IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 23-ICA-58

JOHN R. ORPHANOS, M.D.,
Defendant-Below, Petitioner,

v.

MICHAEL RODGERS,
Plaintiff-Below, Respondent.

PETITIONER JOHN R. ORPHANOS, M.D.'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

A. The circuit court erred in denying Dr. Orphanos' *Motion for Partial Summary Judgment on Claims Other than Medical Negligence, or in the Alternative, Motion to Bifurcate*.

B. The circuit court abused its discretion in denying Dr. Orphanos' *Motion in Limine to Preclude Plaintiff from Asserting or Arguing that Defendant was "Reckless."*

C. The circuit court erred in denying Dr. Orphanos' oral *Motion for Judgment as a Matter of Law* and post-trial *Renewed Motion for Judgment as a Matter of Law*.

D. The circuit court abused its discretion in denying Dr. Orphanos' *Motion for a New Trial*, which included the following issues:

1. The circuit court abused its discretion when it denied Dr. Orphanos' pre-trial motions for Partial Summary Judgment and *in Limine* regarding recklessness.
2. The circuit court abused its discretion by reading to the jury Plaintiff's proposed jury instruction defining recklessness as "an act of unreasonable character in disregard for a risk known to him or so obvious that it must be taken that he was aware of it."
3. The circuit court abused its discretion by reading to the jury Plaintiff's instruction regarding "emergency surgery," and allowing a question to be posed regarding "emergency surgery" on the Verdict Form.
4. The circuit court abused its discretion by failing to either exclude a supplemental expert disclosure filed by Plaintiff just over two months before trial and after discovery had been completed or, in the alternative, grant a continuance to allow Dr. Orphanos adequate time to rebut the evidence.
5. The circuit court abused its discretion by excluding the testimony of Dr. Orphanos' vascular neurology expert, Dr. Jodi Gehring, regarding the effect that a 2020 stroke had

on Plaintiff's life expectancy.

6. The circuit court abused its discretion by permitting Plaintiff's life care planner, Nadene Taniguchi, R.N., to testify that Plaintiff's stroke in 2020 was related to the care rendered by Dr. Orphanos in 2017.
7. The circuit court abused its discretion by permitting Dr. Daniel Feinberg, Plaintiff's neurology expert, to render opinions on the standard of care of a neurosurgeon.
8. The circuit court abused its discretion by permitting Dr. Mark Weidenbaum, Plaintiff's standard of care expert, to be recognized as a spine surgery expert.
9. The circuit court abused its discretion by precluding Dr. Orphanos from cross examining Plaintiff's mother with notes she made that contemporaneously describe a discussion she had with Dr. Joby Joseph, a CAMC treating neurologist.
10. The circuit court abused its discretion by denying Dr. Orphanos' pre-trial Motion *in Limine* and allowing evidence that Dr. Orphanos miscounted vertebral bodies during the surgery at issue.
11. The circuit court abused its discretion by failing to instruct the jury to disregard Plaintiff's demonstrative pie chart during closing arguments.
12. The cumulative prejudicial impact of the above cited errors resulted in a trial in which Dr. Orphanos was deprived of his fundamental right to an impartial and neutral trial under the law.

II. STATEMENT OF THE CASE

A. Statement of Facts

On June 4, 2017, Michael Rodgers ("Plaintiff") lost control of his motorcycle and crashed; he was then life flighted to Charleston Area Medical Center ("CAMC") General Hospital, a Level

1 Trauma Center, where he received care for his injuries as a trauma patient. App. 52. After a CT scan revealed spinal fractures, Plaintiff was admitted to the Surgical Trauma Intensive Care Unit. App. 31, 450 On June 5, 2017, in response to a request for a neurosurgery consultation, Dr. Orphanos assessed Plaintiff and diagnosed a T5 Chance fracture (a transverse fracture through a vertebral body and neural arch). *Id*. Dr. Orphanos determined the spinal fracture was unstable and required surgery. App. 52, 450. The following day, Dr. Orphanos performed surgery, which involved placing orthopedic screws into the vertebrae to stabilize the fracture. App. 31, 450.

After the surgery, Plaintiff had no movement in his lower extremities. App. 53. Dr. Orphanos ordered a spinal CT scan. App. 451. Because the scan did not show evidence of anything which would explain the paralysis, such as spinal cord compression, any malalignment of the orthopedic screws, or evidence of any formation of epidural hematoma, Dr. Orphanos recommended that Plaintiff be returned to surgery. App. 32, 451, 2387. During the second surgery, Dr. Orphanos explored the spine but saw no evidence of compression or any interference with the spinal cord. App. 451, 2387. Plaintiff's paraplegia persisted and was ultimately determined to be permanent. App. 32, 54. According to a treating physician and defense experts, the paralysis was caused by a spinal cord infarct, *i.e*., spinal cord stroke that occurred during the surgery, which was neither predictable nor preventable.[1]

Plaintiff filed a complaint against Dr. Orphanos on May 30, 2019, alleging three breaches of the standard of care: (1) prior to the first surgery, Dr. Orphanos should have ordered an MRI of the thoracic spine; (2) during the surgery, Dr. Orphanos should have used a system called

[1] Dr. Joby Joseph was one of Plaintiff's treating physicians, and during a conversation with Plaintiff's mother, Dr. Joseph said he believed Plaintiff's paraplegia was caused by a spinal cord infarct. App. 2369–70. Dr. Orphanos' causation expert, Dr. Dennis Whaley, offered the opinion that Plaintiff's paraplegia was caused by a vascular injury sustained at the time of the motorcycle accident that infarcted the spinal cord. App. 170, 3328–29.

intraoperative neurophysiological monitoring ("IONM") to monitor Plaintiff; and (3) after learning about Plaintiff's loss of function following the initial surgery, Dr. Orphanos should have ordered a CT myelogram. App. 55–58. Plaintiff further claimed that Dr. Orphanos' treatment amounted to gross negligence and recklessness and sought punitive damages.[2] App. 58–60.

While discovery was ongoing, on July 9, 2020, Plaintiff was diagnosed at the Carilion Clinic in Virginia with a right sided, middle cerebral artery embolic stroke, which left him with left sided hemiparesis. App. 23, 817–18, 2387. Plaintiff never amended his complaint to allege that Dr. Orphanos' 2017 care caused or contributed to his July 2020 stroke. *See* App. 51–61.

B. Procedural History

1. Pre-Trial Motions

On January 21, 2021, Plaintiff filed a Motion for Partial Summary Judgment, arguing that the "Trauma Cap" in the West Virginia Medical Professional Liability Act ("MPLA"), W. Va. Code § 55-7B-9c, did not apply because two statutory exceptions were implicated: (1) the surgery did not qualify as an "emergency" under W. Va. Code § 55-7B-9c(e)(1); and (2) Dr. Orphanos' treatment and conduct were "reckless" under W. Va. Code § 55-7B-9c(h)(1). App. 385–93. Dr. Orphanos opposed the motion. App. 449–65. The circuit court denied the motion on May 21, 2021, concluding that the jury would determine whether Plaintiff's surgery was emergent, and whether Dr. Orphanos acted recklessly. App. 589–94.

On January 5, 2022 (shortly before the scheduled March 14, 2022, trial date), Plaintiff served a Second Amended Expert Witness Disclosure, which included a new life care plan from Nadene Taniguchi, R.N., and a new economic report by Clifford Hawley, Ph.D., both relating to a claimed connection between Plaintiff's 2020 stroke and Dr. Orphanos' 2017 care. App. 761–84.

[2] Plaintiff later abandoned his claim for punitive damages. App. 746 ("[T]he Plaintiff has ***never*** alleged punitive damages in this case . . . ." (emphasis in original)).

Despite having Nurse Taniguchi's new life care plan since September 2021, and Dr. Hawley's new economic report since October 2021, *see* App. 765, 770, Plaintiff did not disclose them until two months before trial.

Dr. Orphanos moved to exclude the reports, arguing that Plaintiff had not identified an expert to causally link Dr. Orphanos' 2017 care to Plaintiff's 2020 stroke, and that the disclosure and updated reports were untimely produced. App. 816–35. In a separate motion, Dr. Orphanos moved to continue the trial date, arguing that Plaintiff added a new claim to the case without providing him an opportunity to conduct discovery. App. 785–91. During a hearing on Dr. Orphanos' motions, Plaintiff's counsel stated he would provide Dr. Orphanos "great latitude" in responding to the new disclosures. App. 2315, 2500. On February 24, 2022, the circuit court denied both of Dr. Orphanos' motions. App. 814–15, 1297–98.

On March 7, 2022, Dr. Orphanos served his Second Supplemental Expert Witness Disclosure, which included opinions from experts rebutting Plaintiff's new expert opinions. App. 1158–63. Despite the earlier assurance of "great latitude," on March 9, 2022, Plaintiff moved to strike the experts, arguing the supplemental expert disclosure was untimely and prejudicial. App. 1296–1301. During the circuit court's March 14, 2022, pre-trial hearing—held the day before jury selection—the circuit court granted in part and denied in part Plaintiff's motion to strike. App. 2506. Critically, the court precluded Dr. Orphanos from offering expert testimony from Dr. Jodi Gehring discussing the effect the 2020 stroke had on Plaintiff's life expectancy. *Id*.

The circuit court addressed other outstanding motions at the pre-trial hearing. Pending were Dr. Orphanos' two motions regarding the claim that he acted with a "reckless disregard of a risk of harm to the patient" under W. Va. Code § 55-7B-9c(h)(1): (1) Motion for Partial Summary Judgment on Claims other than Medical Negligence, App. 595–601, 729–40, and (2) Motion *in*

Limine to Preclude Plaintiff from Asserting or Arguing the Defendant was "Reckless." App. 948–53. In both motions, Dr. Orphanos argued that none of Plaintiff's experts opined that he was "reckless," and that he had disclosed experts who testified that his treatment met the standard of care. App. 737–38, 950. As such, Dr. Orphanos argued that there was no evidence, and specifically no expert evidence, that his care amounted to anything beyond simple negligence; thus, Plaintiff should have been barred from arguing "recklessness" at trial. App. 2518–19. The circuit court denied both motions at the pre-trial hearing, holding that the determination of whether Dr. Orphanos was reckless would be based on the totality of all the evidence presented at trial and not on any one expert's opinion. App. 2518, 2520.

