IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

DOCKET NO. 21-0763

STATE OF WEST VIRGINIA EX. REL. JOHN CHERIAN, M.D. and WEIRTON MEDICAL CENTER,

Petitioners,

v.

THE HONORABLE RONALD E. WILSON, Presiding judicial officer of the Circuit Court Of Ohio County, KEVIN and MARGARET CRAFT

Respondents.

PETITION FOR WRIT OF PROHIBITION

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QUESTION PRESENTED

1. Whether the Circuit Court clearly erred as a matter of law in denying Defendants' Motion to Rescind Consent for Supplemental Expert Witness Disclosure and to Limit Expert Testimony, thereby permitting Plaintiffs to assert new theories of negligence outside the applicable statute of limitations and in violation of the procedural requirements set forth in the Medical Professional Liability Act ("MPLA"), W. Va. Code §§ 55-7B-1 *et seq.*, thereby prejudicing Defendants?

STATEMENT OF THE CASE

The instant medical professional liability action was initiated against the Defendants, Weirton Medical Center ("WMC") and John Cherian, M.D. ("Dr. Cherian"), by the filing of a Summons and Complaint on or about April 17, 2019. *See* Appendix, pages 001-006.

For nearly two years, Plaintiffs' entire case, pleadings, and discovery centered on criticisms of Dr. Cherian in connection with the management of anticoagulation medications for Kevin Craft during a cardiac procedure on July 4, 2017. Plaintiffs allege that WMC is vicariously liable for the actions of Dr. Cherian in connection with the same anticoagulation management of the July 4, 2017 procedure.

Mr. Craft, at the time a fifty-nine-year-old male, presented to WMC on July 4, 2017, via ambulance. Mr. Craft had complaints of chest pain, back pain, nausea, and sweating. During transport, an electrocardiogram ("EKG") was sent to WMC showing an inferior wall myocardial infarction. The on-call cardiologist, Dr. Cherian, and his cath lab team were alerted. Upon Mr. Craft's arrival and presentation to WMC emergency department, but before he could be taken to the cath lab, Mr. Craft went into ventricular fibrillation ("V-fib") and was shocked multiple times with recovery of sinus bradycardiac rhythm with pulse.

Mr. Craft subsequently underwent emergency heart catheterization for myocardial infarction by way of stent placement in his left anterior descending artery ("LAD") and right coronary artery ("RCA"), which was performed by Dr. Cherian. Dr. Cherian employed Angiomax, an anticoagulant, during the procedure, which was stopped at the conclusion of the heart catheterization at approximately 15:26.

Mr. Craft initially tolerated the procedure well. However, shortly after closure (approximately 15:43) and immediately after being moved to the transfer cart, Mr. Craft suffered bradycardic arrest. He was instantly placed back on the table. Shocks from the defibrillator were

given. Mr. Craft suffered acute stent thrombosis, and an intra-aortic balloon pump was inserted as well as an external pacemaker. At 15:57, Angiomax was restarted and ran until 17:07. During this procedure, Mr. Craft also received additional medications for anticoagulation.

Pursuant to W. Va. Code § 55-7B-6, Plaintiffs filed a Screening Certificate of Merit signed by John Pirris, M.D. ("Dr. Pirris"), stating:

> The standard of care required Dr. Cherian to cover Mr. Craft with anti-coagulants throughout his procedure. Specifically, Mr. Craft should have been adequately covered with Heparin (the 1,000 units at 1436 was far too little) and he should have been receiving Angiomax throughout the course of the peri-operative period. At the conclusion of this procedure, he also needed to be covered with oral Brillinta [*sic*]. None of this was done. Instead, Mr. Craft went over 30 minutes with no anticoagulation therapy at all. That is a significant deviation from the standard of care on the part of Dr. Cherian.

See Appendix, pages 007-009 (emphasis added).

Consistent with Dr. Pirris' theory, Plaintiffs' Complaint sets forth specific allegations of negligence against Dr. Cherian.

> 16. The Defendant, John Cherian, M.D., was negligent, breached the standard of care, and breached his duties to Kevin Craft in each of the following ways:
>
> A. Failing to exercise that degree of care, skill and learning required of expected of a reasonable, prudent, health care provider acting in the profession or class to which he belonged acting in the same or similar circumstances.
>
> B. Failing to provide adequate Heparin coverage in connection with the July 4, 2017 procedure.
>
> C. Failing to provide timely and adequate Angiomax coverage in connection with [t]he July 4, 2017 procedure.
>
> D. Failing to provide adequate and timely Brilinta coverage in connection with the July 4, 2017 procedure.

