IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
No. 22-ICA-220

THOMAS A. CUMMINGS,
Individually and as Executor of the Estate of
Cynthia M. Cummings,

Plaintiff below, Petitioner,

vs.

Appeal from an order of the Circuit Court of Monongalia County (Civil Action No. 20-C-86)

WARD J. PAINE, MD, and,
BENJAMIN KLENNERT, PA,

Defendants below, Respondents.

PETITIONER'S BRIEF

Frank E. Simmerman, Jr. (WVSB # 3403)
Chad L. Taylor (WVSB # 10564)
Frank E. Simmerman, III (WVSB # 11589)
Simmerman Law Office, PLLC
254 East Main Street
Clarksburg, West Virginia 26301
Phone: (304) 623-4900
Facsimile: (304) 623-4906
fes@simmermanlaw.com
clt@simmermanlaw.com
trey@simmermanlaw.com

William Richard McCune, Jr. (WVSB # 2429)
Wm. Richard McCune, Jr., PLLC
128 Eden Court
Martinsburg, West Virginia 25403-1038
Phone: (304) 671-5323
lawoffice@wrmccune.com

Counsel for Petitioner Thomas A. Cummings

TABLE OF CONTENTS

page(s)

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

I. ASSIGNMENTS OF ERROR

A. The Circuit Court erred in denying Petitioner's *Motion to Preclude Defendants from Receiving a Pro Tanto Verdict Reduction in Amount of Plaintiff's Settlement with Nursing Home Defendants* and in providing Respondents with the benefit of a dollar-for-dollar/*pro tanto* reduction in judgment for the amount of Petitioner's pretrial settlement with the Nursing Home Defendants insofar as:

1. W.Va. Code § 55-7B-9 is ambiguous and should be construed in light of its clear intent to provide for several, and not joint, liability;

   a. W.Va. Code § 55-7B-9 is internally inconsistent

   b. W.Va. Code § 55-7B-9 is inconsistent with W.Va. Code § 55-7-13d

2. Application of W.Va. Code § 55-7B-9 as written produces an absurd and unjust result;

   a. Granting Respondents a *pro tanto* offset offends the tort system's goal of "requiring tortfeasors to make right their wrongful acts,"

   b. Granting Respondents a *pro tanto* offset and reduction for any fault allocated by the jury to settled parties frustrates W.Va. law which "favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation[.]"

3. W.Va. Code § 55-7B-9 violates the certain remedy right provided by the W.Va. Constitution;

4. A decision in this matter does not constitute an 'advisory opinion.'

II. STATEMENT OF THE CASE

This a medical malpractice/negligence action stemming from Respondents' failure to provide Petitioner's late wife Cindy Cummings with adequate nursing home and medical services

while she was a resident of the Madison Center nursing facility in March and April 2019. A.R. 13, ¶ 3. Mrs. Cummings underwent a right total hip replacement procedure on March 4, 2019, at WVU Ruby Memorial Hospital. A.R. 16, ¶ 23. She was discharged to the Madison Center nursing facility in Morgantown, WV, on March 7, 2019, for short-term rehabilitation with the stated goal of discharging Mrs. Cummings to her home and spouse. A.R. 16, ¶ 24. Mrs. Cummings was a resident of the Madison Center nursing facility from March 7, 2019, through April 18, 2019. A.R. 14, ¶ 14. In this action, filed March 18, 2020, Petitioner alleged that the Respondents' failures with respect to infection recognition and treatment, and adherence to Mrs. Cummings' orthopedic surgeon's discharge instructions, violated applicable standards of care and resulted in an unnecessary and incurable spread of infection which caused Mrs. Cummings pain and suffering, loss of capacity to enjoy life, deterioration of her health and physical and mental condition, mental anguish/emotional distress, and loss of dignity, resulted in Mrs. Cummings having to undergo multiple additional surgeries, caused Mrs. Cummings to experience a prolonged hospital stay and continued nursing home care for the balance of her life, and ultimately resulted in Mrs. Cummings' untimely death on December 31, 2019. A.R. 20-21, ¶ 46 and 47.

Petitioner sued two groups of defendants: (1) corporate entities who owned/operated the Madison Center nursing facility (referred to herein as the "Nursing Home Defendants": 161 Bakers Ridge Road Operations, LLC, d/b/a Madison Center, and Genesis Healthcare, LLC)[1], and (2) the medical professionals in charge of patient care at the Madison Center (attending physician Dr. Ward Paine, MD, and his physician's assistant Benjamin Klennert – collectively referred to herein as the "Respondents"). A.R. 12. As a result of mediation conducted on August 12, 2021,

[1] Other corporate entities – Genesis Healthcare Corporation and Genesis Healthcare Holding Company I, Inc. – were also named as defendants initially, but were voluntarily dismissed by stipulation pursuant to W.Va. Rule of Civil Procedure 41(a)(1)(ii) filed May 8, 2020. A.R. 2.

the Nursing Home Defendants reached a confidential settlement with Plaintiff which was ultimately approved by the Court (resulting in the dismissal of the Nursing Home Defendants, with prejudice) on February 17, 2022. A.R. 97-102.

Petitioner then proceeded to try his claims against the remaining, non-settling defendants – the Respondents - before a Monongalia County jury on February 22-25, and March 1-2, 2022 (Trial transcript found at A.R. 103-1070). On March 2, 2022, the jury returned the verdict finding: (1) Respondents breached the accepted standard of care; (2) Respondents' breach of the accepted standard of care caused and/or contributed to the pre-death injuries and damages of Cindy Cummings; (3) Respondents were each 45% at fault for Mrs. Cummings' pre-death injuries/damages, and Petitioner was 10% at fault; and (4) awarded Petitioner $250,000 for "Cindy Cummings' pre-death pain, suffering, loss of capacity to enjoy life, loss of dignity, and/or mental anguish/emotional distress." A.R. 1263-1265. The settled Nursing Home Defendants appeared on the verdict form for an allocation of fault, *but the jury assigned no fault to them.* A.R. 1264.

