IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 23-ICA-64

MICHAEL RODGERS,
Plaintiff-Below, Petitioner,

v.

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

RESPONDENT JOHN R. ORPHANOS, M.D.'S RESPONSE BRIEF

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I. INTRODUCTION

Petitioner Michael Rodgers' ("Petitioner") appeal is about whether West Virginia law permits recovery for medical expenses, though billed, that were never paid and will never be paid. Sometimes referred to as "phantom damages," these expenses are ones for which the plaintiff recovers money for economic loss that never occurred.[1] Despite the plain language of West Virginia Code §§ 55-7B-9a and 9d, Petitioner argues that this verdict—which indisputably contained over $1.1 million in past medical bills that were never paid and will never be paid—cannot be reduced at all.[2]

At the outset, Petitioner argues only that the circuit court misconstrued the application of West Virginia Code §§ 55-7B-9a and 9d. Abandoned are the sweeping arguments made below and in Petitioner's Notice of Appeal that West Virginia Code § 55-7B-8 either cannot be applied where there is a finding of recklessness (it can) or is unconstitutional (it's not), or that West Virginia Code § 55-7B-9d is unconstitutional (it's not). *See* Petr.'s Notice of Appeal, Transaction ID No.

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[1] Victor E. Schwartz & Christopher E. Appel, *Perspectives on the Future of Tort Damages: The Law Should Reflect Reality*, 74 S.C. L. REV. 1, 5 (2022) ("For example, a hospital might bill $40,000 in health care expenses and expect to collect only a fraction, say $10,000, from a patient's insurer. Because the inflated amount does not reflect--and is often far afield from--the money that actually changes hands, the inflated amounts have been called 'phantom damages.'"); Cary Silverman & Richard R. Heath, Jr., *A Mountain State Transformation: West Virginia's Move into the Mainstream*, 121 W. VA. L. REV. 27, 52 (2018) (discussing statutory changes enacted by the West Virginia Legislature as "Curbing Phantom Damages"). *See also Goble v. Frohman*, 901 So. 2d 830, 832 (Fla. 2005). In *Goble*, the Supreme Court of Florida affirmed the District Court of Appeal of Florida's ruling that the trial court appropriately set off a portion of plaintiff's damages for medical bills that were written off by medical providers, explaining that "forcing an insurer to pay for damages that have not been incurred, would result in a windfall to the injured party. . . . The allowance of a windfall would undermine the legislative purpose of controlling liability insurance rates because 'insurers will be sure to pass the cost for these *phantom damages* on to Floridians.'" *Id.* (emphasis added) (citation omitted). The district court had ruled "[t]he allowance of such a windfall completely undermines the purpose of the Act by requiring insurers to pay damages based on a billing fiction, especially when the insurers will be sure to pass the cost for these phantom damages on to Floridians." *Goble v. Frohman*, 848 So. 2d 406, 410 (Fla. Dist. Ct. App. 2003).

[2] Petitioner argues "(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." Petr.'s Br. at 9.

69186928, at 8–9 (unpaginated). The only issue raised is whether the circuit court correctly applied West Virginia Code § 55-7B-9d to the verdict, reducing the medical expenses awarded to what was actually paid and by deducting what was unpaid. The *amount* of the reduction is not challenged—only that the circuit court erred in doing it at all.

II. STATEMENT OF THE CASE

Petitioner's Statement of the Case summarizes the facts of Mr. Rodgers' injury, treatment, and the verdict below and repeatedly emphasizes Dr. Orphanos' purported "reckless" treatment and decisions. But whether Dr. Orphanos' conduct amounted to "recklessness" is not the subject of or at issue in this appeal; it is at issue in the appeal docketed at 23-ICA-58. There, Dr. Orphanos challenges the circuit court's denial of his Renewal of Motion for Judgment as a Matter of Law After Trial and Motion for New Trial under West Virginia Rules of Civil Procedure 50(b) and 59, respectively. As to the issue of "recklessness," which is the focus of Petitioner's fact section here, Dr. Orphanos argues in Appeal No. 23-ICA-58 that his treatment of Mr. Rodgers was well within the standard of care, and that the circuit court therefore 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 West Virginia Code § 55-7B-9c(h)(1) because the evidence in the record did not support that finding. Dr. Orphanos' experts supported his treatment as reasonable and within the standard of care, whereas none of Petitioner's experts testified that any alleged breach of the standard of care amounted to "recklessness." Although these arguments are not the subject of this appeal, Dr. Orphanos maintains that the jury's finding of "recklessness" in its verdict should be overturned and the Trauma Cap applied pursuant West Virginia Code § 55-7B-9c, or the case should be remanded for a new trial for the other reasons set forth in his briefing.

