



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. AND UPDATE
ON STATUS OF INFORMED CONSENT OF ALL INDIVIDUAL PLAINTIFFS**

FACTS AND PROCEDURAL HISTORY

1. On May 1, 2018, Chief Justice Margaret Workman referred the Raleigh Heart Clinic cases to the Mass Litigation Panel by Administrative Order. There are currently one hundred twenty-four (124) of these civil actions pending before the Mass Litigation 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. It is alleged that this nuclear medicine was supplied exclusively by Cardinal Health 414, LLC ("Cardinal Health") during the relevant time period. It is further alleged that 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.¹

¹ Paragraph 2 of this section supersedes and specifically replaces Paragraph 2 of this Court's previously entered "Order Approving Settlement Between Plaintiffs and Defendants, Thair Barghouthi, M.D. and Raleigh Heart Clinic, Inc.; Plaintiffs Claims Against Cardinal Health 414, LLC Shall Remain Pending" entered July 22, 2019 (Transaction ID 63568073).

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 previously 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 had previously informed this Court that a tentative settlement has been reached as to those parties at a status hearing on a preliminary hearing to approve the partial settlement with the RHC Defendants.

6. Thereafter, Plaintiffs' counsel informed all Plaintiffs of the proposed aggregate settlement in accordance with the West Virginia Rules of Professional Conduct. Additionally, each Plaintiff was provided with notice of the hearing scheduled for August 2, 2019, had they chosen to object to the proposed settlement with the RHC Defendants.

7. On August 2, 2019, the hearing was held on Plaintiffs' request for final approval of the settlement with the RHC Defendants.

8. Out of the 124 Plaintiffs, 122 returned signed informed consent letters along with releases for all claims against the RHC Defendants to their respective attorneys. Neither of the

two Plaintiffs who did not consent to the settlement appeared at the hearing themselves or through counsel. However, one Plaintiff who originally did not consent to the settlement did sign consent and sign a release after the August 2, 2019 hearing.

RULINGS

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). 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 26.1.

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 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 case *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, which was the entirety of all available insurance proceeds in this matter.

9. Because it is clear that there are insufficient 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 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. After being advised of the settlement details and their prospective individual settlements, 123 of the 124 individual Plaintiffs gave informed consent of the settlement in writing. This is consistent with the intent of the aggregate settlement consent as explained in

Rule 1.8, even though this consent could only be obtained after an aggregate amount was determined.

12. It is in the best interest of all Plaintiffs to approve the settlement with the RHC Defendants, and Plaintiffs' counsel shall begin to disburse the settlement monies so as to not further delay the proceedings and the distribution of funds to individual Plaintiffs.

Based upon the foregoing, the Court hereby ORDERS that:

13. Plaintiffs' lead counsel may deposit the settlement check from the RHC Defendants into their IOLTA account.

14. Upon entry of this order, Plaintiffs' counsel may disburse all settlement funds to each other firm to be further disbursed to their individual Plaintiffs in accordance with their contract for legal services and the previously entered into informed consent letter. It is expressly understood that each respective firm may take their contracted fee and expenses for each individual case.

15. The funds allocated to the individual plaintiff who did not consent to the settlement shall remain in their attorney's IOLTA account until either the client agrees to their respective settlement or until further Order of this Court.

16. Counsel for the individual Plaintiff who did not consent to the settlement shall file, under seal, the informed consent letter that was sent to their respective client, including any and all attachments thereto, to be made a part of that individual Plaintiff's record in the case.

17. Counsel for the individual Plaintiff who did not consent to the settlement may move to withdraw as counsel for that individual in accordance with the *West Virginia Trial Court Rule and Rules of Professional Conduct*.

18. Counsel for individual Plaintiffs whose cases are not proceeding against Cardinal Health shall file the appropriate motion and proposed orders upon entry of this Order.

19. All objections and exceptions to the Court's rulings are preserved as to each party.

A copy of this Order is this day electronically served on all counsel of record via File & Serve*Xpress*.

It is so **ORDERED**.

ENTER: August 20, 2019.

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