In the days following trial, the parties submitted competing proposed Judgment Orders (Respondents' proposed Judgment Order: A.R. 1165-1169; Petitioner's proposed Judgment Order: A.R. 1172-1176). Respondents' proposed Order gave them the benefit of a *pro tanto* (i.e. dollar-for-dollar) reduction for the amount of Petitioner's pretrial settlement with the Nursing Home Defendants (leaving Pl. with a judgment of merely $11,250) – A.R. 1165-1169; Petitioner's proposed Judgment Order did not (leaving Petitioner with a judgment of $225,000) – A.R. 1172-1176.

Post-trial, Petitioner timely filed a *Motion to Preclude Defendants from Receiving a Pro Tanto Verdict Reduction in Amount of Plaintiff's Settlement with Nursing Home Defendants* ("Motion to Preclude Offset") – A.R. 1071-1088, which was heard on August 22, 2022, and

September 7, 2022 (hearing transcripts found at A.R. 1177-1221, and A.R. 1222-1262, respectively). Ultimately, by *Judgment Order* and *Order Denying Plaintiffs Motions* entered October 15, 2022, the Circuit Court denied Petitioner's Motion to Preclude Offset and provided Respondents with a *pro tanto* offset/reduction in the amount of Petitioner's pretrial settlement with the Nursing Home Defendants. A.R. 1266-1271 and A.R. 1272-1286.

Through this appeal, Petitioner seeks reversal of the Circuit Court's denial of his Motion to Preclude Offset, and entry of a Judgment Order in his favor in the amount of $225,000 (i.e. with no *pro tanto* offset/reduction for the amount of Petitioner's pretrial settlement with the Nursing Home Defendants)[2].

III. SUMMARY OF ARGUMENT

Petitioner believes this appeal presents the appellate Courts of this state with an issue of first impression: the validity of W.Va. Code § 55-7B-9[3], and specifically, its purported *pro tanto* (i.e. dollar-for-dollar) and concurrent *pro rata*/proportionate share verdict reduction methods. Since 2016, W.Va. Code § 55-7B-9(b) has required the trier of fact in multiple defendant medical malpractice actions "in assessing percentages of fault, [to] consider the fault of all alleged parties, *including the fault of any person who has settled a claim with the plaintiff arising out of the same medical injury*." *Emphasis added.* Procedurally, this means that parties with whom a plaintiff has settled appear on the verdict form with non-settled defendants still in the case, for an allocation of fault.

In the instant case, pursuant to W.Va. Code § 55-7B-9(b), settled parties, Respondents, and Petitioner, all appeared on the verdict form and the jury assigned fault as it deemed appropriate –

---

[2] Such revised judgment is calculated by reducing the jury's $250,000 verdict by the 10% which the jury found Petitioner to be at fault.

[3] W.Va. Code § 55-7B-9 is a provision within the West Virginia Medical Professional Liability Act - §§ 55-7B-1, *et seq.*

with the jury assigning no fault to the settled parties (the Nursing Home Defendants). Nonetheless, in entering the Judgment Order for this trial, the Circuit Court reduced the jury's verdict by the amount of Petitioner's pretrial settlement with the Nursing Home Defendants, pursuant to the language of W.Va. Code § 55-7B-9(d).

On appeal, Petitioner submits that (1) W.Va. Code § 55-7B-9 is ambiguous because of the internally inconsistent provisions of subsections (b) and (d) and should be construed to avoid a potential double reduction of a plaintiff's verdict; (2) W.Va. Code § 55-7B-9 is inconsistent and should be read in *pari materia* with W.Va. Code § 55-7-13d (several liability statute); (3) a literal construction of W.Va. Code § 55-7B-9 produces an absurd and unjust result, and thus, it must be construed so as to avoid the absurd/unjust result; (4) W.Va. Code § 55-7B-9 is unconstitutional because it violates the certain remedy right prescribed by W.Va. Const. art. III, § 17; and (5) contrary to the Circuit Court's finding, a decision concerning the viability of W.Va. Code § 55-7B-9 in this matter does not constitute an advisory opinion.

For these reasons, Petitioner requests that this Court reverse the Circuit Court's denial of Petitioner's *Motion to Preclude Defendants from Receiving a Pro Tanto Verdict Reduction*, and direct the Circuit Court to enter a Judgement Order which does not reduce the jury's damage award to Petitioner by the amount of his pre-trial settlement with the Nursing Home Defendants.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to the criteria set forth in West Virginia Rules of Appellate Procedure 18 and 20, Petitioner requests a Rule 20 argument. Such argument is warranted because, to Petitioner's knowledge, this appeal involves issues of first impression, involves issues of fundamental public importance, and involves constitutional questions regarding the validity and interpretation of a statute.

V. ARGUMENT

A. THE CIRCUIT COURT ERRED IN DENYING PETITIONER'S *MOTION TO PRECLUDE DEFENDANTS FROM RECEIVING A PRO TANTO VERDICT REDUCTION IN AMOUNT OF PLAINTIFF'S SETTLEMENT WITH NURSING HOME DEFENDANTS* AND IN PROVIDING RESPONDENTS WITH THE BENEFIT OF A DOLLAR-FOR-DOLLAR/*PRO TANTO* REDUCTION IN JUDGMENT FOR THE AMOUNT OF PETITIONER'S PRETRIAL SETTLEMENT WITH THE NURSING HOME DEFENDANTS.

1. Standard of Review.

The W.Va. Supreme Court has instructed that "[i]t is well established in this Court's jurisprudence that '[w]here 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.'" *Quicken Loans, Inc. v. Walters*, 239 W.Va. 494, 498, 801 S.E.2d 509, 513 (2017), quoting Syl. Pt. 1, *Chrystal R.L. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995). *See also* Syl. Pt. 1, *Appalachian Power Co. v. State Tax Dep't of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995)("Interpreting a statute or an administrative rule or regulation presents a purely legal question subject to *de novo* review."). Similarly, "[c]onstitutional challenges relating to a statute are reviewed pursuant to a *de novo* standard of review." *Morris v. Crown Equip. Corp.*, 219 W.Va. 347, 352, 633 S.E.2d 292, 297 (2006).