Petitioner first addresses facts pertinent to this appeal on page 7 of his opening brief. There,

Petitioner briefly addresses Dr. Orphanos' post-verdict motion to reduce medical bills under West Virginia Code § 55-7B-9d. After recounting the parties' respective arguments below, Petitioner summarizes the circuit court's ruling:

> 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.

Petr.'s Br. at 8.

To put a finer point on what happened below, Petitioner filed a pre-trial motion *in limine* regarding collateral sources which sought to prohibit Dr. Orphanos from putting forth "any evidence that [Mr. Rodgers] was covered by health insurance or that the costs of his medical treatment were paid, in part or whole, by his health insurer." App. 988. Dr. Orphanos did not object to Petitioner's motion, but expressly reserved (without any objection by Petitioner) "the right to present evidence of insurance benefits, write offs, etc. to the Court, after the trial, consistent with W.Va. Code §55-7B-9a and §55-7B-9d." App. 1082. The circuit court ultimately granted Petitioner's motion. App. 2689. At trial, Petitioner proceeded to introduce a list of medical bills with full charges into evidence, App. 3322–23,[3] and during closing, Petitioner utilized a pie chart

[3] An exhibit recounting the medical bills was admitted at App. 3322–23 ("That is a summary and index of Mr. Rodgers' medical bills associated in this case, do you see that?").

that showed pieces of "pie" relating to claimed damages, including past medical expenses, to argue that Mr. Rodgers should be awarded damages for economic losses without "discount." App. 3935–51[4], App. 1791–93.

On April 13, 2022, after the verdict and before entry of the Judgment Order, Dr. Orphanos moved to reduce the verdict to account for past medical expenses awarded by the jury that were not paid or payable. *See* App. 1339–51. At the circuit court's direction, App. 4048–49, the parties exchanged information as to the amount of the medical bills and the amount to be reduced. On the numbers, there was no disagreement. *See* App. 1810–22 (Petitioner's supplemental briefing), App. 1823–59 (Dr. Orphanos' supplemental briefing). After the parties exchanged this information, the only dispute was whether the reduction of past medical expenses should occur at all.

On June 30, 2022, the circuit court held a hearing on the issue and found that "9d is the section that applies in this matter. And I believe that the past medical expenses must be reduced consistent with that code section." App. 4081. The circuit court memorialized its rulings in its Judgment Order, entered on September 12, 2022, in which it concluded that Petitioner's past medical expenses for care and treatment totaled $215,588.58. App. 1865.

Petitioner timely filed a Notice of Appeal on February 21, 2023. Dr. Orphanos filed his own Notice of Appeal addressing separate issues on February 17, 2023, which is docketed at 23-ICA-58. Here, Dr. Orphanos asserts the circuit court correctly applied the plain language of West Virginia Code § 55-7B-9d to the jury's verdict to account for Petitioner's past medical expenses.

[4] Petitioner argued "the defense theories just don't add up. What does add up respectfully, is three things for Mike Rodgers: His medical bills; his lost earning capacity; and the cost of future care now needed to take care of him for the rest of his life. And this, ladies and gentlemen, is where I ask very much that you make sure this time that Mike Rodgers does get the gold standard, not excuses, not discounts, the gold standard." App. 3935.

III. SUMMARY OF ARGUMENT

Petitioner seeks to avoid the application of West Virginia Code § 55-7B-9d of the Medical Professional Liability Act ("MPLA") to the jury's verdict by arguing that a different statute—West Virginia Code § 55-7B-9a—applies. The parties do not disagree over the amount of Petitioner's past medical bills, or on the amount of the circuit court's reduction. Rather, the parties differ on whether the circuit court correctly reduced the jury's award for past medical care and treatment from $1,374,079.00 to $215,588.58. Dr. Orphanos asserts the circuit court correctly applied Section 9d to the verdict and appropriately deducted from each of Petitioner's medical bills the amounts never paid or amounts determined not to be payable.

