INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

ICA EFiled: May 22 2023
03:56PM EDT
Transaction ID 70061742

No. 23-ICA-64

MICHAEL RODGERS,

Petitioner,

v.

DOCKET NO. 23-ICA-64

(On Appeal from Circuit Court of Kanawha County, Civil Action No. 19-C-561)

JOHN R. ORPHANOS, M.D.,

Respondent.

PETITIONER'S BRIEF

P. Gregory Haddad (WVSB #5834)
John W. Barrett, Esq. (WVSB #7289)
Kerrie W. Boyle (WVSB #9439)
Sharon F. Iskra (WVSB #6582)
BAILEY GLASSER, LLP
209 Capitol Street
Charleston, West Virginia 25301
Tel. No. (304) 345-6555
Fax No. (304) 342-1110
ghaddad@baileyglasser.com
jbarrett@baileyglasser.com
kboyle@baileyglasser.com
siskra@baileyglasser.com

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

This case is about what a Kanawha County jury concluded was the reckless medical care that neurosurgeon John R. Orphanos provided to 49-year-old Michael Rodgers, which left Mr. Rodgers with permanent paraplegia, confined to a wheelchair, and unable to perform without assistance even the simplest tasks of eating, dressing, bathing, and basic self-care.

A West Virginia jury unanimously found that Defendant Dr. Orphanos acted with reckless disregard when he blindly conducted non-emergency surgery to repair a vertebral fracture without fully assessing Mr. Rodgers' condition, and without using the numerous surgical tools that would have allowed him to see, monitor, and protect the patient's spinal cord while working so dangerously close to it. Instead, without those essential surgical tools, Dr. Orphanos chose to conduct the surgery "blind to what's going on with the spinal cord," JA 3090, rendering Mr. Rodgers a permanent paraplegic.[1]

After the first surgery, Dr. Orphanos realized his life-altering error and undertook a second surgery to try and correct it. But, for the second time, he did so without the requisite tools and technology that would have allowed him to find and reverse some of the damage he caused. Instead, he cemented the tragic outcome for Plaintiff Rodgers. The multiple surgeries and mistakes also left Mr. Rodgers with a host of other life-threatening medical problems—in addition to paraplegia—including a stroke that he barely survived. Plaintiff Rodgers is now mostly bedfast and has a life of complicated and expensive medical care ahead of him. For these reasons, the jury returned a unanimous verdict, finding Dr. Orphanos' "recklessness caused" Plaintiff's paraplegia and his subsequent stroke. The jury thus awarded Plaintiff nearly $17.5 million. As part of that verdict, the jury awarded Plaintiff approximately $1.3 million for the reasonable expenses of his

[1] References herein to the appendix record filed with this appeal brief include the prefix "JA."

past medical bills.

In post-trial proceedings, the circuit court, in addition to reducing the jury's noneconomic award to $750,000, practically wiped out its award of past medical expenses, reducing it by more than $1.1 million, because Mr. Rodgers had planned for or contributed to the very medical benefits that paid for his care from various collateral sources. In doing so, the circuit court failed to conduct the analysis required by West Virginia Code § 55-7B-9a for payments from collateral sources, which clearly prohibits the reduction of the verdict. To compound that error, the circuit court gave Defendant Orphanos—whom the jury found was solely responsible for causing Plaintiff's paraplegia and stroke—the benefit of Mr. Rodgers' bargain by limiting Orphanos' liability by the amounts in excess of the benefits paid on behalf of Plaintiff by a collateral source. But that is exactly what the statute prohibits. W. Va. Code § 55-7B-9a(g)(2) ("The court may not reduce the verdict rendered by the trier of fact in any category of economic loss to reflect: … [a]mounts in excess of benefits actually paid or to be paid on behalf of the plaintiff by a collateral source in a category of economic loss."). The trial court's ruling also contravenes clear guidance from the West Virginia Supreme Court and the long-recognized collateral source rule and must be reversed.

QUESTIONS PRESENTED

I. Whether the circuit court erred by failing to conduct the required analysis under West Virginia Code § 55-7B-9a when determining whether to reduce the jury's compensatory damages award for economic losses for payments from collateral sources?

