IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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DARRELL WINGETT and
CAROL WINGETT,

Plaintiffs Below, Petitioners,

vs.) **No. 22-567**

KISHORE K. CHALLA, M.D.,

Defendant Below, Respondent.

RESPONDENT'S BRIEF

Candice M. Harlow (WVSB #12496)
Thomas J. Hurney, Jr. (WVSB #1833)
JACKSON KELLY PLLC
500 Lee Street East, Suite 1600
Post Office Box 553
Charleston, West Virginia 25322
Telephone: (304) 340-1000
Facsimile: (304) 340-1050
charlow@jacksonkelly.com
thurney@jacksonkelly.com

Counsel for Respondent, Kishore K. Challa, M.D.

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STATEMENT OF THE CASE

This case presents a straightforward question and answer as to whether the jury should consider the fault of a defendant-physician voluntarily dismissed without prejudice by a plaintiff even though plaintiff's expert witness holds the opinion the physician was negligent. Since this requires application of West Virginia Code § 55-7B-9, West Virginia Code § 55-7-13c, and/or West Virginia Code § 55-7-13d to the particular facts of this case, a review of those facts is necessary.

In May 2014, Petitioner Darrell Wingett presented to Thomas Memorial Hospital's emergency department with complaints of abdominal pain, weakness, and dizziness for four days. [J.A. 000171-76]. In the emergency room, he was noted to have bradycardia (a slow heartbeat) and was admitted to the hospital. [J.A. 000178-81.] The admitting physician consulted cardiology for Mr. Wingett's bradycardia. *Id.*

In response to that consult, Respondent Dr. Kishore Challa, a cardiologist, saw the patient on May 27, 2014, [J.A. 000183-84], and noted he had complained of dizzy spells for the last few days but had no present symptoms. *Id.* Dr. Challa further noted a "[r]eview of the telemetry shows that he has sinus rhythm with sinus arrest and sinoatrial block of up to 3 to 4 seconds," and that "[t]he patient is not on any beta blockers or any medications to cause these blocks." *Id.* Dr. Challa diagnosed Mr. Wingett with symptomatic sick sinus syndrome with dizziness and recommended a permanent pacemaker. *Id.* Because Dr. Challa does not perform pacemaker implantations, he consulted the dismissed defendant in the underlying action, Dr. M. Salim Ratnani, who is a cardiothoracic surgeon. *See id.*

Dr. Ratnani evaluated Mr. Wingett on May 27, 2014. [J.A. 000186.] Dr. Ratnani documented that Mr. Wingett complained of dizziness intermittently over the last four days, was found to have symptomatic bradycardia with sick sinus syndrome, and was "seen in consultation

by me for PPM implantation." ("PPM" is the abbreviation for permanent pacemaker.) *Id.* Dr. Ratnani documented the patient's personal medical history, family history, medication, review of systems, vital signs, physical examination, labs, and EKG findings. *Id.* Under "Impression/Diagnosis," Dr. Ratnani wrote "symptomatic bradycardia with sick sinus syndrome." *Id.* Dr. Ratnani recommended placement of a pacemaker—under "Recommendation/Plan," he wrote "DDD. PPM implantation tomorrow." ("DDD" means a dual chamber pacing system.) *Id.* On May 28, 2014, Dr. Ratnani implanted the DDD permanent pacemaker. [J.A. 000188-89.] Three years later, in May 2017, Mr. Wingett contracted a MRSA bloodstream infection requiring hospitalization and surgical removal of the pacemaker. [J.A. 000006.]

On January 21, 2019, Petitioners (as set forth in their brief) sent a notice of claim and screening certificate of merit[1] to Respondent, Dr. Challa, and his medical group, South Charleston Cardiology Associates, PLLC ("SCCA").[2] Petitioners asserted that Dr. Challa and SCCA recommended an "unnecessary surgery" for "implantation of a permanent pacemaker when not indicated." [J.A. 000136-37.] Petitioners also identified Dr. Ratnani and his medical group, Professional Cardiothoracic Surgery, PLLC ("PCS"), as other health care providers to whom a notice of claim was being issued and provided the same to Dr. Ratnani and PCS.[3] On May 10, 2019, Petitioners filed their Complaint, naming as defendants Dr. Challa, SCCA, Dr. Ratnani, and

[1] W. Va. Code § 55-7B-6(j) provides that, "[n]otwithstanding any other provision of this code, a notice of claim, a health care provider's response to any notice claim, a screening certificate of merit, and the results of any mediation conducted pursuant to the provisions of this section are confidential and are not admissible as evidence in any court proceeding unless the court, upon hearing, determines that failure to disclose the contents would cause a miscarriage of justice." Out of an abundance of caution, the referenced notices of claim and screening certificate of merits were not attached to the briefing in the underlying case. [J.A. 000137]. Respondent asserted that failure to disclose the contents of the referenced notices of claim and screening certificates of merit would cause a miscarriage of justice given the circumstances of this case. *Id.*

[2] Pet'rs' Br. at 5. SCCA was later dismissed with prejudice. [J.A. 000197-98.]

[3] Pet'rs' Br. at 5. [*See also* J.A. 000005 at ¶ 8; J.A. 000136-37.]

PCS. [J.A. 000004-13.] Petitioners alleged that Dr. Challa and SCCA were negligent in recommending implantation of a permanent pacemaker, [J.A. 000007-9 at ¶¶ 18-29], and that Dr. Ratnani and PCS were negligent in implanting the permanent pacemaker. [J.A. 000009-12 at ¶¶ 30-41.]

On November 12, 2019, Petitioners voluntarily dismissed Dr. Ratnani and PCS, claiming they were unable to serve the Complaint upon Dr. Ratnani because he lived in Pakistan. [J.A. 000030-31.] Petitioners further stated that PCS's license to do business in West Virginia was revoked on November 1, 2016. *Id.*[4] Notwithstanding the statement that "Defendants M. Salim Ratnani, M.D. and Professional Cardiothoracic Surgery, PLLC are not necessary parties at [that] time," Petitioners dismissed those defendants *without prejudice*. [J.A. 000031 (emphasis added).]

As required by the circuit court's scheduling order, Petitioners timely disclosed an expert witness, Scott J. Denardo, M.D. [J.A. 000032.] Dr. Denardo issued a "Preliminary Report," [*see id.*; J.A. 000032-43], stating that Dr. Challa deviated from the applicable standard of care by recommending implantation of a permanent pacemaker in Mr. Wingett because Mr. Wingett "had asymptomatic bradycardic rhythms" and "did not experience symptoms of dizziness, syncope, weakness or fatigue while hospitalized." [J.A. 000042-43.] In support of this opinion, Dr. Denardo relied almost entirely on the "ACCF/AHA/HRS Guidelines"[5] available at the time of the relevant care and stated that, "[w]hile Dr. Challa testified he follows guidelines for pacemaker implantation,

[4] Respondent argued that PCS still could have been served through the West Virginia Secretary of State. [J.A. 000137.] *See* W. Va. Code § 31D-5-504 ("[T]he Secretary of State is hereby constituted the attorney-in-fact for and on behalf of each corporation created pursuant to the provisions of this chapter. The Secretary of State has the authority to accept service of notice and process on behalf of each corporation and is an agent of the corporation upon whom service of notice and process may be made in this state for and upon each corporation."); W. Va. Code § 31D-14-1421(d) ("The administrative dissolution of a corporation does not terminate the authority of its registered agent.").