See Appendix, pages 001-006.

Plaintiffs filed their Expert Witness Disclosure on July 29, 2020, and provided the

following description of the alleged breach of standard of care testimony to be offered at trial by their expert witness Dr. Pirris:

> It is anticipated that Dr. Pirris will testify but [*sic*] Dr. Cherian breached this standard of care by failing to appropriately cover Mr. Craft with anticoagulants throughout the peri-operative period, including that failure to administer Brillinta [*sic*] in a timely fashion. Indeed, Mr. Craft went over 30 minutes with no anticoagulation therapy at all which is a deviation from the standard of care.

See Appendix, pages 010-016.

All motions to amend pleadings were due by January 1, 2020. *See* Appendix, pages 017-018. Plaintiffs were required to disclose all experts on or before July 30, 2020, and make any motion to add additional experts by September 29, 2020. *See* Appendix, pages 019-020. Notably, the pleadings were never amended and no additional experts were disclosed by the respective deadlines.

A pre-trial conference was held on October 23, 2020. Defendants, in compliance with local procedure, indicated their intent to challenge Plaintiffs' use of Dr. Pirris, a cardiothoracic surgeon, for standard of care and causation testimony against Defendant, Dr. Cherian, an interventional cardiologist. As an apparent acknowledgement of Dr. Pirris' inability to satisfy the qualification requirements set forth by both Rule 702 of the West Virginia Rules of Evidence and W. Va. Code § 55-7B-6, Plaintiffs filed a Motion for Leave to File a Supplemental Expert Witness Disclosure following the pre-trial conference. Plaintiffs indicated that the purpose of their motion was to "simply substitute one expert into this case in the place of another for the purposes of streamlining the issues and avoiding otherwise unnecessary controversies" due to Defendants' proposed challenge. *See* Appendix, pages 021-043. Importantly, Plaintiffs represented to the court and counsel, **"this substitution will not add any additional issues into this case"** and assured that **"there will be no prejudice to any party."** *See* Appendix, pages 021-043 (emphasis added).

By way of their Motion for Leave, Plaintiffs represented to the court and counsel that they simply sought to swap Dr. Pirris for Martin Zenni, M.D. ("Dr. Zenni"), an interventional cardiologist. Consistent with the assurances given to the court and its litigants, Plaintiffs' proposed Supplemental Expert Witness Disclosure was **identical** to their original Expert Witness Disclosure except for the change in expert names. *See* Appendix, pages 021-043. Because of the aforementioned assurances, Defendants agreed to move forward in good faith in order to avoid unreasonable expense to the parties as the substitution would not result in new allegations of negligence against Dr. Cherian. The parties then worked together to prepare and submit an agreed upon order for the substitution of Dr. Zenni for Dr. Pirris, which was submitted to the court on March 18, 2021, and granted on March 23, 2021. *See* Appendix, pages 044-045.

With the above understanding surrounding Dr. Zenni's prospective involvement as an expert witness, Defendants were scheduled to take his deposition on March, 23, 2021. On Friday, March 19, 2021, the day after the proposed order permitting Dr. Zenni's substitution was submitted to the court, Plaintiffs' counsel provided Defendants with a Supplemental Expert Witness Disclosure that was materially different from the Supplemental Expert Witness Disclosure submitted to the court as an attachment to Plaintiffs' Motion for Leave. Notably, this disclosure added entirely new allegations of negligence nearly four years after the incident that is the subject of this litigation and two years since the filing of the Summons. Specifically, the new disclosure added the following:

> Dr. Zenni will also testify about the standard of care in terms of the interrelationship between Dr. Cherian's performance of the July 4, 2017 procedure itself and the relationship that performance and the anticoagulation, which cumulatively, constitute a deviation from the standard of care.

See Appendix, pages 046-049.

After reviewing the received disclosure on Monday, March 22, 2021, in anticipation of Dr.

Zenni's deposition, Defendants, for the first time since the inception of this case, were made aware that Plaintiffs were pursuing an additional and entirely new theory of negligence well beyond the statute of limitations. When seeking clarification from Plaintiffs' counsel regarding this material change to their Supplemental Expert Witness Disclosure, Defendants were advised:

> [I]t is my understanding that Dr. Zenni is of the opinion that Mr. Craft's graft clotting had a mechanical component to it in addition to the anticoagulant component. That is, I understand that Dr. Zenni believes that Dr. Cherian's stenting, in terms of location and size, combined with the lack of appropriate anticoagulants, to cause catastrophic clotting.

