IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

JOSEPH MOELLENDICK,	*	
	*	
Plaintiff,	*	
	*	
vs.	*	Case No. 18-C-118
	*	
ROLAND F. CHALIFOUX, JR., D.O. and ROLAND F. CHALIFOUX, JR., D.O., PLLC, a West Virginia Professional Limited Liability Company,	*	
	*	
Defendants.	*	

ORDER DENYING DEFENDANTS, ROLAND F. CHALIFOUX, JR., D.O., AND ROLAND F. CHALIFOUX, JR., D.O., PLLC'S COMBINED MOTION FOR PLACEMENT OF ALLEGED NON-PARTIES ON VERDICT FORM

The Defendants moved the Court, pursuant to W. Va. Code §55-7B-9, to place certain non-parties on the verdict form at the trial of this medical professional liability action. The Plaintiff opposed that motion and the Defendants submitted their reply in further support.

For the reasons set forth below, the Court hereby DENIES the Defendants' motion.

I. FINDINGS OF FACT:

The parties agree that this case arises out of an operative procedure performed on the Plaintiff by the Defendant, Roland Chalifoux, D.O., on April 4, 2017. Specifically, and on that date, Dr. Chalifoux attempted to insert a pain-control device, known as a spinal cord stimulator trial, in the area surrounding Mr. Moellendick's spine. The Plaintiffs contend that Dr. Chalifoux deviated from the standard of care in two respects. First, the Plaintiff alleges that the SCS trial was not indicated in the first place. Second, the Plaintiff alleges that Dr. Chalifoux deviated from the standard of care by performing the SCS trial even though Mr. Moellendick was taking Plavix and Aspirin at the time. The Plaintiffs further contend that as a result of Dr. Chalifoux's deviations

from the standard of care, Mr. Moellendick went on to develop a spinal hematoma, resulting in multiple medical problems, including paraplegia.

Following his treatment with Dr. Chalifoux, Mr. Moellendick went to Summa Health System, Akron City Hospital. While at Akron City Hospital, an MRI revealed the hematoma and Mr. Moellendick received surgery intended to address that condition.

On June 21, 2018, the Plaintiff commenced this civil action against Dr. Chalifoux and his professional corporation. The Plaintiff did not name any other defendants and has made no allegation that anyone other than Dr. Chalifoux is responsible for his injuries. Although the Defendants seek to include non-parties on the verdict form, the Defendants have not filed any third-party complaint and contend that they cannot file such a complaint. *See Defendants' Mot.* at 5-6.

The Court is unable to identify the specific individuals subject to this motion because the Defendants themselves do not identify the individuals and entities they wish to place on the verdict form. Instead, the Defendants ask the Court for the following relief:

> [E]nter an Order finding that certain alleged non-parties, including Summa Health d/b/a Summa Health System Akron Campus aka Akron City Hospital and/or one or more of its affiliates such as: Summa Health System, Summa Health System Corporation, or Summa Physicians, Inc., and/or one or more health care providers working there (sometimes hereinafter "Akron Providers"), be placed on the verdict form for purposes of apportioning fault as provided by West Virginia Medical Professional Liability Act ("MPLA"), at W. Va. Code Section 55-7B-9.
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> ...
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> [T]he Court should permit this evidence to reach the jury, and should instruct the jury to consider this evidence and the conduct of the Akron providers when apportioning fault if it renders a verdict for the Plaintiff.

Defendants' Mot. at 1, 5. For the reasons set forth below, the Court DENIES the Defendants' request.

II. CONCLUSIONS OF LAW:

The Defendants concede that they seek permission to "introduce medical expert opinion testimony and other evidence regarding the negligence and fault of certain non-party Akron providers, and that said non-parties shall be placed on the verdict form for the apportionment of fault by the jury pursuant to West Virginia Code Section 55-7B-9." *Defendants' Mot* at 7-8.[1] The operative statute, W. Va. Code §55-7B-9, states, in relevant part, as follows:

> (a) In the trial of a medical professional liability action under this article **involving multiple defendants**, the trier of fact shall report its findings on a form provided by the court which contains each of the possible verdicts as determined by the court. Unless otherwise agreed by all the parties to the action, the jury shall be instructed to answer special interrogatories, or the court, acting without a jury, shall make findings as to:
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> (1) The total amount of compensatory damages recoverable by the plaintiff;
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> (2) The portion of the damages that represents damages for noneconomic loss;
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> (3) The portion of the damages that represents damages for each category of economic loss;
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> (4) The percentage of fault, if any, attributable to each plaintiff; and
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> (5) The percentage of fault, if any, attributable to each of the defendants.
>
> (b) The trier of fact shall, in assessing percentages of fault, consider the fault of all **alleged parties, including the fault of any person who has settled a claim with the plaintiff arising out of the same medical injury**.