[5] Referring to 2012 practice guidelines set forth by the American College of Cardiology Foundation ("ACCF"), American Heart Association Task Force ("AHA"), and the Heart Rhythm Society ("HRS").

it is clear he did not follow the above contemporary guidelines in Mr. Wingett's case." [J.A. 000042-43.] Dr. Denardo further stated,

> The above breach of the applicable standard of care for recommendation of permanent pacemaker implantation by Dr. Challa was a proximate cause of the unnecessary permanent pacemaker implantation in Mr. Wingett, his subsequent sepsis and mandatory pacemaker explantation. The sepsis and pacemaker explantation could have been averted if deviations in the standard of care – specifically, original recommendation of implantation of the pacemaker – had not occurred.

[J.A. 000043.]

At deposition, held on December 14, 2020, Dr. Denardo testified that he was critical of Dr. Ratnani to the same extent as Respondent, Dr. Challa. [J.A. 0000191-96.] Specifically, he stated as follows:

> **Q:** …. But what I want to know is from the medicine is whether you're still critical of Dr. Ratnani. So my question going to – the discussion you just had regarding general surgeons and all is do you know what kind of surgeon Dr. Ratnani is?
>
> **A:** Do you know, I – as I am looking over that certificate, it looks like at the time, because of my experiences, that he was a cardiothoracic surgeon, but having not looked or thought about Dr. Ratnani in somewhere in the range of two years, somehow in my mind I've drifted back into the general surgeon, that maybe he's just a general surgeon. I can't really comment on a general surgeon putting in a permanent pacemakers [sic], which is the way it was in the late 80s and into the early 90s, but for a cardiothoracic surgeon, yeah, that I can make a comment on because we're more allied so to speak. We're sort of side by side in the management of patients with cardiovascular problems, especially if they need procedures done. So if Dr. Ratnani is a cardiothoracic surgeon, then, yes, I stand by the original certificate.
>
> **Q:** And I don't want to go back through all your opinions, but basically would the opinions you hold as to Dr. Ratnani be the same opinion that you have expressed as it relates to Dr. Challa particularly regarding the violation of the standard of care as evidenced by the failure to follow the 2012 guidelines?
>
> **A:** Yes. As a cardiothoracic surgeon, he should be aware of the guidelines. I mean, if you're doing – I think this is probably true of any domain in medicine, if you're performing a procedure on a patient, you need to be fluent with the guidelines for doing that procedure. I think that's a pretty fair statement.

Id. (emphasis added).

Respondent's expert witness, George H. Crossley, III, M.D., supports Dr. Challa's care because Mr. Wingett's presentation with low heart rate, abnormal sinus pauses, and complaints of dizziness was a Class I indication for pacemaker implantation pursuant to the above-referenced ACC/AHA/HRS guidelines. *Id.* As a result he is not critical of Dr. Ratnani's implantation of the pacemaker. [J.A. 000060].

SUMMARY OF ARGUMENT

The Circuit Court of Kanawha County properly answered the following Certified Question in the affirmative: "Should the jury be allowed to consider the fault of a party who was originally named as a defendant but voluntarily dismissed by the plaintiff pursuant to either West Virginia Code § 55-7B-9, West Virginia Code § 55-7-13c, and/or West Virginia Code § 55-7-13d under the specific facts set forth in the instant case?"

The answer to this question is "yes." Section 55-7B-9(b) unambiguously states the trier of fact "shall" consider the fault of all "alleged parties" in assessing percentages of fault. The term "alleged parties" plainly means, and was intended to apply to, parties outside the litigation at the time of verdict. The term necessarily includes dismissed parties, like Dr. Ratnani and PCS, because they were actual parties in the action who Petitioners and their expert claimed were negligent. This was confirmed during the deposition of Petitioners' expert witness, whose testimony established the necessary elements of proof required by West Virginia Code § 55-7B-3 for the jury to consider any fault of those dismissed parties.

This question was also appropriately answered "yes" under West Virginia Code § 55-7-13d (the "Nonparty Fault Statute") because that section permits the trier of fact to consider the fault of all parties and nonparties who contributed to the alleged damages, with no exception for medical

professional liability cases. The exemption for medical professional liability cases set forth in West Virginia Code § 55-7-13c (the "Modified Comparative Fault Statute") expressly applies only to "this section"—13c—and not to section 13d.

As more fully explained below, the trier of fact should be allowed to consider the fault of Dr. Ratnani and PCS, who were originally named as defendants to this lawsuit but subsequently dismissed without prejudice. The Circuit Court of Kanawha County's answer to the above Certified Question should be upheld and affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Court's February 27, 2023 Order schedules this matter for oral argument under Rule 20 of the West Virginia Rules of Appellate Procedure during the September 2023 Term of Court. Respondent agrees that this is a suitable case for Rule 20 oral argument, as it involves issues of first impression and inconsistencies or conflicts among the decisions of lower tribunals, and further asserts that the decisional process would be significantly aided by oral argument.[6]

STANDARD OF REVIEW

"The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*."[7] "Where the issue . . . is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review."[8]

[6] *See* W. Va. R. App. P. 20(a); W. Va. R. App. P. 18(a).

[7] Syl. Pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 475 S.E.2d 172 (W. Va. 1996).

[8] *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 647 S.E.2d 920, 924 (W. Va. 2007) (citing Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 459 S.E.2d 415 (W. Va. 1995)).

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR IN ANSWERING THE CERTIFIED QUESTION IN THE AFFIRMATIVE BECAUSE THE JURY IS ENTITLED TO CONSIDER THE FAULT OF DISMISSED PARTIES PURSUANT TO BOTH THE MEDICAL PROFESSIONAL LIABILITY ACT AND THE NONPARTY FAULT STATUTE.

A. The Fault of Dismissed Parties "Shall" be Considered under West Virginia Code § 55-7B-9 of the Medical Professional Liability Act because they are "Alleged Parties."

This action is governed by Section 55-7B-9 of the West Virginia Medical Professional Liability Act ("MPLA"),[9] which provides "[t]he 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."[10] Dr. Ratnani and PCS were "alleged parties." Thus, Petitioners' voluntary dismissal of Dr. Ratnani and PCS, without prejudice, should not preclude the trier of fact from considering their alleged fault, if any.[11] This is demonstrated by the plain language and legislative history of Section 55-7B-9.

In deciding the meaning of a statutory provision, this Court has held: "We look first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed."[12] "Where the language of a statute is free

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[9] W. Va. Code §§ 55-7B-1, *et seq.*

[10] W. Va. Code § 55-7B-9(b) (emphasis added). And "[i]t is well established that the word 'shall,' in the absence of language in the statute showing a contrary intent on the part of the Legislature, should be afforded a mandatory connotation." Syl. Pt. 4, *City of Wheeling v. Pub. Serv. Comm'n of W. Va.*, No. 21-1001, __ S.E.2d ___, 2023 WL 3051738 (W. Va. Apr. 24, 2023) (citing Syl. Pt. 1, *Nelson v. W. Va. Pub. Emps. Serv. Bd.*, 300 S.E.2d 86 (W. Va. 1982)).

[11] Petitioners twice point out their assertions in the Notice of Dismissal that Dr. Ratnani and PCS were "not necessary parties" to the action. Pet'rs' Br. at 7, 15 [citing J.A. 000030-31]. This is a red herring. Nothing in West Virginia Codes § 55-7B-9 or § 55-7-13d (or § 55-7-13c) preclude a trier of fact from considering the fault of a nonparty because they were "not necessary parties." Additionally, per Petitioners' assertions, neither Dr. Ratnani nor PCS were subject to service of process.