See Appendix, pages 050-051. In light of these new allegations, which had never been disclosed, pled, or even discussed in this matter, Dr. Zenni's deposition was cancelled.

With trial scheduled to commence on September 13, 2021, Defendants filed a Motion to Rescind Consent for Supplemental Expert Witness Disclosure and to Limit Expert Testimony on April 16, 2021. Following briefing by the parties, the Honorable Ronald E. Wilson entered an order dated August 17, 2021, denying Defendants' Motion to Rescind Consent for Supplemental Expert Witness Disclosure and to Limit Expert Testimony and continuing the trial date. *See* Appendix, pages 052-053. At a later status conference, trial in this matter was subsequently continued to August of 2022.

For the reasons set forth below, Defendants file the instant Petition for Writ of Prohibition before this Court, seeking relief from the lower tribunal's August 17, 2021 order of court, which Defendants maintain is clearly erroneous as a matter of law.

SUMMARY OF THE ARGUMENT

The August 17, 2021 Order of Court entered by the Honorable Ronald E. Wilson, of the Circuit Court of Ohio County, West Virginia denying Defendants' Motion to Rescind Consent for Supplemental Expert Witness Disclosure and to Limit Expert Testimony is clearly erroneous as a matter of law because it is in violation of the procedural requirements of the Medical Professional Liability Act ("MPLA") , W. Va. Code §§ 55-7B-1 et seq., and allows Plaintiffs to improperly assert new theories of negligence outside the applicable statute of limitations.

W. Va. Code § 55-7B-6 of the MPLA sets forth clear procedural requirements Plaintiffs must follow in order to properly pursue a professional negligence action under the MPLA. Specifically, a plaintiff must file a certificate of merit stating with particularity an expert's opinion on how the standard of care was breached. Further, the MPLA provides that claims of medical negligence must be brought within two years of the alleged negligence. Pursuant to those procedural requirements, Plaintiffs had timely pursued this professional negligence action based solely upon the theory that Dr. Cherian was negligent in his employment of certain anticoagulation medications during Mr. Craft's cardiac procedure.

In supplementing their disclosure, Plaintiffs, for the first time since the initiation of this action on April 17, 2019, attempted to allege that Dr. Cherian negligently performed Mr. Craft's cardiac procedure, which is an entirely new theory of medical negligence well beyond the applicable statute of limitations. Raising matters not timely pled or disclosed is clearly in violation of the MPLA. As a result, any attempt to raise new theories of negligence beyond those asserted in the Complaint and Screening Certificate of Merit, the original Expert Witness Disclosure, or in the agreed upon Supplemental Expert Witness Disclosure, should be precluded. Simply put, Plaintiffs' new allegations of negligence, at this juncture, are time-barred, contrary to law, inappropriate, and extremely prejudicial to Defendants.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary under Rule 18(a) of the West Virginia Rules of Appellate Procedure. This matter involves assignments of error in the application of settled law and should be set for oral argument pursuant to West Virginia Rule of Appellate Procedure 19.

ARGUMENT

I. THE CIRCUIT COURT CLEARLY ERRED AS A MATTER OF LAW IN DENYING DEFENDANTS' MOTION TO RESCIND CONSENT FOR SUPPLEMENTAL EXPERT WITNESS DISCLOSURE AND TO LIMIT EXPERT TESTIMONY, THEREBY PERMITTING PLAINTIFFS TO ALLEGE NEW ALLEGATIONS OF NEGLIGENCE IN VIOLATION OF THE MEDICAL PROFESSIONAL LIABLITY ACT AND BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS.

A. Standard of Review for Issuance of a Writ of Prohibition.

A writ of prohibition, an extraordinary remedy, is appropriate in circumstances where the trial court either has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W. Va. Code. § 53-1-1; *State ex rel. Suriano v. Gaughan*, 480 S.E. 2d 548, 554 (W.Va. 1996); Syl. Pt. 2, *State ex rel. Peacher v. Sencindiver*, 233 S.E. 2d 425 (W.Va. 1977). The factors to be considered for issuance of a writ of prohibition are well-established:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, the Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third fact, the existence of clear error as a matter of law, should be given substantial weight.

Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 483 S.E.2d 12 (W.Va. 1996). Defendants maintain that the current Order meets the above threshold criteria warranting the issue of a writ of prohibition.

