

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2001 Term

FILED

December 11, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

RELEASED

December 12, 2001
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 29161

BRIAN W. ROWE,
Plaintiff Below, Appellee,

v.

SISTERS OF THE PALLOTTINE MISSIONARY SOCIETY,
a non-profit corporation,
Defendant Below, Appellant.

Appeal from the Circuit Court of Cabell County
Honorable John L. Cummings, Judge
Civil Action 88-C-916

AFFIRMED

Submitted: September 19, 2001
Filed: December 11, 2001

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JUSTICE STARCHER delivered the Opinion of the Court.

CHIEF JUSTICE MCGRAW concurs, and reserves the right to file a separate opinion.

JUSTICE DAVIS concurs, in part, and dissents, in part, and reserves the right to file a separate opinion.

JUSTICE MAYNARD concurs, in part, and dissents, in part, and reserves the right to file a separate opinion.

SYLLABUS BY THE COURT

1. “As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is *de novo*.” Syllabus Point 1, *State v. Hinkle*, 200 W.Va. 280, 489 S.E.2d 257 (1996).

2. “A party is not barred from recovering damages in a tort action so long as his negligence or fault does not equal or exceed the combined negligence or fault of the other parties involved in the accident.” Syllabus Point 3, *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879 (1979).

3. In a medical malpractice claim, a health care provider is not entitled to a comparative negligence instruction requiring a jury to consider the plaintiff’s negligent conduct that triggered the plaintiff’s need for medical treatment. Plaintiffs who negligently injure themselves are entitled to subsequent, non-negligent medical treatment. If a health care provider renders negligent medical treatment, regardless of the event that triggered the need for medical treatment, plaintiffs are entitled to an undiminished recovery in a tort action for any damages proximately caused by that negligent medical treatment.

4. “Contributory negligence on the part of the plaintiff is an affirmative defense. There is a presumption of ordinary care in favor of the plaintiff, and where the defendant relies upon contributory negligence, the burden of proof rests upon the defendant to show such negligence unless it is disclosed by the plaintiff’s evidence or may be fairly inferred by all of the evidence and circumstances surrounding the case.” Syllabus Point 6, *Leftwich v. Wesco Corp.*, 146 W.Va. 196, 119 S.E.2d 401 (1961)

(*overruled on other grounds by Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879 (1979)).

5. For a health care provider to establish the defense of comparative negligence, the health care provider must prove, with respect to the plaintiff's conduct after medical treatment is initiated, that: (1) the plaintiff owed himself a duty of care; (2) the plaintiff breached that duty; and (3) the breach was a proximate cause of the damages the plaintiff sustained.

6. "In order to obtain a proper assessment of the total amount of the plaintiff's contributory negligence under our comparative negligence rule, it must be ascertained in relation to all of the parties whose negligence contributed to the accident, and not merely those defendants involved in the litigation." Syllabus Point 3, *Bowman v. Barnes*, 168 W.Va. 111, 282 S.E.2d 613 (1981).

7. Without some proof of negligence by the plaintiff, there is no requirement that the jury be instructed to ascertain or apportion fault between the defendant and a non-party tortfeasor.

8. "It is improper for counsel to make arguments to the jury regarding a party's omission from a lawsuit or suggesting that the absent party is solely responsible for the plaintiff's injury where the evidence establishing the absent party's liability has not been fully developed." Syllabus Point 2, *Doe v. Wal-Mart Stores, Inc.*, ___ W.Va. ___, ___ S.E.2d ___ (No. 26012, Dec. 7, 2001).

9. *W.Va. Code*, 55-7B-9 [1986], by its own terms, applies only to the parties to a medical professional liability action, and does not apply to non-party tortfeasors.

Starcher, Justice:

In this medical malpractice action from the Circuit Court of Cabell County, we are asked to examine a judgment order adopting a jury's verdict awarding damages to appellee, Brian W. Rowe ("Mr. Rowe"). The appellant is the Sisters of Pallottine Missionary Society, which does business as St. Mary's Hospital. The appellant hospital contends that the circuit court erred in refusing to instruct the jury on the principles of comparative negligence.