[12] *Appalachian Power Co. v. State Tax Dep't*, 466 S.E.2d 424, 438 (W. Va. 1995).

from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation."[13] Similarly, "[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect."[14] A court may consider the statute's legislative history in determining legislative intent.[15]

But, "[i]n the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used."[16] This Court recently reiterated the importance of applying the plain meaning to statutory language in *City of Wheeling v. Public Service Commission of West Virginia*, where it once again held that "[g]enerally the words of a statute are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use."[17] "Likewise, '[i]n the absence of any specific indication to the contrary, words used in a statute will be given their common, ordinary and accepted meaning.'"[18]

Here, the term "alleged parties" is not defined and appears only once in the MPLA in Section 55-7B-9(b). Respondent maintains that Dr. Ratnani and PCS were "alleged parties" simply by virtue of being named in the Complaint. By definition, "alleged" means "[a]sserted to be true

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[13] Syl. Pt. 2, *Crockett v. Andrews*, 172 S.E.2d 384, 385 (W. Va. 1970).

[14] Syl. Pt. 2, *State v. Epperly*, 65 S.E.2d 488, 489 (W. Va. 1951).

[15] *See, e.g., Davis Mem'l Hosp. v. W. Va. State Tax Com'r*, 671 S.E.2d 682, 689 (W. Va. 2008).

[16] Syl. Pt. 4, *W. Va. Consol. Pub. Ret. Bd. v. Weaver*, 671 S.E.2d 673, 675 (W. Va. 2008).

[17] No. 21-1001, __ S.E.2d ___, 2023 WL 3051738, *5 (W. Va. Apr. 24, 2023) (citing Syl Pt. 4, *State v. Gen. Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 107 S.E.2d 353 (W. Va. 1959)).

[18] *Id.* (citing Syl. Pt. 7, *Wheeling Park Comm'n v. Dattoli*, 787 S.E.2d 546 (W. Va. 2016) (quoting Syl. Pt. 1, *Tug Valley Recovery Ctr., Inc. v. Mingo Cnty. Comm'n*, 261 S.E.2d 165 (W. Va. 1979)).

as described" or "[a]ccused but not yet tried."[19] "Party," means "[o]ne by or against whom a lawsuit is brought" or "anyone who both is directly interested in a lawsuit and has a right to control the proceedings, make a defense, or appeal from an adverse judgment."[20] Thus, an alleged party necessarily includes any person named in a complaint, regardless of whether they remain in the case at the time of verdict. Here, Petitioners squarely alleged Dr. Ratnani and PCS were negligent (and their expert confirmed it). [J.A. 000009-12 at ¶¶ 30-41; J.A. 0000192-96.] For these reasons alone, Dr. Ratnani and PCS should be placed on the verdict form.

Significantly, in gleaning the meaning of the statute, the Legislature chose the term "alleged party"—rather than terms like "litigant," "plaintiff," or "defendant." Again, Section 55-7B-9(b) plainly states: "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."[21] This is in comparison to the preceding and subsequent portions of Section 55-7B-9, which specifically identify either "plaintiff" or "defendant."[22]

To be sure, in 2016, this provision was amended from its previous version that stated:

> In assessing percentages of fault, the trier of fact shall consider only the fault of the parties in the litigation at the time the verdict is rendered and shall not consider the fault of any other person who has settled a claim with the plaintiff arising out of the same medical injury. *Provided*, That, upon creation of the patient injury compensation fund . . . or of some other mechanism for compensating a plaintiff

[19] *Alleged*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[20] *Party*, BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis added); *compare with Litigant*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defined as "[a] party to a lawsuit; the plaintiff or defendant in a court action, whether an individual, firm, corporation, or other entity").

[21] W. Va. Code § 55-7B-9(b) (emphasis added).

[22] *See generally* W. Va. Code § 55-7B-9(a), (c), (d), (e) (using the terms "plaintiff," "defendant"); *see also* W. Va. Code § 55-7B-9(g) (using the term "health care provider"). *See also State ex rel. Chalifoux v. Cramer*, No. 20-0929, 2021 WL 2420196, at *7 (W. Va. June 14, 2021) (memorandum decision) (Armstead, J., dissenting) (distinguishing "plaintiff" and "defendant" from potential defendants or other nonparties) (citing *Rowe v. Sisters of Pallottine Missionary Soc'y*, 560 S.E.2d 491, 500 (W. Va. 2001)).

> for any amount of economic damages awarded by the trier of fact which the plaintiff has been unable to collect, 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.[23]

Striking the phrase "parties in the litigation at the time the verdict is rendered," but maintaining the "all alleged parties" language, demonstrates the Legislature intended to expand that phrase to apply to persons not necessarily "in the litigation at the time the verdict is rendered."[24] The prior statutory language also suggests that the term "all alleged parties" was originally intended to apply to "any person" "which the plaintiff has been unable to collect."[25] Such a person "includ[es] . . . any person who has settled a claim with the plaintiff arising out of the same medical injury."[26] When read in conjunction with its legislative history, the phrase "all alleged parties," therefore, includes "any person"—not just "defendant"—who settled a claim with the plaintiff or any other person from whom the plaintiff might otherwise not be able "to collect" for claims "arising out of the same medical injury."[27] Dr. Ratnani and PCS were alleged parties from whom Petitioners would have been "unable to collect" for the allegations asserted in the Complaint (for the same medical injury) due to Petitioners' assertions that they could not be served with the Complaint. [J.A. 000030.]

The fact that the Legislature did not intend for the phrase "all alleged parties" to apply only to persons who settled claims with the plaintiff is supported by use of the term "including." The

[23] W. Va. Code § 55-7B-9(b) (2003) (emphasis added).

[24] *See id.*

[25] *See id.* (emphasis added).

[26] *Id.*

[27] *See id.*

term "including" is not meant to be restrictive. Indeed, this Court has recognized that the term "includes" in a statute is intended to be a word of enlargement."[28]

Justice Armstead addressed the significance of the term "including" in Section 55-7B-9(b) in his dissenting opinion in *State ex rel. Chalifoux v. Cramer*:

> It is evident that the Legislature did not intend for the term "all alleged parties" to consist only of parties named in the Plaintiff's complaint, otherwise it would not have added the phrase "including any person who has settled a claim with the plaintiff." Obviously, persons settling a claim with the Plaintiff may be persons who were never named in a complaint. By using the term "including the fault of any person who has settled a claim with the plaintiff" immediately following the term "all alleged parties," the Legislature could not have intended that the phrase "all alleged parties" only include parties to the litigation. Moreover, when the term "includes" is used, as in this case, it generally means "to contain as a part of something" and "typically indicates a partial list." *See Postlewait v. City of Wheeling*, 231 W. Va. 1, 4, 743 S.E.2d 309, 312 (2012). Accordingly, the Legislature clearly did not intend to exclude from consideration of fault those alleged parties who were not named in the litigation.[29]

[28] *Citynet, LLC v. Toney*, 772 S.E.2d 36, 50 (W. Va. 2015) ("The Legislature's use of the word 'includes' . . . reveals that the list is not intended to be an exclusive list."); *Postlewait v. City of Wheeling*, 743 S.E.2d 309, 312 (W. Va. 2012) ("by using the word 'includes' . . . this Court was setting forth only a partial list"); *Shepherdstown Observer, Inc. v. Maghan*, 700 S.E.2d 805, 811 (W. Va. 2010) ("It is obvious that the Legislature . . . meant for the word 'includes' to be given its common, ordinary and accepted meaning, which is that of a word of enlargement."); *Davis Mem'l Hosp.*, 671 S.E.2d at 689 ("The term 'includes' in a statute is to be dealt with as a word of enlargement.") (citation omitted); *State v. Zain*, 528 S.E.2d 748, 754 n.3 (W. Va. 1999) ("the term 'include,' . . . is a term of enlargement rather than a term of limitation"); *State Human Rights Comm'n v. Pauley*, 212 S.E.2d 77, 80 (W. Va. 1975) (further stating "this is especially so," but not only so, "where . . . such word is followed by 'but not limited to' . . . .").