Looking specifically at the determination of whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, as is the case here, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy

of effort and money among litigants, lawyers, and courts. However, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of clear statutory, constitutional, or common law mandate, which may be resolved independently of any disputed facts, and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance. Syl. Pt. 2, *State ex rel. Tucker Cty. Solid Waste Auth. V. W. Virginia Div. of Lab.*, 668 S.E.2d 217 (W.Va. 2008).

As discussed more fully below, the trial court's denial of Defendants' Motion to Rescind Consent for Supplemental Expert Witness Disclosure and to Limit Expert Testimony is clearly erroneous as a matter of law as it is in contravention of clear statutory law. Accordingly, this Court should grant a rule to show cause in prohibition.

B. Plaintiffs' Newly Asserted Allegations of Negligence Violate the Medical Professional Liability Act and Prejudice Defendants.

In order to properly pursue a professional negligence action under the Medical Professional Liability Act ("MPLA"), W. Va. Code §§ 55-7B-1 *et seq.*, Plaintiffs are required to file a Screening Certificate of Merit pursuant to W. Va. Code § 55-7B-6, which provides:

> The screening certificate of merit shall be executed under oath by a health care provider who is qualified as an expert under the West Virginia rules of evidence . . . and **shall state with particularity** . . . (A) The basis for the expert's familiarity with the applicable standard of care at issue; (B) the expert's qualifications; **(C) the expert's opinion as to how the applicable standard of care was breached**; (D) the expert's opinion as to how the breach of the applicable standard of care resulted in injury or death; and (E) a list of all medical records and other information reviewed by the expert executing the screening certificate of merit. A separate screening certificate of merit must be provided for each health care provider against whom a claim is asserted.

W. Va. Code § 55-7B-6 (emphasis added). The MPLA's notice provision exists to: (1) prevent the making and filing of frivolous medical mal practice claims and lawsuits; and (2) promote the pre-suit resolution of non-frivolous medical malpractice claims. *State ex rel. PrimeCare Medical*

of West Virginia, Inc. v. Faircloth, 835 S.E.2d 579, 589 (W.Va. 2019).

Pursuant to W. Va. Code § 55-7B-6, Plaintiffs filed a Screening Certificate of Merit signed by Dr. Pirris, setting forth their cause of action based solely on alleged negligent anticoagulation management of Mr. Craft:

> The standard of care required Dr. Cherian to cover Mr. Craft with anti-coagulants throughout his procedure. Specifically, Mr. Craft should have been adequately covered with Heparin (the 1,000 units at 1436 was far too little) and he should have been receiving Angiomax throughout the course of the peri-operative period. At the conclusion of this procedure, he also needed to be covered with oral Brillinta [*sic*]. None of this was done. Instead, Mr. Craft went over 30 minutes with no anticoagulation therapy at all. That is a significant deviation from the standard of care on the part of Dr. Cherian.

See Appendix, pages 007-009.

Consistent with Dr. Pirris' theory, Plaintiffs' Complaint sets forth specific allegations of negligence against Dr. Cherian concerning his anticoagulation management:

> 16. The Defendant, John Cherian, M.D., was negligent, breached the standard of care, and breached his duties to Kevin Craft in each of the following ways:
>
> A. Failing to exercise that degree of care, skill and learning required of expected of a reasonable, prudent, health care provider acting in the profession or class to which he belonged acting in the same or similar circumstances.
>
> B. Failing to provide adequate Heparin coverage in connection with the July 4, 2017 procedure.
>
> C. Failing to provide timely and adequate Angiomax coverage in connection with [t]he July 4, 2017 procedure.
>
> D. Failing to provide adequate and timely Brilinta coverage in connection with the July 4, 2017 procedure.

See Appendix, pages 001-006.

Plaintiffs filed their Expert Witness Disclosure on July 29, 2020, and provided the following description of the alleged breach of standard of care testimony to be offered at trial by

their expert witness Dr. Pirris:

> It is anticipated that Dr. Pirris will testify but [*sic*] Dr. Cherian breached this standard of care by failing to appropriately cover Mr. Craft with anticoagulants throughout the peri-operative period, including that failure to administer Brillinta [*sic*] in a timely fashion. Indeed, Mr. Craft went over 30 minutes with no anticoagulation therapy at all which is a deviation from the standard of care.