[1] The Defendants suggest that W. Va. Code § 55-7-13d may be a "potential mechanism" for the relief they now request. *See Defendants' Mot.* at 4 n. 2. However, the Defendants also concede that this code provision falls "outside the MPLA" and "that the 2015 amendments to several liability found in West Virginia Code Section 55-7-13a-d do not apply to MPLA cases." *Id.* at 7 n.5. Further, W. Va. Code § 55-7-13d must be read in conjunction with W. Va. Code § 55-7-13c, which is expressly inapplicable to MPLA claims like the present. *See* W. Va. Code § 55-7-13c(i)(3). The MPLA, which applies to this action, contains its own several liability provision, W. Va. Code § 55-7B-9, which the Court will apply here.

(emphasis supplied).

As in any case where statutory language in clear and unambiguous, the Court is obligated to apply the statute as written. According to the plain language of W. Va. Code §55-7B-9, the jury must apportion fault in any case involving more than one defendant. That does not apply to this case where there is one and only one alleged tortfeasor.[2] The statute also contemplates the jury's consideration of "alleged parties," such as individuals who previously settled with a plaintiff.

The issue, then, is whether the unnamed Akron healthcare providers are "alleged parties" with respect to this case. The Court concludes that they are not.

The Plaintiff makes no claim against any healthcare provider in Akron. Thus, the Akron healthcare providers are not "alleged parties" based on the Complaint. The Defendants take the position that "they are not permitted to file a third-party complaint for contribution, and that they have no claims for implied or express indemnity." *Defendants' Mot.* at 6. Accordingly, the Plaintiffs have not alleged that the Akron healthcare providers should be parties. The Defendants argue that they cannot make these claims as a matter of law. The Akron healthcare providers cannot be "alleged parties" in this circumstance.

Further, even if the jury were to conclude that unnamed Akron healthcare providers were negligent in treating Mr. Moellendick's hematoma, including them on the verdict form would be futile. In Syl. Pt. 1, *Rine v. Irisari*, 187 W. Va. 550 (1992), the West Virginia Supreme Court of Appeals held as follows:

> A negligent physician is liable for the aggravation of injuries resulting from subsequent negligent medical treatment, if foreseeable, where that subsequent medical treatment is undertaken to mitigate the harm caused by the physician's own negligence.

[2] The claims against Dr. Chalifoux's professional corporation sound in vicarious liability.

Along similar lines, the West Virginia Supreme Court of Appeals held as follows in Syl. Pts. 2 & 3, *Thorton v. CAMC*, 158 W. Va. 504 (1975):

> 2. If an injured person uses ordinary care in selecting a physician or hospital, then the law regards an injury resulting from the negligence of the physician or hospital as a part of the immediate and direct damages which naturally flow from the original injury.
>
> 3. As the law regards the negligence of the one who caused the original injury as the proximate cause of the aggravated injuries occurring by reason of the negligence of the treating physician or hospital, the original tort-feasor is liable for all damages, including the successive damages inflicted by the physician or hospital.

Thus, under *Rine* and *Thorton*, Dr. Chalifoux would be responsible for any injuries caused by the Akron healthcare providers. Thus, there is no reason to ask the jury to attribute any responsibility to them.

Finally, the Court takes note of the prejudice that would fall on the Plaintiff if this motion were granted. Essentially, the Defendants seek to blame unnamed healthcare providers for unspecified conduct, all while conceding that these individuals and entities will not be named parties to this case and will, thus, have no incentive or opportunity to defend themselves. In this environment, the Plaintiff would not only have to prosecute his claims against Dr. Chalifoux, he would have to defend the unnamed Akron healthcare providers against ambiguous charges, all at enormous cost.

The Defendants concede that the relief they are requesting is something akin to the inclusion of the Akron healthcare providers under Rule 14 of the West Virginia Rules of Civil Procedure. Thus, the guidance of the West Virginia Supreme Court of Appeals on that type of interpleader is instructive:

> A trial court may, in exercising its discretion whether to allow a party to file a third-party complaint pursuant to Rule 14(a) of the West Virginia Rules of Civil Procedure, consider the following

> factors: (1) the potential prejudice to the original plaintiff or to the third-party defendant; (2) whether a third-party complaint would delay or unduly complicate the trial; (3) the timeliness of the motion; (4) judicial efficiency; and (5) whether the proposed third-party complaint states a claim upon which relief can be granted.

Syl. Pt. 1, *Cava v. National Union Fire Ins., Co.*, 232 W. Va. 503 (2013). With these factors in mind, this motion should be DENIED.

III. CONCLUSION:

For these reasons, the Defendants' motion is DENIED. The jury will not be instructed on any alleged fault of the Akron health care providers, nor will the jury be asked to apportion fault to any of them on the verdict form.

It is so **ORDERED** this 25TH day of SEPT., 2020.

The Clerk of this Court is directed to forward an attested copy of this Order to all counsel of record.

JUDGE JEFFREY D. CRAMER

A Copy Teste:
Joseph M. Rucki, Clerk
By Deborah Hall Deputy