As set forth below, we find the circuit court correctly refused to give comparative negligence instructions to the jury. We therefore affirm the circuit court's judgment order.

I.
Facts & Background

On the afternoon of Sunday, September 6, 1987, 17-year-old appellee Brian W. Rowe lost control of his motorcycle while participating in a motocross event. During the crash, the motorcycle tumbled onto Mr. Rowe's left leg, injuring his knee. Mr. Rowe was transported by ambulance to the emergency room of the appellant, St. Mary's Hospital.

Mr. Rowe arrived at St. Mary's Hospital at approximately 4:05 p.m., where his left leg was examined by emergency room nurses. Over the course of the next 2½ hours, the nurses made extensive notes in Mr. Rowe's patient file. The notes indicate that Mr. Rowe complained of severe pain in his left knee and numbness in his foot. The nurses were repeatedly unable to find a pulse in Mr. Rowe's lower left leg and foot either by palpitation or with the assistance of a portable Doppler ultrasound device.

Mr. Rowe was also examined by a St. Mary's Hospital emergency room physician, Dr. Willard F. Daniels,¹ a defendant below. Dr. Daniels noted tenderness and swelling in the left knee and lower left leg, and he had difficulty finding – but claimed he did find – a pulse in Mr. Rowe's lower leg and foot. A nurse testified that she told Dr. Daniels that she was unable to detect a pulse in Mr. Rowe's foot, that she asked Dr. Daniels why she wasn't getting a pulse, and that Dr. Daniels replied, "I don't know[.]" While x-rays showed fragments of bone in Mr. Rowe's knee joint, Dr. Daniels noted in the patient file that Mr. Rowe had a "severe sprain, [left] knee."

Mr. Rowe was discharged at 6:20 p.m. to be taken home by his mother. He was given instructions to elevate his left leg and apply ice to the knee. Mr. Rowe was also told that the nurses could not find a pulse in his lower leg, but that this condition was probably caused by the swelling, and that a pulse would return when the swelling went down. Mr. Rowe was instructed to make an appointment with an orthopedist several days later, and was told that in the meanwhile, if his pain continued or became worse, he should return to St. Mary's emergency room.

That night, Mr. Rowe's knee and leg continued to swell, and the pain intensified. His parents called several physicians by phone, and one agreed to see Mr. Rowe at 10:00 a.m. the next morning at Cabell Huntington Hospital's emergency room.

An examination revealed that Mr. Rowe had a dislocated knee and a lacerated popliteal artery, an artery which passes behind the knee joint and provides circulation to the lower leg. Because of the loss of blood flow, the physician contemplated amputation of the lower left leg. However, after

¹As will be discussed later, Dr. Daniels settled with Mr. Rowe prior to trial.

extensive surgery to repair the knee and artery, to relieve pressure on the leg and to remove dead tissue, the lower leg was saved. Mr. Rowe was hospitalized for 35 days, and currently has significant impairment to the use of his left leg.

The appellee, Mr. Rowe, subsequently brought a lawsuit against Dr. Daniels and against appellant St. Mary's Hospital for negligence. In October 1996, after 8 years of litigation, the appellee settled his cause of action against Dr. Daniels for \$270,000.00, and the case proceeded to trial against the hospital alone.

At trial, the appellee asserted that St. Mary's nurses had breached the standard of care by not adequately advocating his interests when he was discharged with unexplained and unaddressed symptoms. The appellee presented evidence that St. Mary's policy -- and the guiding standard of care for all emergency room nurses -- was that when a nurse "believe[d] that appropriate care [was] not being administered to a patient by a physician," the nurse was to report the situation to a supervisor who would discuss it with the doctor. If that did not alleviate the problem, the matter was to be referred up the chain of command so that another doctor could evaluate the problem.²

²The parties presented the following stipulation, in part, to the jury:

[S]hould there be an occasion when an RN believes that appropriate care is not being administered to a patient by a physician, the following procedure shall occur:

One, the RN will discuss her concerns with the physician. If, after the discussion, she still feels that the care is inappropriate, she will report it to the clinical manager, if available, or the patient care coordinator on duty.