See Appendix, pages 010-016. Again, Plaintiffs' only criticism related to anticoagulation management. It is readily apparent that as of July 29, 2020, Plaintiffs' only theory of negligence was based upon Dr. Cherian's employment of certain anticoagulation medications during Mr. Craft's cardiac procedure. Notably absent from each and every pleading was any mention of stenting size, deployment, and/or any criticism of the "mechanical" component of the procedure whatsoever. For two years there was absolutely no advancement of any theory of liability outside of alleged negligent anticoagulation management.

As set forth prior, there was no indication that Plaintiffs intended on even substituting expert witnesses until after the pre-trial conference in October 2020. Only after that conference, and as the parties were nearly ready for trial, did Plaintiffs file a Motion for Leave to File a Supplemental Expert Witness Disclosure, indicating that the purpose of their motion was to "simply substitute one expert [, Dr. Zenni,] into this case in the place of another [expert, Dr. Pirris,] for the purposes of streamlining the issues and avoiding otherwise unnecessary controversies." *See* Appendix, pages 021-043. Plaintiffs further falsely represented to the court and its litigants that, "this substitution will not add any additional issues into this case" and assuring that "there will be no prejudice to any party." *See* Appendix, pages 021-043. Consistent with the assurances given to the court and its litigants, Plaintiffs' proposed Supplemental Expert Witness Disclosure was **identical** to their original Expert Witness Disclosure except for the change in expert names. *See*, Appendix, pages 010-016. As a result, Defendants consented to Plaintiffs' Motion for Leave

on March 18, 2021, which the court granted a few days later on March 23, 2021. *See* Appendix, pages 044-045. Consequently, as late as March 18, 2021, Plaintiffs' sole theory of negligence still remained limited to Dr. Cherian's employment of certain anticoagulation medications during Mr. Craft's cardiac procedure. **Specifically, five months past the pre-trial conference, almost at the end of discovery, and after their supplemental expert would have completed review and was disclosed, Plaintiffs theory of liability had not changed.**

Only after the parties submitted the agreed upon order to the court, Plaintiffs' counsel provided Defendants with its Supplemental Expert Witness Disclosure on March 19, 2021. Notably, this version of Plaintiffs' Supplemental Expert Witness Disclosure was materially different than the proposed Supplemental Expert Disclosure submitted to the court as an attachment to Plaintiffs' Motion for Leave. This disclosure added entirely new allegations of negligence:

> Dr. Zenni will also testify about the standard of care in terms of the interrelationship between Dr. Cherian's performance of the July 4, 2017 procedure itself and the relationship that performance and the anticoagulation, which cumulatively, constitute a deviation from the standard of care.

See Appendix, pages 046-049. This new theory was seemingly acknowledged by counsel:

> [I]t is my understanding that Dr. Zenni is of the opinion that Mr. Craft's graft clotting had a mechanical component to it **in addition** to the anticoagulant component. That is, I understand that Dr. Zenni believes that Dr. Cherian's stenting, in terms of location and size, combined with the lack of appropriate anticoagulants, to cause catastrophic clotting.

See Appendix, pages 050-051.

For the very first time in nearly **two years since the beginning of this case** and **almost four years since the at-issue incident**, Plaintiffs attempt to allege that Dr. Cherian negligently performed Mr. Craft's cardiac procedure, which is an entirely separate and distinct theory of negligence compared to the allegations set forth in Plaintiffs' Complaint and Screening Certificate

of Merit. This alleged theory of negligence was wholly absent from every pleading and disclosure. Moreover, in two years of litigation, not one deponent (including Dr. Cherian and the entire cardiac catheterization team) was questioned regarding this new theory of negligence, nor has any discovery request addressed this issue. Plaintiffs had two years to prepare their case, had all available medical records and imaging, and in not one instance, put forth any theory of liability other than Dr. Cherian's failure to properly anticogulate Mr. Craft. Moreover, Dr. Zenni arguably reviewed the records and agreed to serve as an expert witness (as evidenced by Plaintiffs' initial Motion to Supplement) and suspiciously never set forth any criticisms of the "mechanical component" of the procedure until immediately before his deposition. Again, there has never been a single explanation or justification for this overt omission and significant delay in disclosure. Consequently, Plaintiffs' new allegations of negligence should be precluded. Allowing these new allegations to go forward is in direct contravention of the MPLA.

