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 REPLY IN SUPPORT OF APPEAL

Counsel for Petitioner,
John R. Orphanos, M.D.

Thomas J. Hurney, Jr. (WV Bar No. 1833)
Blair E. Wessels (WV Bar No. 13707)
JACKSON KELLY PLLC
Post Office Box 553
Charleston, West Virginia 25322
(304) 340-1000
thurney@jacksonkelly.com
blair.wessels@jacksonkelly.com

Richard D. Jones (WV Bar No. 1927)
J. Dustin Dillard (WV Bar No. 9051)
FLAHERTY SENSABAUGH BONASSO, PLLC
200 Capitol Street
Post Office Box 3843
Charleston, West Virginia 25338
(304) 345-0200
rjones@flahertylegal.com
ddillard@flahertylegal.com

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I. INTRODUCTION

Rather than address Dr. Orphanos' substantive arguments, Plaintiff's Response mischaracterizes Dr. Orphanos' arguments to better suit Plaintiff's narrative. This is particularly true with Dr. Orphanos' arguments regarding the jury's finding that he acted with a "reckless disregard of a risk of harm to the patient." W. Va. Code § 55-7B-9c(h)(1). Dr. Orphanos' argument is not that Plaintiff's experts needed to utter the word "reckless" to preclude application of the Trauma Cap, but rather that Plaintiff was required to present expert testimony that "Dr. Orphanos' conduct was so far removed from reasonable to be considered reckless." Pet. Br., at 18.

Plaintiff also continues to double-down and rely on *non-negligent* behavior to justify the jury's finding of recklessness. Despite expert testimony identifying only three breaches of the standard of care, Plaintiff's Response is full of claims of other ways Dr. Orphanos allegedly deviated from the standard of care. But what Plaintiff continues to ignore is that *none* of his experts testified that these other actions breached the standard of care.

When the actual testimony of Plaintiff's experts is examined, the evidence demonstrates that this is at best a case of medical negligence. Indeed, under Plaintiff's argument, juries in every medical professional liability case will be allowed to consider recklessness, regardless of expert support. Thus, the circuit court erred in permitting the jury to consider the issue of whether Dr. Orphanos was reckless and erred in concluding that "nothing in W. Va. Code § 55-7B-9c(h)(1) requir[es] specific expert testimony that a health care provider was 'reckless.'" App. 34.[1]

The circuit court's error is compounded by other abuses of discretion that occurred

[1] In footnote 1 of Plaintiff's Response in Opposition, Plaintiff advises that he chose to use the Appendix filed in 23-ICA-64 for the Appendix citations included in his brief here. Plaintiff provided no explanation for this choice. Dr. Orphanos' Appendix citations here reference the actual Appendix filed in this case—an Appendix agreed to by Plaintiff prior to filing. Likewise, in 23-ICA-64, Dr. Orphanos used the Appendix filed in that appeal for his briefing in that matter.

throughout the trial process. Contrary to Plaintiff's contention that Dr. Orphanos has asserted a "hodge-podge" of challenges to the circuit court's rulings,[2] the pages that follow demonstrate the circuit court committed abuses of discretion that permeated the trial and resulted in an unfair trial and unsupported verdict.

For the reasons that follow, the Court should grant Dr. Orphanos' request to vacate the verdict below and enforce the Trauma Cap or remand the case for a new trial.

II. ARGUMENT

A. The Circuit Court Should Have Granted Dr. Orphanos' Motion for Judgment as Matter of Law and Erred in Allowing the Jury to Consider the Issue of Recklessness.

Each argument Plaintiff asserts to justify the jury's finding of recklessness and preclude application of the Trauma Cap is flawed. To support the argument that W. Va. Code § 55-7B-9c(h)(1) does not require expert testimony, Plaintiff repeatedly asserts that Dr. Orphanos' "main argument is that, because none of Mr. Rodgers' experts specifically labeled his content as 'reckless,' the jury's conclusion on this point cannot stand." Resp. Br., at 12; *see also* at 2, 18, 21, 22. But that is not Dr. Orphanos' argument: "[T]he point is not just whether an expert uttered the term 'reckless,'" rather, Plaintiff needed to present expert testimony that "Dr. Orphanos' conduct was so far removed from reasonable to be considered reckless." Pet. Br., at 18.

Requiring expert testimony on whether a physician acted in a "willful and wanton or reckless disregard of a risk of harm to the patient" for Plaintiff to avoid the Trauma Cap is consistent with the language and purpose of the MPLA when the statute is considered in its entirety. And when the actual testimony and evidence Plaintiff relies on to demonstrate

[2] As part of Plaintiff's explanation of Dr. Orphanos' "purported errors," Plaintiff claims that if the Trauma Cap is applied, Plaintiff's damages will be limited to $500,000.00. Resp. Br., at 2. Plaintiff's calculations are not correct. If the Trauma Cap is applied, then the verdict will be reduced to $1,593,349.54. App. 1413.

recklessness is examined, the record is clear that Dr. Orphanos did not act with a "reckless disregard of a risk of harm to the patient." W. Va. Code § 55-7B-9c(h)(1).

1. Principles of statutory interpretation support the conclusion that the MPLA requires expert testimony on the issue of "recklessness."