Secondly, the clinical manager or patient care coordinator will weigh the factors involved and if she feels that the concern is valid, she will discuss it with the physician. If nothing is done to ease her concern, she will contact nursing administration.

(continued...)

The appellee argued that St. Mary's nurses repeatedly found no pulse in his lower left leg or foot, and that when Dr. Daniels did not address this serious symptom, the nurses did not properly report the problem to a supervisor, or otherwise seek another medical opinion. As the plaintiff's expert stated:

[T]he nurses at St. Mary's Hospital failed to advocate for Brian Rowe in the sense that they knew that he had compromised circulation to his left leg. He had no pulse. He was not able to move his foot. He had no sensation in his foot. . . . [T]he nurses did not intervene with the physician and try to influence his care so that he would have gotten further medical care to address those serious problems.

The evidence showed that, instead of following the hospital's policy, the emergency room nurses simply made notes of their findings in Mr. Rowe's medical file, as one nurse said, "I guess basically to cover myself."

A jury returned a verdict against the appellee hospital for \$880,186.00. A judgment order adopting the jury's verdict, with an offset for Dr. Daniels' settlement, was entered on September 13, 1999. The hospital now appeals the circuit court's judgment order.

II.

²(...continued)

Thirdly, nursing administration will discuss it with the clinical manager and contact the chief of service for guidance and assistance. If nursing administration, after discussion with the chief of services, feels that appropriate action still has not been taken, the problem will then be referred to the assistant executive director of medical affairs.

The director of medical affairs will contact the attending physician and/or chief of service. Should appropriate action not be taken at this level, the director of medical affairs will contact the president of the medical staff.

Nursing administration may at any point in time request the assistance from administration.

Standard of Review

In the instant case, we are asked to review the circuit court's refusal to give certain instructions to the jury. We held, at Syllabus Point 1 of *State v. Hinkle*, 200 W.Va. 280, 489 S.E.2d 257 (1996), that:

As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is *de novo*.

III.

Discussion

The appellant, St. Mary's Hospital, argues that the jury should have been instructed on principles of comparative negligence, and been required to assess the contributory negligence of the appellee, Mr. Rowe; the negligence of Dr. Daniels, who settled prior to trial; and the negligence of other individuals, namely the physicians who consulted on the appellee's case by telephone with the appellee's parents, but who would not see the appellee the night of his accident.

Under the comparative negligence doctrine, a plaintiff is not entitled to recover from a negligent tortfeasor if the plaintiff's own contributory negligence equals or exceeds the combined negligence or fault of the other parties involved in the accident or occurrence. As we stated in Syllabus Point 3 of *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879 (1979):

A party is not barred from recovering damages in a tort action so long as his negligence or fault does not equal or exceed the combined negligence or fault of the other parties involved in the accident.

In operation, the jury must apportion the comparative fault of parties in special interrogatories. 163 W.Va. at 343, 256 S.E.2d at 885-86. The plaintiff's percentage of fault is then deducted from the gross award of the jury, 163 W.Va. at 343, 256 S.E.2d at 886, and the defendants may seek contribution from other defendants in accordance with their percentage of fault.

The appellant contends that the jury should have been instructed to consider the contributory negligence of the appellee, and apportion comparative fault between the appellee and the appellant hospital. The appellant argues that the appellee's own conduct in crashing his motorcycle caused many of his injuries. Furthermore, when the appellee was discharged at 6:20 p.m., he and his mother were told that if his condition persisted or became worse, he should be brought back to St. Mary's emergency department. When his condition did not improve later that night, and the appellee's parents did not return him to the emergency room, the appellant argues the appellee was negligent and contributed to his injury.

We begin by addressing the appellant's first argument, that the appellee's own conduct in crashing his motorcycle contributed to his injury, and that the jury should have been instructed to consider whether this conduct was a proximate cause of the appellee's damages. We find nothing in the record to suggest that the appellee's crash was caused by negligence, but for purposes of this argument, we will assume the appellee's conduct was negligent.