Further, not only would allowing Plaintiffs' new theory of negligence to go forward violate the MPLA, Defendants will certainly be prejudiced by this untimely and unjustified disclosure. If a party fails to seasonably supplement its expert disclosures, a court does not abuse its discretion by limiting the witness' testimony to what has been disclosed. *State ex rel. Tallman v. Tucker*, 769 S.E.2d 502, 506 (W. Va. 2015). In deciding whether to permit late supplemental expert witness disclosures, the court may consider a number of factors, including (1) the explanation for making the supplemental disclosure at the time it was made; (2) the importance of the supplemental information to the proposed testimony of the expert, and the expert's importance to the litigation, (3) potential prejudice to an opposing party; and (4) the availability of a continuance to mitigate any prejudice. *Id.* Defendants address these factors in *seriatim*.

First, Plaintiffs' explanation for the timing of the proposed supplemental disclosure was to

"simply substitute one expert into this case in the place of another for the purposes of streamlining the issues and avoiding otherwise unnecessary controversies" due to Defendants' proposed challenge to Dr. Pirris' testimony. *See* Appendix, pages 021-043. Plaintiffs further indicated, **"this substitution will not add any additional issues into this case"** and assuring that **"there will be no prejudice to any party."** *See* Appendix, pages 021-043 (emphasis added). Notwithstanding Plaintiffs' representations to the court and its litigants, Plaintiffs' eventual Supplemental Expert Witness Disclosure added an entirely new theory of negligence, thus resulting in prejudice to Defendants as substantial time and expense had been spent in developing this case on an entirely different theory of liability.

Mr. Craft's cardiac procedure occurred over four years ago. All records and imaging were available to Plaintiffs well before their pleadings and expert disclosures were filed. No new evidence has been disclosed or received since Plaintiffs provided their original Expert Witness Disclosure. Plaintiffs cannot provide any reasonable basis for the timing of their Supplemental Expert Witness Disclosure or significant delay, aside from their desire to "merely substitute" Dr. Zenni for Dr. Pirris, which in turn changed this entire case.

It was specifically alleged to counsel and the Circuit Court that the importance of Dr. Zenni's involvement in this case was to cure the apparent issue regarding Defendants' proposed challenge to Plaintiffs' use of Dr. Pirris, a cardiothoracic surgeon, for standard of care and causation testimony against Defendant, Dr. Cherian, an interventional cardiologist. Plaintiffs, at no point, indicated a desire to alter, edit, or add allegations of negligence not previously disclosed or identified in their Screening Certificate of Merit, Complaint, or original Expert Witness Disclosure. To allow so now, is an error of law.

Defendants will undoubtedly suffer great prejudice should Dr. Zenni be permitted to testify

as to the newly asserted allegations of negligence included in Plaintiffs' Supplemental Expert Witness Disclosure. At the time Plaintiffs produced the edited version of their Supplemental Expert Witness Disclosure, the case had been ongoing for two years, and discovery was set to close in little over a month. As previously stated, all critical depositions had already been completed, extensive discovery exchanged, and expert witnesses retained with significant expense occurred in their review and preparation on the specifically identified issues. Specifically, Dr. Cherian had already been deposed for two-and-a-half hours on September 20, 2019. Four members of the cath lab had been deposed in October 2020. Neither Dr. Cherian nor any member of his team were asked a single question regarding stent location or sizing at their respective depositions. Every deposition centered upon the use of Angiomax and other anticoagulant drugs. Not one set of written discovery ever included a question regarding stent location or sizing.

Undoubtedly, one of the purposes of the discovery process under the civil procedure rules is to eliminate surprise; trial by ambush is not contemplated in the rules. *Graham v. Wallace*, 588 S.E.2d 167, 174 (W. Va. 2003). To permit Dr. Zenni to testify as to his opinions regarding stent location or sizing, or any matter not previously and properly identified throughout this litigation, would prejudice Defendants greatly. So as to avoid manifest injustice, Dr. Zenni's testimony at trial should be excluded, or at minimum, limited to the matters identified in Plaintiffs' original Expert Witness Disclosure.

While Defendants acknowledge that the trial has been continued in this matter, prejudice remains. Since the initiation of this action on April 17, 2019, Defendants have zealously prepared for trial based upon the allegations set forth in Plaintiffs' Screening Certificate of Merit and Complaint. Specifically, Defendants have prepared for trial in opposition to Plaintiffs' sole theory that Dr. Cherian was negligent in his use of certain anticoagulation medications during Mr. Craft's

cardiac procedure. To assert new allegations of negligence based upon records that have been available for years is simply improper, untimely, and in contravention of the MPLA. Accordingly, the rescheduling of trial cannot ameliorate the resulting prejudice to Defendants.