Dr. Orphanos' other motions addressed at the pre-trial conference included (1) Motion *in Limine* to Exclude Medical Expenses Not Supported by Expert Testimony, relating to the testimony of Nurse Taniguchi, App. 1057–60; (2) Motion *in Limine* to Exclude the Testimony of Plaintiff's Expert, David Feinberg, M.D., Regarding the Applicable Standard of Care, App. 1029–34; and (3) Motion *in Limine* to Exclude Evidence or Testimony Regarding Miscounting of Vertebral Bodies During Surgery. App. 979–83. The circuit court denied all three motions at the pre-trial conference. App. 2513–15, 2511–913, and 2516–17, respectively.

2. The Trial

The trial began on March 15, 2022, and lasted for seven days. App. 2533–3707. Because the circuit court denied Dr. Orphanos' pre-trial motions on the issue of recklessness, Plaintiff's counsel actively injected recklessness at every turn, including voir dire,[3] opening statement,[4] and

[3] During voir dire, Plaintiff asked the following questions: "How about a situation where a doctor doesn't mean to hurt the patient, but the result is the patient is hurt and it's shown that a doctor is reckless. Do you believe there are situations where doctors are reckless?" App. 3897; "Is there a difference in your mind between making a mistake and being reckless?" App. 3898.

[4] During opening statements, Plaintiff argued, "First, Do No Harm. And when you think about doing no harm, when you listen to the evidence in this case and the things that Dr. Orphanos did and failed to do, it

closing argument.[5] But no witness testified Dr. Orphanos was reckless or anything close to it.

On the first day of trial, Plaintiff's mother testified. App. 2654. During her direct examination, Ms. Rodgers referred to personal notes she made while talking with Plaintiff's treating physicians. App. 2669. On cross examination, Dr. Orphanos moved to introduce the notes into evidence. App. 2682–85. Without objection, the court admitted the notes. App. 2685. Dr. Orphanos then sought to question Ms. Rodgers on her notes about a conversation she had with Dr. Joby Joseph, one of the treating physicians, who told her that he believed Plaintiff's paralysis was caused by an "infarction just above T3/T4" that "would have happened at the time of accident" resulting in a "possible spinal stroke," thus supporting Dr. Orphanos' causation defense. App. 2685, 2369–70. But Plaintiff then objected, arguing the admission of the notes would violate the circuit court's order on Dr. Orphanos' motion *in limine* precluding standard of care or causation opinions not previously disclosed. App. 2686–87. The circuit court sustained Plaintiff's objection and disallowed the previously admitted notes. App. 2687, 2694–95. Dr. Orphanos, thus, was precluded from inquiring about the conversation.

On March 16, 2022, Plaintiff called Dr. Mark Weidenbaum, his standard of care expert, and moved to qualify him as an expert in spine surgery. App. 2721, 2735–36. Dr. Orphanos objected, arguing there was an insufficient foundation regarding whether Dr. Weidenbaum had experience in treating Chance fractures (like the one suffered by Plaintiff). App. 2736. The circuit court overruled Dr. Orphanos' objection and qualified Dr. Weidenbaum as an expert. *Id*.

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will defy logic that when a doctor makes the wrong choices and the reckless choices and doesn't treat a patient reasonably and appropriately and responsibly, he does harm. He should not be able to escape accountability or responsibility for the negligent, unreasonable and reckless choices he made during the course of Mike's care and treatment." App. 2545–46.

[5] During closing argument, Plaintiff stated, "And how many times have we talked about the things Dr. Orphanos failed to do, neglected to do, recklessly failed to do, not because he is a bad doctor. Because he made a fatal and serious, reckless mistake when he took Mike into surgery without dotting all the Is, and crossing all the Ts to avoid this catastrophe." App. 3603.

After the presentation of all the evidence, Dr. Orphanos moved for partial judgment as a matter of law under Rule 50(a) of the West Virginia Rules of Civil Procedure, arguing that the evidence presented at trial was insufficient to allow the issue of recklessness under W. Va. Code § 55-7B-9c(h)(1) to be presented to the jury, App. 3558–60; specifically, none of Plaintiff's experts offered testimony demonstrating that Dr. Orphanos' alleged breaches of the standard of care were "reckless," and the evidence failed to establish recklessness. App. 3439. Plaintiff countered that the MPLA does not require expert testimony on the issue of recklessness, and that the jury could determine recklessness based on the totality of the evidence. App. 3559–60. The circuit court denied Dr. Orphanos' motion, finding that sufficient evidence had been presented for the jury to find in favor of Plaintiff on the issue of recklessness. App. 3560.

Before the circuit court instructed the jury, the court directed counsel to submit a Proposed Jury Charge that reflected the parties' respective objections to ensure that all objections were preserved. App. 3563–64.[6] The parties jointly submitted the Proposed Jury Charge with Dr. Orphanos' objections in red font and Plaintiff's objections in blue font. App. 1895–1921. Dr. Orphanos objected to any instruction or interrogatory on the jury Verdict Form referencing recklessness, and to the instruction defining recklessness misstating the law based on W. Va. Code § 55-7B-9c(h)(1) and West Virginia case law. App. 1910. Dr. Orphanos also objected to the inclusion of an instruction on "emergency surgery" because whether the initial surgery constituted an "emergency" was irrelevant to the application of the Trauma Cap. App. 1908–09. The circuit court overruled Dr. Orphanos' objections. App. 3562–67.

[6] Regarding the Proposed Jury Charge and Instructions, the circuit court stated, "[i]t has your objections on there, so I can guess for purposes of any kind of appeal, I guess I could - - we can file the proposal that you all sent in that notes the objections[.] [. . .] Yes, I think for each of these it is in parenthesis the objection and the reason for the objection. [. . .] Yes, that's why I think it would make sense to file the joint proposed charge that has the objections for each instruction." App. 3563–64.

Dr. Orphanos also objected to the proposed Verdict Form because the first question asked the jury to determine whether "the first surgery performed on Michael Rodgers was an emergency surgery." App. 3565. He objected based on the reasons previously asserted regarding the "emergency" jury instruction and arguments in response to Plaintiff's motion for directed verdict. App. 3565, 3561–62. He also objected to the placement of the "emergency surgery" question on the Verdict Form, arguing that it should not have been the first question posed to the jury. App. 3567. Rather, Dr. Orphanos argued that the first question posed to the jury should be on the standard of care because if the jury found that Dr. Orphanos did not breach the standard of care, then no other inquiries were needed. *Id*. The circuit court left "emergency surgery" as the first question. App. 3568.

During Plaintiff's closing argument, Dr. Orphanos objected to the use of a pie chart, App. 1924, that showed pieces of "pie" relating to the claimed damages with, by far, the largest of the "pie" pieces labeled as non-economic damages. App. 3636–37. Dr. Orphanos argued that the pie chart inappropriately suggested to the jury a larger amount should be awarded for non-economic damages and requested that the jury be instructed to disregard the pie chart. App. 3637. The circuit court overruled the objection. App. 3638.

3. Post-Trial Motions

On March 24, 2022, after deliberation, the jury returned a verdict finding for Plaintiff. App. 1408–11. The jury found: (1) the first surgery performed on Plaintiff was not an "emergency surgery"; (2) Dr. Orphanos was negligent; (3) Dr. Orphanos' breach of the standard of care caused or contributed to Plaintiff's paraplegia; (4) Dr. Orphanos was reckless in his care and treatment of Plaintiff; (5) Dr. Orphanos' negligence caused or contributed to Plaintiff's 2020 stroke; and (6) Plaintiff was not negligent in failing to present to the emergency department prior to his 2020

stroke. *Id*. Based on these findings, the jury returned the following verdict for Plaintiff regarding his paraplegia and the 2017 surgery:

Past expenses for care and treatment	$1,374,079.00
Lost Earning Capacity	$591,166.00
Future care, treatment and renovation expenses	$6,511,940.00
Past pain, suffering and loss of enjoyment of life	$1,000,000.00
Future pain, suffering and loss of enjoyment of life	$1,500,000.00

App. 1409. For Plaintiff's 2020 stroke, the jury awarded additional damages:

Additional future care and treatment	$1,793,690.00
Future pain, suffering, and loss of enjoyment of life associated with stroke	$5,000,000.00

App. 1410. When combined, the total verdict was $17,770,875.00.

On April 13, 2022, Dr. Orphanos filed a Motion to Reduce Verdict Consistent with the MPLA, App. 1412–24, which Plaintiff opposed. App. 1467–91. After briefing, the circuit court heard argument on April 29, 2022. App. 3708. On June 9, 2022, the circuit court entered an order (1) deferring ruling (by agreement of Plaintiff's counsel) on Dr. Orphanos' motion to reduce the entire verdict under the MPLA's Trauma Cap; (2) applying W. Va. Code § 55-7B-8 to reduce the verdict for non-economic damages to $750,000.00; and (3) taking under advisement Dr. Orphanos' motion to reduce the award of medical expenses; the court also instructed the parties to exchange additional information on the medical bills. App. 8–16. The parties exchanged information and filed supplemental briefing. App. 1612, 1625. The circuit court held another hearing on June 30, 2022. App. 3755. The circuit court's rulings on these issues were included in its Judgment Order.