A majority of courts hold that a health care provider cannot compare the plaintiff's negligent conduct that triggered the plaintiff's need for treatment with the health care provider's later negligence in treating the plaintiff. *See* M. Orr, "Defense of Patient's Contribution to Fault in Medical Malpractice Actions," 25 Creighton L.Rev. 665, 687 (1992). The reason for this rule is simple and obvious:

[A] physician simply may not avoid liability for negligent treatment by asserting that the patient's injuries were originally caused by the patient's own negligence. "Those patients who may have negligently injured themselves are nevertheless entitled to subsequent non-negligent medical treatment and to an undiminished recovery if such subsequent non-negligent treatment is not afforded."

Fritts v. McKinne, 934 P.2d 371, 374 (Okla.Ct.App. 1996) (reversing and remanding for a new trial because jury was instructed to consider plaintiff's drunk driving, which caused the accident for which he was subsequently negligently treated, as evidence of the patient's comparative negligence in the malpractice action), quoting *Martin v. Reed*, 200 Ga.App. 775, ___, 409 S.E.2d 874, 876-77 (1991) (holding that a jury is not authorized to find that even though subsequent treatment and diagnosis did constitute malpractice, a recovery therefor is barred because the original car accident was caused by plaintiff). See also, *Huffman v. Thomas*, 26 Kan.App.2d 685, 994 P.2d 1072 (1999) (physician could not introduce evidence that decedent negligently placed truck on lift as defense to negligent treatment); *Harvey ex rel. Harvey v. Mid-Coast Hospital*, 36 F.Supp.2d 32 (D.Me. 1999) (principles of comparative fault do not apply in a medical malpractice action where plaintiff attempted suicide and hospital subsequently negligently administered treatment).

We therefore hold that in a medical malpractice claim, a health care provider is not entitled to a comparative negligence instruction requiring a jury to consider the plaintiff's negligent conduct that triggered the plaintiff's need for medical treatment. Plaintiffs who negligently injure themselves are entitled to subsequent, non-negligent medical treatment. If a health care provider renders negligent medical treatment, regardless of the event that triggered the need for medical treatment, plaintiffs are entitled to an

undiminished recovery in a tort action for any damages proximately caused by that negligent medical treatment. The circuit court did not abuse its discretion in refusing to give an instruction on this issue.

Next, we examine the appellant's argument that it was entitled to an instruction requiring the jury to consider whether the plaintiff was contributorily negligent in not returning to the St. Mary's emergency room.

In the context of medical malpractice actions, courts usually place extreme limits upon a health care provider's use of the defense of comparative negligence. Courts do this because of the "disparity in medical knowledge between the patient and the physician," and because of the "patient's justifiable reliance on the [physician's] recommendations and care." M. Orr, "Defense of Patient's Contribution to Fault in Medical Malpractice Actions," 25 Creighton L.Rev. 665, 677 (1992). *See also, Judy v. Grant Co. Health Dept.*, ___ W.Va. ___, ___, ___ S.E.2d ___, ___ (Slip. Op. at 8)(No. 29637, Nov. 30, 2001) (*per curiam*) ("The physician-patient relationship differs substantially from that of the ordinary plaintiff and defendant' This is so because of the great disparity in medical knowledge between 'doctor and patient.'"). We recognized over a century ago that the doctrine of contributory negligence has a limited use in the medical negligence field when we stated:

It is the duty of the patient to co-operate with the physician, and to conform to his prescriptions and directions, and if he neglect to do so, he can not hold the physician responsible for his own neglect. On the other hand, he has a right to rely upon the instructions and directions of his physician and incurs no liability by so doing.

Syllabus Point 3, in part, *Lawson v. Conaway*, 37 W.Va. 159, 16 S.E. 564 (1892). *See also Jenkins v. Charleston General Hospital & Training School*, 90 W.Va. 230, 110 S.E. 560 (1922).

In any action -- medical malpractice or otherwise -- the defendant carries the initial burden of proving an affirmative defense such as comparative negligence. As we stated in Syllabus Point 6 of *Leftwich v. Wesco Corp.*, 146 W.Va. 196, 119 S.E.2d 401 (1961)(*overruled on other grounds* by *Bradley v. Appalachian Power Co.*, *supra*):

Contributory negligence on the part of the plaintiff is an affirmative defense. There is a presumption of ordinary care in favor of the plaintiff, and where the defendant relies upon contributory negligence, the burden of proof rests upon the defendant to show such negligence unless it is disclosed by the plaintiff's evidence or may be fairly inferred by all of the evidence and circumstances surrounding the case.