2. The statute at issue.

This appeal challenges the Judgement Order entered by the Circuit Court (A.R. 1266), and its attendant denial of Petitioner's Motion to Preclude Offset (A.R. 1272). More specifically, the Circuit Court erred in granting Respondents the benefit of a *pro tanto* (i.e. dollar-for-dollar) reduction of the jury's verdict amount for the value of Petitioner's pre-trial settlement with the Nursing Home Defendants.[4] The issue on appeal is the interpretation and application of W.Va.

[4] Pursuant to Petitioner's settlement agreement with the Nursing Home Defendants, the precise amount of Petitioner's settlement is confidential and thus not expressly identified in this brief. The Order approving

Code § 55-7B-9 of the Medical Professional Liability Act (MPLA), titled "Several liability."

W.Va. Code § 55-7B-9 states in relevant part that:

> (b) The **trier of fact shall**, in assessing percentages of fault, **consider the fault of all alleged parties, including the fault of any person who has settled a claim with the plaintiff arising out of the same medical injury**.
>
> (c) If the trier of fact renders a verdict for the plaintiff, the **court shall enter judgment of several, but not joint, liability against each defendant** in accordance with the percentage of fault attributed to the defendant by the trier of fact.
>
> (d) To determine the amount of judgment to be entered against each defendant, the court shall first, after adjusting the verdict as proved in section nine – a [§ 55-7B-9a] of this article, **reduce the adjusted verdict by the amount of any pre-verdict settlement arising out of the same medical injury**. The court shall then, with regard to each defendant, multiply the total amount of damages remaining, with prejudgment interest recoverable by the plaintiff, by the percentage of fault attributed to each defendant by the trier of fact. The resulting amount of damages, together with any post-judgment interest accrued, shall be the maximum recoverable against the defendant. . .

Emphasis added.

Pursuant to subsection (b) of this statute – requiring the trier of fact to "consider the fault of all alleged parties", including those who settled with the plaintiff pre-verdict, the Nursing Home Defendants appeared on the verdict form for an allocation of fault. A.R. 1268. Though the jury assigned no fault to the Nursing Home Defendants, they were free to assign fault to them pursuant to W.Va. Code § 55-7B-9(b). The jury could have found the Nursing Home Defendants 30%, 40%, 50%, or more at fault. Point in fact, the jury even surprisingly allocated 10% fault to Petitioner (a loving husband with no medical training).[5]

Although the jury was tasked with assigning fault among all parties – including the Nursing

---

Petitioner's confidential settlement with the Nursing Home Defendants was filed under seal by the Circuit Court, and references to the amount of Petitioner's settlement amount are designated as confidential (not for public access) in the appendix record submitted with this brief.

[5] Petitioner appeared on the verdict form pursuant to W.Va. Code § 55-7B-9(a)(4) requiring the jury to make finding as to "[t]he percentage of fault, if any, attributable to each plaintiff."

Home Defendants who were dismissed from this action pre-trial - pursuant to subsection (d), the Circuit Court nonetheless reduced the jury's $250,000 verdict by the full amount of Petitioner's settlement with the Nursing Home Defendants. A.R. 1269-70.

3. W.Va. Code § 55-7B-9 is ambiguous and should be construed in light of its clear intent to provide for several, and not joint, liability.[6]

a. Internal inconsistency.

Petitioner submits that subsections (b) and (d) of § 55-7B-9 are internally inconsistent and conflicting (i.e. the trier of fact shall consider the fault of any person who has settled a claim with the plaintiff arising out of the same medical injury – vs. – the verdict shall be reduced by the amount of any pre-verdict settlement arising out of the same medical injury), and when considered together, ambiguous. Most basically, while each method has been utilized by courts to adjust verdicts, Petitioner is aware of no court decision permitting *both* methods to be used concurrently among non-joint tortfeasors which has passed scrutiny. An ambiguous statute may be interpreted by the Court. *See e.g.* Syl. Pt. 1, *Ohio County Comm'n v. Manchin*, 171 W.Va. 552, 301 S.E.2d 183 (1983)("Judicial interpretation of a statute is warranted only if the statute is ambiguous and the initial step in such interpretative inquiry is to ascertain the legislative intent."); Syl. Pt. 1 *Farley v. Buckalew*, 186 W.Va. 693, 414 S.E.2d 454 (1992)("A statute that is ambiguous must be construed before it can be applied.").

W.Va. Code § 55-7B-9 is titled "*several* liability"[7], and further, subsection (c) states that judgment shall be "*several, but not joint*" against the defendants in accordance with the percentage

---

[6] Such issue was raised before the Circuit Court via Petitioner's Motion to Preclude Offset (A.R. 1073), and Reply in support thereof (A.R. 1146), and addressed by the Circuit Court's Order Denying Plaintiff's Motions (A.R. 1274).

[7] The W.Va. Supreme Court has held that "[i]n construing an ambiguity in a statute, this Court will examine the title to the Act of the Legislature as a means of ascertaining the legislative intent, and the overall purpose of the legislation." Syl. Pt. 2, *Huntington v. State Water Comm'n,* 135 W.Va. 568, 64 S.E.2d 225 (1951).

of fault attributed to the defendant by the jury. *Emphasis added.* Accordingly, it is clear that the non-settling Respondents are not to be considered joint tortfeasors with the settled Nursing Home Defendants. Therefore, why would W.Va. Code § 55-7B-9 require the jury to allocate fault among "all alleged parties" *and* direct the trial court to reduce the amount of a plaintiff's verdict by the amount of plaintiff's pre-verdict settlement?

Our Supreme Court has opined that when the jury can apportion damages, a verdict set-off for prior settlements is not appropriate. *See Johnson by Johnson v. General Motors Corp.*, 190 W.Va. 236, 241, 438 S.E.2d 28, 33 (1993)(An automobile accident case involving the 'crashworthiness doctrine' wherein the W.Va. Supreme Court held: ". . . if the jury can apportion the damages, then the injury was divisible and a set-off is not appropriate. However, if the jury is unable to apportion the damages, then the injury is indivisible and since the tortfeasors will then be jointly and severally liable, a set-off is appropriate.").