This Court has also cited Black's Law Dictionary, which defines the term "include" as "to contain as a part of something" and "typically indicates a partial list." *See, e.g.*, *W. Va. Consol. Pub. Ret. Bd. v. Clark*, 859 S.E.2d 453, n.40 (W. Va. 2021); *Texas E. Transmission, LP v. W. Va. Dep't of Env't Prot., Div. of Mining & Reclamation*, 807 S.E.2d 802, 814 (W. Va. 2017); *Postlewait*, 743 S.E.2d at 312. Black's Law Dictionary further explains that "some drafters use phrases such as *including without limitation* and *including but not limited to*—which mean the same thing." *Include*, BLACK'S LAW DICTIONARY (11th ed. 2019) (emphasis in original).

[29] No. 20-0929, 2021 WL 2420196, at *10 (W. Va. June 14, 2021) (memorandum decision) (Armstead, J., dissenting) (emphasis in original).

To therefore conclude that "alleged party" means nothing more than a "defendant" or "settling person" would ignore the carefully chosen language and legislative history of West Virginia Code § 55-7B-9(b).

The plain meaning of "all alleged parties" in Section 55-7B-9(b) includes parties both named and unnamed in the litigation. At the very least, however, "all alleged parties" certainly includes a party who was at any point a named litigant, whether or not they remain as such at the time a verdict is rendered. Here, Dr. Ratnani and PCS are the precise "alleged parties" the Legislature intended that section to cover.[30] Thus, the Circuit Court of Kanawha County was correct in finding that the trier of fact "shall" consider the fault, if any, of dismissed parties such as Dr. Ratnani and PCS.

B. The Fault of Dismissed Parties likewise "Shall" be Considered under West Virginia Code § 55-7-13d(a)(1), the Nonparty Fault Statute, because Respondent Provided the Required Notice, and the Nonparty Fault Statute does not Preclude its Application to MPLA Cases.

A second issue is whether this action is governed by the Nonparty Fault Statute, West Virginia Code § 55-7-13d(a)(1). To be clear, because this action is governed by the MPLA, and because Dr. Ratnani and PCS are "alleged parties," Section 55-7B-9(b) is controlling. Thus, Respondent was not required to give the notice set forth in Section 55-7-13d because the MPLA provides no such notice requirement.[31] Nevertheless, out of an abundance of caution, Respondent provided said notice within the required timeframe. [J.A. 000026-29.]

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[30] The current version of the MPLA applies to Petitioners' claims. *Estate of Burns by & through Vance v. Cohen*, No. 5:18-CV-00888, 2020 WL 1181717, at *2 (S.D.W. Va. Mar. 11, 2020) ("Fundamentally remedial, the 2016 amendment to West Virginia Code § 55-7B-9(b) applies 'irrespective of when the cause of action accrued.'") (citing *Martinez v. Asplundh Tree Expert Co.*, 803 S.E.2d 582, 588 (W. Va. 2017) ("It is recognized that '[i]n general, statutes dealing with a remedy apply to actions tried after their passage even though the right or cause of action arose prior thereto.'")). To be sure, the MPLA is silent as to the effective dates of the July 2016 amendments. *See* W. Va. Code § 55-7B-10.

[31] *See* W. Va. Code § 55-7B-9.

West Virginia Code § 55-7-13d(a)(1) provides that, "[i]n assessing percentages of fault, the trier of fact shall consider the fault of all persons who contributed to the alleged damages regardless of whether the person was or could have been named as a party to the suit." The fault of a nonparty "shall be considered if . . . a defending party gives notice no later than one hundred eighty days after service of process upon said defendant that a nonparty was wholly or partially at fault."[32]

As set forth more fully in Part II(B) below, West Virginia Code § 55-7-13d(a)(2) does not expressly preclude medical professional liability claims brought pursuant to the MPLA. Thus, because Respondent fully complied with the notice requirements in Section 55-7-13d, he is entitled to the protections and privileges allowed under that statute, which complement the protections and privileges permitted under the MPLA.

II. AS TO PETITIONERS' ASSIGNMENTS OF ERROR, RESPONDENT SPECIFICALLY RESPONDS AS FOLLOWS:

A. The MPLA Permits the Jury to Consider the Fault of the Dismissed Defendants in the Underlying Matter.

Petitioners contend that "the Circuit Court erred in answering its Certified Question in the Affirmative as the clear and unambiguous language of the West Virginia Medical Professional Liability Act does not permit the jury to consider the fault of the dismissed defendants in the underlying matter."[33] For the reasons below, Respondent disagrees.

In response to this Assignment of Error, Respondent directs the Court to its argument contained in Part I(A), *supra*, which is incorporated by reference to this section.

Additionally, Respondent points out that this Court has only once considered the meaning and application of the term "all alleged parties" in the context of the MPLA, and that was in the

[32] W. Va. Code § 55-7-13d(a)(2) (emphasis added).

[33] Pet'rs' Br. at 14.

memorandum decision of *State ex rel. Chalifoux v. Cramer*.[34] However, the Court provided little analysis on that issue, holding only that "Dr. Chalifoux has failed to demonstrate that the circuit court's order rises to the level of clear error as a matter of law."[35] While recognizing "there were arguments made that supported both Dr. Chalifoux's Combined Notice [of Non-Party Fault] and Motion [for Placement of Alleged Non-Parties on Verdict Form] and Mr. Moellendick's response," the Court held that "Dr. Chalifoux ha[d] not demonstrated he is entitled to the issuance of a writ of prohibition . . . ."[36] Thus, the *Chalifoux* Court never reached a determination as to the meaning of the MPLA's term "all alleged parties" or the application of the Nonparty Fault Statute to the MPLA.[37]

Additionally, the facts in *Chalifoux* are distinguishable from the facts here. In *Chalifoux*, the defendant physician filed motions to place certain nonparty health care providers on the verdict form. Those health care providers were never named parties to the litigation. The circuit court denied Dr. Chalifoux's motions on two grounds: (1) "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"; and (2) "The statue

[34] No. 20-0929, 2021 WL 2420196 (W. Va. June 14, 2021) (memorandum decision).

[35] *Id.* at *5.

[36] *Id.* at *4. *See also Agoston v. Com. of Pa.*, 340 U.S. 844, 844 (1950) ("The [Supreme] Court [of the United States] has stated again and again what the denial of a petition for writ of certiorari means and more particularly what it does not mean. Such a denial, it has been repeatedly stated, 'imports no expression of opinion upon the merits of the case'.") (citing *U.S. v. Carver*, 260 U.S. 482, 490 (1923)).