Despite Petitioner's assertions, this appeal is not about collateral source benefits. Throughout his appeal, Petitioner conflates the evidentiary mandate for collateral sources—that the jury should not hear of collateral sources prior to rendering a verdict (which did not happen here)—with the rule's effect on damages, which is that any "windfall" from medical expenses not paid goes to the plaintiff. The latter is in play here. By enacting West Virginia Code § 55-7B-9d, the Legislature clearly directed that only actual losses be awarded in MPLA cases.

West Virginia Code § 55-7B-9a does not apply here. Section 9a addresses collateral sources—bills *paid* by third parties for the plaintiff—and permits reduction where the plaintiff was not damaged. But if any third party has a subrogation claim, no reduction is permitted. Make no mistake—no *payments* from collateral sources were ever reduced from this verdict. Dr. Orphanos never asked the circuit court to reduce the verdict by what was actually paid for Mr. Rodgers' medical treatment, which is why the amount of the bills actually paid remains in the Judgment Order. Regarding medical expenses not paid (the subject matter addressed by Section 9d), the best Petitioner can argue is that under Section 9a, any reduction should have been addressed pre-trial.

But this issue *was* addressed pre-trial and, further, none of the cases Petitioner relies on support this argument. And having benefitted from the use of the entirety of Mr. Rodgers' past medical expenses to drive the verdict, *i.e.*, introducing the full amount of the medical bills at trial and using a "pie chart" with those amounts to assert that Mr. Rodgers is entitled to a "gold standard" verdict, Petitioner cannot now change course. App. 3935, 3941.

The circuit court did not commit any errors—and certainly no clear errors—of law as it relates to applying West Virginia Code § 55-7B-9d to the jury's verdict and reducing the amount of Petitioner's past medical expenses. Accordingly, this Court should affirm the circuit court's Judgment Order as it pertains to the reduction of medical bills under Section 9d.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Although this Court could conclude that the interpretation of West Virginia Code § 55-7B-9d is an issue of first impression, Dr. Orphanos asserts that the circuit court acted within its discretion in applying the statute to undisputed evidence. As such, oral argument is not necessary to aid this Court in its decisional process, and the Court can resolve Petitioner's appeal by memorandum decision. If the Court determines oral argument is necessary, argument under Rule 19 of the West Virginia Rules of Appellate Procedure is appropriate.

V. ARGUMENT

A. Standard of Review

The Supreme Court of Appeals of West Virginia has consistently held that "[t]he standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to W. Va. R. Civ. P. 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed." Syl. Pt. 1, *Wickland v. Am. Travellers Life Ins. Co.*, 204 W. Va. 430, 431, 513 S.E.2d 657, 658 (1998). The judgment

underlying Petitioner's Rule 59(e) motion was the circuit court's ruling granting, in part, Dr. Orphanos' *Motion to Reduce Verdict Consistent with the West Virginia Medical Professional Liability Act*, which was incorporated into the court's Judgment Order, dated September 12, 2022. App. 1860–66.

Petitioner's challenge to the circuit court's order is one of statutory interpretation, as Petitioner asserts that the circuit court misapplied West Virginia Code §§ 55-7B-9a and 9d in reducing the jury's verdict regarding past medical expenses. "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." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 139, 459 S.E.2d 415, 416 (1995).

B. Petitioner Waived Certain Arguments on Appeal by Failing to Address Them in His Opening Brief.

In his Notice of Appeal, Petitioner asserted that the circuit court erred in applying West Virginia Code § 55-7B-8 to the verdict, which limited Petitioner's noneconomic damages award to $750,000.00. Petitioner also claimed that West Virginia Code § 55-7B-9d operates as a rule of evidence, making the statute "an unconstitutional invasion of the Supreme Court's rulemaking power under W. Va. Const. art. VIII, §1." Petr.'s Notice of Appeal, Transaction ID No. 69186928, at 8–9 (unpaginated). Neither of these arguments are included in Petitioner's brief. Because Petitioner did not assert these arguments in his opening brief, he has waived the right to further raise them on appeal. *See* Syl. Pt. 6, *Addair v. Bryant*, 168 W. Va. 306, 307, 284 S.E.2d 374, 376 (1981) ("Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived.").