Historically, a verdict credit or offset for the amount of pretrial settlements was utilized to ensure that plaintiffs did not receive a double recovery for one wrong or injury. *E.g.* Syl. Pt. 1, *Thornton v. Charleston Area Medical Center*, 158 W.Va. 504, 213 S.E.2d 102 (1975)("At common law, an injured party may have only one full recovery, and complete satisfaction from any tortfeasor is satisfaction of the total damages suffered."). "The reason for permitting the credit [for a plaintiff's pre-verdict settlement with a joint tortfeasor] is that **joint tortfeasors** are **jointly and severally liable** to the plaintiff so that a payment by one operates as a *pro tanto* satisfaction for all." *Emphasis added,* FN3, *Groves v. Compton*, 167 W.Va. 873, 877, 280 S.E.2d 708 (1981), citing *New River & Pocahontas Consolidated Coal Company v. Eary*, 115 W.Va. 46, 174 S.E. 573 (1934). The concept of a verdict offset for the amount of a plaintiff's prior settlement with a joint tortfeasor is contrary to the clear intent of the W.Va. MPLA which expressly provides that medical

malpractice defendants are *severally, not jointly*, liable. W.Va. Code § 55-7B-9(c). Essentially, if medical malpractice defendants are not subject to joint liability, then a *pro tanto* settlement credit is inappropriate.

The U.S. Supreme Court has considered whether a *pro tanto* verdict reduction for a prior settlement or a proportionate share approach is more appropriate. See *McDermott, Inc. v. Amclyde*, 511 U.S. 202 (1994). *McDermott* involved a construction accident and subsequent admiralty claim against multiple defendants. Plaintiff settled with some of the defendants pretrial, and then tried his claims against the remaining defendants. At trial, the jury allocated fault among the non-settled defendants, as well as the settled parties. The issue before the Supreme Court was whether the liability of the non-settling defendants should have been calculated by the jury's allocation of proportionate responsibility (i.e. allocation of fault), or by giving the non-settling defendants a credit for the dollar amount of plaintiff's pretrial settlement with the settled parties. The Fifth Circuit Court of Appeals had given the non-settling defendants a "double credit" (i.e. double reduction of plaintiff's verdict) by reducing plaintiff's damages by the percentage of fault found against him and the settled parties, and then also applying a full *pro tanto* dollar-for-dollar reduction to the verdict in the amount of plaintiff's pretrial settlement. *Id.* at 211. The Supreme Court reversed the Court of Appeals and held that the proportionate share approach was the superior method. *Id.* at 204, 217.

In considering the appropriate method of calculating an offset for plaintiff's pretrial settlement, the *McDermott* Court considered its precedent, promotion of settlement, and judicial economy. *Id.* at 211. Respondents in *McDermott* argued that the proportionate share approach would violate the "one satisfaction rule" (i.e. that a plaintiff is entitled to one, but only one, full recovery of damages for a single injury). The *McDermott* Court opined that even if the

proportionate share approach resulted in overcompensation to the plaintiff, it would not apply the one satisfaction rule because "[t]he law contains no rigid rule against overcompensation," and finding that:

> [s]everal doctrines, such as the collateral benefits rule, recognize that **making tortfeasors pay for the damage they cause can be more important than preventing overcompensation**. In this case, any excess recovery is entirely attributable to the fact that the [settled] defendants may have made an unwise settlement. It seems probable that in most cases in which there is a partial settlement, the plaintiff is more apt to accept *less* than the proportionate share that the jury might later assess against the settling defendant, because of the uncertainty of recovery at the time of settlement negotiations and because the first settlement normally improves the plaintiff's litigating posture against the nonsettlors.

Emphasis added, Id. at 219. The W.Va. Supreme Court has acknowledged similar public policies in addressing collateral source issues, including "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." *Kenney v.* Liston, 233 W.Va. 620, 631, 760 S.E.2d 434 (2014), quoting *Ilosky v. Michelin Tire Corp.,* 172 W.Va. 435, 446, 307 S.E.2d 603, 615 (1983). As the Supreme Court of Texas noted regarding the question of overcompensation: "Plaintiffs bear the risk of poor settlements; logic and equity dictate that the benefit of good settlements should also be theirs." *Duncan v. Cessna Aircraft Co.,* 665 S.W.2d 414, 430-31 (Sup. Ct. of TX 1984).

Subsequent to *McDermott,* the U.S. Court of Appeals for the Fifth Circuit addressed the inapplicability of *pro tanto* reduction to several only liability situations (as opposed to joint and several) in *Krieser v. Hobbs*, 166 F.3d 736 (5th Cir. 1999). In *Krieser*, a defendant was seeking to do what the Circuit Court did in the instant matter: grant defendant a *pro tanto* verdict reduction for the amount of plaintiff's pretrial settlement, *as well as* application of apportionment of fault. *Id.* at 743. As the *Krieser* Court recognized, the defendant was essentially seeking to reduce its

liability *"twice*: first, by the settling defendant's share of fault; and second, by the amount of that settlement, if greater." *Id.* The *Krieser* Court stated:

> [s]et-offs for settlement and the "one-satisfaction" rule exist to prevent the plaintiff from recovering twice from the same assessment of liability. But, where liability is not joint-and-several, and each defendant instead bears liability for damages *only proportionate* to his own fault, there *is no* assessment of liability for damages common to the settling and non-settling defendants. Accordingly, the settlement has an entirely separate basis from the apportioned damages, and the one-recovery rule does not apply.

Id. The Fifth Circuit opined that if the Mississippi Supreme Court were faced with this issue, it:

> would follow the large number of other courts who have understood legislative limitation of joint-and-several liability to render incompatible a *pro-tanto* credit for non-settling tortfeasors. Courts is at least 16 other States – Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Kentucky, New Jersey, New Mexico, Pennsylvania, Tennessee, Texas, Washington, West Virginia, and Wyoming – have so overridden or limited *pro-tanto* regimes. . .