II. Whether the circuit court erred by crediting Dr. Orphanos and reducing the jury's verdict award for Plaintiff's past medical bills based on contractual insurance benefits when West Virginia Code § 55-7B-9a(g)(2) prohibits the court from "reduc[ing] the verdict rendered by the trier of fact in any category of economic loss to reflect: …[a]mounts in excess of benefits actually paid or to be paid on behalf of the plaintiff by a collateral source in a category of economic loss"?

STATEMENT OF THE CASE

I. Factual Background

On June 4, 2017, Plaintiff Michael Rodgers, then 49 years old, was injured in a motorcycle accident and transported to Charleston Area Medical Center ("CAMC") in Charleston, West Virginia. JA 3052. Emergency physicians at CAMC performed a CT scan of Plaintiff's chest, which revealed a T5 Chance fracture. Basically, a Chance fracture affects at least two of the three columns that comprise the vertebrae. JA 3059-60. Eventually, Defendant Dr. Orphanos, a neurosurgeon, was contacted for purposes of a neurosurgical consult.

Mr. Rodgers was first seen by a surrogate of Dr. Orphanos' practice at 11:30 a.m. on June 5. JA 3060. The surrogate assessed Mr. Rodgers, placed him on spinal precautions, and ordered a back brace—a conservative, nonsurgical treatment. JA 3189-90. Dr. Orphanos saw Mr. Rodgers that same afternoon. Mr. Rodgers' condition was stable and he was not presenting with any emergency—a fact confirmed repeatedly by Dr. Orphanos himself and ultimately by the jury. JA 3158-59, 3168, 3208. Notably, Dr. Orphanos' standard-of-care expert, Dr. Berkman, agreed this was "not an emergency surgery." JA 3858. Even the perioperative record reflected the fact that the surgery was being done on a nonemergent basis. JA 326.

Dr. Orphanos conceded it is critically important to gather as much information as possible before any kind of spinal surgery. JA 3153. As Mr. Rodgers' standard-of-care expert explained, "you want to cross every T and dot every I and give your patient the best chance for a good outcome." JA 3077. Nevertheless, Dr. Orphanos failed to perform some of the simplest information-gathering tasks. He did not even bother to read Mr. Rodgers' entire chart; instead, he chose to ignore over 40 hourly nursing notes. JA 3184-86. Furthermore, even though Dr. Orphanos claimed that his own, in-person assessment of the patient was his "gold standard," his assessment of Mr. Rodgers took barely 19 minutes. JA 3166-67. Notably, Dr. Orphanos' finding that Mr.

Rodgers was mentally competent to participate in his assessment directly contradicts every single nursing note and the notes written by ER staff—all of which documented the fact that Mr. Rodgers was confused, disoriented, or both. JA 3171, 3181-83.

More than that, the jury found Dr. Orphanos recklessly failed to obtain the testing necessary to ensure a safe and successful surgery. Before surgery, Dr. Orphanos did not order an MRI of the thoracic spine—where the fracture was located—relying instead on the earlier CT of the chest. Because it was a chest CT, it did not provide an assessment of the spinal cord itself. Furthermore, and especially important here, the CT only visualized the bony structures of the spine column, that being the vertebrae. Only an MRI was capable of visualizing the spinal cord and the soft tissues surrounding it. JA 3175-76. Dr. Orphanos' failure to order an MRI deprived him of valuable information necessary for managing the surgery, including maintaining the integrity of the spine and revealing the presence of edema, disc fragments, or other abnormalities. JA 3071-72, 3090. Dr. Orphanos had nearly 2 days between Mr. Rodgers' arrival at CAMC and the surgery itself to order and complete an MRI.

Even more troubling, Defendant also failed to order and utilize intraoperative neurophysiological monitoring (IONM)—a machine which monitors and provides a real-time alert if the spinal cord is being compromised during spinal surgery. IONM causes no pain or ill effects; it is "all benefit[,] no risk." JA 2949-50. If the spinal cord is affected in any way during the course of surgery, it will trigger an IONM alert. Plaintiff's expert, Dr. Mark Weidenbaum, a spine surgeon practicing at Columbia University, testified that the use of IONM is required by the standard of care. JA 3090-91, 3096. Further, Dr. Feinberg, another of Plaintiff's experts from the University of Pennsylvania, testified that IONM is required by the standard of care for all complex spinal cases, and that Dr. Orphanos' failure to use IONM during Mr. Rodgers' spinal surgery was a

deviation from the standard of care. JA 2931, 2949-50.

