McDowell County v. Zando Martin & Milstead, Inc., 390 S.E.2d 796 (W. Va. 1990), Smith v. Monongahela Power Co., 429 S.E.2d 643 (W. Va. 1993), Hager v. Marshall, 505 S.E.2d 640 (W. Va. 1998). Therefore, the Court dismisses Cardinal Health's cross-claims against the RHC Defendants as to its claims for contribution and implied indemnity. However, Cardinal Health's cross-claim for contractual indemnity against the RHC Defendants is not dismissed and the RHC Defendants will remain a party to the case.

15. At the hearing on August 2, 2019, Counsel for all Plaintiffs will submit to this Panel a proposed distribution plan/formula of said settlement funds that takes into consideration the limited nature of the funds while still protecting the Plaintiffs' interests. This distribution plan/formula shall be communicated to each Individual Plaintiff and informed consent to the distribution plan/formula shall be obtained by each Individual Plaintiff's attorney and provided to the Panel under seal. Said informed consent shall supplement the prior informed consent (Authorizations) already provided to the Panel.

16. Certified notice of the August 2, 2019 hearing shall be provided to all Individual Plaintiffs, should any Individual Plaintiff choose to dispute their distribution of this settlement.

17. No monies from the proposed partial settlement shall be distributed from the Segal Law Firm's trust account to any individual Plaintiffs until further Order of this Court.

18. Following further Order of this Court and upon distribution of the settlement monies to the Individual Plaintiffs, each Individual Plaintiff shall execute the Release and Settlement Agreement (Transaction ID 63297049) and the original executed release shall be provided to the RHC Defendants.

A copy of this Order will be electronically served on all counsel of record this day.

It is so **ORDERED**.

ENTERED: July 22, 2019.

/s/ Jay M. Hoke
Lead Presiding Judge
Raleigh Heart Clinic Litigation