Emphasis added, *Id.* at 743. The *Krieser* Court concluded that "[i]n sum, the majority rule is decidedly that a *pro-tanto*/one satisfaction rule has *no* application to liability no longer both joint *and* several." *Id.* at 744.[8] This Court should similarly conclude that the ambiguity present between

---

[8] The *Krieser* Court found persuasive other Courts' reasoning along the lines of the following:

> Reducing plaintiffs' award by the amount of the [previous] settlement would undermine the policy justifications underlying several only liability. Under several only liability, the defendant is liable only for the amount of the plaintiff's damages that is proportional to the defendant's percentage of fault. [] Thus, offsetting a plaintiff's damages by the amount of a non-party's settlement is unnecessary because the defendant pays only his share of the damages. A contrary rule would (1) give the benefit of an advantageous settlement to the non-settling tortfeasor, rather than to the plaintiff who negotiated the settlement, (2) discourage some defendants from settling in anticipation of acquiring the benefits of the settlements of their co-tortfeasors, and (3) neglect to recognize the fact that settlement dollars are not synonymous with damages but merely a contractual estimate of the settling tortfeasor's liability.

Gemstar Ltd. v. Ernst & Young, 185 Ariz. 483, 917 P.2d 222, 237 (Ariz. 1996). As well as:

> Where proportionate liability applies, as here, a defendant can never be liable for more than his percentage share, because recovery is limited to his proportionate share of the total damages. The reasons for allowing credits where the liability is joint and several are not present where liability is proportionate.

subsections (b) and (d) of W.Va. Code § 55-7B-9 prohibits application of the statute such that defendants are permitted a *pro tanto* verdict reduction for the amount of plaintiff's pre-verdict settlements.

b. Inconsistency between W.Va. Code § 55-7B-9 (MPLA) and W.Va. Code § 55-7-13d (several liability statute).[9]

W.Va. Code § 55-7B-9 should be read in *pari materia* with W.Va. Code § 55-7-13d. W.Va. Code § 55-7-13d is part of the West Virginia's modified comparative fault/several liability statutory scheme enacted in 2015. The relevant provision of § 55-7-13d(a)(3) states:

> In all instances where a nonparty is assessed a percentage of fault, any recovery by a plaintiff shall be reduced in proportion to the percentage of fault chargeable to such nonparty. **Where a plaintiff has settled with a party or nonparty before verdict, that plaintiff's recovery will be reduced in proportion to the percentage of fault assigned to the settling party or nonparty, rather than by the amount of the nonparty's or party's settlement.**

Emphasis added.

The interplay between W.Va. Code § 55-7B-9 and W.Va. Code § 55-7-13d was detailed by a relatively recent dissenting opinion of Justice Armstead in *State ex rel. Chalifoux v. Cramer*, 2021 W.Va. LEXIS 317 (p. 13), 2021 WL 2420196 (June 14, 2021, memorandum decision). Justice Armstead's dissent included the following points supporting his position that W.Va. Code § 55-7B-9 and W.Va. Code § 55-7-13d should be read in *pari materia*:

> - The W.Va. Supreme "Court has long acknowledged that statutes should be read in *pari materia* and that '[o]ur rules of statutory construction require us to give meaning to all provisions in a statutory scheme, if at all possible.' *Community Antenna Services, Inc. v. Charter Communications VI, LLC,* 227 W.Va. 595, 604, 712 S.E.2d 504, 514 (2011). In

---

Waite v. Morisette, 68 Wash. App. 521, 843 P.2d 1121, 1124 (Wash. App.), amended, 851 P.2d 1241 (1993).

[9] Such issue raised below in Petitioner's Motion to Preclude Offset (A.R. 1080), Reply in support thereof (A.R. 1147), and addressed by the Circuit Court's Order Denying Plaintiff's Motions (A.R. 1277).

Community Antenna, [the W.Va. Supreme] Court further held:

> We must apply statutes so that no legislative enactment is meaningless, and to read them to harmonize with legislative intent. '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.'*** 'It is always presumed that the legislature will not enact a meaningless or useless statute.' . . . 'Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *para materia* to assure recognition and implementation of the legislative intent. ***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.***

Id. at 604-605, 712 SE.2d at 513-14. (Internal citations omitted, emphasis added [by Justice Armstead]). Th[e W.Va. Supreme] Court in *Community Antenna* relied upon the holding in *State v. Snyder*, 64 W.Va. 659, 63 S.E. 385 (1908), in which [the W.Va. Supreme] Court, more than a century ago, discussed the exact circumstances which [Justice Armstead believed were present in the *Chalifoux*] case:

> A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, 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.

Id. at syl. pt. 5." *Chalifoux*, 2021 W.Va. LEXIS 217, p. 30.

- "[I]t is clear that both W.Va. Code § 55-7B-9c and W.Va. Code § 55-7-13d serve a common purpose – to enact a statutory scheme imposing several liability rather than joint and several liability. Accordingly, they should be read in *para materia* pursuant to [the W.Va. Supreme] Court's holdings in *Community Antenna* and *Snyder*." *Chalifoux*, 2021 W.Va. LEXIS 217, p. 33.

- "Nowhere in W.Va. Code § 55-7-13d does the language exclude its application to matters filed under the MPLA. Instead, the express language of W.Va. Code § 55-7-13d provides that it 'applies to all causes of action.' Indeed, even prior to its effective date, th[e W.Va. Supreme] Court recognized that the 2015 legislation that included these revisions to W.Va. Code § 55-7-13d comprised 'a series of new statutes which in fact do purport to ***fully occupy the field of comparative fault*** and the consideration of 'the fault of parties and nonparties to a civil action[.]' *Modular Bldg. Consultants of W.Va., Inc. v. Poerio, Inc.,* 235 W.Va. 474, 486 n. 12, 774 S.E.2d 555, 567 n. 12 (2015)([emphasis by Justice Armstead]). If these changes were designed to 'fully occupy the field of comparative fault,' they certainly did not exclude MPLA actions from their scope." *Chalifoux*, 2021 W.Va. LEXIS 217, p. 34, 35.
- "The application of W.Va. Code § 55-7-13d to MPLA actions in West Virginia is not unprecedented." *See e.g. Estate of Burns v. Cohen*, No. 5:18-cv-00888, 2019 U.S. Dist. LEXIS 158317, 2019 WL 4463318 (SDWV Sept. 17, 2019)(permitting a defendant in MPLA case to file a 'notice of consideration of fault of nonparties' pursuant to W.Va. Code § 55-7-13d(a)(2)). *Chalifoux*, 2021 W.Va. LEXIS 217, p. 36.