[37] It further appears that neither this Court nor the underlying circuit court made a determination as to the application of West Virginia Code § 55-7-13d to the MPLA in that case. *See id.* at *11 (Armstead, J., dissenting) ("[T]he majority opinion fails to specifically discuss whether W. Va. Code § 55-7-13d may also be applied to a cause of action brought under the MPLA. Both the circuit court's order and the majority opinion issued by this Court appear to simply assume that the broader statutory provisions contained in W. Va. Code § 55-7-13d do not apply in the present case.").

also contemplates the jury's consideration of 'alleged parties,' such as individuals who previously settled with a plaintiff." Thus, "because Mr. Moellendick [the underlying plaintiff] made no claim against any health care provider in Akron, those unnamed providers 'are not "alleged parties" based on the Complaint.' Moreover, because Dr. Chalifoux failed to file a third-party complaint, there are no allegations against the Akron providers that would make them alleged parties."[38] In the instant case, however, (1) there were more than one named defendant, and certainly more than one "alleged tortfeasor"; and (2) Dr. Ratnani and PCS were named parties, against whom Petitioners made specific allegations in their Complaint which were later bolstered by their expert witness's testimony. [J.A. 000004-000013; J.A. 000192-96.]

The plain language of "alleged parties" in West Virginia Code § 55-7B-9 supports a broad application of the term to include any allegedly negligent party, whether named in the litigation or not.[39] At a minimum, however, "alleged parties" certainly applies to parties originally named but later voluntarily dismissed, with or without settlement. The Circuit Court of Kanawha County properly answered the Certified Question.

B. The Nonparty Fault Statute Does Not Exclude Matters Governed by the MPLA.

Petitioners assert that "the Circuit Court erred in answering its Certified Question in the affirmative as the modified comparative fault statute and related sections do not apply to the underlying matter as it is governed by the MPLA."[40] Petitioners rely heavily on West Virginia

[38] *Id.* at *4 (emphasis added).

[39] *See supra* Part I(a) (citing, in part, State ex rel. Chalifoux, 2021 WL 2420196, at *10 (Armstead, J., dissenting) ("[T]he Legislature clearly did not intend to exclude from consideration of fault those alleged parties who were not named in the litigation.").

[40] Pet'rs' Br. at 17.

Code Chapter 55, Article 7, Section **13c** (W. Va. Code § 55-7-13c) in formulating this position; but Section 13c addresses modified comparative fault, not nonparty fault. The applicable section on nonparty fault is West Virginia Code § 55-7-**13d**.

Nothing in West Virginia Code § 55-7-13d precludes application to cases brought pursuant to the MPLA. Section 13d states, in pertinent part:

> In assessing percentages of fault, the trier of fact shall consider the fault of all persons who contributed to the alleged damages regardless of whether the person was or could have been named as a party to the suit. . . .
>
> This section applies to all causes of action arising or accruing on or after the effective date of its enactment. The amendments to this section enacted during the 2016 regular session of the Legislature shall apply to all causes of action accruing[41] on or after the effective date of those amendments.[42]

West Virginia Code § 55-7-13b defines the term "fault," as used in that article, as "an act or omission of a person, which is a proximate cause of injury or death to another person or persons, damage to property, or economic injury, including but not limited to, negligence, malpractice, strict product liability, absolute liability, liability under section two, article four, chapter twenty-three of this code or assumption of the risk."[43] Finally, Section 55-7-13d provides that "[n]othing in this section is meant to eliminate or diminish any defenses or immunities, which exist as of the effective date of this section, except as expressly noted herein."[44]

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[41] While the medical care and treatment at issue took place in May 2014, Mr. Wingett's alleged injuries did not occur until May 2017, after the effective date of this Section and all 2016 Regular Session amendments.

[42] W. Va. Code § 55-7-13d(a)(1); 55-7-13d(h) (emphasis added).

[43] W. Va. Code § 55-7-13b (emphasis added).

[44] W. Va. Code § 55-7-13d(a)(4) (emphasis added).

Conversely, West Virginia Code § 55-7-13c—which provides generally that "the liability of each defendant for compensatory damages shall be several only and may not be joint"[45]—expressly excludes the MPLA from its application:

> This section does not apply to the following statutes:
>
> (1) Article twelve-a, chapter twenty-nine of this code;
>
> (2) Chapter forty-six of this code; and
>
> (3) Article seven-b, chapter fifty-five of this code [the MPLA].[46]

Contrary to Petitioners' assertion, there is no such exclusion provided in Section 55-7-13d.[47] Thus, because the Legislature specifically excluded the MPLA from "section" **13c**, but not "section" **13d**, it is clear that the Legislature did not intend for cases brought pursuant to the MPLA to be excluded from the application of Section 55-7-13d.[48]

Justice Armstead addressed this precise issue in his dissent in *State ex rel. Chalifoux v. Cramer*.[49] Distinguishing Section 13c from 13d, Justice Armstead explained:

> The circuit court erroneously determined W. Va. Code § 55-7-13d to be inapplicable in this case by stating that "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." However, a clear reading of W. Va. Code § 55-7-13d reveals no language excluding its applicability to MPLA actions. The circuit court's reliance on W. Va. Code § 55-7-13c to interpret W.Va. Code § 55-7-13d is flawed. In fact, the Legislature's exclusion of MPLA actions in W. Va. Code § 55-7-13c and its failure to make a similar exclusion in W. Va. Code § 55-7-13d actually supports the conclusion that it intended W. Va. Code § 55-7-13d to apply to MPLA actions. As the United States Supreme Court has held, "[w]e have often noted that

[45] W. Va. Code § 55-7-13c(a).

[46] W. Va. Code § 55-7-13c(i) (emphasis added).

[47] *See* W. Va. Code § 55-7-13d.

[48] *See id.*; *compare with* W. Va. Code § 55-7-13**b** (defining the term "fault" for purposes of the entire "article").

[49] No. 20-0929, 2021 WL 2420196 (W. Va. June 14, 2021) (memorandum decision).

> when 'Congress includes particular language in one section of a statute but omits it in another' – let alone in the very next provision – this Court '[p]resumes' that Congress intended a difference in meaning." *Loughrin v. United States*, 573 U.S. 351, 358, 134 S.Ct. 2384, 2390 (2014).[50]

Thus, the fact that Section 55-7-13c specifically excludes MPLA actions, but Section 55-7-13d does not, should serve as evidence of the Legislature's intent that the determination of fault to nonparties afforded to defendants under West Virginia Code § 55-7-13d is the same as available to MPLA defendants, and the two statutory schemes should be read *in pari materia*.[51]

Petitioners argue that, "as a practical matter," the MPLA and Section 55-7-13d "cannot be reconciled in practical application."[52] While there are slight differences as to other portions of these statutes,[53] the specific provisions regarding consideration of fault of nonparties and alleged parties are consistent and compatible.[54] Regardless, this Court has recognized its limited role is to apply the plain meaning and statutory intent where statutes are free from ambiguity and not to

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[50] *Id.* at *12 (emphasis added).

[51] *See id.* at *11-12 (citing *Cmty. Antenna Servs., Inc. v. Charter Commc'ns VI, LLC*, 712 S.E.2d 504, 513-14 (W. Va. 2011) ("[T]he Legislature's intention can be gathered from the whole of the enactments. . . . Accordingly, a court should not limit is consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent properly.").

[52] Pet'rs' Br. at 18-19.