At the time of the surgery, IONM was available to CAMC's surgeons. In fact, Dr. Orphanos admitted that he had used IONM during his residency and even during his years of private practice in Charleston. Put simply, there was nothing preventing Dr. Orphanos from using IONM during Mr. Rodgers' surgery. JA 3196-98. Dr. Orphanos made a choice—a reckless choice that prevented him from recognizing any problems until it was too late—to proceed with a complicated thoracic surgery "blind to what's going on with the spinal cord." JA 3090. Dr. Weidenbaum testified that if IONM had been used in Mr. Rodgers' case, it would have detected any signal loss during surgery, thus allowing Dr. Orphanos to identify and immediately reverse his missteps.

Because of these failures, Dr. Orphanos lacked the means to properly assess the potential dangers, localize the fracture site, and protect against any possible errors during surgery. Dr. Orphanos admitted that had IONM been used, it would have alerted him to signal loss during surgery indicating spinal cord compromise. JA 3198-99. Dr. Orphanos also admitted in his surgical report that he miscounted the vertebral bodies and, therefore, failed to place the screws where he intended. JA 3216-17. Because of this miscounting, Dr. Orphanos ended up placing the screws into the fractured vertebra itself. That, in turn, increased the risk there might be "some movement of the bony structure across the fracture." JA 3085. It was not until postoperative studies were done that Dr. Orphanos learned the screws were actually protruding outside of the vertebral body at the T5 level. Dr. Weidenbaum testified that one of the screws protruded medially—i.e., impacting the spinal cord—and that the misplaced screw was a contributing factor in causing Mr. Rodgers' paraplegia. JA 3106.

When Mr. Rodgers awoke, he lacked any sensation or motor functioning in his legs. It was admitted that in the two days prior to surgery, when Mr. Rodgers was an inpatient at CAMC, his

neurological functioning was fully intact. JA 3067-68, 3167-68. As a result of the post-operative paraplegia, Dr. Orphanos decided to go back in and perform an exploratory surgery. JA 3106. Even at this point, there was still an opportunity to reverse Mr. Rodgers' paralysis. But once again Defendant recklessly failed to obtain the necessary testing. Specifically, he failed to order a CT myelogram after discovering Mr. Rodgers' paralysis. A CT myelogram was necessary because, unlike a CT, it allows the surgeon to visualize the spinal cord itself. Had a CT myelogram been performed, it would have revealed exactly where the spinal cord was compressed, enabling Defendant to decompress it. JA 3107-08, 3119-20. Without the benefit of those test results in hand, Dr. Orphanos was unable to find, let alone repair, the damage he caused to Mr. Rodgers' spinal cord.

Mr. Rodgers' paralysis was thus permanent, resulting in significantly limited mobility and lower body function. To compound his paraplegia, the surgery and lack of mobility created a host of new medical problems. Mr. Rodgers battled infections, bed sores, sepsis, and other serious health issues and ultimately suffered a stroke. The jury concluded that the medical records demonstrated Mr. Rodgers' paraplegia and the surgical errors proximately caused his stroke and other health complications. JA 1862, 3362-65[2]

II. Procedural History

This case was tried to a jury in March 2022. Responding to special interrogatories, the jury found that Dr. Orphanos was not only negligent, but also reckless. JA 1861. The jury also found by way of special interrogatory that the surgery was non-emergent. JA 1335. The jury further found

[2] Specifically, Plaintiff developed a bed sore which, in turn, became septic secondary to an infectious process. The bacteria migrated to the heart, then to the brain, resulting in Plaintiff's stroke. AR 872 et seq., 3362-63. Tragically, Plaintiff's stroke caused even more physical impairments and limitations. Instead of only being wheelchair-bound, Plaintiff is now largely bedfast, unable to perform the most basic activities of daily living. AR 3364-65.

that Dr. Orphanos' malpractice proximately caused Plaintiff's stroke in July 2020. JA 1337. The jury awarded damages in excess of $17 million by verdict as follows.

For Plaintiff's paraplegia arising from the 2017 spinal surgery:

Past expenses for care and treatment	$1,374,079
Lost earning capacity	$591,166
Future care, treatment, and renovations	$6,511,940
Past pain, suffering and loss of enjoyment of life	$1,000,000
Future pain, suffering and loss of enjoyment of life	$1,500,000
TOTAL	**$10,977,185**

With respect to Plaintiff's 2020 stroke:

Additional care and treatment	$1,793,690
Future pain, suffering and loss of enjoyment of life	$5,000,000
TOTAL	**$6,793,690**

JA 1336-38.