The Judgment Order was entered on September 12, 2022. App. 1–7. The circuit court

concluded that based on the jury's verdict and the mandatory reductions required by the MPLA, the judgment against Dr. Orphanos included: (1) past and future pain, suffering and loss of enjoyment of life totaling $750,000.00; (2) lost earning capacity totaling $591,166.00; (3) past expenses for care and treatment totaling $215,588.58; and (4) future care, treatment and renovation expenses totaling $8,305,630.00. App. 6. The judgment totaled $9,862,384.58. *Id*.

After the Judgment Order was entered, Dr. Orphanos filed a Renewed Motion for Judgment as a Matter of Law on the Issue of Recklessness and a Motion for New Trial. App. 1927, 2129. Plaintiff filed a Motion to Alter or Amend the Judgment. App. 2060. The circuit court held a hearing on these motions on November 22, 2022. App. 3779. On January 19, 2023, the circuit court denied the parties' post-trial motions. App. 31, 22, and 36, respectively. Dr. Orphanos timely filed his Notice of Appeal on February 17, 2023. App. 49. Plaintiff also timely filed an appeal on February 21, 2023, which is docketed at 23-ICA-64.

III. SUMMARY OF ARGUMENT

This appeal is about ensuring a level playing field. By allowing Plaintiff, without any evidentiary support, to inject recklessness at every turn, and not instructing the jury appropriately, the circuit court permitted the jury to reach a verdict that denied Dr. Orphanos the protection of the MPLA's Trauma Cap for a patient with a fractured spine he treated on referral from the emergency room. The jury ultimately concluded that Dr. Orphanos acted recklessly despite the absence of any expert testimony or evidence that Dr. Orphanos was reckless. For the following reasons, this verdict cannot stand. Dr. Orphanos is either entitled to have the "recklessness verdict" overturned and the Trauma Cap enforced, or he is entitled to a new trial.

Dr. Orphanos asserts sixteen assignments of error ranging from errors of law to evidentiary rulings. As to recklessness, Dr. Orphanos asserts the circuit court erred in permitting the jury to

consider the issue of whether his conduct amounted to a "reckless disregard of a risk of harm to the patient" under W. Va. Code § 55-7B-9c due to the lack of evidence, particularly expert testimony, in the record. As a result, Plaintiff's counsel (but no witness) was permitted to inject "recklessness" into the trial. The court compounded this error by reading instructions to the jury that contained misstatements of law and providing a defective Verdict Form.

Prior to trial, the circuit court abused its discretion in permitting Plaintiff to disclose late experts with new opinions while denying Dr. Orphanos the same opportunity or any other relief—particularly a continuance. During trial, the circuit court further abused its discretion in allowing Plaintiff's experts to render opinions on topics for which they were not qualified, allowing Plaintiff to examine a witness using notes written by the witness but denying Dr. Orphanos the opportunity to use those same notes on cross examination, failing to exclude standard of care arguments not supported by expert testimony, and allowing Plaintiff to suggest a verdict amount to the jury for non-economic damages.

During each of phase of the litigation, the circuit court made clear errors of law and abused its discretion, and the combined effect of these errors warrants a finding that the jury's verdict in this case is unreliable, and that Dr. Orphanos is entitled to a new trial.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument will aid the decisional process and should be granted under W. Va. R. App. P. 20. Rule 20 oral argument is appropriate because this case involves issues of first impression in West Virginia. The Supreme Court of Appeals has not addressed the question of whether expert testimony is needed to demonstrate that a healthcare provider acted "[i]n willful and wanton or reckless disregard of a risk of harm to the patient" under W. Va. Code § 55-7B-9c(h)(1). Nor has the Court previously interpreted the language in W. Va. Code § 55-7B-9c regarding the

"reasonable" amount of time between the original emergency care and follow-up surgery for purposes of determining whether the Trauma Cap applies. This case presents an opportunity to address these previously unresolved issues related to the MPLA's interpretation.

V. ARGUMENT

A. Standard of Review

"The appellate standard of review for an order granting or denying a renewed motion for a judgment as a matter of law after trial pursuant to Rule 50(b) of the *West Virginia Rules of Civil Procedure* is *de novo*." *Dan's Car World, LLC v. Delaney*, 246 W. Va. 289, 295, 873 S.E.2d 820, 826 (2022) (citation omitted). "Specifically, '[a]fter considering the evidence in the light most favorable to the nonmovant party, we will sustain the granting or denial of a pre-verdict or post-verdict motion for judgment as a matter of law when only one reasonable conclusion as to the verdict can be reached.'" *Id.*

A circuit court's decision to grant a new trial is reviewed for an abuse of discretion. *Tennant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 104, 459 S.E.2d 374, 381 (1995); *Williams v. Charleston Area Med. Ctr., Inc.*, 215 W. Va. 15, 18, 592 S.E.2d 794, 797 (2003); Syl. Pt. 3, *In re State Pub. Bldg. Asbestos Litig.*, 193 W. Va. 119, 123, 454 S.E.2d 413,417 (1994). "A party is entitled to a new trial 'if there is a reasonable probability that the jury's verdict was affected or influenced by trial error.'" *Herbert J. Thomas Mem'l Hosp. Ass'n v. Nutter*, 238 W. Va. 375, 391, 795 S.E.2d 530, 546 (2016) (quoting *Tennant*, 194 W. Va. at 111, 459 S.E.2d at 388).

B. The Circuit Court Erred in Denying Dr. Orphanos' Motion for Partial Summary Judgment, Motion for Judgment as a Matter of Law, and Renewed Motion for Judgment as a Matter of Law on the Issue of "Recklessness."

At the heart of this appeal is whether the Trauma Cap applies to Plaintiff's claims. W. Va. Code § 55-7B-9c(a) provides "[i]n any action . . . for injury to or death of a patient as a result of

health care services or assistance rendered in good faith and necessitated by an emergency condition for which the patient enters a health care facility designated . . . as a trauma center . . . the total amount of civil damages recovered may not exceed $500,000[.]" W. Va. Code § 55-7B-9c(d) further provides that the Trauma Cap "also applies to any act or omission of a health care provider in rendering continued care or assistance in the event that surgery is required as a result of the emergency condition within a reasonable time after the patient's condition is stabilized." Plaintiff argues that Dr. Orphanos' treatment—a surgery to stabilize the spine fracture for which Plaintiff was admitted—was rendered "[i]n a willful and wanton or reckless disregard of a risk of harm to the patient," thereby precluding application of the Trauma Cap. *See* W. Va. Code § 55-7B-9c(h)(1). However, Plaintiff did not produce any evidence or expert opinion during discovery or at trial to support the jury's finding that Dr. Orphanos was reckless.

The circuit court had several opportunities to determine that Plaintiff failed to support his claim that Dr. Orphanos' alleged breaches of the standard of care amounted to a "reckless disregard of a risk of harm to the patient" under W. Va. Code § 55-7B-9c(h)(1), including Dr. Orphanos' pre-trial Motion for Partial Summary Judgment on Claims Other than Medical Negligence,[7] his Motion for Judgment as a Matter of Law made at the conclusion of the evidence, and his post-trial Renewed Motion for Judgment as a Matter of Law. App. 595, 3558, and 1927, respectively.

In denying Dr. Orphanos' pre-trial motions for summary judgment and *in limine* related to recklessness, App. 2518–20, the circuit court permitted Plaintiff to interject "recklessness" into the trial. In voir dire, opening statement, and closing argument, Plaintiff used every opportunity to characterize Dr. Orphanos' actions as "reckless." *See supra* Section II.B.2, notes 3–5. At the close

[7] As set forth in the argument for New Trial below, the circuit court also erred in denying his Motion *in Limine* to Preclude Plaintiff from Asserting or Arguing that Defendant was "Reckless." *See* infra Section V.C.1.

of evidence, the circuit court similarly denied Dr. Orphanos' motion for Judgment as a Matter of Law which argued there was insufficient evidence to allow the jury to consider the issue of recklessness. App. 3558–60. Because the circuit court denied the motion, the jury—over Dr. Orphanos' objections to the instructions and Verdict Form—was permitted to consider the issue of "recklessness."

After the entry of judgment, Dr. Orphanos renewed his motion for judgment as a matter of law on the insufficiency of the evidence of "recklessness," and moved for new trial, arguing the circuit court erred in permitting the jury to consider the issue of "recklessness." App. 1927, 2129. The circuit court denied these motions, concluding that "an expert is not required to opine regarding recklessness," and that "nothing in W. Va. Code § 55-7B-9c(h)(1) require[es] specific expert testimony that a health care provider was 'reckless.'" App. 34.

With these rulings, the circuit court misinterpreted and misapplied the provisions of the MPLA governing exceptions to the Trauma Cap. As such, the circuit court committed clear error.

1. The circuit court erred in finding that the MPLA does not require expert testimony on the issue of "recklessness."

The circuit court's rulings are inconsistent with both the language of the MPLA and case law interpretating the provisions of the MPLA. The MPLA expressly requires that a defendant's failure to meet the standard of care shall be established by expert testimony. W. Va. Code § 55-7B-7(a) ("The applicable standard of care and a defendant's failure to meet the standard of care, if at issue, shall be established in medical professional liability cases by the plaintiff by testimony of one or more knowledgeable, competent expert witnesses if required by the court."); *see also Farley v. Shook*, 218 W. Va. 680, 685, 629 S.E.2d 739, 744 (2006) ("It has been explained further that '[i]t is the general rule that in medical malpractice cases negligence or want of professional skill can be proved only by expert witnesses.'") (citation omitted).