C. Petitioner's Appeal Should be Rejected under Either Judicial Estoppel or Invited Error, or Both.

Petitioner's appeal should be rejected because prior to trial, he moved *in limine* to prohibit the mention of collateral sources, and in response, Dr. Orphanos expressly reserved "the right to present evidence of insurance benefits, write offs, etc. to the Court, after the trial, consistent with W. Va. Code §55-7B-9a and §55-7B-9d." App. 1082. Petitioner did not contest that position, and with the motion *in limine* granted, proceeded to introduce the full medical bills (with no reference to what was paid or unpaid or by whom) into evidence, App. 3322–23, and then use them in closing to argue for a large damage award without "discount" as demonstrated by the "pie chart" exhibit. App. 3935, 3941, 1791–93.

Since Petitioner assented to Dr. Orphanos' reservation of rights and fully benefitted from the medical bills being introduced without limitation, he is barred here from arguing that Dr. Orphanos somehow waived reduction under Section 9d by failing to move to reduce the bills pre-trial. Petitioner's change in position should be rejected under either the doctrine of judicial estoppel, *Bell v. Perkins*, No. 19-0019, 2021 WL 595415, at *6 (W. Va. Feb. 16, 2021) ("This Court has recognized that 'a party is "generally prevent[ed] ... from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase."' . . . Petitioners now attempt to evade precisely the same fate which they successfully imposed upon two of the original devisees, which enlarged their interests in the subject property."), or invited error. *State v. Crabtree*, 198 W. Va. 620, 627, 482 S.E.2d 605, 612 (1996) (explaining that the "invited error" doctrine "is a branch of the doctrine of waiver which prevents a party from inducing an inappropriate or erroneous response and then later seeking to profit from that error").

D. The Circuit Court Did Not Err in Applying West Virginia Code § 55-7B-9d to the Jury's Verdict.

Petitioner misconstrues the interplay between the statutes governing the reduction of past medical expenses from a damages award. In different ways, both West Virginia Code §§ 55-7B-

9a and 9d address the award of phantom economic damages—those damages a plaintiff (or his insurer) either never paid, never will pay, or are paid by a third party without an obligation of repayment by the plaintiff. The common thread between the two statutes is that both limit a plaintiff's recovery to actual damages, but each applies in a different way.

Here, Petitioner asserts that the circuit court erred in concluding that West Virginia Code § 55-7B-9a did not apply to the verdict, arguing that "Section 9a is the method for determining the post-trial credits and reductions for collateral source payments," and that Section 9d only "governs what a factfinder may consider in determining a medical expense award." Petr.'s Br. at 10–11. To reach this conclusion, Petitioner argues that Section 9d operates as an "evidentiary rule" that governs the admissibility of collateral source evidence at trial. Petr.'s Br. at 11. Petitioner's argument makes little sense when considering the actual statutory language for each provision, the legislative history of the MPLA, and case law interpreting these and other similar statutes.

1. West Virginia Code §§ 55-7B-9a and 9d address different scenarios governing the reduction of a verdict.

West Virginia Code § 55-7B-9a, titled "Reduction in compensatory damages for economic losses for payments from collateral sources for the same injury," provides for the reduction of economic losses awarded by a jury in situations where those losses were *paid* by a collateral source on the plaintiff's behalf. But subsection (g) provides "[t]he court may not reduce the verdict rendered by the trier of fact in any category of economic loss to reflect," either "(1) Amounts paid to or on behalf of the plaintiff which the collateral source has a right to recover from the plaintiff through subrogation, lien or reimbursement," or "(2) Amounts 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[.]"[5]

[5] Courts are also prohibited from reducing the verdict to reflect "(3) The proceeds of any individual disability or income replacement insurance paid for entirely by the plaintiff; (4) The assets of the plaintiff or the members of the plaintiff's immediate family; or (5) A settlement between the plaintiff and another

W. Va. Code § 55-7B-9a(g)(1)–(2). Based on this language, Section 9a addresses awards for past and future medical care which have been or will be paid by a collateral source that *does not have a right of subrogation or reimbursement from the plaintiff*. Notably, in the MPLA's definition of "collateral source," the statute expressly excludes from collateral source "any amount that a group, organization, partnership, corporation, or health care provider agrees to reduce, discount, or write off of a medical bill." W. Va. Code § 55-7B-2(b)(2).