Thereafter, Dr. Orphanos filed a motion seeking to reduce the verdict under the Medical Professional Liability Act, W. Va. Code § 55-7B-1 *et seq*. ("MPLA"). Specifically, he argued that Mr. Rodgers' recovery of past medical bills was governed by West Virginia Code § 55-7B-9d, requiring the court to deduct any amounts beyond what was actually paid by Plaintiff or his insurers. Mr. Rodgers argued in response that the medical-bill issue was governed by West Virginia Code § 55-7B-9a, not Section 9d, because the latter applies to the verdict itself and is akin to an evidentiary rule that applies only to trial proceedings. On the other hand, Section 9a governs post-trial proceedings for reducing a verdict for payments from collateral sources, and subsections

9a(g)(1) and (2) specifically prohibit any deductions from Mr. Rodgers' past medical bills. Separately, Dr. Orphanos asked the court to apply the noneconomic damages cap found in West Virginia Code § 55-7B-8.

On June 9, 2022, the trial court entered an order applying the cap and reducing the amount of Mr. Rodgers' noneconomic damages to $750,000—effectively nullifying $7.5 million of the jury's non-economic damage award. JA 1797-98. The court took the issues involving Mr. Rodgers' medical bills under advisement and requested supplemental briefing. After a further round of briefing and argument, the court entered an order on September 12, 2022, reducing the amount of Mr. Rodgers' past medical bills from $1,374,079 to $215,588.58. The court concluded that Section 9d applied, but provided no legal analysis. JA 1864-65. The court entered final judgment in the amount of $9,862,384.58. JA 1865.

Mr. Rodgers then moved to alter or amend the judgment under Rule 59(e) of the Rules of Civil Procedure, again raising the issues involving the reduction of his medical bills under Section 9d and the application of the noneconomic damages cap. JA 2257, *et seq*. The court denied Plaintiff's motion on January 19, 2023, stating simply that it was "not inclined to change its prior rulings." JA 2432. This appeal followed.

SUMMARY OF ARGUMENT

"The collateral source rule protects payments made to or benefits conferred upon an injured party from sources other than the tortfeasor by denying the tortfeasor any corresponding offset or credit against the injured party's damages." *Kenney v. Liston*, 233 W. Va. 620, 760 S.E.2d 434, 440 (2014). The rule's purpose is that "it is better for injured plaintiffs to receive the benefit of collateral sources in addition to actual damages than for defendants to be able to limit their liability for damages merely by the fortuitous presence of these sources." *Id*. at 445 (cleaned up). This rule is codified at West Virginia Code § 55-7B-9a(g), which states in no uncertain terms that a court

evaluating the post-trial impact of collateral source payments on a jury's award of past medical expenses "may not reduce the verdict rendered by the trier of fact … to reflect … [a]mounts in excess of benefits actually paid or to be paid on behalf of the plaintiff by a collateral source[.]"

Yet that is precisely what the circuit court did, all but wiping out the jury's award to Plaintiff of $1,374,079 for past medical bills by deducting $1,158,490.42 in collateral source benefits received by the Plaintiff, all because the circuit court concluded, without explanation, that the post-trial collateral source analysis of Section 9a was not applicable. As explained below, (1) the circuit court was wrong to disregard the Section 9a framework, and (2) had the circuit court applied that framework, it would not have reduced the past medical bill award as it did. The Court should reverse these rulings and direct the circuit court to reinstate the Plaintiff's past medical expenses.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to West Virginia Rules of Appellate Procedure 18(a), Petitioner respectfully requests Rule 19 oral argument. This Petition is appropriate for oral argument pursuant to Rule of Appellate Procedure 19(a) because it involves a narrow issue of law and a lower court's decision that is contrary to plain statutory language and settled West Virginia law. Specifically, the Petition seeks to resolve a misapplication of the MPLA and the collateral source rule. Because this Petition satisfies Rule 19 of the West Virginia Rules of Appellate Procedure, oral argument is both necessary and appropriate.