Plaintiff's central counterpoint to Dr. Orphanos' argument that expert testimony is needed to establish recklessness, and thus preclude application of the Trauma Cap, is that W. Va. Code § 55-7B-9c(h)(1) does not mention expert testimony. Plaintiff also concludes that because expert testimony is referenced in the MPLA's standard of care provision—W. Va. Code § 55-7B-7—but not in § 55-7B-9c(h)(1), this "necessarily means that no such testimony is required to demonstrate recklessness." Resp. Br., at 13. But the Supreme Court of Appeals has consistently recognized that all parts of a statute must be construed together. *See* Syl. Pt. 3, *Smith v. State Workmen's Comp. Com'r*, 159 W. Va. 108, 109, 219 S.E.2d 361, 362 (1975) ("Statutes which relate to the same subject matter should be read and applied together so that the Legislature's intention can be gathered from the whole of the enactments."). Because "statutes are not meant to be construed in a vacuum," W. Va. Code § 55-7B-7 and § 55-7B-9c must be read together as part of the overall makeup of the MPLA. *Cmty. Antenna Serv., Inc. v. Charter Commc'ns VI, LLC*, 227 W. Va. 595, 604–05, 712 S.E.2d 504, 513–14 (2011) ("'Accordingly, a court should not limit its 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.'" (citation omitted)).

Requiring expert testimony does not change or amend W. Va. Code § 55-7B-9c(h)(1), but is consistent with the purpose and intent of the MPLA. *See, e.g.*, W. Va. Code § 55-7B-1 ("[T]he Legislature has determined that reforms in the common law and statutory rights of our citizens must be enacted together as necessary . . . ."); *State ex rel. W. Va. Univ. Hosps., Inc. v. Scott*, 246 W. Va. 184, 193, 866 S.E.2d 350, 359 (2021) (explaining that "the Legislature's intent in

enacting—and amending—the MPLA" must be considered when determining what claims are encompassed under the MPLA).

There is no question that MPLA cases require expert testimony. *See* W. Va. Code § 55-7B-7(a). Only where the circuit court finds the acts are within the common knowledge of the jury are experts not required. *See Totten v. Adongay*, 175 W. Va. 634, 638, 337 S.E.2d 2, 6 (1985) (recognizing the "common knowledge" exception to the expert testimony requirement). To require expert testimony to prove a physician was negligent but not that he or she acted with a "willful and wanton or reckless disregard of a risk of harm to the patient"—a higher level of culpability beyond a breach of the standard of care—is nonsensical. *See Smith*, 159 W. Va. at 116, 219 S.E.2d at 365–66 ("'That which is necessarily implied in a statute, or must be included in it in order to make the terms actually used have effect . . . is as much a part of it as if it had been declared in express terms." (citation omitted)). In this case dealing with complex spinal surgery, experts were clearly required; Plaintiff has presented no argument otherwise.

Further, W. Va. Code § 55-7B-9c(h)(1) was enacted *after* § 55-7B-7, and the Supreme Court of Appeals has explained that it is "'presumed that the legislators who drafted and passed it were *familiar with all existing law*, applicable to the subject matter, . . . and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.'" *State ex rel. Hall v. Schlaegel*, 202 W. Va. 93, 97, 502 S.E.2d 190, 194 (1998) (emphasis added) (citation omitted). Because the Legislature had already declared the need for expert testimony in MPLA cases prior to the enactment of W. Va. Code § 55-7B-9c(h)(1), for the two statutory provisions to be in "harmony," expert testimony is required to preclude the application of the Trauma Cap.

With West Virginia's statutory scheme in mind, Plaintiff's reliance on an Idaho case,

Ballard v. Kerr, 378 P.3d 464 (Idaho 2016), is misplaced. In Idaho, the statute addressing limitations on non-economic damages provides that the limitation "shall not apply to" "[c]auses of action arising out of willful or reckless misconduct." Idaho Code § 6-1603(4)(a). This provision is *not* included in Idaho's medical malpractice statute, codified at Idaho Code §§ 6-1001, *et. seq.*, but instead applies to a wide range of personal injury actions. In the context of Idaho's specific statutory makeup, the decision in *Ballard* makes sense because not every personal injury action will require expert testimony. But W. Va. Code § 55-7B-9c(h)(1) applies only to MPLA cases and does not have any broader implications. The lack of any corresponding language in Idaho's statute requiring a plaintiff to prove that there was a "disregard of a risk of harm to a patient" matters. The issue here is not just whether Dr. Orphanos was "reckless;" rather, it is if any "willful and wanton or reckless" conduct constitutes a "disregard of a risk of harm to the patient." Because the MPLA requires expert testimony, the connection between reckless conduct and a patient's treatment cannot be proven without it.

2. Expert testimony on the issue of recklessness is not a legal conclusion.

Plaintiff asserts that if experts are required to "label" a physician's actions as "reckless," their testimony would be an impermissible opinion on a question of law. Resp. Br., at 18. But Dr. Orphanos did not argue that experts could testify as to the meaning of W. Va. Code § 55-7B-9c(h)(1). Nor is the issue whether any expert said the word "reckless." The issue is whether any expert testified that Dr. Orphanos' conduct was so far removed from reasonable as to be considered a "reckless disregard of a risk of harm to the patient." An expert can provide this testimony without saying the words "willful and wanton or reckless." *See, e.g.*, *Stephen v. Rakes*, 235 W. Va. 555, 567, 775 S.E.2d 107, 119 (2015) (expert testified that defendant's treatment "was as bad a care as I've ever seen in my 30 years in a three-day hospitalization").