West Virginia Code § 55-7B-9d addresses an entirely different issue. Titled "Adjustment of verdict for past medical expenses," this statute provides that "A verdict for past medical expenses is limited to: (1) The total amount of past medical expenses paid by or on behalf of the plaintiff; and (2) The total amount of past medical expenses incurred but not paid by or on behalf of the plaintiff for which the plaintiff or another person on behalf of the plaintiff is obligated to pay." W. Va. Code § 55-7B-9d(1)–(2). Section 9d applies where verdicts reflect the entirety of a plaintiff's past medical expenses, but the verdict is then reduced to account for amounts that were never paid and will never be paid. Further, nothing in Section 9d requires this reduction to be done either pre- or post-trial; the statute simply mandates that recovery for past medical expenses is limited to what was actually paid.

2. West Virginia Code § 55-7B-9a does not apply here because Dr. Orphanos is not seeking to reduce the jury's verdict to account for collateral sources.

Petitioner claims that the circuit court's decision should be reversed because the court did not follow the procedures in West Virginia Code § 55-7B-9a for "how to reduce the award to account for the injured plaintiff's receipt of collateral source payments for medical care." Petr.'s Br. at 9. Petitioner is correct that Section 9a addresses collateral source payments, as Section 9a establishes how courts address medical expenses a plaintiff either did not pay or will never pay

tortfeasor." W. Va. Code § 55-7B-9a(g)(3)–(5).

because the bills were paid by some other entity with no right to repayment in the event of a damages award.

But Dr. Orphanos is not seeking to reduce the damages award by payments made from collateral sources. Instead, Dr. Orphanos seeks to reduce Petitioner's verdict by accounting for the various write offs and discounts applied to Petitioner's medical bills, which are expressly covered by Section 9d. As explained in *Estate of Burns by & through Vance v. Cohen*, No. 5:18-CV-00888, 2020 WL 3271047, at *1 (S.D.W. Va. June 17, 2020), "Section 55-7B-9d limits the verdict to amounts paid or owed; section 55-7B-9a correspondingly allows for a subsequent adjustment of the verdict for collateral source payments. The MPLA makes explicit that written off or adjusted medical expenses are not collateral source payments by excluding the former from the definition of the latter. *See* W. Va. Code § 55-7B-2(b)."

When interpreting similar statutes, other jurisdictions have recognized the distinction between collateral source payments and adjusting verdicts to account for medical expenses that were written off or forgiven. In *Smithers v. C & G Custom Module Hauling*, 172 F. Supp. 2d 765 (E.D. Va. 2000), the district court addressed the same concept:

> Simply put, the issue to the Court is not whether the victim or the responsible defendant should benefit from any "windfall" that may occur from the practice of write-offs, but whether either party should benefit where there is clearly a distinction between the purpose of the traditional collateral source rule *with regard to insurance coverage generally as it may benefit the victim* (and *should not* act as a windfall to the defendant where the rule is intended to prevent a tortfeasor from avoiding an obligation to compensate just because the victim has insurance) *and the situation involving write-offs in which the expenses are never incurred as the result of contractual arrangements between two third parties such as the hospital and the carrier*.

Id. at 777 (emphasis added). Interpreting a similar statute, a Florida appellate court explained:

> This alteration in the common law collateral source rule evinces the legislature's intent to prevent plaintiffs from receiving a windfall by being compensated twice for the same medical bills by both their insurance company and by the tortfeasor.

> Our holding in this case likewise allows an injured party to receive compensation for medical expenses for which they have become liable, but does not permit the plaintiff to receive a windfall by recovering "phantom damages."

Coop. Leasing, Inc. v. Johnson, 872 So.2d 956, 959 (Fla. Dist. Ct. App. 2004) (citing *Goble v. Frohman*, 848 So.2d 406 (Fla. Dist. Ct. App. 2003)); *see also supra* note 1 (discussing "phantom damages").

Here, Petitioner laments the circuit court's decision to reduce the jury's verdict for past medical expenses and treatment to $215,588.58. But as demonstrated in Dr. Orphanos' motion to reduce the verdict and supplemental briefing on the motion, the evidence demonstrated without dispute that the majority of Petitioner's medical bills were written off or forgiven. *See* App. 1344–45 (chart of Petitioner's past medical bills noting the charged amount and the written off amount), App. 1352 (summary of medical bills exhibit introduced at trial), App. 1823–59 (providing supplemental records from additional health care providers demonstrating additional expenses written off). Because the medical bills demonstrate that these amounts have not and will never be paid, the circuit court correctly limited Petitioner's verdict to the amount of expenses actually paid.