Moreover, the misrepresentations of counsel should have also warranted preclusion by the lower court. *See Woolwine v. Raleigh General Hosp.*, 460 S.e.2d 457, 462 (W.Va. 1995) (providing that a court may issue sanctions where a party's counsel intentionally or with gross negligence fails to obey an order of court to provide or permit discovery). In this respect, the lower court entered an order granting Plaintiffs' Motion for Leave to File a Supplemental Expert Witness Disclosure based upon counsel's representation to the court and its litigants that substituting Dr. Zenni in place of Dr. Pirris would be the only alteration. Plaintiffs' substitution was well beyond the court's August 31, 2020 deadline to disclose expert witnesses and should have otherwise been excluded without this representation.

It is clear, and Plaintiffs' counsel does not deny, the proposed Supplemental Expert Witness Disclosure submitted to the court on November 23, 2020, differs from the Supplemental Expert Witness Disclosure actually provided to Defendants on March 19, 2021. Whether this misrepresentation was done so intentionally or by gross negligence, Plaintiffs' surreptitious supplement is a clear violation of the court's March 23, 2021 order, the lower court's scheduling order, and in contravention to counsels' agreement, which permitted Plaintiffs to present its motion to the court as uncontested. Consequently, Dr. Zenni should have been excluded as an expert at trial by the lower court, or at a minimum, his testimony should have been limited to the information included in Plaintiffs' original Expert Witness Disclosure.

C. Plaintiffs' Supplemental Expert Disclosure Raises New Allegations of Negligence Barred by the Applicable Statute of Limitations.

The MLPA requires:

> A cause of action for injury to a person alleging medical professional liability against a health care provider . . . arises as the date of injury . . . and must be commenced within two years of the date of the injury, or within two years of the date when such person discovers, or with the exercise of reasonable diligence, should have discovered such injury, whichever last occurs.

W. Va. § 55-7B-4.

Instantly, the cardiac procedure in question occurred on July 4, 2017. Accordingly, Plaintiffs had until July 4, 2019, to assert a cause of action. *See* W. Va. § 55-7B-4.

Plaintiffs' attempt to raise new allegations of negligence within their Supplemental Expert Witness Disclosure constitutes a new cause of action, which necessitates the filing of an amended complaint. *See McCoy v. CAMC, Inc.*, 557 S.E.2d 378 (W. Va. 2001) (affirming the trial court's denial of plaintiff's motion to amend complaint where plaintiff's supplemental expert disclosure alleged a new theory of medical negligence not previously identified in their complaint, and plaintiff's delay was unreasonable).

To the extent Plaintiffs argue that Dr. Zenni's new theory of negligence does not constitute a new cause of action, the factual predicate underlying the Court's decision in *McCoy* is instructive. In *McCoy*, the plaintiff underwent double coronary bypass surgery at the Charleston Area Medical Center ("CAMC"), which was performed by Jay Requarth, M.D. ("Dr. Requarth") who was assisted by John Chapman, M.D. ("Dr. Chapman"). *Id.* at 380. The surgery was completed without incident; however, while recovering from surgery, the plaintiff's sternum separated causing him to develop a staph infection. *Id.* In his complaint, plaintiff alleged, *inter alia*, that the defendants carelessly or negligently moved him after his surgery, thus causing his sternum to separate. *Id.* at 380-81. Throughout the course of litigation, plaintiff failed to comply with various

discovery orders, namely the compelled disclosure of additional expert witness information of their expert Joseph Chiota, M.D. ("Dr. Chiota"), pursuant to Rule 26 of the West Virginia Rules of Civil Procedure. *Id.* Plaintiff eventually provided the requested expert disclosure information; however, the information provided related solely to a new allegation by Dr. Chiota that the underlying bypass surgery was not necessary. *Id.* at 382. Instructively, the court held that plaintiff's newly identified theory of negligence constituted a new cause of action, which necessitated the filing of an amended complaint. *Id.* at 383.

In the case *sub judice*, Plaintiffs' Supplemental Expert Witness Disclosure sets forth new allegations of negligence, which necessitates the filing of an Amended Complaint to include a new cause of action. *See id.* Similar to the *McCoy* case, Plaintiffs are attempting to include new allegations of negligence, which are entirely separate and distinct from the theories of negligence set forth in their Complaint and Screening Certificate of Merit. Accordingly, Plaintiffs should have moved to file an Amended Complaint within the applicable statute of limitations in order to properly and timely allege that Dr. Cherian negligently performed Mr. Craft's cardiac procedure.