Having an expert testify as to reckless conduct is necessary to help the jury apply the law to the facts. This case involves complicated issues surrounding the treatment of a spinal fracture. No lay juror could be expected to understand the complexities involved in this treatment, let alone understand when a breach of the standard of care crosses the threshold into a "reckless disregard of a risk of harm to a patient." *See Farley v. Shook*, 218 W. Va. 680, 685–86, 629 S.E.2d 739, 744–45 (2006) ("These medical issues and alleged breaches relate to complex matters of diagnosis and treatment that are not within the understanding of lay jurors . . . . Therefore, expert testimony was required . . . ."). Of course, the jury's job is to apply the law to the facts, but if the jury cannot understand what facts constitute "reckless" conduct, then the jury's verdict will be unsupported.

3. West Virginia's punitive damages statute illustrates the point that determinations of "recklessness" require expert testimony.

Plaintiff's arguments about the inapplicability of the punitive damages statute answer a question that Dr. Orphanos did not pose. Dr. Orphanos did not argue that a plaintiff's burden to prove recklessness under W. Va. Code § 55-7B-9c(h)(1) should be "clear and convincing." Instead, Dr. Orphanos pointed to the statute and cases addressing the sufficiency of evidence for punitive damages to demonstrate the necessity of expert testimony in determining whether certain conduct is "willful and wanton or reckless." As addressed in Dr. Orphanos' opening brief, both *Stephen v. Rakes* and *Karpacs-Brown v. Murthy* are instructive here. Pet. Br., at 15–16, 19. Although neither addresses the Trauma Cap, the Court in both cases examined the record to determine whether the evidence was sufficient to support punitive damages. The evidence was sufficient in *Stephen v. Rakes*, 235 W. Va. at 566–67, 775 S.E.2d at 118–19, where plaintiff's expert described the defendant's conduct as "dangerous" and "as bad a care as I've ever seen in my 30 years", but not in *Karpacs-Brown v. Murthy*, 224 W. Va. 516, 527, 686 S.E.2d 746, 757 (2009), where no punitive damages instruction was given because there was a lack of "sufficient evidence in the record"

based on the conflicting testimony regarding whether the physician breached the standard of care. Dr. Orphanos asserts that the Court's analysis of the sufficiency of the evidence to establish punitive damages is directly persuasive in examining whether the Trauma Cap's requirement of "willful and wanton or reckless disregard of a risk of harm to the patient" conduct was satisfied.

4. The evidence upon which Plaintiff relies to support his claim that Dr. Orphanos was reckless was heavily disputed at trial and does not support a finding of recklessness.

Despite arguing there was "ample" testimony in the record supporting a finding of recklessness, Plaintiff fails to identify this evidence or explain why the evidence demonstrates "recklessness" instead of only negligence. Resp. Br., at 23. Plaintiff's Complaint and expert testimony at trial advanced only 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 IONM to monitor Plaintiff; and (3) after learning of Plaintiff's paralysis, Dr. Orphanos should have ordered a CT myelogram. App. 55–58. At trial, Dr. Orphanos' experts contested the testimony of Plaintiff's experts, demonstrating that this case is at best one of medical negligence, and that Dr. Orphanos' conduct did not rise to the level of recklessness.

Addressing the preoperative MRI of the thoracic spine urged by Plaintiff's experts, Dr. Orphanos testified at trial that an MRI was not needed because the CT scan revealed "a bony Chance fracture . . . that involved . . . three columns of the spine that fractured through the front and back part of the bone. I did not feel that an MRI would have given me any further information[.]" App. 2960. Dr. Orphanos' judgment was supported by his neurosurgical expert, Dr. Berkman, who testified that a preoperative MRI was not required, App. 3499, because everything Dr. Orphanos needed to see would have been on the CT scan, and that "if [Mr. Rodgers] was my patient, I wouldn't have ordered an MRI scan." App. 3501. Dr. Berkman soundly rejected

the idea that the standard of care required a preoperative MRI: "There [are] tons of patients at Vanderbilt that are just like Mr. Rodgers that we never get an MRI scan on." *Id.*

In his Response, Plaintiff quotes Dr. Feinberg, Resp. Br., at 5, who agreed that the use of IONM was "all benefit[,] no risk," App. 2638, and Dr. Weidenbaum, who said that not using IONM was the equivalent of operating "blind." App. 2779; Resp. Br., at 1, 4, 5, 6, 7, 8, 36. Plaintiff ignores the contrary opinion from Dr. Berkman, who testified that the use of IONM is not the standard of care because the technology is not "reliable," because "75 percent of the time," an IONM alarm is "a false alarm," resulting in an interrupted surgery or a change in the operation for no reason. App. 3502, 3504. Even if the IONM alarm happens to alert a problem, "the vast majority of the time when you lose signals and it's real, you can't change anything." App. 3504.