3. Petitioner's argument that West Virginia Code § 55-7B-9d operates as an evidentiary rule is without merit.

Against this simple backdrop, Petitioner picks and chooses language from Sections 9a and 9d to avoid *any* reduction. Petitioner argues Section 9d is "an evidentiary rule" that "lays out what a jury may award for medical expense" by "governing the admissibility of collateral source evidence at trial"; whereas "Section 9a details what a court must do after trial to reduce a medical expense award after trial." Petr.'s Br. at 11. To support this position, Petitioner relies on two district court cases, *Goodman v. United States*, No. 3:16-5953, 2018 WL 3715740 (S.D.W. Va. Aug. 3, 2018), and *Estate of Burns by & through Vance v. Cohen*, No. 5:18-CV-00888, 2020 WL 3271047 (S.D.W. Va. June 17, 2020):

> 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").

Petr.'s Br. at 11.

But neither the language of West Virginia Code § 55-7B-9d nor the cases Petitioner relies on support the conclusion that Section 9d only applies in the pre-trial context. Unlike Section 9a, which, as explained, addresses a different issue, Section 9d is silent as to when it should be applied. The fact that federal district courts have addressed Section 9d in motions *in limine* and ruled on whether plaintiffs were permitted to introduce only the paid portion of a medical bill at trial does not change Section 9d's language or its application here.

Further, neither *Goodman* nor *Vance* support Petitioner's argument. In *Goodman*, Judge Chambers addressed the issue of when to apply Section 9d and determined that "Section 55-7B-9a does not limit or usurp the authority of Section 55-7B-9d at the time of the verdict." *Goodman*, 2018 WL 3715740, at *10. The court then ruled that Section 9d applied to limit a verdict for medical expenses to what was actually paid:

> *Because Section 55-7B-9d's language limits the jury's verdict regarding past medical expenses, the statute's limits will be extended to the evidence this Court will allow to be presented at trial*. Defendant's Motion is GRANTED, and Plaintiff will be prohibited from presenting or admitting into evidence any evidence of amounts paid for past medical expenses in excess of amounts actually paid for her or on her behalf at trial.

Id. (emphasis added). *Goodman* does not state that Section 9d is a rule of evidence applicable only at pre-trial. Fairly read, *Goodman* merely reflects that the district court exercised judicial discretion in limiting the plaintiff to presenting evidence of damages awardable under Section 9d.

A review of the subsequent orders in *Goodman* shows this, as well as shows that the court reduced medical damages under both Sections 9d and 9a. *See Goodman v. United States*, No. 3:16-5953, 2019 WL 3072594, at *1–3 (S.D.W. Va. July 12, 2019) (holding that under Section 9d, "[d]amages for past medical expenses are limited to the amounts actually paid for or on behalf of the plaintiff," and directing the parties to confer on collateral source reductions pursuant to Section 9a prior to the entry of judgment); *Goodman v. United States*, No. 3:16-5953, 2019 WL 5682123, at *1 (S.D.W. Va. Aug. 6, 2019) (reducing the plaintiff's medical expenses and finding that "the Court has received notification from the parties that there is no issue as to collateral source subtraction").

Likewise, the *Vance* case also does not interpret Section 9d the way Petitioner claims it should be read. In *Vance*, the defendant argued that "written off or adjusted medical expenses [that] are not actually paid or owed by Ms. Burns or anyone on her behalf . . . should be excluded at trial." *Vance*, 2020 WL 3271047, at *1. Citing *Goodman*, Judge Volk recognized the difference between Sections 9a and 9d, and found that Section 9d limited medical damages to amounts paid or owed:

> Section 55-7B-9d limits the verdict to amounts paid or owed; section 55-7B-9a correspondingly allows for a subsequent adjustment of the verdict for collateral source payments. The MPLA makes explicit that written off or adjusted medical expenses are not collateral source payments by excluding the former from the definition of the latter. *See* W. Va. Code § 55-7B-2(b).
>
> In deciding a similar motion, my colleague Judge Chambers -- the longest serving Speaker of the West Virginia House of Delegates -- concluded that the post-trial adjustment for collateral sources "does not limit or usurp" the statutory pronouncement that a verdict be limited to the medical expenses actually paid or owed. . . . So reasoning, Judge Chambers excluded at trial those medical expenses in excess of the amounts paid or owed. *See id*.
>
> Inasmuch as written off or adjusted expenses are neither paid nor obligated to be paid by Ms. Burns or anyone on her behalf, they cannot be considered damages at trial under the plain language of the MPLA. *See* W. Va. Code § 55-7B-9d . . . .