ARGUMENT

I. The lower court erred by failing to conduct the analysis required under W. Va. Code § 55-7B-9a.

When a jury awards a tort plaintiff damages for medical care, West Virginia Code § 55-7B-9a provides the post-trial framework for deciding whether and how to reduce the award to account for the injured plaintiff's receipt of collateral source payments for medical care. Here,

based on collateral source payments and benefits received by Mr. Rodgers, the circuit court after trial reduced the jury's $1,374,079 award of past medical expenses by $1,158,490.42, but did not follow Section 9a's procedures. This legal error requires reversal of that reduction.

Section 9a is entitled "Reduction in compensatory damages for economic losses for payments from collateral sources for the same injury." Consistent with the title, its subsection (a) states, "[A] defendant who has been found liable for medical care … may present to the court, after the trier of fact has rendered a verdict, but before entry of judgment, evidence of payments the plaintiff has received for the same injury from collateral sources." W. Va. Code § 55-7B-9a(a). The remaining sections lay out the math for adjusting the verdict. In broad strokes, Section 9a(b) allows the defendant to present evidence of future payments the plaintiff may receive; Section 9a(c) allows the plaintiff to present evidence of payments (e.g., insurance premiums) he or she has made to secure the benefits; Section 9a(d) outlines the required findings of fact for the circuit court regarding the collateral sources; Section 9a(e) allows the plaintiff to receive credit for premiums paid to secure collateral source benefits; Section 9a(f) requires the circuit court to reduce the jury's award to account for certain collateral source benefits, but Section 9a(g)(2) disallows reductions for, inter alia, "amounts in excess of benefits actually paid … on behalf of plaintiff by a collateral source"; and Section 9a(h) requires the circuit court to enter judgment reflecting the mathematical credits and reductions outlined in the other provisions.

Simply stated, the circuit court erred by failing to conduct this analysis. The circuit court instead found "that W. Va. Code § 55-7B-9a does not apply, and that W. Va. Code § 55-7B-9d" does. JA 1864. This was wrong. Section 9a is the method for determining the *post-trial* credits and reductions for collateral source payments, if any. Section 9d applies to "a *verdict* for medical expenses," and states that those *verdicts* consist of "the total amount of past medical expenses paid

by or on behalf of the plaintiff … and "the total amount of past medical expenses incurred but not paid by or on behalf of the plaintiff[.]" W. Va. Code § 55-7B-9d. The purpose here is clear: Section 9d governs what a factfinder may consider in determining a medical expense award; Section 9a lays out the *post-trial* method of determining what "a defendant who has been found liable to the plaintiff for damages for medical care" must pay after accounting for credits and offsets attributable to collateral sources. W. Va. Code § 55-7B-9a(b). Put another way, Section 9d lays out what a jury may award for medical expenses; Section 9a details what a court must do after trial to reduce a medical expense award after trial.

A federal court decision applying these provisions proves the point. In *Goodman v. United States*, Judge Chambers wrote: "[T]he plain language of these statutes is clear. Section 55-7B-9a applies only 'after the trier of fact has rendered a verdict.' W. Va. Code § 55-7B-9a(a). Section 55-7B-9d applies to the verdict itself." No. 3:16-5953, 2018 WL 3715740, *10 (Aug. 3, 2018); *see also Vance v. Cohen*, No. 5:18-CV-00888, 2020 WL 3271047, at *1 (S.D.W. Va. June 17, 2020) (explaining that Section 9d merely "limits the verdict to amounts paid or owed," and Section 9a "applies only 'after the trier of fact has rendered a verdict,'" which "allows for a subsequent adjustment of the verdict for collateral source payments").

The lower court erred by failing to apply the post-verdict, pre-judgment scheme laid out under W. Va. Code § 55-7B-9a. The trial court's sole basis for doing so was a misapplication of the MPLA—specifically, by applying an evidentiary rule (Section 9d), governing the admissibility of collateral source evidence at trial, to a situation in which the "defendant who has been found liable to the plaintiff for damages for medical care" was attempting to offset his liability by the collateral sources identified in Section 9a. This decision was clear legal error, and must be reversed through application of a *de novo* standard of review. Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.,* 194

W.Va. 138, 459 S.E.2d 415 (1995) ("Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.").

II. Had the lower court conducted the required collateral source analysis under Section 9a, it could not have reduced the verdict by more than $1.1 million as a matter of law.