To establish the defense of comparative negligence in a medical malpractice claim, the defendant must establish that the plaintiff has committed each of the elements of negligence:

In order to establish the defense of comparative negligence [the defendant] had to prove each of the elements of negligence: that [the plaintiff] owed herself a duty of care, that she breached that duty and that the breach was the proximate cause of the damages she sustained. Proximate cause means that the alleged wrong of the party caused the damage. There must be such a natural, direct and continuous sequence between the negligent act and the injury that it can reasonably be said that but for the act, the injury would not have occurred.

Borenstein v. Raskin, 401 So.2d 884, 886 (Fla.App. 1981). *See also, Riegel v. Beilan*, 788 So.2d 990, 991 (Fla.App. 2000) (“To establish the defense of comparative negligence, the medical defendants had to prove each of the following elements of negligence: (1) The patient . . . owed himself a duty of care; (2) the patient breached that duty; and (3) the breach was the proximate cause of the damages the patient sustained.”). We similarly stated in *Bradley* that “before any party is entitled to recover, it must be shown that the negligence of the defendant was the proximate cause of the accident and subsequent injuries. The

same is true of contributory fault or negligence. Before it can be counted against a plaintiff, it must be found to be the proximate cause of his injuries.” *Bradley*, 163 W.Va. at 342-343, 256 S.E.2d at 885.

We therefore hold that for a health care provider to establish the defense of comparative negligence, the health care provider must prove, with respect to plaintiff’s conduct after medical treatment is initiated, that: (1) the plaintiff owed himself a duty of care; (2) the plaintiff breached that duty; and (3) the breach was a proximate cause of the damages the plaintiff sustained.

Examining the record in the instant case, we find no evidence in the record indicating that Mr. Rowe breached any duty of care he may have owed himself. It appears that Mr. Rowe and his family were told he had no pulse in his lower left leg and foot, but they were also told that the pulse would return when the swelling went down. Dr. Daniels’ erroneous diagnosis was a sprain to the left knee. Mr. Rowe was advised to keep ice on the knee and elevate his leg. He was advised to return to the appellant’s emergency room if his condition worsened, without being given any timetable for making that evaluation. He was advised to see an orthopedic specialist later in the week. Had Mr. Rowe’s parents not called other physicians, and arranged for Mr. Rowe to be promptly seen the following morning, it is possible that he might have lost his leg.

We stated in 1892, in *Lawson v. Conaway*, *supra*, that a patient “has a right to rely upon the instructions and directions of his physician and incurs no liability by so doing.” Mr. Rowe appears to have followed the instructions of his physician, and returned to an emergency room the next day. We cannot, on this record, find that Mr. Rowe breached any duty of care.

Additionally, we note that when contributory negligence by the patient arises as an issue in a medical malpractice context, there is often a need for the defendant to offer expert testimony on the

issue; usually only experts can testify regarding the proximate effect that a patient's negligence may have had to aggravate the patient's medical condition. *Lambert v. Shearer*, 84 Ohio App.3d 266, 285, 616 N.E.2d 965, 977 (1992); *Barton v. Owen*, 71 Cal.App.3d 484, 506, 139 Cal.Rptr. 494, 506 (1977). "In much the same way that laymen [on the jury] are not qualified to judge whether a doctor has been negligent because of their lack of common knowledge on the subject, they also are not qualified from a medical standpoint to determine the effects of the 'negligent' acts of the plaintiff." *Barton*, 71 Cal.App.3d at 506, 139 Cal.Rptr. at 506.

We find no affirmative evidence in the record, and the appellant directs us to none, indicating that Mr. Rowe was negligent in the time he took to go to another emergency room, nor do we find any evidence that the passage of this time was a proximate cause of any portion of his damages. We therefore conclude that the circuit court did not abuse its discretion, and correctly refused to instruct the jury to consider whether Mr. Rowe was contributorily negligent.