Id. at *1.

Goodman and *Vance* are not binding precedent. But even if they were, neither held that the application of Section 9d is an "evidentiary rule" that must be addressed pre-trial or pre-verdict; rather, the judges exercised their discretion and determined that Section 9d *could* be used prior to trial to limit the jury from hearing evidence of damages not paid or owed.[6] Nothing precluded those courts from ruling the other way and applying Section 9d after the verdict was rendered, like the circuit court did below. The key holding from those decisions is that the courts expressly recognized that Section 9d limits damages to amounts actually paid and is independent of Section 9a. The courts' exercises of discretion in enforcing Section 9d via orders on motions *in limine* does not translate to the broad interpretation (in absence of statutory language) that Petitioner advances here.

It bears repeating that *this issue was addressed pre-trial*. Petitioner moved *in limine* to prohibit Dr. Orphanos from introducing any evidence regarding collateral source payments. App. 988. Dr. Orphanos did not object to Petitioner's motion, but specifically preserved "the right to present evidence of insurance benefits, write offs, etc. to the Court, after the trial, consistent with W.Va. Code §55-7B-9a and §55-7B-9d." App. 1082. Petitioner did not object to this, and the circuit court granted Petitioner's motion. App. 2689. Petitioner cannot now try and argue that Dr. Orphanos somehow waived his right to seek the reductions recognized in the MPLA when he both assented to, and benefited from, this procedural process. *See supra* Section V.C. Indeed, it is easy to posit that Petitioner would have objected to any effort made by Dr. Orphanos to exclude the full amount of the medical bills from being heard at trial.

4. The legislative history of the MPLA and the enactment of West Virginia Code § 55-7B-9d supports Dr. Orphanos' position.

[6] In *Goodman*, the plaintiff asserted claims under the Federal Tort Claims Act, and the case was tried as a bench trial before Judge Chambers rather than before a jury. This puts a gloss on the district court's exercise of discretion in pre-trial rulings that is absent here.

Petitioner's last effort to avoid the application of Section 9d is to argue that the circuit court's order "defeats the purpose and normal application of the collateral source rule" because "the collateral source rule works to prevent the tortfeasor from benefitting from their victim's good fortune." Petr.'s Br. at 13. Petitioner then cites to a string of cases in support of his position, but none are MPLA cases, and all were decided prior to the Legislature's enactment of Section 9d. *See* Petr.'s Br. at 13–15.

The case Petitioner relies on most heavily is *Kenney v. Liston*, 233 W. Va. 620, 760 S.E.2d 434 (2014). *Kenney* held that the collateral source rule does not allow for the reduction of "discounts" or "write offs" from a verdict, *i.e.*, reducing the amount of medical bills awarded to plaintiff to the amounts actually paid.

> Where an injured person's health care provider agrees to reduce, discount or write off a portion of the person's medical bill, the collateral source rule permits the person to recover the entire reasonable value of the medical services necessarily required by the injury. The tortfeasor is not entitled to receive the benefit of the reduced, discounted or written-off amount.

Syl. Pt. 7, *Kenney*, 233 W. Va. at 620, 760 S.E.2d at 437. The Court went on to hold:

> We turn now to the specific question at hand: does the collateral source rule protect the amounts discounted from the plaintiff's medical bill or written off by the medical provider? We hold that it does, because the amount of the medical expense that was discounted or written off can be considered both a benefit of the plaintiff's bargain with his health insurance carrier, and a gratuitous benefit arising from the plaintiff's bargain with the medical provider.

Id. at 630, 760 S.E.2d at 444. In a footnote, the *Kenney* court recognized that West Virginia Code § 55-7B-9a changed the collateral source rule for MPLA cases: "We note that, in the limited context of medical negligence actions, *the Legislature has chosen to alter this balance and to permit a careless defendant to benefit from 'evidence of payments the plaintiff has received for the same injury from collateral sources*.'" *Id.* at 632 n.54, 760 S.E.2d at 446 n.54 (emphasis added); *see also Simms v. United States*, 839 F.3d 364, 370 (4th Cir. 2016) (recognizing that W. Va. Code § 55-7B-

9a "modifies the common law collateral source rule in the context of medical professional liability actions").