Plaintiff's experts testified to three breaches of the standard of care: (1) Dr. Orphanos did not order a pre-operative MRI of the thoracic spine; (2) during the surgery, Dr. Orphanos did not use IONM; and (3) after learning about Plaintiff's loss of function, Dr. Orphanos did not order a CT myelogram. App. 55–58. To be clear, Plaintiff's experts did not testify that any other conduct by Dr. Orphanos breached the standard of care. Nevertheless, throughout the trial, Plaintiff referred to various other acts by Dr. Orphanos that Plaintiff claimed amounted to "reckless" behavior, including that Dr. Orphanos "rushed" Plaintiff to surgery, App. 2569; did not take enough time to evaluate the patient, App. 3608; failed to review forty hours of nursing notes, *id.*; failed to obtain proper consent, App. 2558–59; and miscounted the vertebrae. App. 2574. In fact, Plaintiff suggested to the jury that Dr. Orphanos' miscounting of the vertebrae showed recklessness when his own expert admitted it was not a breach of the standard of care. App. 2773. Most significantly, none of Plaintiff's experts testified that any of these actions breached the standard of care, much less that Dr. Orphanos acted in a "reckless disregard of a risk of harm to the patient."

If expert testimony is required to prove that a defendant failed to meet the standard of care, then expert testimony is also required to establish when a defendant's conduct goes beyond a mere breach of the standard of care and amounts to "willful and wanton or reckless disregard of a risk of harm to the patient." W. Va. Code § 55-7B-9c(h)(1). Although the Supreme Court of Appeals has never explicitly ruled expert testimony is necessary to prove "recklessness" with respect to the Trauma Cap, the Court has relied on expert testimony to support a finding of punitive damages. Similar to W. Va. Code § 55-7B-9c(h)(1), a punitive damage claim requires evidence demonstrating "that a defendant acted with wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others to appear or where the legislature so authorizes." Syl. Pt. 8, *Karpacs-Brown v. Murthy*, 224 W. Va. 516, 686 S.E.2d 746, 749 (2009)

(citation omitted). And under W. Va. Code § 55-7-29, that evidence must be *clear and convincing*.

In *Stephen v. Rakes*, 235 W. Va. 555, 775 S.E.2d 107 (2015), the Supreme Court of Appeals affirmed the denial of a defendant physician's motion for summary judgment on plaintiff's claim for punitive damages because plaintiff "provided evidence that Dr. Stephens' care of the decedent was 'dangerous, and at the very least, reckless.'" 235 W. Va. at 566, 775 S.E.2d at 118. The plaintiff's expert testified that the defendant's treatment "was as bad a care as I've ever seen in my 30 years in a three-day hospitalization." *Id.* at 567, 775 S.E.2d at 119. And another of the plaintiff's experts specifically called the defendant's conduct "reckless." *Id.* Based on this evidence, the Court concluded that this testimony "sufficiently established" that defendant's conduct was reckless. *Id.* at 566, 775 S.E.2d at 188.

Here, the standard the Supreme Court of Appeals applies to determining the sufficiency of evidence supporting punitive damages should apply to determinations of "willful and wanton or reckless disregard of a risk of harm to the patient" in W. Va. Code § 55-7B-9c(h)(1). This is consistent with the MPLA's statutory requirements regarding establishing breaches of the standard of care, as well as the Court's concern in assisting "lay jurors in determining whether the injuries incurred by the plaintiff were indeed the result of a breach of the duty of care or lack of requisite skill by the defendant-physician." *Totten v. Adongay*, 175 W. Va. 634, 638, 337 S.E.2d 2, 6 (1985). If lay jurors cannot be expected to know when a physician's actions are negligent without expert testimony, then lay jurors cannot be expected to know when that negligence crosses the threshold into being considered "reckless."[8] Here, Plaintiff relied on alleged conduct not identified as breaches by expert testimony in support of the notion that Dr. Orphanos acted recklessly. Because expert testimony is needed to establish whether a physician acted recklessly, the circuit court erred

[8] It is worth note that Plaintiff withdrew his punitive damages claim, avoiding the standard and requirement of clear and convincing evidence set forth in W. Va. Code § 55-7-29. App. 746.

in ruling that "an expert is not required to opine regarding recklessness." App. 34.

2. Because the MPLA requires expert testimony to establish "recklessness," the circuit court erred in denying Dr. Orphanos' Motion for Judgment as a Matter of Law, as there was legally insufficient evidence to support Plaintiff's claim.

By failing to offer expert testimony supporting a finding of "recklessness," Plaintiff failed to meet his burden of proof on this issue as a matter of law. Despite numerous opportunities during discovery and at trial to testify that Dr. Orphanos' alleged breaches of the standard of care rose to the level of "willful and wanton or reckless disregard of a risk of harm to the patient," no expert ever did.

When Plaintiff's expert Dr. Feinberg was questioned about whether Dr. Orphanos breached the standard of care by failing to use IONM during surgery, Dr. Feinberg merely testified that, "I think it should have been used." App. 2637. And when discussing the use of IONM during surgeries, Dr. Feinberg qualified his opinion by stating that "[i]n Philadelphia the spine surgeons that would operate on the thoracic spine would always use this technology." *Id.* He never testified that the use of IONM was considered the standard of care throughout the country. Dr. Feinberg was presented with the opportunity to testify that Dr. Orphanos' failure to use IONM amounted to "reckless" conduct—but he did not. Nor could Dr. Feinberg even explain how Dr. Orphanos' actions during the initial surgery caused Plaintiff's paraplegia. App. 2622–23 ("My opinion is that the spinal cord injury was sustained during the surgery.").

Likewise, Dr. Weidenbaum, when testifying about what Dr. Orphanos should have done prior to the second surgery, stated that Dr. Orphanos did not meet the standard of care when he failed to order a CT myelogram. App. 2811–12. But Dr. Weidenbaum never testified that the failure to order a CT myelogram amounted to anything more than simple medical negligence. The only assertions that Dr. Orphanos' conduct was egregious enough to be considered "reckless"

came from Plaintiff's counsel.[9]

But to be clear, the point is not just whether an expert uttered the term "reckless." The point is that no expert testified that Dr. Orphanos' conduct was so far removed from reasonable to be considered reckless. *See Stephen*, 235 W. Va. at 567, 775 S.E.2d at 119 (testimony that defendant physician's treatment "was as bad a care as I've ever seen in my 30 years in a three-day hospitalization" sufficient to support punitive damage award).

In contrast, Dr. Orphanos presented expert testimony in support of his medical treatment, demonstrating that his choices were reasonable. Dr. Richard Berkman, Dr. Orphanos' neurosurgery expert, testified that Dr. Orphanos was not required to order a pre-operative MRI before the initial surgery to satisfy the standard of care because the CT provided all the radiological evidence that was needed. App. 3500.[10] He also confirmed that Dr. Orphanos was not required to use IONM during surgery to satisfy the standard of care because Dr. Orphanos was not going to be manipulating the spinal cord, *see* App. 3502, 3505,[11] nor was he required to obtain a CT myelogram before proceeding with the second surgery, as doing so would have delayed getting

[9] The Supreme Court of Appeals has consistently held that arguments of counsel are not evidence. *See Perrine v. E.I. du Pont de Nemours & Co*., 225 W. Va. 482, 532 n.56, 694 S.E.2d 815, 865 n.56 (2010) ("'Every trial judge knows, as every trial lawyer knows, and every appellate court judge should know, that the statements of counsel in an argument are not evidence but are merely the expression of his individual views[.]'") (quoting *Crum v. Ward*, 146 W. Va. 421, 457, 122 S.E.2d 18, 38 (1961)); *see also W. Va. Fire & Cas. Co. v. Mathews*, 209 W. Va. 107, 112 n.5, 543 S.E.2d 664, 669 n.5 (2000) ("Statements made by lawyers do not constitute evidence in a case.").

[10] Dr. Berkman was asked, "So do you have an opinion to a reasonable degree of medical probability as to whether or not the standard of care required a preoperative MRI?" He responded, "Yes, it does not. There is no question about it. [. . .] And even so, in my opinion in this case, even if they had an MRI, it would not have changed the outcome and that's important too." App. 3501.

[11] Dr. Berkman was asked, "Do you have an opinion to a reasonable degree of medical probability whether intraoperative monitoring was required to be used by Dr. Orphanos?" And he responded, "Yeah. It's not." App. 3506.

the patient back to surgery without providing any additional information to aid in that surgery. App. 3507–08.[12]

Because there was conflicting evidence regarding whether Dr. Orphanos even breached the standard of care, the circuit court erred in permitting the jury to consider the issue of "recklessness." In *Karpacs-Brown v. Murthy*, 224 W. Va. 516, 686 S.E.2d 746 (2009), the Supreme Court of Appeals was asked to determine if the trial court erred in refusing to give the jury an instruction permitting an award of punitive damages. *Id.* at 527, 686 S.E.2d at 757. The Court concluded that because the defendant presented a medical expert who testified that the defendant did not commit medical malpractice, there was insufficient evidence in the record to support an instruction on punitive damages. *Id.* Had Plaintiff sought punitive damages at trial, the competing expert testimony regarding whether Dr. Orphanos committed simple medical negligence would have prevented the jury from considering the issue under *Karpacs-Brown*. The same analysis should apply to the jury's consideration of recklessness here.

Even if expert testimony is not required to prove recklessness, the totality of the evidence presented at trial still failed to establish recklessness as a matter of law. Plaintiff did not present any evidence that came close to demonstrating that Dr. Orphanos acted with a "reckless disregard of a risk of harm to the patient." This is not a case where the physician was unqualified, proceeded to do a procedure that was prohibited, or was under the influence.[13] Rather, Plaintiff presented

[12] Dr. Berkman was asked, "So do you have an opinion to a reasonable degree of medical probability whether the standard of care required Dr. Orphanos to get a CT myelogram after the first surgery?" And he responded, "Yeah, I think it would have been a mistake to wait for a CT myelogram. I think he did exactly what - - I know he did exactly what I would have done." App. 3508.