[53] For example, the MPLA does not provide a notice requirement as discussed *infra*, Part I(B), and, as Petitioners point out (Pet'rs' Br. at 18-19), the method for reduction in verdicts in cases where pre-verdict settlements are reached is handled differently. *Compare* W. Va. Code § 55-7B-9(d) *with* W. Va. Code § 55-7-13d(a)(3).

[54] *See also State ex rel. Chalifoux*, 2021 WL 2420196, at *12 (memorandum decision) (Armstead, J., dissenting) ("[I]t is clear that both W. Va. Code § 55-7B-9c and W. Va. Code § 55-7-13d serve a common purpose – to enact a statutory scheme imposing several liability rather than joint and several liability. Accordingly, they should be read in *para materia* . . . ."). Additionally, West Virginia Code § 55-7-13d states that "[t]he provisions of this section are severable from one another, so that if any provision of this section is held void, the remaining provisions of this section shall remain valid." W. Va. Code § 55-7-13d(i). And further provides that "[n]othing in this section is meant to eliminate or diminish any defenses or immunities, which exist as of the effective date of this section, except as expressly noted herein." W. Va. Code § 55-7-13d(a)(4) (emphasis added).

determine the practicality of the intended application, or to rewrite the statute in order to reach unintended results.[55] Petitioners have cited no legal authority or legislative history to support their interpretation of the statute. Without more, courts are not permitted to expand or enlarge upon the plain statutory meaning to reach the "practical" results Petitioners have requested.[56] And here, the two statutes can be read in harmony. As such, the Certified Question was appropriately answered.

C. Sufficient Evidence of Fault Exists to Establish the Elements of Proof Required by the MPLA, and Respondent was Not Required to File a Crossclaim or Third-Party Complaint.

Petitioners next argue that "the Circuit Court erred in answering its Certified Question in the affirmative as the Respondent failed to prove a case against the dismissed defendants in the underlying matter."[57] This argument likewise fails because sufficient evidence, including the required expert witness testimony, exists to establish the necessary elements of proof against Dr. Ratnani and/or PCS.

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[55] *See, e.g.*, *State ex rel. March-Westin Co., Inc. v. Gaujot*, 879 S.E.2d 770, 777-78 (W. Va. 2022) ("For us to ignore the clear meaning of [a statute] and rewrite it in order to reach the result urged by [Petitioner], would be a quintessential example of this court imposing its will as a 'superlegislature.' We decline the invitation to do so."); *State ex rel. Riffle v. Ranson*, 464 S.E.2d 763, 768 (W. Va. 1995) ("Once the Legislature indicates its preference by the enactment of a statute, the Court's role is limited. Our duty is to interpret the statute, not to expand or enlarge upon it."); *State ex rel. Frazier v. Meadows*, 454 S.E.2d 65, 69 (W. Va. 1994) ("Courts are not free to read into the language what is not there, but rather should apply the statute as written."); Syl. Pt. 2, *Crockett*, 172 S.E.2d at 385 ("Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation."); *Vest v. Cobb*, 76 S.E.2d 885, 902 (W. Va. 1953) ("Our duty is simply to interpret the statutes of this State when they involve inconsistent provisions, and to apply the statutes when they are clear and unambiguous . . . ."); Syl. Pt. 2, *Epperly*, 65 S.E.2d at 489 ("A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect."). *See also, c.f.*, Syl. Pt. 1, *City of Wheeling*, 2023 WL 3051738, at *1 ("The court's responsibility is not to supplant the [Public Service] Commission's balance of [public interests as permitted within its authority] with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors.").

[56] *See id.*

[57] Pet'rs' Br. at 19.

Pursuant to West Virginia Code § 55-7-13d, Respondent timely identified and notified Petitioners of his intent to place the potential fault of Dr. Ratnani and/or PCS in front of the jury. [J.A. 000026-28.] More importantly, Respondent appropriately, through Petitioners' expert witness, identified sufficient supporting evidence pursuant to the MPLA to allow the jury to consider Dr. Ratnani's and/or PCS's fault. Having met this burden, Petitioners' strategic decision not to pursue Dr. Ratnani and/or PCS as defendants in the underlying action should not preclude a jury from considering the potential fault thereof, as expressly permitted by both statutes.

1. The necessary elements of proof have been established.

Prior to filing a medical professional liability action against any health care provider, the MPLA requires a notice of claim and screening certificate of merit be served.[58] Once the claim is filed, the following "necessary elements of proof that an injury or death resulted from the failure of a health care provider to follow the accepted standard of care" must be established:

> (1) The health care provider failed to exercise that degree of care, skill and learning required or expected of a reasonable, prudent health care provider in the profession or class to which the health care provider belongs acting in the same or similar circumstances; and
>
> (2) Such failure was a proximate cause of the injury or death.[59]

The MPLA also provides that expert witness testimony is ordinarily required to establish a breach in the standard of care as set forth above.[60]

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[58] W. Va. Code § 55-7B-6.

[59] W. Va. Code § 55-7B-3(a).

[60] W. Va. Code § 55-7B-7(a). *But see* Syl. Pt. 4, *Banfi v. Am. Hosp. for Rehab.*, 529 S.E.2d 600, 601 (W. Va. 2000) (holding that expert testimony may not be required in cases where the "lack of care or want of skill is so gross, so as to be apparent, or the alleged breach relates to noncomplex matters of diagnosis and treatment within the understanding of lay jurors by resort to common knowledge and experience.").

Here, prior to filing their civil action, Petitioners admit they "sent" Dr. Ratnani and PCS, "by certified mail . . . a Notice of Claim and Screening Certificate of Merit to comply with the prerequisite requirements of the [MPLA]."[61] [*See* J.A. 000136-37.] Petitioners then filed suit and named Dr. Ratnani and PCS as defendants, asserting specific negligence claims against them. [J.A. 000004-13.] Petitioners say they voluntarily dismissed Dr. Ratnani and PCS because they were unsuccessful in serving Dr. Ratnani, and because PCS's license to do business in West Virginia was revoked. [J.A. 000030-31.] Notwithstanding their position that Dr. Ratnani and PCS were "not necessary parties," Petitioners' dismissal was *without prejudice*. *Id.*

Subsequently, Petitioners' expert witness, Dr. Denardo, testified under oath that both Dr. Ratnani and Dr. Challa committed a "violation of the standard of care as evidenced by [their] failure to follow the 2012 guidelines." [J.A. at 000196 at 80:13-24.] Petitioners' expert witness established the requisite expert testimony regarding standard of care for jury consideration. It does not matter that Respondent's expert witness is not critical of Dr. Ratnani as there is sufficient evidence and expert witness testimony to establish the necessary elements of proof required by Section 55-7B-3 of the MPLA.

2. Respondent does not have to file a crossclaim or third-party complaint to avail himself of the applicable statutory apportionment provisions.