Dr. Orphanos' experts also contested Plaintiff's claim that a CT myelogram should have been performed after the initial surgery. Dr. Berkman testified that "it would have been a mistake to wait for a CT myelogram" because obtaining a CT myelogram can take hours, causing "an unnecessary delay." App. 3508–10. Dr. Berkman confirmed that "what Dr. Orphanos did was exactly what I would have done[.]" App. 3510.

To justify the jury's finding of recklessness, Plaintiff, as at trial, continues to rely on acts by Dr. Orphanos that *no expert testified were breaches of the standard of care*, including that Dr. Orphanos did not read Plaintiff's entire chart, ignored 40 hours of nursing notes, assessed Plaintiff in 19 minutes, failed to recognize that Plaintiff could not consent to surgery, and miscounted Plaintiff's vertebrae.[3] Resp. Br., at 4, 6. But even the testimony Plaintiff presented with these allegations is not enough to support a finding of recklessness.

[3] Plaintiff's Response in Opposition fails to respond to Dr. Orphanos' arguments regarding the impropriety of Plaintiff relying on non-negligent behaviors to support a finding of recklessness. Pursuant to W. Va. R. App. P. 10(d), Plaintiff has failed to fully respond to Dr. Orphanos' assignments of error, thus, waiving the right to further challenge these arguments on appeal.

Plaintiff picks and chooses testimony devoid from the context within which it was given. For example, Plaintiff rails that Dr. Orphanos did not read Plaintiff's entire chart and ignored 40 hours of nursing notes. But at trial, Dr. Orphanos explained that "[t]he nurses' notes are documentation that's passed on from nurse to nurse and shift to shift." App. 2872–73. He testified that rather than "bury myself in a computer," he speaks to the nurses, and they examine the patient together. App. 2873. Dr. Orphanos took pains to explain his process in evaluating and treating Plaintiff, including the importance of the clinical examination: "[T]he most important thing is what the patient will show us, what Mr. Rodgers showed us on clinical examination." App. 2956–60. Notably, none of Plaintiff's experts testified that not reading the whole chart, evaluating the patient in 19 minutes, or obtaining consent breached the standard of care. The same is true for Plaintiff's claims regarding the miscounting of the vertebrae. *See infra*, Section II.B.3.

The record demonstrates that Plaintiff's evidence was insufficient to allow the jury to consider whether Dr. Orphanos' conduct amounted to a "reckless disregard of a risk of harm to the patient." Plaintiff's experts testified to negligence and nothing more. Despite the insufficiency of the evidence, recklessness was injected into the case in Plaintiff's voir dire, opening statement and closing argument. Pet. Br., at 5–6. Because of the insufficiency of evidence, the circuit court should have precluded the jury from considering recklessness, or granted Dr. Orphanos' post-trial Motion for Judgment as a Matter of Law and applied the Trauma Cap.

This case is important. This Court should reverse the circuit court and establish the evidentiary standard required to avoid the application of the Trauma Cap. Otherwise, if Plaintiff's approach is affirmed, plaintiffs will be able to (and will) argue that every MPLA jury can consider "recklessness" regardless of the absence of expert testimony.

B. The Circuit Court Should Have Granted Dr. Orphanos' Motion for New Trial.

1. The circuit court should have granted Dr. Orphanos' motion *in limine* on the issue of "recklessness."

As argued above and in Dr. Orphanos' opening brief, the circuit court erred in denying Dr. Orphanos' Motion for Judgment as a Matter of Law. But even before this, the court erred in denying Dr. Orphanos' partial Motion for Summary Judgment and abused its discretion in denying his motion *in limine* on the issue of recklessness. The circuit court's decision to permit the jury to hear Plaintiff's argument that Dr. Orphanos acted with a "reckless disregard of a risk of harm to the patient" without sufficient evidentiary support prejudiced Dr. Orphanos, as the ruling resulted in the jury returning an unsupported verdict against him. *See* Syl. Pt. 6, in part, *Smith v. Clark*, 241 W. Va. 838, 828 S.E.2d 900, 905 (2019) ("[T]he verdict of the jury will not be set aside unless plainly contrary to the evidence or without sufficient evidence to support it." (citation omitted)).

2. The circuit court should have excluded Plaintiff's late disclosed expert opinions or, alternatively, granted Dr. Orphanos' motion to continue the trial.

Plaintiff's claim that the new life care plan "contained no causation opinions, and did not change the experts' opinions in any other material way," is not true. Resp. Br., at 25. The new life care plan contained new and detailed information regarding his 2020 stroke. *Compare* App. 318–19 (initial life care plan), *with* App. 772–74 (new life care plan). After detailing Plaintiff's medical history regarding the 2020 stroke and the resulting complications, the new life care plan provided that "[t]he spinal cord injury has negatively impacted nearly all aspects of Mr. Rodgers' life." App. 774. Plaintiff's new life care plan, including the significant increase in the value of the plan, cannot be supported without creating a causal connection between the stroke and the surgery.