[13] *See Short v. Downs*, 537 P.2d 754, 759 (Colo. App. 1975) (holding that the physician acted with "wanton and reckless disregard" to the patient when physician injected patient with silicone that was labeled "not for human use"); *Cash v. Kim*, 342 S.E.2d 61, 64 (S.C. Ct. App. 1986) (sustaining punitive damages award when plaintiff's expert testified that defendant-physician "lacked the skill required of a physician" when defendant tore a blood vessel after six unsuccessful attempts to insert a catheter into a patient's heart); *Med. Protective Co. v. Duma*, 478 F. App'x 977, 985 (6th Cir. 2012) (Rogers, J., dissenting) (defendant physician

evidence only on how Dr. Orphanos breached the standard of care and committed negligence in three discrete areas, which were disputed by Dr. Orphanos and his expert witnesses. Plaintiff then broadly argued the care was "reckless" without evidentiary foundation. The circuit court should have determined that the evidence was legally insufficient to sustain a verdict finding Dr. Orphanos acted in "reckless disregard of a risk of harm to the patient." Thus, the circuit court should have granted his motion or post-trial motion for judgment as a matter of law and should have applied the Trauma Cap to reduce the damage award.

C. The Circuit Court Abused its Discretion in Denying Dr. Orphanos' Motion for New Trial.

The circuit court's error in denying Dr. Orphanos' Motion for Judgment as a Matter of Law alone warrants the granting of a new trial. However, the circuit court committed additional abuses of discretion prior to and during trial that also warrant the granting of a new trial.

1. The circuit court abused its discretion by failing to grant Dr. Orphanos' motion *in limine* on the issue of "recklessness."

At every procedural step, Dr. Orphanos made the record that the jury should never have been allowed to consider the issue of "recklessness." The circuit court had the opportunity to preclude Plaintiff from arguing "recklessness" to the jury by granting Dr. Orphanos' motion *in limine* on the issue. As previously addressed, *see supra* Section V.B., pp. 12–20, in the absence of evidence demonstrating "willful and wanton or reckless disregard of a risk of harm to the patient," the circuit court committed clear error and abused its discretion in denying this motion and finding that "whether Dr. Orphanos was reckless will be based upon the totality of all the evidence and not any one expert's opinion." App. 2518. This ruling prejudiced Dr. Orphanos because it allowed Plaintiff to argue "recklessness" to the jury without sufficient evidentiary support in the record,

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who drank a fifth of vodka and delivered a baby was determined to be reckless).

thus resulting in a tainted jury verdict based on unsubstantiated claims and legally insufficient evidence. *See Brown v. Berkeley Fam. Med. Assocs., Inc.*, No. 16-0572, 2017 WL 3821807, at *3 (W. Va. Sept. 1, 2017) (upholding the trial court's decision to preclude plaintiff's counsel from using certain words such as "rule," "danger," and "dangerous" because these terms "were potentially confusing and misleading to jurors").

2. The circuit court abused its discretion by failing to exclude Plaintiff's late disclosed expert witnesses, and further abused its discretion by failing to allow Dr. Orphanos to present rebuttal expert testimony.

Two months before trial, in violation of the scheduling order, Plaintiff disclosed a new life care plan by nursing expert Taniguchi, and a new economic report by economist Hawley. App. 761. Plaintiff—for the first time—asserted that he sustained a stroke in 2020 caused by the care Dr. Orphanos rendered in 2017 and identified Nurse Taniguchi to testify to a causal connection. App. 772. With this new claim, Plaintiff's experts significantly increased the value of Plaintiff's life care plan from between $2,123,505.00 and $5,855,135.00, as disclosed on February 24, 2020, App. 301–02, to $7,940,860.00. App. 766, 775. Despite Dr. Orphanos' objections to these late disclosures and request for continuance to respond to Plaintiff's new opinions, the circuit court denied Dr. Orphanos any relief. App. 814.

a. Dr. Orphanos was prejudiced by the circuit court permitting Plaintiff to present new expert opinions at trial.

When Plaintiff filed his Second Amended Expert Witness Disclosure on January 5, 2022, discovery in the case had been closed since April 1, 2021, with his expert disclosures due on December 15, 2020. App. 210–11. The circuit court's last amended scheduling order, entered October 7, 2021, noted that expert disclosures had already been made. App. 758–59. Based on the timing of these disclosures—two months before trial—the circuit court should have determined that the disclosures were untimely. Deadlines in scheduling orders are binding. *See* Louis J.

Palmer, et al., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 16(b), at p. 510 (5th ed. 2017). The West Virginia Rules of Civil Procedure place parties under "a continuing duty to make a seasonable supplementation to its original answers to any question asking for the identity of an expert witness expected to be called at trial, the subject matter on which the expert will testify and the substance of his testimony." *State ex rel. Tallman v. Tucker*, 234 W. Va. 713, 717, 769 S.E.2d 502, 506 (2015) (citation omitted).

Despite these mandates, Plaintiff delayed disclosing both reports for months. Nurse Taniguchi prepared her new life care plan in September 2021, and Dr. Hawley prepared his new economic report in October 2021. App. 765, 770. Even if produced when written, these new reports and opinions were still way outside the deadlines in the circuit court's scheduling order. But had Plaintiff disclosed them when they were created, Dr. Orphanos would have had a more reasonable time to prepare rebuttal reports, and the parties would have had the opportunity to re-depose Plaintiff and expert witnesses to explore these new opinions. Instead, due to Plaintiff's delay, Dr. Orphanos was forced shortly before trial to secure rebuttal expert testimony and file various motions seeking relief.

Courts consider the following factors in determining whether to permit late supplemental expert disclosures: "(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." Syl. Pt. 2, *Tallman*, 234 W. Va. at 714, 769 S.E.2d at 504. Applying these factors here tips the scales in favor of Dr. Orphanos. There was no explanation for the untimely disclosure—the stroke occurred in 2020, and both reports were complete by the fall of 2021. Plaintiff had no explanation for the delay, other than it was mere

oversight. App. 2315. The untimely opinions advanced a significant new claim that Plaintiff's 2020 stroke was related to Dr. Orphanos' 2017 care, but this claim was not supported by qualified expert testimony proving a causal link. *See Tallman*, 234 W. Va. at 718, 769 S.E.2d at 507 (explaining that when determining whether a party will be prejudiced by a late disclosure, courts should look at the sufficiency of the disclosure and determine whether the party will have to undergo a "fishing expedition" to determine an expert's opinions). Even though Dr. Orphanos sought a continuance to mitigate his prejudice, the circuit court denied him relief. *See, e.g.*, *Kiser v. Caudill*, 210 W. Va. 191, 197, 557 S.E.2d 245, 251 (2001) (holding that circuit court abused its discretion by refusing to allow expert to testify after the trial had been continued).

Applying the *Tallman* factors, the circuit court abused its discretion in permitting Plaintiff's late disclosed experts and denying Dr. Orphanos' continuance motion.

b. The circuit court denied Dr. Orphanos a fair opportunity to rebut Plaintiff's new opinions.

Because the circuit court allowed Plaintiff's late disclosure of new claims and opinions regarding a connection between Dr. Orphanos' 2017 care and Plaintiff's 2020 stroke, Dr. Orphanos was forced to expend time and resources preparing to rebut this testimony in short shrift. Nonetheless, his Second Supplemental Expert Witness Disclosure provided rebuttal opinions from new experts and supplemental opinions from previously disclosed experts. App. 1158. Notably, Dr. William A. Petri was disclosed to opine on Plaintiff's refusal to present to an emergency department prior to his stroke, and Dr. Jodi Gehring was disclosed to opine on the effect Plaintiff's 2020 stroke had on his life expectancy. App. 1158–63.

Despite the promise of "great latitude" in allowing Dr. Orphanos to respond to his late disclosed experts, Plaintiff moved to strike Dr. Orphanos' supplemental disclosures, arguing they were untimely filed, and that Dr. Orphanos should not have been "surprised" by Plaintiff's new

opinions because he was aware of Plaintiff's stroke through his medical records. App. 1296–1300. Despite allowing Plaintiff's late disclosure, the circuit court struck Dr. Gehring's opinion that the 2020 stroke significantly reduced Plaintiff's life expectancy. App. 2506. As a result, Dr. Orphanos was precluded from challenging Plaintiff's life expectancy at trial; Dr. Orphanos preserved this error by vouching the record outside the presence of the jury. *See* App. 3467–70. The exclusion of Dr. Gehring's testimony on Plaintiff's life expectancy resulted in the jury awarding the full value of the new life care plan. App. 1408–11. The court's ruling was improvident and patently unfair because it sanctioned Dr. Orphanos for a late supplemental disclosure that resulted from Plaintiff's gamesmanship.

The Supreme Court of Appeals does not permit circuit courts to apply double standards. *See Tallman*, 234 W. Va. at 717, 769 S.E.2d at 506 (Defendant was not treated fairly when "the circuit court order finds fault with Dr. Tallman for supplementing his expert witness disclosure fifteen days after the discovery cut-off date" yet "pardons [plaintiff] for not filing her initial expert witness disclosure until thirty-three days after the deadline for making such disclosure."). Here, rather than preclude Dr. Orphanos from offering Dr. Gehring's supplemental rebuttal opinions, the circuit court should have granted Dr. Orphanos' request for a continuance to allow him to fully explore and respond to the new opinions in Plaintiff's untimely disclosure. *See Kiser*, 210 W. Va. at 197, 557 S.E.2d at 251. Instead, the circuit court awarded Plaintiff an unfair advantage right before the start of trial. Because the circuit court should not have excluded Dr. Gehring's rebuttal opinions, the circuit abused its discretion, and Dr. Orphanos is entitled to a new trial.

3. The circuit court abused its discretion by denying Dr. Orphanos' motion *in limine* to preclude evidence that Dr. Orphanos miscounted vertebral bodies during the surgery.

Prior to trial, Dr. Orphanos filed a motion *in limine* seeking to preclude Plaintiff from

introducing evidence that he miscounted the vertebral bodies during surgery. App. 979. None of Plaintiff's expert witnesses testified in deposition or claimed in their expert reports that the miscounting of the vertebral bodies was a breach of the standard of care. Nonetheless, Plaintiff argued that his "experts will testify that the placement of the screw in a damaged vertebra will negatively affect the stability of the vertebrae." App. 1135. The circuit court ultimately denied the motion after Plaintiff agreed that his expert would not testify that the miscounting of the vertebral bodies was "in and of itself a violation of the standard of care." App. 2517.