However, Plaintiffs have failed to seek leave from the court to amend their Complaint at any point, and are now out of time to do so. The applicable two-year statute of limitations ran on July 4, 2019, and any attempt to amend and/or add new theories of negligence beyond July 4, 2019, must be strictly prohibited. It is well-established that a supplemental pleading that "creates an entirely new cause of action based upon facts different from those in the original complaint . . . will not relate back from statute of limitations purposes." *S. Env't, Inc/ v. Bell*, 854 S.E.2d 285, 292 (W.Va. 2020); *citing*, W.Va.R.C.P. 15. Accordingly, Plaintiffs' delay in bringing forth new allegations of negligence is unreasonable, untimely, and should not be permitted. *See State ex rel. Packard v. Perry*, 655 S.E.2d 548, 564 (W. Va. 2007) (providing that lack of diligence is

justification for a denial of leave to amend complaint where the delay is unreasonable and places the burden on the moving party to demonstrate some valid reason for his or her neglect and delay).

CONCLUSION

As set forth herein, the lower tribunal's order permitting Plaintiffs to assert new theories of negligence via the testimony of Dr. Zenni undoubtedly results in prejudice to Defendants, is clearly erroneous as a matter of law, and disregards the procedural law of the MPLA. Further, and because Defendants only consented to Plaintiffs' substitution of Dr. Zenni for Dr. Pirris on the explicit representation that he would testify consistent with the allegations in the Complaint, Screening Certificate of Merit, and original Expert Witness Disclosure, Defendants maintain that the lower tribunal's failure to permit them to rescind consent was in error.

WHEREFORE, Petitioners-Defendants pray this Honorable Court:

1. Issue a Rule to Show Cause to Respondents to demonstrate why Petitioners' requested relief should not be granted;

2. Order Oral Argument before the Court pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure;

3. Prohibit the enforcement of the Circuit Court's March 23, 2021 Order of Court granting Plaintiffs' Motion for Leave to File a Supplemental Expert Disclosure; and

4. Any further relief this Court deems just and proper.

Respectfully submitted,

GORDON REES SCULLY MANSUKHANI, LLP

By: _____

Edmund L. Olszewski, Jr., Esq.
Fallon C. Stephenson, Esq.

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

DOCKET NO. _____

STATE OF WEST VIRGINIA EX. REL. JOHN CHERIAN, M.D. and WEIRTON MEDICAL CENTER,

Petitioners,

v.

THE HONORABLE RONALD E. WILSON, Presiding judicial officer of the Circuit Court Of Ohio County, KEVIN and MARGARET CRAFT

Respondents.

VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF BROOKE

The undersigned, John Frankovich upon his oath, being duly sworn, says that the facts and statements contained in the attached Petition for Writ of Prohibition are true insofar as they are based upon information he believes to be true.

John Frankovich, on behalf of Weirton Medical Center

Sworn to and subscribed before me this 23rd day of September, 2021

Beth Cooper
Notary Public

My Commission Expires: Aug. 8, 2022

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
BETH COOPER
WEIRTON MEDICAL CENTER
601 COLLIERS WAY
WEIRTON, WV 26062
My commission expires August 8, 2022

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

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Petitioners,

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Respondents.

VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF BROOKE

The undersigned, John Cherian, M.D., upon his oath, being duly sworn, says that the facts and statements contained in the attached Petition for Writ of Prohibition are true insofar as they are based upon information he believes to be true.

John Cherian, M.D.

Sworn to and subscribed before me this 23rd day of September, 2021

Beth Cooper
Notary Public

My Commission Expires: Aug 8, 2022

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
BETH COOPER
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Respondents.

CERTIFICATE OF SERVICE

I, Edmund L. Olszewski, Jr., Esquire hereby certify that on September 23, 2021, a true and correct copy of the PETITION FOR WRIT OF PROHIBITION and APPENDIX RECORD was served upon all counsel of record and all parties to whom a rule to "show cause" should also be served, via U.S. Mail, postage prepaid, and addressed as follows:

The Honorable Ronald E. Wilson
Hancock County Courthouse
P.O. Box 428
102 Court Street
New Cumberland, WV 26047

Geoffrey C. Brown, Esquire
BORDAS & BORDAS, PLLC
1358 National Road
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