The appellant hospital also contends that the jury should have been instructed to consider the negligence of Dr. Daniels, and to consider the negligence of the other doctors telephoned by Mr. Rowe's parents the night of his injury.³ The appellant argues that the circuit court erred by refusing to instruct the jury that it could apportion comparative negligence between these non-party tortfeasors and the appellant hospital.

³The appellant contends that these other doctors, by refusing to see Mr. Rowe that night, essentially "abandoned" the appellee and thereby proximately caused his injuries. See *McAllister v. Weirton Hospital Co.*, 173 W.Va. 75, 312 S.E.2d 738 (1983); *Howell v. Biggart*, 108 W.Va. 560, 152 S.E. 323 (1930); *Young v. Jordan*, 106 W.Va. 139, 145 S.E. 41 (1928).

In *Bowman v. Barnes*, 168 W.Va. 111, 282 S.E.2d 613 (1981), we held at Syllabus

Point 3 that:

In order to obtain a proper assessment of the total amount of the plaintiff's contributory negligence under our comparative negligence rule, it must be ascertained in relation to all of the parties whose negligence contributed to the accident, and not merely those defendants involved in the litigation.

As *Bowman v. Barnes* makes clear, the comparative negligence doctrine applies only when a plaintiff has been contributorily negligent -- the negligence of the plaintiff in causing his or her injury is ascertained in relation to all other tortfeasors.⁴

Consequently, without some proof of negligence by the plaintiff, there is no requirement that the jury be instructed to ascertain or apportion fault between the defendant and a non-party tortfeasor.⁵

⁴In those instances where a defendant intends to shift some degree of fault to a non-party tortfeasor, one court proposed the following rule in a medical malpractice action:

To prove the nonparties' negligence, Defendant had to show (1) the nonparties owed the patient a duty recognized by law, (2) the nonparties breached the duty by departing from the proper standard of medical practice recognized in the community, and (3) the acts or omissions complained of proximately caused the patient's death.

Jaramillo v. Kellogg, 126 N.M. 84, 86, 966 P.2d 792, 794 (1998).

⁵Between tortfeasors who have asserted claims for contribution, however, an instruction allowing a jury to apportion fault may be necessary so as to allow the tortfeasors to ascertain their degrees of joint and several liability. The concept of joint and several liability is a doctrine separate from the comparative negligence doctrine. As we held in Syllabus Point 2 of *Sitzes v. Anchor Motor Freight, Inc.*, 169 W.Va. 698, 289 S.E.2d 679 (1982), joint and several liability among joint tortfeasors was not changed by the adoption of the comparative negligence doctrine. When contribution claims have been asserted between joint tortfeasors, the relative fault of the various tortfeasors is relevant, and a jury could be properly instructed to assess the fault of the joint tortfeasors.

Additionally, when a tortfeasor seeks contribution or otherwise seeks to share liability with other tortfeasors, we have said:

“West Virginia jurisprudence favors the consideration, in a unitary trial,

(continued...)

See Travelers Ins. Co. v. Ballinger, 312 So.2d 249, 251 (Fla.App. 1975). More importantly, even if the plaintiff is guilty of some contributory negligence, in the absence of substantial evidence, an attorney cannot make an “empty chair” argument and blame an absent tortfeasor for a plaintiff’s injury. As we recently stated in Syllabus Point 2 of *Doe v. Wal-Mart Stores, Inc.*, ___ W.Va. ___, ___ S.E.2d ___ (No. 26012, Dec. 7, 2001):

It is improper for counsel to make arguments to the jury regarding a party’s omission from a lawsuit or suggesting that the absent party is solely responsible for the plaintiff’s injury where the evidence establishing the absent party’s liability has not been fully developed.

In the instant action, the only parties are the plaintiff-appellee, Mr. Rowe, and the defendant-appellant, St. Mary’s Hospital -- and as we indicated above, the appellant failed to establish a cognizable issue at trial as to whether the appellee was in any way contributorily negligent. Accordingly, the only issue at trial was whether the appellant was negligent, and whether the appellant’s negligence proximately caused the appellee’s damages. Without more, the alleged negligence of other non-party tortfeasors would appear to be irrelevant, and argument or instructions regarding the liability of the non-party tortfeasors improper.