At trial, Plaintiff's standard of care expert, Dr. Weidenbaum, was asked, "[I]s miscounting the vertebra a failure or deviation from the standard of care?" And he replied, "No." App. 2773. As a result of the court's denial of the motion *in limine*, Plaintiff was permitted to repeatedly state in his opening statement[14] and at closing argument[15] that miscounting the vertebrae was indicative of Dr. Orphanos' negligence and recklessness. Because these statements imply that Dr. Orphanos breached the standard of care and are unsupported by expert testimony, the circuit court abused its discretion in permitting the jury to hear these arguments. *See Hamilton v. Ryu*, No. 16-0856, 2017 WL 4711421, at *4 (W. Va. Oct. 20, 2017) (upholding circuit court's decision to preclude plaintiff from putting on evidence implying doctor breached the standard of care when there was no expert testimony to support the claim).

[14] Plaintiff's opening statement: "He miscounted the vertebra. Now, I will tell you this, there are occasions where miscounting can occur. The problem is when you're tapping in to get that screw in, you're messing with a bad fracture and you're making what they want to say is an unstable fracture, how - - if it's unstable and he's fixed either by bracing or surgery, how good is it for where that fracture to be pounded - - to have a screw pounded into it and screwed in. He put it in the wrong place and it now becomes a point where he goes right through the fracture line with that screw." App. 2574. No expert testimony supported these statements as breaches of the standard of care.

[15] Plaintiff's closing argument: "And we talked about him putting in the screws in the wrong place. And again, miscounting the vertebrae I guess it happens. Dr. Weidenbaum says it does. It can. But he's counting - - tapping in this needle so he can put a screw right across the fracture line. Right into where the spinal cord space is. It's right against the spinal cord and it's compressing it, combined with that epidural fat and that's what you saw on the CT myelogram." App. 3619.

Without expert testimony, arguments regarding the miscounted vertebral bodies were not relevant to determining whether Dr. Orphanos breached the standard of care or was reckless. Yet, the jury was permitted to hear arguments from Plaintiff that the miscounting of vertebral bodies was evidence that Dr. Orphanos was negligent and reckless. Based on the verdict, the jury was likely misled, and a new trial is needed to correct this error.

4. The circuit court abused its discretion by permitting Plaintiff's expert witnesses to render opinions on topics for which they were not qualified.

Three of Plaintiff's expert witnesses—Nurse Taniguchi, Dr. Feinberg, and Dr. Weidenbaum—admitted they were not qualified to render opinions on the topics to which they testified at trial. Over Dr. Orphanos' objections, the circuit court permitted their testimony, and as a result, the jury's verdict was tainted.

a. Plaintiff's life care planner, Nurse Taniguchi, was not qualified to render medical causation opinions.

Prior to trial, Dr. Orphanos moved *in limine* to prohibit Nurse Taniguchi from testifying regarding a causal link between Plaintiff's 2020 stroke and Dr. Orphanos' 2017 care. App. 1057. Dr. Orphanos argued that nurses (like Nurse Taniguchi) are not qualified to render expert causation opinions. App. 1059. At the pre-trial conference, the circuit court denied Dr. Orphanos' motion and permitted Nurse Taniguchi to testify as to a causation. App. 2515.

At trial, during Dr. Orphanos' voir dire, Nurse Taniguchi admitted she is not a physician, and that only physicians can make medical diagnoses, including diagnoses for whether someone has had a stroke, is septic, or suffers from a UTI. App. 3008–09. After questioning Nurse Taniguchi, Dr. Orphanos renewed his objection to her testifying on "the issue of whether the decubitus ulcer relates back to the care rendered by Dr. Orphanos." App. 3009–10. The circuit court qualified Nurse Taniguchi as an expert in the field of nurse life care planning. App. 3010.

Then, on direct examination, Nurse Taniguchi was permitted to read Plaintiff's medical records into the record and testify that the medical records established a link between the 2020 stroke and Dr. Orphanos' 2017 care. App. 3050–51. This was the only testimony at trial making a connection between these events; Plaintiff did not call an expert physician witness.

There is no question that Nurse Taniguchi was not qualified to render causation opinions. She admitted it. She admitted that as a nurse, she lacks the requisite "knowledge, skill, experience, training, or education" needed to opine as to a causal relationship between Dr. Orphanos' 2017 care and Plaintiff's 2020 stroke. App. 3008–09. *See* W. Va. R. Evid. 702; *see also Short v. Appalachian OH-9, Inc.*, 203 W. Va. 246, 253, 507 S.E.2d 124, 131 (1998) (affirming decision by circuit court finding that nurses are not qualified as experts to render causation opinions about breaches of the standard of care applicable to emergency medical service providers); *Kiser*, 210 W. Va. at 196, 557 S.E.2d at 250 ("Given Dr. Brill's own admissions about his limited knowledge of neurosurgery, we do not find that the circuit court erred by limiting his testimony at trial to the field of neurology."); *Jenkins v. CSX Transp., Inc.*, 220 W. Va. 721, 731, 649 S.E.2d 294, 304 (2007) ("Here, it is clear that Dr. Phifer was prohibited from giving a causation opinion at trial not because he was a neuropsychologist as opposed to a medical doctor, but because he acknowledged that he was not qualified to make the required diagnosis.").

But because Nurse Taniguchi was permitted to read Plaintiff's medical records to the jury, and then opine how the records showed causation, the jury heard testimony that linked the stroke to Dr. Orphanos' care by someone who was admittedly unqualified. Put another way, by qualifying Nurse Taniguchi as an expert and allowing her to read Plaintiff's medical records to the jury, and then opine on causation, the circuit court lent credence to Nurse Taniguchi's testimony that was not warranted. Allowing this testimony permitted the jury to improperly draw a causal connection

between the two events without qualified expert testimony. *See* W. Va. R. Evid. 702(a) (expert testimony must be based on the requisite "knowledge, skill, experience, training, or education"); W. Va. Code § 55-7B-7(a) (physician's failure to meet the standard of care shall be established by expert witness who "possesses professional knowledge and expertise coupled with knowledge of the applicable standard of care to which his or her expert opinion is addressed"); W. Va. Code § 55-7B-3 (failure to exercise the requisite standard of care must be shown to be the proximate cause of the injury or death to prove MPLA claim); *see also Roberts v. Gale*, 149 W. Va. 166, 172, 139 S.E.2d 272, 275–76 (1964) ("In an action for damages against a physician for negligence and want of professional skill in the treatment of an injury or disease, the burden is on the plaintiff to prove such negligence or want of professional skill and that it resulted in the injury of which complaint is made.").

Moreover, the medical records alone were insufficient to establish causation. "In the majority of cases, simply reading medical records will not be sufficient for an expert to render a bonafide opinion." *Hinchman v. Gillette*, 217 W. Va. 378, 396, 618 S.E.2d 387, 405 (2005) (Davis, J., concurring); *Keith v. Lawrence*, No. 15-0223, 2015 WL 7628691, at *4 n.8 (W. Va. Nov. 20, 2015) (same).

The circuit court abused its discretion in allowing Nurse Taniguchi's testimony as she was not qualified to render causation opinions. Thus, the jury improperly heard an unsupported opinion linking the 2020 stroke to Dr. Orphanos' 2017 care. A new trial is needed to correct this error.

b. Plaintiff's neurology expert, Dr. Feinberg, was not qualified to render opinions on the standard of care.

Prior to trial, Dr. Orphanos moved to exclude Plaintiff's expert Dr. Feinberg from offering opinions about the standard of care for neurosurgeons or spine surgeons, App. 1029, because in his deposition, Dr. Feinberg admitted he could not "testify as to the standard of care for

neurosurgeons or spine surgeons." App. 1031. Despite this concession, Plaintiff had disclosed Dr. Feinberg to testify that "[t]o the extent IONM is available, the standard of care requires IONM be used during surgery." App. 217. In response to the motion, Plaintiff countered that W. Va. Code § 55-7B-7 "does not require a one-to-one correlation between the Defendant's specialty and the expert's specialty." App. 1133. The circuit court denied the motion, concluding that Dr. Orphanos could cross examine Dr. Feinberg at trial on the issues raised in his motion. App. 2511–13.

During trial, the circuit court ruled that Dr. Feinberg was a qualified expert in neurology, neurophysiology, neuromuscular medicine, and IONM. App. 2620. Once again, at trial, Dr. Feinberg conceded that *he could not testify as to the standard of care for neurosurgeons or spine surgeons*. App. 2643. He also conceded that he had never performed the type of surgery at issue in this case: "I can't really opine on exactly any elements of the procedure because I'm not a surgeon." App. 2642.

Regarding IONM, he testified that "[i]n Philadelphia the spine surgeons that would operate on the thoracic spine would always use this technology." App. 2637. And when asked at trial what caused the paralysis, Dr. Feinberg replied that the paralysis "was caused by something that happened during the surgery." App. 2639. However, Dr. Feinberg could not identify any specific action taken by Dr. Orphanos that caused the paralysis or was a breach of the standard of care: "Lack of use of intraoperative monitoring didn't cause the spinal cord injury. Something during the surgical procedure did." App. 2651. Despite this testimony, the circuit court permitted Dr. Feinberg to testify that because Dr. Orphanos did not use IONM during the initial surgery, he breached the standard of care. App. 2637.

The circuit court's decision to permit Dr. Feinberg's testimony was an abuse of discretion he was not qualified under Rule 702 of the West Virginia Rules of Evidence to opine on the

standard of care. W. Va. R. Evid. 702(a) (expert testimony must be based on the requisite "knowledge, skill, experience, training, or education"). Consistent with Rule 702, the MPLA requires that expert witnesses possess "professional knowledge and expertise coupled with knowledge of the applicable standard of care to which his or her expert testimony is addressed." W. Va. Code § 55-7B-7(a). Dr. Feinberg's concession during his deposition that he did not know the standard of care for neurosurgeons or spine surgeons—Dr. Orphanos' profession and where his expertise lies—should have been the nail in the coffin for Dr. Feinberg's testimony.