When Dr. Orphanos raised these concerns in both his motion to exclude and motion to continue the trial, no "fair compromise" was reached. With less than two months before trial, Dr. Orphanos was forced to evaluate the new claims, prepare and disclose rebuttal expert opinions,

and depose Nurse Taniguchi. Nevertheless, the circuit court limited Dr. Orphanos' ability to respond by excluding testimony, despite the wholesale allowance of Plaintiff's new opinions. In particular, the court excluded Dr. Gehring's opinion related to life expectancy after the stroke. App. 2506. While Plaintiff claims that the court was right because it was "an entirely new opinion about Plaintiff's life expectancy," Resp. Br., at 25, Dr. Gehring's rebuttal opinion was only necessary because Plaintiff's *new* life care plan significantly increased the damages and calculated these costs based on Plaintiff's life expectancy being "27.3 additional years from age 53." App. 775. By including new opinions about the 2020 stroke without accounting for the effect the stroke had on Plaintiff's life expectancy, Plaintiff put life expectancy directly at issue, and Dr. Orphanos should have been provided the opportunity to challenge Plaintiff's life expectancy at trial.

Had the circuit court properly considered the *Tallman* factors when ruling on Dr. Orphanos' motions, the court should have either struck Plaintiff's supplemental disclosures or continued the trial. Plaintiff provides no justification for the untimeliness of his supplemental expert disclosures. *See* Syl. Pt. 2, *State ex rel. Tallman v. Tucker*, 234 W. Va. 713, 769 S.E.2d 502, 504 (2015) (discussing factors in determining whether to permit late disclosures, including "the explanation for making the supplemental disclosure at the time it was made"). Despite Dr. Orphanos inquiring about Plaintiff producing supplemental expert reports on April 16, 2021, *see* App. 913, and despite Plaintiff having these reports as early as September 13, 2021 and October 7, 2021, *see* App. 765, 770, Plaintiff sat on the reports until January 5, 2022—two months prior to trial, App. 761, forcing Dr. Orphanos to scramble and alter his trial preparation strategy and file various motions seeking relief.

The prejudicial impact of the circuit court's decision to exclude Dr. Gehring's supplemental opinions cannot be overstated. *See* Syl. Pt. 2, *Tallman*, 234 W. Va. at 714, 769 S.E.2d

at 504 (holding that the "potential prejudice to an opposing party" is a factor for determining whether to permit late supplemental expert disclosures). Under Plaintiff's new life care plan—calculated based on a normal life expectancy—the value of the plan increased from an initial estimate of between $2,123,505.00 and $5,855,135.00 to $7,940,860.00. App. 301–02, 775. Dr. Gehring's supplemental report, which calculated Plaintiff's life expectancy to be five to seven years based on his condition after the 2020 stroke, directly challenged Plaintiff's estimates. App. 1162. Not only was Dr. Orphanos precluded from challenging Plaintiff's life expectancy, but he was also unable to fully utilize updated reports from his defense life care planner and economist because both relied on Dr. Gehring's life expectancy opinion. App. 1293, 2330.

The circuit court's decision hamstrung Dr. Orphanos' ability to properly defend against Plaintiff's damages claim, thereby resulting in the jury awarding the full value of Plaintiff's new life care plan. The circuit court abused its discretion by allowing Plaintiff to untimely disclose new expert opinions on the eve of trial while simultaneously denying Dr. Orphanos relief.

3. The circuit court should have granted Dr. Orphanos' motion *in limine* to preclude evidence that Dr. Orphanos miscounted the vertebral bodies.

Plaintiff tries to justify his counsel's statements regarding the miscounting of vertebral bodies by asserting that these statements were used to support Dr. Weidenbaum's testimony on why the failure to use IONM breached the standard of care. Resp. Br., at 28. Plaintiff conflates the miscounting of the vertebral bodies with the placement of the screw at the T5 vertebrae, but these are separate and distinct acts. Dr. Weidenbaum confirmed that the process of placing a screw in the vertebrae could create the risk of "some movement of the bony structure across the fracture," and that IONM could be used to alert a surgeon if a screw is placed in the wrong location. App. 2773, 2807. Dr. Weidenbaum *did not* testify that these acts were reliant on or caused by Dr. Orphanos miscounting the vertebral bodies, nor did he testify that Dr. Orphanos negligently placed

the screw. Plaintiff could have addressed the placement or the way the screw was placed in the T5 vertebrae without making any reference to Dr. Orphanos miscounting the vertebral bodies.

For Plaintiff to assert that his counsel "never stated or implied in opening or at closing that the miscounting of the vertebrae was itself evidence of recklessness or negligence" misses the point and is untrue. Resp. Br., at 28. Each time Plaintiff's counsel referenced the miscounting of the vertebral bodies, he did so to reinforce his position that Dr. Orphanos was negligent and/or reckless. During closing arguments, Plaintiff's counsel referred to Dr. Orphanos as "reckless" and "flying blind" within the same context of describing Dr. Orphanos miscounting the vertebrae. App. 3618–19. The proximity of these statements could easily mislead the jury to conclude that the miscounting of the vertebral bodies was evidence of Dr. Orphanos' negligence and recklessness. Because the miscounting of the vertebral bodies was irrelevant to determining whether Dr. Orphanos breached the standard of care or was reckless, but was nevertheless used by Plaintiff to support his case, the jury's verdict was tainted, and a new trial is required.