The enactment of Sections 9a and 9d is consistent with the Legislature's purpose in passing the MPLA. *See* W. Va. Code § 55-7B-1 (explaining that the Legislature enacted the MPLA to address issues related to the rising cost of professional liability insurance, resulting in West Virginia's loss of qualified health care professionals and facilities); *see also MacDonald v. City Hosp., Inc.*, 227 W. Va. 707, 719, 715 S.E.2d 405, 417 (2011) (When the West Virginia Legislature enacted the MPLA, it "set forth a detailed explanation of its findings and purpose of the Act[.]"). To address these issues, the Legislature crafted different reforms within the MPLA to "balance the rights of our individual citizens to adequate and reasonable compensation with the broad public interest in the provision of services by qualified health care providers and health care facilities . . . ." W. Va. Code § 55-7B-1; *see also Robinson v. Charleston Area Med. Ctr., Inc.*, 186 W. Va. 720, 724, 414 S.E.2d 877, 881 (1991) (finding that the MPLA was enacted "to encourage and facilitate the provision of the best health care services to the citizens of this state"). Over the years, the Legislature has amended the MPLA to maintain this "balance of rights" between West Virginia citizens and health care providers and facilities, most notably in 2001, 2003, 2015, and 2017.

In 2015, the Legislature amended the MPLA and enacted West Virginia Code § 55-7B-9d to specifically address "certain limitations of verdicts for past medical expenses of the plaintiff." S.B. 6, 82nd Leg., Reg. Sess. (W. Va. 2015). This new statutory provision was passed in direct response to the Supreme Court of Appeals' decision in *Kenney v. Liston*.[7] In keeping with the

[7] *See* The Hon. Judge Joseph K. Reeder & Matthew G. Chapman, *2015 West Virginia Legislation Update: Part I*, 118 W. VA. L. REV. ONLINE 23 (2015), https://wvlawreview.wvu.edu/west-virginia-law-review-online/2015/09/29/2015-west-Virginia-legislation-update-part-i ("In a direct response to [*Kenney v. Liston*], the Legislature passed Senate Bill No. 6, which changed the definition of collateral source set forth in West Virginia Code § 55-7B-2(b)(2)," and "went on to create a new section, W. Va. Code §55-7B-9d, which clearly defines what a verdict for past medical expenses may be[.]"); Cary Silverman & Richard R. Heath,

Legislature's goal to balance rights between West Virginia citizens and health care providers, Section 9d overturned *Kenney* with respect to MPLA claims, thus ensuring that damages awards include only actual medical expenses incurred and not amounts that have not, and will never be, paid. Here, the circuit court correctly applied Section 9d to the jury's verdict and complied with the Legislature's directive.

VI. CONCLUSION

By its plain language, West Virginia Code § 55-7B-9d provides for the reduction of economic losses awarded to the plaintiff but never paid by the plaintiff or anyone on his or her behalf. This is the result of a legislative determination that only economic losses actually incurred and paid should be recovered by a plaintiff. The circuit court correctly applied Section 9d to the undisputed evidence to reduce the award for medical bills. Because the circuit court did not commit an error of law, this Court should affirm the circuit court's ruling in this respect.

Respectfully submitted,

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Jr., *A Mountain State Transformation: West Virginia's Move into the Mainstream*, 121 W. VA. L. REV. 27, 53 (2018) ("In 2015, the legislature overturned *Kenney* with respect to medical professional liability claims. The new law limits a verdict for past medical expenses to 'the total amount . . . paid by or on behalf of the plaintiff' and any incurred unpaid amounts that 'the plaintiff or another person on behalf of the plaintiff is obligated to pay.' This law ensures that plaintiffs receive compensation for their actual medical expenses (even if paid by an insurer) while reducing the potential that West Virginia courts will award damages that reflect healthcare billing practices, not real costs.").

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

No. 23-ICA-64

MICHAEL RODGERS,
Plaintiff-Below, Petitioner,

v.

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

CERTIFICATE OF SERVICE

I, Thomas J. Hurney, Jr., counsel for the Respondent John R. Orphanos, M.D., certify that on July 6, 2023, I have served the foregoing ***Respondent John R. Orphanos, M.D.'s Response Brief*** on the following counsel of record via the Court's E-Filing system.

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