Despite Plaintiff's insistence that Dr. Feinberg "only has to have more than a casual familiarity with the standard of care applicable to that issue," App. 2512, the Supreme Court of Appeals has been clear that when experts admit they are not qualified, their testimony should be excluded. *Kiser*, 210 W. Va. at 196, 557 S.E.2d at 250 ("Given Dr. Brill's own admissions about his limited knowledge of neurosurgery, we do not find that the circuit court erred by limiting his testimony at trial to the field of neurology."); *Jenkins*, 220 W. Va. at 731, 649 S.E.2d at 304 ("Here, it is clear that Dr. Phifer was prohibited from giving a causation opinion at trial not because he was a neuropsychologist as opposed to a medical doctor, but because he acknowledged that he was not qualified to make the required diagnosis.").

Dr. Feinberg should not have been permitted to render opinions about Dr. Orphanos breaching the standard of care. Because the jury was permitted to hear this testimony, their verdict was tainted in finding that Dr. Orphanos was negligent. A new trial is warranted.

c. Plaintiff's standard of care expert, Dr. Weidenbaum, was not qualified to be recognized as an expert in spine surgery.

Like Nurse Taniguchi and Dr. Feinberg, Dr. Weidenbaum was also not qualified to render the opinions he offered at trial. At trial, Dr. Orphanos objected to Dr. Weidenbaum testifying as an expert in spinal surgery due to the lack of foundation laid regarding his experience treating

Chance fractures. App. 2736. The circuit court overruled the objection, finding that a sufficient foundation had been laid and that Dr. Weidenbaum was qualified as an expert in spine surgery. *Id*.

The circuit court's decision to permit Dr. Weidenbaum's testimony was an abuse of discretion because, as revealed on cross examination, his familiarity and knowledge of Chance fractures was very limited. He could not recall when he first performed a surgery involving a Chance fracture, how many times he had operated on Chance fractures, or when he last performed such a surgery involving a Chance fracture. App. 2813–14. His inability to recall basic information about his familiarity with treating Chance fractures established his utter lack of knowledge of the requisite procedures and treatment needed in cases involving injuries like those suffered by Plaintiff. This testimony is troubling because Dr. Weidenbaum was disclosed to specifically provide testimony on "the diagnosis and treatment of a Chance fracture in the thoracic spine," that "Dr. Orphanos deviated from the standard of care for a surgeon by failing to order appropriate pre-operative imaging to identify the nature and extent of any thoracic fracture," and that Dr. Orphanos should have used IONM during surgery because it was available. App. 213–15.

"[T]o qualify a witness as an expert on that standard of care, the party offering the witness must establish that the witness has more than a casual familiarity with the standard of care and treatment commonly practiced by physicians engaged in the defendant's specialty[.]" *Mayhorn v. Logan Med. Found.*, 193 W. Va. 42, 49–50, 454 S.E.2d 87, 94–95 (1994). While Dr. Weidenbaum might have a "casual familiarity" with Chance fractures, more is needed to be qualified as an expert of the standard of care. Because Dr. Weidenbaum's "area of expertise" did not cover the particular opinion to which he testified—the standard of care for treating Chance fractures—he should not have been qualified as an expert in this case, as his opinions would not assist the jury in determining whether Dr. Orphanos breached the standard of care. Syl Pt. 5, *Gentry v. Mangum*,

195 W. Va. 512, 515, 466 S.E.2d 171, 174 (1995). As such, a new trial is required.

5. The circuit court abused its discretion in precluding Dr. Orphanos from cross-examining Plaintiff's mother regarding notes she made while consulting with Plaintiff's treating physicians.

At trial, Plaintiff called his mother, Bonnie Rodgers. App. 2654. On direct examination, Ms. Rodgers testified that she had written personal notes contemporaneously while Plaintiff was in the hospital. App. 2669. Plaintiff then provided the notes to Ms. Rodgers so that she could use them while testifying. App. 2670. At the beginning of cross examination, Dr. Orphanos moved her notes into evidence, and they were admitted without objection. App. 2684–85. He then sought to publish the notes to the jury and question Ms. Rodgers about them. App. 2685–86. Specifically, Dr. Orphanos sought to question Ms. Rodgers about a July 19, 2017, conversation she describes in the notes between herself and Dr. Joby Joseph, one of Plaintiff's treating physicians at CAMC, in which Dr. Joseph explained that he believed Plaintiff's paraplegia was caused by a spinal cord infarct. App. 2686.[16]

Despite not objecting to the introduction of the notes, Plaintiff objected to Dr. Orphanos publishing the notes, arguing that they were hearsay, and that permitting testimony about Dr. Joseph's statements violated the circuit court's ruling granting Dr. Orphanos motion *in limine* which prohibited experts from offering new opinions not disclosed in discovery. *See* App. 2686–87. The circuit court agreed, holding "[t]his goes against the previous ruling on the Motion in Limine, I mean that's the reason for keeping it out." App. 2694–95. The notes, which had been admitted, were then stricken from the record. App. 2695.

Because Plaintiff allowed Ms. Rodgers to refresh her recollection with the notes on direct

[16] Ms. Rodgers' notes state: "Dr. Joseph came back by. He thinks there was an infarction just above T3/T4 – if a contusion, then paralysis would have happened at time of accident and there would have been no movement of the lower extremities when he got to trauma unit, possible spinal stroke." App. 2369–70.

examination, the notes were admissible under Rule 612 of the West Virginia Rules of Evidence. *See* W. Va. R. Evid. 612(b) ("An adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition to inspect it, to cross-examine the witness about it, *and to introduce in evidence any portion that relates to the witness's testimony*.") (emphasis added). Dr. Joseph's comments, as described in Ms. Rodgers' notes, were relevant under Rule of Evidence 401 because they supported Dr. Orphanos' position that Plaintiff's paraplegia was caused by an unpreventable spinal cord infarct that occurred during surgery as a result of a vascular injury sustained at the time of the motorcycle accident and not because of a breach of the standard of care.[17] *See* W. Va. R. Evid. 401 ("Evidence is relevant if: it has any tendency to make a fact more or less probable than it would be without the evidence."). The notes were also highly relevant because they flatly refuted Plaintiff's comments during cross examination suggesting that Dr. Orphanos' causation defense was simply made up for trial,[18] an accusation repeated in closing argument.[19]

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[17] Dr. Orphanos' causation expert, Dr. Whaley, testified at trial that "[t]he clinical findings and the imaging findings both show clearly that he suffered an infarct of the spinal cord. He had a stroke. He had a spinal cord stroke, and that is why he had this immediate loss of function in his lower extremities and that happened obviously - - you know that's when his symptoms occurred so during the time of surgery, he suffered a stroke." App. 3328–29.

[18] During cross examination, Plaintiff repeatedly questioned Dr. Orphanos about whether he documented his thoughts about what caused Plaintiff's paraplegia:

> Q. So you did not write it down, correct?
> A. Correct.
> Q. And now you're coming in and saying, I thought about it?
> A. Based on everything I looked at during that time, there were records that discussed spinal cord stroke.

App. 2882.

[19] During closing arguments, Plaintiff's counsel stated that when Dr. Orphanos had a chance to explain what happened to Plaintiff, "he never had one explanation. Didn't write it down because he didn't want to because there is no segmental artery, never said infarct, never said any of this until he hired Dr. Berkman at 1,000 dollars an hour . . . ." App. 3686. He asserted that Dr. Orphanos "made up segmental artery some three years in this litigation." App. 3687. "[Y]ou read where Dr. Orphanos had no idea about this segmental artery business until he raised it three years into this litigation. Three years. Think about it." App. 3681.

The grounds for precluding the evidence were erroneous. Dr. Orphanos' motion *in limine* as to undisclosed expert opinions was immaterial to whether Ms. Rodgers' notes should have been admitted. The motion did not mention statements or opinions by treating physicians; the motion exclusively applied to experts and undisclosed opinions. App. 1055–56. Not only did the circuit court misinterpret the scope of the motion, but the court also misinterpreted the motion's purpose. The motion was based on Rule 26 of the West Virginia Rules of Civil Procedure, which seeks to "eliminate surprise" and prevent "[t]rial by ambush." *See Graham v. Wallace*, 214 W. Va. 178, 185, 588 S.E.2d 167, 174 (2003) (citation omitted). The statements included in Ms. Rodgers' notes were of no surprise to Plaintiff because he questioned her about the notes on direct examination. App. 2669–70.

Rule 612(b) ensures what is good for the goose is good for the gander. Since Plaintiff used Ms. Rodgers' notes on direct examination, Dr. Orphanos was entitled under Rule 612(b) to use the notes on cross examination and publish them to the jury. This was the result in *Herbert J. Thomas Mem'l Hosp. Ass'n v. Nutter*, 238 W. Va. 375, 795 S.E.2d 530 (2016), where the Supreme Court of Appeals held the circuit court abused its discretion regarding the use and admissibility of documents relating to various employees' states of mind. Although "the circuit court permitted counsel for the plaintiff to read portions of the same documents during the examination of witnesses," the court "prohibited defense counsel from using or admitting the very same documents with the very same witnesses." *Id.* at 393, 795 S.E.2d at 548.

Plaintiff's mother was permitted to use the notes during her direct examination, but Dr. Orphanos was prohibited from publishing the notes to the jury or questioning Plaintiff's mother about her conversation with Dr. Joseph on cross examination. Here, like *Nutter*, the circuit court allowed Plaintiff to use the notes but denied the same opportunity to the defense. And despite the

express requirement of Rule 612, the circuit court ultimately refused admission of the notes by having them struck from the record. This precluded the jury from hearing what Dr. Joseph told Ms. Rodgers and permitted the jury to believe that Dr. Orphanos created a new causation theory for trial. Both tainted the jury's view of the evidence. When this error is taken into consideration with the record as a whole, the appropriate relief for Dr. Orphanos is a new trial.