4. The circuit court should have excluded Plaintiff's expert witnesses and prevented them from rendering opinions for which they were not qualified.

The circuit court abused its discretion in qualifying Nurse Taniguchi, Dr. Feinberg, and Dr. Weidenbaum based on each expert's qualifications and testimony regarding their own expertise. *See Kiser v. Caudill*, 210 W. Va. 191, 196, 557 S.E.2d 245, 250 (2001) (finding the circuit court did not abuse its discretion in limiting expert's testimony based on his admissions regarding his unfamiliarity with the standard of care or the way certain procedures were performed).

Plaintiff claims that Dr. Orphanos misrepresented Nurse Taniguchi's testimony, arguing that she did not testify as to causation. Resp. Br., at 30. Once again, Plaintiff fails to address Dr. Orphanos' argument that Nurse Taniguchi's testimony is the *only* testimony causally linking Plaintiff's 2020 stroke to the 2017 surgery. Without Nurse Taniguchi's testimony, there is no other

evidence establishing a causal connection between these events.

Because Plaintiff utilized the 2020 stroke to support his claims for damages, Plaintiff was required to produce expert testimony demonstrating how Dr. Orphanos' negligence resulted in those damages. *See Stoudt v. Eads*, No. 22-ICA-159, 2023 WL 4011684, at *5 (W. Va. App. June 15, 2023) (upholding summary judgment award because plaintiff failed "to produce expert testimony connecting the alleged negligence and her damages" because "[w]ithout such expert testimony, no jury could reasonably infer a causal connection in this case"). Nurse Taniguchi admitted she was not qualified to render such opinions. App. 3008–09. It was appropriate for Nurse Taniguchi to rely on the medical records to form her opinions with respect to the life care report; however, instead of calling physicians from the Carilion Clinic to testify, *see* App. 2583–84 (referring to "two infectious disease doctors at Carilion Medical Center in Roanoke" who "said it was the bed sore that cause it"), or having another qualified expert testify, Plaintiff had Nurse Taniguchi read the medical records into evidence to establish a causal connection between two events that occurred three years apart. App. 3050–51. This was wholly improper.

Likewise, Dr. Feinberg admitted he was not qualified to render the opinions he gave at trial. Dr. Feinberg was disclosed to offer both causation and standard of care opinions. App. 217.[4] During his deposition and at trial, Dr. Feinberg admitted that he could not testify as to the standard of care for neurosurgeons or spine surgeons. App. 1054, 2643. He admitted at trial that he could not opine to any "elements of the procedure" for treating a Chance fracture, nor could he specifically identify what happened during the surgery to cause Plaintiff's paralysis. App. 2642,

[4] "It is expected that Dr. Feinberg will testify that that Mr. Rodgers' paraplegia was not caused by a spinal cord infarction (spinal cord stroke) as suggested by Defendant's experts. Rather, Dr. Feinberg will testify that Mr. Rodgers' paraplegia was caused during surgery and manipulation of the spine . . . ." App. 217. "Further it is expected that Dr. Feinberg will testify concerning the use of IONM during surgery . . . . To the extent IONM is available, the standard of care requires IONM to be used during surgery, including surgeries similar to the surgery Mr. Rodgers underwent." *Id.*

2639. And he admitted that "[l]ack of use of intraoperative monitoring didn't cause the spinal cord injury." App. 2651. The combination of these admissions proves that Dr. Feinberg was not qualified to render expert opinions in this case. *See Kiser*, 210 W. Va. at 196, 557 at 250.

Although Plaintiff tries to limit Dr. Feinberg as solely an "expert in IONM," Resp. Br., at 31, Dr. Feinberg's testimony on IONM demonstrates that IONM is not the standard of care for neurosurgeons and spine surgeons. At trial, Dr. Feinberg did not testify that the standard of care required IONM be used in every health care facility where spinal surgeries are performed; rather, he merely testified that IONM was always used by his group "in Philadelphia" where his practice is located. App. 2637. In no way did Dr. Feinberg's testimony or opinions "assist the trier of fact" in rendering a verdict in this case. *See* W. Va. R. Evid. 702(a).

Regarding Dr. Weidenbaum, Plaintiff is correct that Dr. Orphanos "had ample opportunity to cross-examine Dr. Weidenbaum regarding his experience with Chance fractures." Resp. Br., at 33. Dr. Orphanos' cross-examination of Dr. Weidenbaum proves exactly why he should not have been qualified as an expert on Chance fractures. He could not recall (1) when he last performed surgery on a patient with a Chance fracture, (2) when he first performed surgery on a patient with a Chance fracture, or (3) how many Chance fracture procedures he had performed in total. App. 2813–14. These admissions demonstrate that Dr. Weidenbaum was not qualified to render expert opinions on "the diagnosis and treatment of a Chance fracture in the thoracic spine." App. 213. Even under the "casual familiarity" test embraced by Plaintiff, Resp. Br., at 32–33, Dr. Weidenbaum falls short because he was unable to provide a basis for having a casual familiarity with treating Chance fractures. *See Fortney v. Al-Hajj*, 188 W. Va. 588, 594, 425 S.E.2d 264, 270 (1992) (finding that plaintiff's expert, a general surgeon, was qualified to give expert standard of care opinion as to defendant emergency room doctor's care of the patient's impacted food blockage

because he had experience treating similar patients).