Justice Armstead concluded his dissent by stating: "I believe the United States District Court's conclusion [in *Estate of Burns*] that W.Va. Code § 55-7-13d applies to cases filed pursuant to the MPLA is the correct interpretation of the interplay between the MPLA and W.Va. Code § 55-7-13d." *Chalifoux*, 2021 W.Va. LEXIS 217, p. 37, 38. Justice Armstead noted in his dissenting opinion that "[i]t is significant here that the majority recognized that we must look not only to the

provisions of W.Va. Code § 55-7B-9 but must also consider W.Va. Code § 55-7-13d." *Emphasis added,* 2021 W.Va. LEXIS 317, p. 29 (memorandum decision)(referencing the majority's statement that "we must also consider whether the circuit court correctly interpreted the statutes governing liability – both West Virginia Code §§ 55-7-13d and 55-7B-9. . .") *Chalifoux,* at p. 6, 29. In fact, the *Chalifoux* majority recognized that:

> [i]n 2015, the Legislature made major changes to this State's general liability statute, W.Va. Code § 55-7-1 to 31. The changes abolished joint and several liability and instituted a new modified comparative fault system
> . . .
>
> Where a plaintiff has settled with a party or a non-party before the verdict, the plaintiff's recovery will be reduced in proportion to the percentage of fault assigned to the settling party or non-party.

Id. at p. 10-11. The *Chalifoux* majority stopped far short of holding that W.Va. Code § 55-7-13d does not apply to MPLA cases (as recognized by Justice Armstead's dissent – "[w]hile the majority outlines the 2015 changes to W.Va. Code § 55-7-13d, the majority opinion fails to specifically discuss whether W.Va. Code § 55-7-13d may also be applied to a cause of action brought under the MPLA."). *Id.* at 30.

To Petitioner's knowledge, no majority opinion of the W.Va. Supreme Court has so thoroughly analyzed the relationship of W.Va. Code § 55-7B-9 and W.Va. Code § 55-7-13d as Justice Armstead's *Chalifoux* dissent. When reading W.Va. Code § 55-7B-9 in *pari materia* with W.Va. Code § 55-7-13d, it is clear that the legislature intended for the Petitioner's recovery to be reduced in proportion of the percentage of fault assigned to the Nursing Home Defendants, and not by a *pro tanto*/dollar-for-dollar offset.

4. Application of W.Va. Code § 55-7B-9 as written produces an absurd and unjust result.[10]

Even if determined to be unambiguous, W.Va. Code § 55-7B-9(d)'s directive for a *pro tanto* verdict reduction should be disregarded because it produces an unjust and absurd result. As W.Va. Code § 55-7B-9 was applied by the Circuit Court, Respondents received the benefit of having the jury allocate fault among Respondents, Petitioner, and the settled Nursing Home Defendants, **and** received the benefit of a *pro tanto* (i.e. dollar-for-dollar) offset for the amount of Petitioner's pre-trial settlement with the Nursing Home Defendants. Such application creates the potential for a *double reduction* of a plaintiff's recovery - an absurd and unjust result.

Our Supreme Court has held that "[w]here a particular construction of a statute will result in an absurdity, some other reasonable construction, which will not produce such absurdity, will be made." Syl. Pt. 2, *Richards v. Harmon,* 217 W.Va. 206, 617 S.E.2d 556 (2005) (quoting Syl. Pt. 2, *Newhart v. Pennybacker*, 120 W.Va. 774, 200 S.E. 350 (1938)). Further, "[i]t is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold the law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity." Syl. Pt. 2, *Conseco Fin. Serv'g Corp. v. Myers*, 211 W.Va. 631, 567 S.E.2d 641 (2002)(quoting Syl. Pt. 2, *Click v. Click*, 98 W.Va. 419, 127 S.E. 194 (1925)(emphasis in original)).

W.Va. Code § 55-7B-9(b) of the MPLA, as last modified in 2016, now requires that the trier of fact consider the fault of any person who has settled a claim with the plaintiff arising out of the same medical injury. This was not always the case. The immediately prior version of W.Va.

---

[10] Such issue was raised below in Petitioner's Motion to Preclude Offset (A.R. 1072) and Reply in support thereof (A.R. 1146), and raised during the hearing of the same (A.R. 1181).

Code § 55-7B-9(b) stated that "In assessing percentages of fault, the trier of fact shall consider only the fault of the parties in the litigation at the time the verdict is rendered and may not consider the fault of any other person who has settled a claim with the plaintiff arising out of the same medical injury. . ." *See* 'Effect of amendment of 2016' comment to W.Va. Code § 55-7B-9. Petitioner submits such language, prohibiting the jury from considering the fault of non-parties (i.e. settled parties) to the action is more consistent with § 55-7B-9(d)'s prescribed reduction of a verdict by the amount of a plaintiff's pre-verdict settlement. Most basically, if the jury is not permitted to consider the fault of non-parties, under the aforementioned one recovery rule, it may make sense that the subject statute would instruct a trial Court to reduce a verdict by the amount of a pre-trial settlement. Now, however, with the jury permitted to allocate fault among "all alleged parties", *including settled parties*, an additional *pro tanto* verdict offset creates injustice and absurdity, as evidenced by the facts of this case:

In August 2021, Petitioner reached a contractual (settlement) agreement with the Nursing Home Defendants to resolve his claims against them pursuant to certain terms and a confidential payment amount. In February 2022, Petitioner tried his case against the Respondents, proved they committed medical malpractice, and obtained a verdict for $250,000 in damages (of which the jury found the Respondents 90% at fault, and assigned 0% fault to the settled Nursing Home Defendants). As a result of W.Va. Code § 55-7B-9, however, Respondents nonetheless received an offset for the full amount of Petitioner's settlement with the Nursing Home Defendants, as evidenced by the Circuit Court's Judgment Order. The parties proven to have injured Cindy Cummings through their negligence would be permitted to nearly fully escape responsibility for their conduct (i.e. a mere $11,250 adjusted judgment). Such a result cannot be described as anything other than unjust and absurd.