6. The circuit court abused its discretion by giving jury instructions on "recklessness" and "emergency surgery" that misstated the law.

"A jury instruction is erroneous if it has a reasonable potential to mislead the jury as to the correct legal principle or does not adequately inform the jury on the law. An erroneous instruction requires a new trial unless the error is harmless." *Tracy v. Cottrell ex rel. Cottrell*, 206 W. Va. 363, 376, 524 S.E.2d 879, 892 (1999) (citation omitted). Over Dr. Orphanos' objections, the circuit court read instructions to the jury for "recklessness" and "emergency surgery" that misstated the law. The Supreme Court of Appeals has explained that while trial courts have "broad discretion in formulating its charge to the jury," when "a particular instruction misstates or mischaracterizes the applicable law, a trial court abuses its discretion." *Id*.; *see also* Syl. Pt. 5, *Gen. Pipeline Const., Inc. v. Hairston*, 234 W. Va. 274, 277, 765 S.E.2d 163, 166 (2014) ("It is reversible error to give an instruction which is misleading and misstates the law applicable to the facts.").

a. The circuit court's jury instruction for "recklessness" misstated the law.

The circuit court read Plaintiff's proposed jury instruction for recklessness to the jury: "Recklessness means an act of unreasonable character in disregard for a risk known to him or so obvious that it must be taken that he was aware of it." App. 3583. To exclude the applicability of the Trauma Cap, the statute refers to acts that are "in willful and wanton or reckless disregard of a risk of harm to the patient." W. Va. Code § 55-7B-9c(h)(1). Not only did the circuit court's jury

instruction fail to use the correct statutory language, but the court's definition of "recklessness" is also inconsistent with the Supreme Court of Appeals' language interpreting "willful, wanton or reckless" in other contexts. For a person's conduct to be considered "reckless," the Court has explained that the person "has intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to the consequence . . . ." *Cline v. Joy Mfg. Co.*, 172 W. Va. 769, 772 n.6, 310 S.E.2d 835, 838 n.6 (1983). The instruction cribs only part of the language from *Cline*, particularly leaving out the requirement that the act must be "intentionally done." The circuit court's jury instruction on "recklessness," thus, falls far short of this standard and misstates the law for determining whether the exclusion applies.

The circuit court's instruction for recklessness prejudiced Dr. Orphanos because the standard communicated to the jury did not accurately reflect the high bar Plaintiff needed to satisfy to preclude application of the Trauma Cap. The instruction misled the jury regarding what they needed to find to conclude that Dr. Orphanos acted in a "reckless disregard of a risk of harm to the patient." As the Supreme Court of Appeals has held, "[t]he jury must be clearly and properly advised of the law in order to render a true and lawful verdict." *State v. Romine*, 166 W. Va. 135, 137, 272 S.E.2d 680, 682 (1980). Given the absence of evidence that Dr. Orphanos was reckless, this erroneous charge cannot be considered harmless.

b. The circuit court's jury instruction for "emergency surgery" misstated the law.

The circuit court's "recklessness" jury instruction was not the only improper instruction given to the jury. The circuit court read the following instruction regarding "emergency surgery": "The court instructs the jury that Michael Rodgers has asserted that the surgery carried out two

days after his admission to the hospital was not an emergency surgery. If you find that the surgery carried out by the Defendant was not an emergency surgery, then you should answer the special interrogatory on the verdict form accordingly." App. 3583.

At the outset, this jury instruction does not use the correct language from W. Va. Code § 55-7B-9c(e)(1), which states the Trauma Cap does not apply only if the care provided "[o]ccurs after the patient's condition is stabilized and the patient is capable of receiving medical treatment as a nonemergency patient." Nowhere in the statute does the phrase "emergency surgery" appear. Although Dr. Orphanos objected that this instruction was a misstatement of the law, *see* App. 1908–09, Plaintiff argued that because his condition was "stable," the surgery could not constitute an "emergency," thus precluding application of the Trauma Cap. App. 391. The circuit court ultimately overruled Dr. Orphanos' objection. App. 3563, 3583.

The circuit court's instruction on "emergency surgery" prejudiced Dr. Orphanos. The instruction did not explain to the jury the requirement of finding that Plaintiff's condition was stabilized, nor did the instruction ask the jury to find whether Plaintiff was a nonemergency patient. Instead, the instruction included terminology that misstated the standard for determining whether an exemption applies to preclude application of the Trauma Cap.

Further, as noted in Dr. Orphanos' objection, *see* App. 1908–09, in permitting the jury to consider whether Plaintiff's initial surgery was an "emergency," the circuit court incorrectly interpreted the interplay between W. Va. Code § 55-7B-9c(e)(1) and § 55-7B-9c(d). W. Va. Code § 55-7B-9c(d) plainly states that the Trauma Cap applies to acts or omissions by health care providers "in rendering continued care and assistance in the event that surgery is required as a result of the emergency condition within a reasonable time after the patient's condition is stabilized." The Supreme Court of Appeals has not previously determined what constitutes a

"reasonable time" between the original emergency care and the subsequent surgery after the patient's condition is stabilized. However, here, the surgery occurred within two days after Plaintiff was admitted to the hospital's Surgical Trauma Intensive Care Unit as a trauma patient, and the surgery was performed "as a result of the emergency condition" for which he was brought to the emergency room, *i.e.*, to stabilize his T5 Chance fracture.

Because the circuit court's jury instructions on "reckless" and "emergency surgery" misstated the applicable law, the jury's verdict cannot stand, and a new trial is required.

7. The circuit court abused its discretion by failing to instruct the jury to disregard Plaintiff's demonstrative pie chart during closing arguments.

At the pre-trial hearing, the circuit court granted Dr. Orphanos' motion *in limine* that precluded the parties from making suggestions as to a specific amount of money that should or should not be awarded relating to non-economic damages. App. 2508. But during closing arguments, Plaintiff used a demonstrative pie chart that suggested to the jury that it should award Plaintiff more non-economic damages than his claimed economic damages. App. 3623–36. The pie chart clearly shows a larger "pie slice" for non-economic loss than the pie slices contributing to economic loss. App. 1924.

Dr. Orphanos objected to the pie chart and requested that the jury be given an instruction to disregard the chart, *see* App. 3636–37, but the circuit court overruled the objection, explaining that

the jury had already been instructed on damages. App. 3638.

The circuit court's ruling was an abuse of discretion because Plaintiff's emphasis on the size of the economic loss compared to the non-economic loss prejudiced Dr. Orphanos. The Supreme Court of Appeals has ruled that suggesting non-economic verdict amounts to the jury can result in reversible error. *See* Syl. Pt. 7, in part, *Bennett v. 3 C Coal Co.*, 180 W. Va. 665, 667, 379 S.E.2d 388, 390 (1989) (holding, in part, that suggesting a verdict amount to a jury for non-economic damages "may result in reversible error where the verdict is obviously influenced by such statement"); *Foster v. Sakhai*, 210 W. Va. 716, 733, 559 S.E.2d 53, 70 (2001) (Davis, J., concurring in part and dissenting in part) ("Stating a target amount for a jury to return for noneconomic damages is 'reversible error where the verdict is obviously influenced by such statement.'") (citation omitted).

The impact of Plaintiff's pie chart on the jury cannot be discredited. After the pie chart was shown to the jury, and the circuit court denied Dr. Orphanos' request for an instruction to the jury on damages, the jury returned a $7,500,000.00 non-economic verdict amount for Plaintiff. App. 1408–11. Plaintiff's targeted pie chart prejudiced the jury by emphasizing that a greater amount should be awarded for non-economic damages. A new trial should be granted.

8. The cumulative impact of the errors merits the granting of a new trial because Dr. Orphanos was deprived of his fundamental right to an impartial and neutral trial under the law.

When considering whether a new trial should be awarded, the Supreme Court of Appeals has held "[a] party is entitled to a new trial 'if there is a reasonable probably that the jury's verdict was affected or influenced by trial error.'" *Herbert J. Thomas Mem'l Hosp. Ass'n*, 238 W. Va. at 391, 795 S.E.2d at 546 (citation omitted). Further, "[t]he cumulative error doctrine may be applied in a civil case when it is apparent that justice requires a reversal of a judgment because the presence

of several seemingly inconsequential errors has made any resulting judgment inherently unreliable." Syl. Pt. 8, *Tennant*, 194 W. Va. at 102, 459 S.E.2d at 379.

The combination of the errors presented above has made the jury's verdict in this case unreliable. The circuit court's rulings—both legal and evidentiary—created an unfair trial and prejudiced Dr. Orphanos. *See, e.g.*, *Tallman*, 234 W. Va. at 717, 769 S.E.2d at 506 ("The bedrock of our judicial system is fairness to all parties."). To correct this injustice, this Court must vacate the decision from the circuit court and grant Dr. Orphanos a new trial.

VI. CONCLUSION

For these reasons, Dr. Orphanos respectfully requests that this Court vacate the verdict below, overturn the recklessness verdict and enforce the Trauma Cap, or remand this case for a new trial.

Respectfully submitted,

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 23-ICA-58

JOHN R. ORPHANOS, M.D.,
Defendant-Below, Petitioner,

v.

MICHAEL RODGERS,
Plaintiff-Below, Respondent.

CERTIFICATE OF SERVICE

I, Thomas J. Hurney, Jr., counsel for the Petitioner John R. Orphanos, M.D., certify that on May 22, 2023, I have served the foregoing ***Petitioner John R. Orphanos, M.D.'s Opening Brief*** on the following counsel of record via the Court's E-Filing system.

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