As stated above, West Virginia Code § 55-7B-9a provides for a post-trial adjustment of a verdict for "collateral source payments" received by the plaintiff. The MPLA defines "collateral source" as "a source of benefits or advantages for economic loss that the claimant has received" from specified contracts or public programs. *Id.* § 55-7B-2(b). Specifically excluded from the definition of "collateral source" payments are "any amount that a group … or health care provider agrees to reduce, discount or write off of a medical bill." *Id.*

Section 2(b)'s definition of collateral source is very clearly reflected in the provisions of the post-trial collateral source framework found in Section 9a. "[T]he Court cannot issue an immediate offset for past medical expenses pursuant to the MPLA's limitation in § 55-7B-9a(g)." Specifically, West Virginia Code § 55-7B-9a(g)(2) categorically prohibits the court from "reduc[ing] the verdict rendered by the trier of fact in any category of economic loss to reflect: … [a]mounts in excess of benefits actually paid or to be paid on behalf of the plaintiff by a collateral source in a category of economic loss." W. Va. Code § 55-7B-9a(g)(2). Yet, by reducing the jury's award by more than $1.1 million in medical charges billed but not paid, that is exactly what the circuit court did. This was clear error. Had the court conducted the required analysis under Section 9a, subsection (g) clearly prohibits the very offset the court applied by reducing the verdict by the "[a]mounts in excess of benefits actually paid."

Similarly, Section 9a(g)(1), forbids an offset where there is an existing right of subrogation—regardless of whether the collateral source has already exercised its subrogation

right or is likely to do so in the future. Section 9a(g)(1) applies to all amounts paid to Plaintiff "which the collateral source has a right to recover from the plaintiff through subrogation, lien or reimbursement." Thus, the prohibition in Section 9a(g)(1) applies so long as a right to subrogation exists. *See, e.g.*, *Simms v. United States*, No. 3:11-cv-0932, 2017 WL 3317417, at *3 (S.D.W. Va. Aug. 3, 2017) (noting that Section 9a(g)(1) categorically "prevents a court from calculating an offset when the collateral source … has a right to recover from Plaintiff directly"). Here, statutory subrogation rights exist for both Medicare and Medicaid, and contractual subrogation rights exist for Plaintiff's private insurance through Highmark West Virginia. Therefore, Section 9a(g)(1) also prohibits any court-ordered reduction of Plaintiff's verdict because the corresponding collateral sources have a right to subrogation.

The court's ruling also defeats the purpose and normal application of the collateral source rule. Fundamentally, the collateral source rule works to prevent the tortfeasor from benefiting from their victim's good fortune, for example, of having insurance or other third-party sources that provide benefits. As the Supreme Court of Appeals has stated, "[t]he collateral source rule protects payments made to or benefits conferred upon an injured party from sources other than the tortfeasor by denying the tortfeasor any corresponding offset or credit against the injured party's damages." *Kenney v. Liston*, 233 W. Va. 620, 760 S.E.2d 434, 440 (2014). The purpose behind the collateral source rule is that "it is better for injured plaintiffs to receive the benefit of collateral sources in addition to actual damages than for defendants to be able to limit their liability for damages merely by the fortuitous presence of these sources." *Id.* at 445 (citation omitted) (internal quotation marks omitted); *see also Ilosky v. Michelin Tire Corp.*, 172 W. Va. 435, 307 S.E.2d 603, 615 (1983) ("The purpose of the collateral source doctrine is to prevent reduction in the damage liability of defendants simply because the victim had the good fortune to be insured or have other

means of compensation.").

Under West Virginia law, the "proper measure of damages [for medical expenses] is not simply the expenses or liability incurred," as the lower court held, "but rather the [r]easonable value of medical services made [n]ecessary because of the injury." *Jordan v. Bero*, 158 W. Va. 28, 210 S.E.2d 618, 637 (1974); *see also Delong v. Kermit Lumber & Pressure Treating Co.*, 175 W. Va. 243, 332 S.E.2d 256, 258 (1985) ("The proper measure of damages for future medical expenses is 'the reasonable value of medical services as will probably be necessary by reason of the permanent effects of a party's injuries.'" (citation omitted)). Thus, when a reckless tortfeasor causes a plaintiff an injury that requires medical services, the plaintiff is entitled to recover the reasonable value of those services, regardless of the amount actually paid or whether the services were rendered gratuitously. *Kenney*, 760 S.E.2d at 445–46.