Based upon the foregoing, and the facts of the instant matter, there is no danger or even valid argument that Petitioner would be *overcompensated* for his injuries and damages if Respondents are not granted a *pro tanto* credit for the amount of Petitioner's settlement with the Nursing Home Defendants. Conversely, however, affirming the Circuit Court's application of § 55-7B-9 and resulting Judgment Order would run afoul of longstanding tenets of our civil justice system.

First,[11] by way of the Circuit Court's Judgment Order, Respondents will escape nearly all liability for harms which the jury found they caused. After a six (6) day trial, the jury found that Respondents breached the accepted standard of care in their treatment of Cindy Cummings, and awarded Petitioner $250,000.00 in damages. A.R. 1267-68. The Circuit Court's Judgment Order reduces that verdict to a mere $11,250.00. A.R. 1270. As a result, the jury's verdict is essentially revised from a finding that the Nursing Home [settled] Defendants are 0% at fault, to a finding that the Nursing Home [settled] Defendants are 95% at fault. Thus, granting Resondents an offset for the amount of Petitioner's settlement with the Nursing Home Defendants is inappropriate. Such an outcome is unjust and offends the tort system's goal of "requiring tortfeasors to make right their wrongful acts." *Kenney v. Liston*, 233 W.Va. 620, 631, 760 S.E.2d 434 (2014)(quoting Krauss & Kidd, 48 U. Louisville L. Rev. at 52 (2009).[12]

Further, the unjust result of the Circuit Court's *pro tanto* verdict offset is even more apparent when one considers that the jury did not award Petitioner damages for Mrs. Cummings' medical expenses. As evidenced by the Order approving Petitioner's pre-trial settlement with the Nursing Home Defendants (filed under seal by the Circuit Court – A.R.97-100), a substantial

---

[11] Such issue was raised below in Petitioner's Motion to Preclude Offset (A.R. 1078).

[12] Similarly, the *Kenney* Court noted that it was "persuaded that a defendant owes to an injured plaintiff a duty to make right for his or her wrongful acts, and so must pay the plaintiff compensation for all losses proximately caused by any negligence or wrongdoing." 233 W.Va. at 631.

amount of those settlement proceeds were utilized to satisfy outstanding medical bills and liens. In addition to all other arguments set forth herein, it is unjust for Respondents to receive an offset for damages which were not even awarded Petitioner against Respondents by the jury.

Second,[13] the Circuit Court's Judgment Order frustrates the principle that the law favors and encourages settlements. In this state, "[t]he law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation[.]" Syl. Pt. 8, *Modular Bldg. Consultants of W.Va., Inc. v. Poerio, Inc.*, 235 W.Va. 474, 774 S.E.2d 555 (2015); quoting Syl. Pt. 1, in part, *Sanders v. Roselawn Mem'l Gardens,* 152 W.Va. 91, 159 S.E.2d 784 (1968). The U.S. Supreme Court in *McDermott* also noted that:

> we must recognize that settlements frequently result in the plaintiff getting more than he would have been entitled to at trial. Because settlement amounts are based on rough estimates of liability, anticipated savings in litigation costs, and a host of other factors, they will rarely match exactly the amounts a trier of fact would have set. **It seems to us that a plaintiff's good fortune in striking a favorable bargain with one defendant gives other defendants no claim to pay less than their proportionate share of the total loss. In fact, one of the virtues of the proportionate share rule is that, unlike the *pro tanto* rule, it does not make a litigating defendant's liability dependent on the amount of a settlement negotiated by others without regard to its interests.**

Emphasis added, 511 U.S. 202, 219-20.

If faced with the potential for a *double reduction* of their damages at trial on account of pretrial settlements with some, but not all, defendants, medical malpractice plaintiffs will be reluctant to settle with anyone for fear that in addition to having a favorable verdict reduced by the amount of a partial settlement, they run the risk of having their verdict further reduced by defendants assigning fault to settled parties at trial (diluting such defendants' potential liability exposure). Such a double reduction hazard would negatively affect both plaintiffs and defendants desiring to resolve claims prior to trial.

---

[13] Such issue was raised below in Petitioner's Motion to Preclude Offset (A.R. 1080).

5. W.Va. Code § 55-7B-9 violates the certain remedy right provided by the W.Va. Constitution.[14]

Pursuant to the W.Va. Constitution, an injured person has a right to trial by jury (W.Va. Const. art. III, § 13) and attendant right to a 'certain remedy' for all tortious injuries (W.Va. Const. art. III, § 17). Allowing defendants the benefit of a double reduction of medical malpractice verdicts would deny plaintiffs a full, complete, and adequate remedy when they settle with some, but not all, defendants prior to trial. As recognized by the MPLA itself:

> our system of litigation is an essential component of this state's interest in providing **adequate and reasonable compensation** to those persons who suffer from injury or death as a result of professional negligence, and any limitation placed on this system must be balanced with and consider of the **need to fairly compensate patients who have been injured as a result of negligence** and incompetent acts by health care providers[.]

Emphasis added, W.Va. Code § 55-7B-1. Medical malpractice plaintiffs suing multiple tortfeasors do not have the opportunity to be made whole if non-settling defendants are provided the windfall of a *double* reduction of adverse verdicts on account of pre-trial partial settlements.

The W.Va. Supreme Court has maintained that it "does not sit as a superlegislature, commissioned to pass upon the political, social, economic or scientific merits of statutes pertaining to proper subjects of legislation." *Boyd v. Merritt*, 177 W.Va. 472, 474, 354 S.E.2d 106, 108 (1986). However, it is the duty of the court to enforce legislation "**unless it runs afoul of the State or Federal Constitutions**." *Emphasis added, Id.* W.Va. Const. art. III, § 17 provides: "The Courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay." Regarding implication of this 'certain remedy' right, our Supreme Court has stated:

---

[14] Such issue raised below in Petitioner's Reply in support of his Motion to Preclude Offset (A.R. 1146), and during the hearing of the same (A.R. 1180).

> [t]here is a presumption of constitutionality with regard to legislation. However, when a legislative enactment either substantially impairs vested rights or severely limits existing procedural remedies permitting court adjudication of cases, then the certain remedy provision of Article III, Section 17 of the West Virginia Constitution is implicated.