⁵(...continued)

of all claims regarding liability and damages arising out of the same transaction, occurrence or nucleus of operative facts, and the joinder in such trial of all parties who may be responsible for the relief that is sought in the litigation.”

Syllabus Point 4, *Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC*, 209 W.Va. 318, 547 S.E.2d 256 (2001).

In the instant action, appellant St. Mary’s Hospital is the sole party tortfeasor. It does not appear from the record that any cross- or counter-claims for contribution have been asserted.

The appellant, however, asserts that it was still entitled to an instruction allowing the jury to apportion fault between itself and the other, alleged non-party tortfeasors. The appellant directs our attention to a portion of the Medical Professional Liability Act, *W.Va. Code*, 55-7B-9(b) [1986], which states:

In every medical professional liability action, the court shall make findings as to the total dollar amount awarded as damages to each plaintiff. The court shall enter judgment of joint and several liability against every defendant which bears twenty-five percent or more of the negligence attributable to all defendants. The court shall enter judgment of several, but not joint, liability against and among all defendants which bear less than twenty-five percent of the negligence attributable to all defendants.

The statute provides that, if a defendant in a medical professional liability action is less than 25% at fault for a plaintiff's damages, then the defendant is liable only for that percentage share of the plaintiff's damages. The appellant contends that, had the jury been instructed to consider the fault of Dr. Daniels and the other doctors called by the appellee's parents, it might have returned a verdict showing the appellant was less than 25% at fault -- and therefore, St. Mary's would not be required to pay most of the outstanding balance of the judgment order. However, a plain reading of the statute leads us to reject the appellant's argument.

“[G]enerally the words of a statute are to be given their ordinary and familiar significance and meaning [.]” *Amick v. C & T Development Co., Inc.*, 187 W.Va. 115, 118, 416 S.E.2d 73, 76 (1992). “It is not for this Court arbitrarily to read into [a statute] that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.” *Banker v. Banker*, 196 W.Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996).

W.Va. Code, 55-7B-9, by its own terms, applies only to the parties to a medical professional liability action, and does not apply to non-party tortfeasors. The first paragraph of the section makes clear that the section applies only “[i]n the trial of a medical professional liability action against a health care provider involving multiple defendants[.]” *W.Va. Code*, 55-7B-9(a). The Legislature specifically chose the terms “plaintiff” and “defendant” in discussing joint and several liability in *W.Va. Code*, 55-7B-9(b) -- we decline to read these terms to mean “potential defendants” or other non-parties to the action, as the appellant urges.

Dr. Daniels had settled and was dismissed from the action, and none of the other alleged tortfeasors was brought into the litigation, by either the appellee or the appellant. Dr. Daniels and the other alleged tortfeasors were not “defendants” in the trial. We therefore conclude that the circuit court did not err in refusing to charge the jury to assess the comparative negligence of Dr. Daniels or any other non-party.⁶

IV. *Conclusion*

⁶The appellant also contends that certain arguments made by the appellee’s counsel during closing argument were prejudicial. The appellant’s counsel did not make a contemporaneous objection to any of these arguments, nor did the appellant ask for a curative instruction before the jury retired for its deliberations. Instead, after the jury began deliberating, the appellant made a motion for a mistrial which was denied by the circuit court. We have repeatedly held that a party’s failure to make a timely objection to improper closing argument, and to seek a curative instruction, waives the party’s right to raise the question on appeal. *See* Syllabus Point 6, *Yuncke v. Welker*, 128 W.Va. 299, 36 S.E.2d 410 (1945); Syllabus Point 6, *McCullough v. Clark*, 88 W.Va. 22, 106 S.E. 61 (1921). We decline to address the contentions raised by the appellant.

The appellant also contends that the verdict was excessive. In light of the evidence in the record regarding the extensive nature of the appellee’s injuries, we also decline to address this argument.

Finding no error in the circuit court's rulings, we affirm the September 13, 1999 judgment order for the appellee.

Affirmed.