The record establishes that none of Plaintiff's experts were qualified to render the opinions they put forth at trial. Without qualified expert testimony, Plaintiff cannot establish that Dr. Orphanos breached the standard of care, thus rendering the jury's verdict in this case unreliable.

5. The circuit court should have allowed Dr. Orphanos to cross-examine Plaintiff's mother on the contemporaneous notes she made while consulting with Plaintiff's treating physicians.

Plaintiff criticizes Dr. Orphanos for arguing that Ms. Rodgers' notes should have been admissible under West Virginia Rule of Evidence 612(b), asserting that this is the first time Dr. Orphanos made such argument on appeal. Resp. Br., at 34. Although Dr. Orphanos may not have specified Rule 612 by name at trial, when Plaintiff objected, Dr. Orphanos argued that "these are her notes that they brought up, that they gave to her, that she's been referring to this entire time." App. 2687. These arguments are directly in line with Rule 612(b)'s mandate entitling adverse parties the right to "have the writing or object produced at the trial," "cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony." Although Plaintiff asserts that Ms. Rodgers' testimony was unrelated "to causation of her son's spinal cord injury," Resp. Br., at 34, Ms. Rodgers was questioned and testified about a conversation she had with Dr. Orphanos, in which he indicated "[t]hat there may be either a blood clot or a blockage somewhere." App. 2673. This testimony directly relates to Dr. Joby Joseph's comments about the possibility of Plaintiff suffering a spinal cord infarct. App. 2369–70.

In arguing Dr. Joseph's comments were "hearsay" under Rule 802, Plaintiff also misconstrues Dr. Orphanos' position. The point is not about eliciting admissible testimony from Ms. Rodgers about the truth of Dr. Joseph's comments; rather, the point is to simply show that at the time, Dr. Joseph told her Plaintiff may have had a spinal stroke. Causation of Plaintiff's

paralysis was hotly contested at trial. Plaintiff argued the paralysis was caused by "something that happened during the [first] surgery." App. 2639; Resp. Br., at 7–8. Dr. Orphanos and his experts testified the paralysis 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. App. 3328–29; Pet. Br., at 33. Plaintiff repeatedly argued that Dr. Orphanos and his experts ginned up a causation defense for trial. App. 3687 (Plaintiff's counsel claiming Dr. Orphanos "made up segmental artery some three years in this litigation."); App. 2580–82 (challenging Dr. Orphanos' causation defense as "an excuse" in opening statement); App. 2995 (During Dr. Orphanos' cross-examination, Plaintiff's counsel asked, "A matter of fact, the first time that came up is your paid experts who are going to come in and defend you, correct?"). Dr. Joseph's comments, as reflected in Ms. Rodgers' notes, disprove Plaintiff's accusations. Because the notes were relevant and admissible, the circuit court abused its discretion in striking the notes from the record.

6. The circuit court should have sustained Dr. Orphanos' objections to the jury instructions for "recklessness" and "emergency surgery."

Plaintiff's arguments in support of the jury instructions for both "recklessness" and "emergency surgery" essentially boil down to the circuit court's language was close enough to the law that both instructions should pass muster. But the Supreme Court of Appeals has held that jury instructions must be "accurate and fair to both parties." Syl. Pt. 6, *Tennant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 102, 459 S.E.2d 374, 379 (1995). The instructions here were neither.

Plaintiff argues that because willful, wanton, and reckless are used "synonymously," the circuit court's jury instruction on "recklessness" was not a misstatement of law. Resp. Br., at 35–36. But omitted from the circuit court's instruction is the key phrase "disregard of a risk of harm to the patient." This omission matters because had the court read the entire definition of "recklessness" from *Cline v. Joy Mfg. Co.*, the jury would have been instructed that it needed to

find that Dr. Orphanos had acted "intentionally" in his treatment choices, such that the risk of harm to the patient was "so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to the consequence . . . ." 172 W. Va. 769, 772 n.6, 310 S.E.2d 835, 838 n.6 (1983). Because the MPLA defines "negligence" based on a reasonableness standard, *see* W. Va. Code § 55-7B-3(a)(1), merely finding that a health care provider acted "unreasonably" is not enough to cross the threshold into "recklessness." The standard for recklessness requires something more.

Plaintiff tries to salvage the circuit court's instruction for recklessness by arguing that the omission of the "intentional" language from *Cline* is irrelevant because "there is no dispute that Defendant 'intentionally' chose to operate on Plaintiff 'blind.'" Resp. Br., at 36. Plaintiff is wrong there there is no "dispute" over Dr. Orphanos operating "blindly." Both Dr. Orphanos and Dr. Berkman testified that the chest CT scan revealed everything Dr. Orphanos needed to see before the initial surgery. App. 2960, 3501. And whether Dr. Orphanos was required to use IONM to meet the standard of care was heavily debated. *See supra*, Section II.A.4. With this conflicting testimony, there is simply no evidence Dr. Orphanos' choices were done "with a conscious indifference to the consequences," nor was it "highly probable that harm would follow." Because the circuit court's instruction did not track *Cline*'s language, the jury was provided with an incomplete definition of recklessness that lowered the standard Plaintiff needed to satisfy to preclude the application of the Trauma Cap.