Petitioners' suggestion that Respondent was required to file a crossclaim or third-party complaint against Dr. Ratnani and/or PCS is unsupported. Neither West Virginia Code § 55-7-13d nor the MPLA require a defendant to file a crossclaim or third-party complaint as a prerequisite

[61] Pet'rs' Br. at 5.

for applying the apportionment provisions contained therein.[62] And it is never mandatory that one defendant file a crossclaim or third-party claim against another.[63]

The MPLA provides only that "[t]he 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."[64] As more fully discussed above, while not defined, the term "alleged parties" extends beyond the term "defendants," as used elsewhere in that section.[65] Additionally, the term "alleged parties" was extended to include (with no limiting language) "any person"—not only defendants—who has settled a claim with the plaintiff.[66] Thus, there is no expressed or implied requirement that an "alleged party" must be first joined in the lawsuit to trigger this section. In fact, enactment of West Virginia Code § 55-7-13d expressly absolves a defendant's need to file third-party complaints to preserve their right of contribution.[67]

The Court's recent decision in *March-Westin* illustrates the distinction between liability and fault. While that case dealt with West Virginia Code § 55-7-13d, the allocation of fault analysis can also be applied to West Virginia Code § 55-7B-9(b). There, this Court found that, "[a] jury

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[62] *See* W. Va. Code § 55-7B-9(b); W. Va. Code § 55-7-13d.

[63] *See* W. Va. R. Civ. P. 13(g) ("A pleading may state as a cross-claim any claim by one party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein." (emphasis added)); W. Va. R. Civ. P. 14(a) ("At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claims against the third-party plaintiff.") (emphasis added).

[64] W. Va. Code § 55-7B-9(b) (emphasis added).

[65] *See id.*

[66] *Id.*

[67] *See* W. Va. Code § 55-7-13d.

cannot accurately assess a named party's fault unless the jury also weighs the fault of every nonparty who may have contributed to the claimant's damages."[68] The Court recognized,

> [a]lthough proximate causation occurs in a variety of contexts where *liability* is assigned based on such theories as negligence, malpractice, strict liability, and deliberate intention, the essence of *fault* is an act or omission that proximately causes harm; any breach of a legal duty to the plaintiff is sufficient if it is a proximate cause of the plaintiff's injury regardless of whether the person breaching the duty may be entitled to immunity from liability. This does not mean, however, that *fault* and *liability* are the same. They are not.[69]

Thus, the *March-Westin* Court found that allocation of fault of nonparties actually assists the trier of fact in fairly determining the liability of the named parties.[70]

The facts in *March-Westin* are distinguishable, but still worthy of consideration. The Monongalia County Commission hired a general contractor, March-Westin, for a renovation project. The Petitioner, an employee of the County Commission, was injured on the job and filed suit against March-Westin. In turn, March-Westin filed a notice of nonparty fault against the County Commission. The circuit court granted Petitioner's motion to strike the notice of nonparty fault pursuant to West Virginia Code § 55-7-13d, in pertinent part, because the County Commission was statutorily immune from liability, and because March-Westin failed to prove a claim of deliberate intent against the County Commission.[71]

In granting March-Westin's writ of prohibition, this Court found the jury was entitled to consider the fault of all persons, including nonparties, who may have proximately caused the

[68] *State ex rel. March-Westin Co., Inc.*, 879 S.E.2d at 775.

[69] *Id.* at 776 (emphasis in original).

[70] *Id.*

[71] *Id.* at 772.

alleged damage.[72] The fact that the County Commission was immune from liability under West Virginia Code § 23-2-6 made no difference.[73] Likewise, the Court made no finding that March-Westin was required to join (or attempt to join) the County Commission into the lawsuit.[74] Finally, relying on the definition of "fault" as set forth in West Virginia Code § 55-7-13b, the Court held that March-Westin was not required to prove the elements of deliberate intent to avail itself of the nonparty fault provisions in Section 55-7-13d.[75] Again, the Court explained that "allocation of fault under Section 13d is strictly a matter of 'determining the fault of named parties' by reducing such fault by the degree of *fault* (rather than liability) of nonparties to the action."[76]

Although *March-Westin* dealt solely with Section 55-7-13d and deliberate intent, the overarching theme is applicable here. As the Court made clear, the purpose of nonparty fault is to assist the trier of fact in assessing the named parties' liability and, in those situations, there is no need to join the nonparties to the action. The same is true for MPLA cases. Specifically, here, the jury cannot properly assess the liability, if any, of Respondent, Dr. Challa, who recommended implantation of a pacemaker, without also assessing the fault, if any, of dismissed defendant, Dr. Ratnani, who actually implanted the pacemaker. As set forth above, Dr. Ratnani need not be joined to the action for the jury to assess his fault.

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[72] *Id.* at 774-75.

[73] *Id.*

[74] *See id.*

[75] *Id.* at 776.

[76] *Id.* (emphasis added) (citing *Taylor v. Wallace Auto Parts & Servs., Inc.*, No. 2:19-CV-27, 2020 WL 1316730 (N.D.W. Va. Mar. 19, 2020) ("Because the only liability (as opposed to assessment of fault) to be established here is the fault of the non-employer Defendant, the elements of deliberate intent need not be alleged for Defendant to avail itself of section 55-7-13d . . . .").

Petitioners' argument also fails from a logistical standpoint because, if true that neither Dr. Ratnani and/or PCS could be properly served as Petitioners argue, then Respondent would likewise be unable to pursue a crossclaim or third-party complaint against those defendants.[77] And, Section 55-7-13d provides for notice sufficient to allow a plaintiff to add the at-fault nonparties as defendants.

For these reasons, the Circuit Court of Kanawha County correctly affirmed that the fault of the dismissed defendants in this case may be considered by the jury under the MPLA.

D. Respondent Properly Relied Upon Petitioners' Allegations and Expert Witness's Opinions as Evidence of Fault Against the Dismissed Defendants.

Petitioners claim that "[t]he Circuit Court erred in answering its Certified Question in the affirmative as the clear and unambiguous language of the West Virginia Medical Professional Liability Act does not permit evidence of fault of the dismissed defendants in the underlying matter when the only evidence of fault elicited was from a screening certificate of merit submtited [sic] pre-suit."[78]

W. Va. Code § 55-7B-6(j) provides:

> Notwithstanding any other provision of this code, a notice of claim, a health care provider's response to any notice of claim, a screening certificate of merit, and the results of any mediation conducted pursuant to the provisions of this section are confidential and are not admissible as evidence in any court proceeding unless the court, upon hearing, determines that failure to disclose the contents would cause a miscarriage of justice.[79]

[77] *See, c.f., id.* at 770 (finding that immunity from suit does not preclude the jury from considering fault of that party).

[78] Pet'rs' Br. at 22.

[79] W. Va. Code § 55-7B-6(j).

But here, Petitioners expressly referenced the notice of claim and certificate of merit in the Complaint, allowing their consideration by the circuit court.[80] And the fault of Dr. Ratnani was well established in the deposition of Petitioners' expert, Dr. Denardo. The fact that Dr. Denardo offered opinions at deposition consistent with his previously executed screening certificate of merit does not make those opinions confidential or inadmissible as evidence at trial.[81]

During the deposition, there was testimony about the screening certificate of merit, [J.A. 000196 at 80:11-12],[82] but Dr. Denardo also offered opinions critical of Dr. Ratnani apart from his screening certificate of merit:

> **Q:** And I don't want to go back through all your opinions, but basically would the opinions you hold as to Dr. Ratnani be the same opinion that you have expressed as it relates to Dr. Challa particularly regarding the violation of the standard of care as evidenced by the failure to follow the 2012 guidelines?
>
> **A:** Yes. As a cardiothoracic surgeon, he should be aware of the guidelines. I mean, if you're doing – I think this is probably true of any domain in medicine, if you're performing a procedure on a patient, you need to be fluent with the guidelines for doing that procedure. I think that's a pretty fair statement.

[J.A. 0000196 at 80:13-24.]