In *Kenney*, the West Virginia Supreme Court of Appeals addressed the application of the collateral source rule where a healthcare provider adjusted a portion of a medical bill thanks to plaintiff's health insurance. *Id.* at 439–40. The court held that, under the collateral source rule, a plaintiff is entitled to "the total amount billed by his medical providers absent his health insurance coverage," and therefore, that "[t]he tortfeasor is not entitled to receive the benefit of the reduced, discounted or written-off amount." *Id.* at 446; *Id.* at 442–44 (discussing examples, which "are legion," of collateral sources being inadmissible to reduce a defendant's liability and collecting cases); *see also* Restatement (Second) of Torts § 920A cmt. c (Am. Law Inst. 1979) (stating "[s]ocial legislation benefits" are collateral sources).

Kenney expressly refused to restrict the universe of benefits protected by the collateral source rule to "payments" made to a plaintiff or on a plaintiff's behalf, explaining that "the collateral source rule applies to any benefit received by a plaintiff from any source in line with the

plaintiff's interests." *Id.* at 445; *see also Id.* at 440 ("The collateral source rule protects payments made to or benefits conferred upon an injured party from sources other than the tortfeasor."). And the *Kenney* court specifically identified discounted rates negotiated by payers as one type of "benefit" subject to the collateral source rule. *Id.* at 445–46 ("The damage is sustained when the plaintiff incurs the liability, and the method by which that liability is later discharged has no effect on the measure of damages." (internal quotation omitted)).

Here, the amounts on the medical bills were not "written off" or "adjusted." They reflect the amount Plaintiff's benefits providers bargained to pay for certain procedures and treatments with health care providers. The court's summary order choosing to apply Section 9d ignored its obligations under Section 9a to conduct a fulsome analysis that accounts for Plaintiff's insurance premiums, what the reasonable cost would be for the medical treatments, which are presumed to be "reasonable and necessary" in the absence of affirmative evidence presented to the contrary.

As such, Section 9a applies in all cases where collateral source payments have been made. W. Va. Code § 55-7B-9a(a) (regulating how "collateral sources" are to be handled, post-verdict, in all cases where the jury awards damages for "economic losses"). Because Plaintiff's medical bills were submitted to and paid by collateral sources, including Medicare, Medicaid, and a private insurer, Defendant's right to benefit from anything related to those payments is specifically governed by Section 9a. The court's September 12, 2022 Order granting an offset was erroneous and should be reversed.

CONCLUSION

For the foregoing reasons, the trial court's reduction of the jury's verdict for past medical expenses was rooted in a legal error, and this Court should reverse the lower court's reduction of the jury's award for past medical expenses and remand this case with instructions to reinstate the

jury's original award of $1,374,079.00. Alternatively, the Court should reverse the lower court's ruling and remand for a post-trial hearing under W. Va. Code § 55-7B-9a.

Respectfully submitted,

PETITIONER
By Counsel

P. Gregory Haddad (WVSB #5834)
John W. Barrett, Esq. (WVSB #7289)
Kerrie W. Boyle (WVSB #9439)
Sharon F. Iskra (WVSB #6582)
BAILEY GLASSER, LLP
209 Capitol Street
Charleston, West Virginia 25301
Tel. No. (304) 345-6555
Fax No. (304) 342-1110
ghaddad@baileyglasser.com
jbarrett@baileyglasser.com
kboyle@baileyglasser.com
siskra@baileyglasser.com

INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 23-ICA-64

MICHAEL RODGERS,

Petitioner,

v.

JOHN R. ORPHANOS, M.D.,

Respondent.

DOCKET NO. 23-ICA-64
(On Appeal from Circuit Court of Kanawha County, Civil Action No. 19-C-561)

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May 2023, I served a true and correct copy of the **PETITIONER'S BRIEF** on the following individuals, via electronic mail:

Richard D. Jones, Esq.
J. Dustin Dillard, Esq.
Flaherty Sensabaugh Bonasso, PLLC
200 Capitol Street
Post Office Box 3843
Charleston, WV 25338-3843
rjones@flahertylegal.com
ddillard@flahertylegal.com

Thomas J. Hurney, Jr., Esq.
Blair E. Wessels, Esq.
Jackson Kelly PLLC
500 Lee Street East, Suite 1600
Charleston, WV 25301-3202
thurney@jacksonkelly.com
blair.wessels@jacksonkelly.com

P. Gregory Haddad (WVSB #5384)