Like the circuit court's instruction for "recklessness," the court's instruction for "emergency surgery" also prejudiced Dr. Orphanos. Plaintiff claims that the substitution of the words "emergency surgery" for "nonemergency patient" is a distinction without a difference. Resp. Br., at 37. But this could not be further from the truth. At the time Dr. Orphanos performed

the initial surgery, Plaintiff was admitted to CAMC's Surgical Trauma Intensive Care Unit as a trauma patient suffering from an acute trauma injury to the spine. The MPLA expressly provides that "any acute traumatic injury . . . which . . . involves a significant risk of death or the precipitation of significant complications or disabilities, [or] impairments of bodily functions" is an "emergency condition." W. Va. Code § 55-7B-2(d). Plaintiff was still suffering from an "emergency condition," or to put it another way, Plaintiff was still an *emergency patient* with a fractured spine when Dr. Orphanos performed surgery. In accordance with the statutory language of W. Va. Code § 55-7B-9c(e), the jury instruction should have emphasized the condition of the patient, not the type of surgery or treatment.

Plaintiff dismisses Dr. Orphanos' arguments regarding W. Va. Code § 55-7B-9c(d) because Dr. Orphanos initially presented Plaintiff with two treatment options. Resp. Br., at 37. That there was another option on the table at the beginning of the evaluation does not mean that the surgery was not "required." There is no dispute that Plaintiff was still in critical condition. As Dr. Weidenbaum testified, "this type of fracture here was three columns which means its unstable which means you have to do something." App. 2748. Dr. Orphanos also testified that "[t]his was a surgery that was an urgent operation that needed to be done to stabilize his spine so that we could mobilize him better." App. 2896. Plaintiff is being disingenuous in taking the testimony of Dr. Orphanos and other witnesses out of context to argue that Plaintiff's surgery was not "required."

The jury's instructions for "recklessness" and "emergency surgery" were misstatements of law that severely prejudiced Dr. Orphanos because the jury was improperly instructed on what was required to preclude application of the Trauma Cap. Accordingly, the jury's verdict cannot stand.

7. The circuit court should have provided a limiting instruction regarding Plaintiff's pie chart.

Plaintiff asserts that Dr. Orphanos forfeited his argument regarding the pie chart used

during closing argument "by lodging his objection after the pie chat had already been taken down." Resp. Br., at 38. The record shows Dr. Orphanos' objection to the pie chart was timely. He objected while Plaintiff was still presenting his closing argument on damages, and during a time when a curable instruction could still be given to the jury. App. 3636–38. The pie chart was "taken down" because Plaintiff's counsel, faced with the objection, announced she would not use the chart anymore. App. 3638. But the damage was done. The circuit court's refusal to instruct the jury to disregard the pie chart was an abuse of discretion because the pie chart directly suggested that the jury should award Plaintiff a far larger amount of non-economic damages than his claimed economic damages. *See* Pet. Br., at 38–39.

8. Based on the cumulative errors at issue, this Court should award Dr. Orphanos a new trial.

Although the cumulative error doctrine is used sparingly, that does not mean it should not be used at all. The combination of errors present here warrants application of the doctrine because the jury's verdict is unreliable and not supported by the evidence. Syl. Pt. 8, *Tennant*, 194 W. Va. at 102, 459 S.E.2d at 379. Plaintiff's blustering that Dr. Orphanos did not identify a "single error" is refuted by a review of the record. The circuit court's rulings created an unfair trial that significantly prejudiced Dr. Orphanos, resulting in a miscarriage of justice. Because the jury's verdict was impacted by trial error, this Court should vacate the verdict below. *See Herbert J. Thomas Mem'l Hosp. Ass'n v. Nutter*, 238 W. Va. 375, 391, 795 S.E.2d 530, 546 (2016).

III. CONCLUSION

For these reasons, as well as those included in Dr. Orphanos' opening brief, this Court should vacate the verdict below, overturn the recklessness verdict and enforce the Trauma Cap, or remand this case for a new trial.

Respectfully submitted,

JOHN R. ORPHANOS, M.D.,

/s/ Thomas J. Hurney, Jr.

Thomas J. Hurney, Jr. (WV Bar No. 1833)
Blair E. Wessels (WV Bar No. 13707)
JACKSON KELLY PLLC
Post Office Box 553
Charleston, West Virginia 25322
(304) 340-1000
thurney@jacksonkelly.com
blair.wessels@jacksonkelly.com

Richard D. Jones (WV Bar No. 1927)
J. Dustin Dillard (WV Bar No. 9051)
FLAHERTY SENSABAUGH BONASSO, PLLC
200 Capitol Street
Post Office Box 3843
Charleston, West Virginia 25338
rjones@flahertylegal.com
ddillard@flahertylegal.com

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 August 2, 2023, I have served the foregoing ***Petitioner John R. Orphanos, M.D.'s Reply in Support of Appeal*** on all counsel of record via the Court's E-Filing system.

/s/ Thomas J. Hurney, Jr.
Thomas J. Hurney, Jr. (WV Bar No. 1833)