As such, expert witness testimony was sufficiently developed independent of the screening certificate of merit to establish the requisite elements of proof against Dr. Ratnani.[83]

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[80] *See, c.f., Forshey v. Jackson*, 671 S.E.2d 748, 753-54 (W. Va. 2008).

[81] *See* W. Va. Code § 55-7B-6(j). Additionally, the fact that Petitioners asserted claims against Dr. Ratnani and PCS in the Complaint is likewise not confidential.

[82] Testifying that, "if Dr. Ratnani is a cardiothoracic surgeon, then, yes, I stand by the original certificate."

[83] Respondent further raised, and therefore preserved, the argument that a failure to disclose the contents of the notice of claim and screening certificate of merit to Dr. Ratnani and PCS would cause a miscarriage of justice. [J.A. 0000137 at n.1.]

E. Public Policy Dictates that the Fault of the Dismissed Defendants be Considered by the Jury.

Petitioners last argue "[t]he Circuit Court erred in answering its Certified Question in the affirmative as public policy dictates that the fault of the dismissed defendants in the underlying matter cannot be considered by the jury."[84]

Petitioners' theory of liability in this case is that Respondent Dr. Challa's *recommendation* for implantation of a pacemaker was a proximate cause of his alleged damages. [J.A. 000007 at ¶¶ 11, 20.] But Dr. Challa does not implant pacemakers. [*See* J.A. 000009 at ¶¶ 12, 32; J.A. 000136.] He had to consult Dr. Ratnani, a cardiothoracic surgeon who performs pacemaker implantations. [J.A. 000009 at ¶ 12.] Dr. Ratnani performed an independent evaluation of Mr. Wingett, agreed with Dr. Challa's recommendation, and proceeded to implant the pacemaker. [*See id.*; J.A. 000136.] But for Dr. Ratnani's implantation of the pacemaker, Petitioners would have no case.

Petitioners sued Dr. Ratnani and specifically alleged that his negligent implantation of the pacemaker proximately caused the alleged damages. [J.A. 000013.] Due to an alleged inability to effectuate service, however, Petitioners dismissed Dr. Ratnani and his group, PCS, *without prejudice*. [J.A. 000030-31.] Regardless, at deposition, Petitioners' expert witness testified that he was critical of Dr. Ratnani to the same extent he was critical of Dr. Challa; *i.e.*, because they both allegedly did not follow applicable guidelines that suggested Mr. Wingett was not a candidate for pacemaker implantation. [J.A. 0000196 at 80:13-24.] Nevertheless, Petitioners seek to have this Court prevent the jury from considering the fault of Dr. Ratnani.

[84] Pet'rs' Br. at 24.

In 2015, the West Virginia Legislature made several major changes to our State's general liability statutes.[85] Those changes were enacted in effort to prevent defendants from paying in excess of their fair share of fault. In discussing the purpose of this statute in the February 13, 2015 West Virginia Legislative Wrap Up, House Judiciary Chairman John Shott observed that the applicable bill was intended to "remove unfairness and uncertainty in assignment of fault. Defendants would no longer be held accountable for damages that were not their own."[86]

This Court has also recognized the importance of such policy considerations. As set forth above, this Court found that "[a] jury *cannot* accurately assess a named party's fault unless the jury also weighs the fault of every nonparty who may have contributed to the claimant's damages."[87] This conclusion also holds true for juries assessing fault under the MPLA.[88] And, this is particularly important in cases where the parties are immune from liability or otherwise unable to be added to the lawsuit, as Petitioners allege was the case here since Dr. Ratnani and PCS were not servable.[89]

Therefore, public policy leans strongly towards parties paying damages only for their own fault. Permitting the jury to consider the fault of all alleged parties, whether named in the lawsuit or not, accomplishes this goal. West Virginia Code § 55-7-13d broadly accomplishes this goal.

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[85] This Court summarized those changes in *State ex rel. Chalifoux*, 2021 WL 2420196, at *4. *See also State ex rel. March-Westin Co., Inc.*, 879 S.E.2d at 774, n.6 (citing *State ex rel. Chalifoux*, 2021 WL 2420196, at *4).

[86] WV Legis. Wrap-Up, 2/13/2015 (available as cited on Westlaw).

[87] *State ex rel. March-Westin Co., Inc.*, 879 S.E.2d at 775 (emphasis added).

[88] This Court further held that "[f]ault of a nonparty shall be considered . . . if a defending party gives notice no later than one hundred eighty days after service of process upon said defendant that a nonparty was wholly or partially at fault." *Id.* (citing W. Va. Code § 55-7-13d(a)(1) and (2)). Thus, at a minimum, because Respondent satisfied that requirement, nonparty fault shall be considered in this case.

[89] *See id.* at 770.

West Virginia Code § 55-7B-9(b) accomplishes the goal in a more specific setting—medical professional liability actions. And these policy considerations are arguably more important in MPLA cases because, by enacting the current version of the MPLA, the Legislature specifically declared that a citizen's rights to health care must be balanced with the ability to have qualified health care providers practice medicine in the State of West Virginia, which is achieved, in part, by controlling the cost of liability insurance to maintain access to affordable health care services for its citizens.[90]

Applying those policy considerations to the facts in this case leads to the conclusion that the fault of Dr. Ratnani and PCS should be considered by the jury.

Petitioners assert they would be prejudiced if the jury were permitted to consider the fault of the dismissed parties but make no showing as to what prejudicial effect such an action would have.[91] Conversely, Respondent would be significantly prejudiced because his liability, if any, cannot be accurately assessed unless the jury also weighs the fault of every nonparty who may have contributed to Petitioners' alleged damages.[92] Thus, Respondent maintains that the Circuit Court of Kanawha County properly answered the above Certified Question.

CONCLUSION

For these reasons, Respondent respectfully requests this Court uphold and affirm the Certified Question as answered by the Circuit Court of Kanawha County, West Virginia. Respondent requests any additional relief this Court deems just and necessary.

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[90] W. Va. Code § 55-7B-1. *See also State ex rel. Chalifoux*, 2021 WL 2420196, at *7-8, *13 (memorandum decision) (Armstead, J., dissenting).

[91] Pet'rs' Br. at 25.

[92] *State ex rel. March-Westin Co., Inc.*, 879 S.E.2d at 775.

/s/ Candice M. Harlow
Candice M. Harlow (WVSB #12496)
Thomas J. Hurney, Jr. (WVSB #1833)
JACKSON KELLY PLLC
500 Lee Street East, Suite 1600
Post Office Box 553
Charleston, West Virginia 25322
Telephone: (304) 340-1000
Facsimile: (304) 340-1050
charlow@jacksonkelly.com
thurney@jacksonkelly.com

Counsel for Respondent, Kishore K. Challa, M.D.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DARRELL WINGETT and
CAROL WINGETT,

Plaintiffs Below, Petitioners,

vs.) **No. 22-567**

KISHORE K. CHALLA, M.D.,

Defendant Below, Respondent.

CERTIFICATE OF SERVICE

I, Candice M. Harlow counsel for Defendant Below/Respondent, Kishore K. Challa, M.D., do hereby certify that on this the 25th day of May 2023, a true and exact copy of the foregoing ***Respondent's Brief*** was served upon the following counsel of record via File & ServeXpress:

Andrew D. Byrd, Esquire
WARNER LAW OFFICES, PLLC
227 Capitol Street
Charleston, West Virginia 25333

/s/ Candice M. Harlow
Candice M. Harlow (WVSB #12496)