Syl. Pt. 6, *Gibson v. West Virginia Dept. of Highways,* 185 W.Va. 214, 406 S.E.2d 440 (1991).

Petitioner submits that the facts of the instant matter clearly implicate the certain remedy provision. West Virginia medical malpractice victims enjoy the right to sue multiple alleged tortfeasors and have their claims determined by a trier of fact. Historically, if plaintiffs settled with some, but not all, medical malpractice defendants pre-verdict, there were various methods of ensuring that plaintiffs received but one recovery for one injury (discussed above). The 2016 amendments to W.Va. Code § 55-7B-9, however, create the potential for a double reduction of a plaintiff's verdict – severely limiting a malpractice plaintiff's available remedy to be fairly compensated for acts of negligence by health care providers.

Once it is determined that the 'certain remedy' right is implicated, our Supreme Court has established a two-step process for determining whether such right is violated by a statute:

> the legislation will be upheld under [the certain remedy] provision if, first, a reasonably effective alternative remedy is provided by the legislation or, second, if no such alternative remedy is provided, the purpose of the alteration or repeal of the existing cause of action or remedy is to eliminate or curtail a clear social or economic problem, and the alteration or repeal of the existing cause of action or remedy is a reasonable method of achieving such purpose.

Syl. Pt. 5, *Lewis v. Canaan Valley Resorts, Inc.,* 185 W.Va. 684, 408 S.E.2d 634 (1991). W.Va. Code § 55-7B-9 offers victims of multiple tortfeasor medical malpractice no reasonably effective alternative remedy. To avoid the hazard of the potential double verdict reduction, such plaintiffs would either have to (a) sue no more than one defendant, or (b) refuse to settle with any defendant pre-verdict. Such alternatives are not reasonable nor effective.

Because there is no alternative remedy provided by W.Va. Code § 55-7B-9, there must exist a 'clear social or economic problem' for which the alteration of the existing remedy is a 'reasonable method of achieving such purpose.' A different provision of the MPLA, specifically, W.Va. Code § 55-7B-8, has twice been examined by our Supreme Court and found to not violate the certain remedy provision of the W.Va. Constitution. See e.g., *Robinson v. Charleston Area Medical Center*, 186 W.Va. 720, 414 S.E.2d 877 (1991); *MacDonald v. City Hospital, Inc.*, 227 W.Va. 707, 715 S.E.2d 405 (2011). W.Va. Code § 55-7B-8 imposes limits on a medical malpractice plaintiff's recovery of noneconomic damages. Essentially, in upholding W.Va. Code § 55-7B-8, the *Robinson* and *MacDonald* Courts found that the W.Va. Legislature "could have rationally believed that decreasing the cap on noneconomic damages would reduce rising medical malpractice premiums and, in turn, prevent physicians from leaving the state thereby increasing the quality of, and access to, healthcare for West Virginia residents." *MacDonald*, 227 W.Va. at 720.

To Petitioner's knowledge, the current version of W.Va. Code § 55-7B-9 and its purported double verdict reduction scheme has not previously undergone a certain remedy analysis. Moreover, the MPLA does not speak to nor provide a claimed purpose for/rationale behind the amendments made in 2016 to W.Va. Code § 55-7B-9 (particularly, identifying any "clear social or economic problem" allowing the fact finder to allocate fault among settled parties *and* granting defendants the benefit of a *pro tanto* verdict reduction was designed to remedy). Medical malpractice defendants already enjoyed the MPLA's caps on noneconomic damages prescribed by W.Va. Code § 55-7B-8, and now W.Va. Code § 55-7B-9 purports to provide further reduction of a plaintiff's economic and noneconomic damages. There is simply no clear social or economic problem which W.Va. Code § 55-7B-9 can be claimed to reasonably curtail. Accordingly, the

concurrent allocation of fault and *pro tanto* verdict reduction methods prescribed by W.Va. Code § 55-7B-9 should be declared unconstitutional as violative of the certain remedy right of W.Va. Const. art. III, § 13.

6. A decision in this matter does not constitute an 'advisory opinion'.[15]

In its *Order Denying Plaintiff's Motions* (A.R.1276), the Circuit Court found that Petitioner's argument that the *pro tanto* and *pro rata* verdict reductions suggested by W.Va. Code § 55-7B-9 produce an unjust and absurd double reduction of verdicts called for an advisory opinion because it "rests on hypothetical grounds that are not applicable to this case." A.R. 1276. Most basically, the Circuit Court found such a double reduction hypothetical because the jury in this case did not assign fault to the Nursing Home Defendants (therefore, Petitioner's verdict was merely reduced by the amount of the Nursing Home Defendants' settlement, and not by an additional percentage of fault allocated to such Nursing Home Defendants).

Petitioner disagrees, and respectfully submits that the issue on appeal does not represent a hypothetical situation or present a mere academic exercise. Clearly, there was a dispute between the parties as to the application of W.Va. Code § 55-7B-9, as evidenced by the parties' respective competing proposed judgment orders. Moreover, the unjust and absurd result from the Respondents' proposed application of W.Va. Code § 55-7B-9 is evident from the facts of this matter – not the least of which being that Respondents were found to be 90% responsible for $250,000 in damages yet the Judgment Order entered by the Circuit Court leaves them responsible for a mere 4.5% of the awarded damages. Litigants may challenge a statute which affects them. *Harshbarger v. Gainer*, 184 W.Va. 656, 659, 403 S.E.2d 399 (1991), citing *Fleming v. Rhodes,* 331 U.S. 100, 104 (1947). The application of W.Va. Code § 55-7B-9 has directly impacted

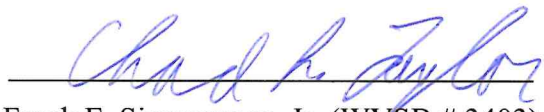
[15] Such issue was raised by the Circuit Court in its Order Denying Plaintiff's Motions (A.R. 1276).

Petitioner's verdict returned by the jury, and accordingly, he has a valid basis on which to challenge the same.

VI. CONCLUSION

Petitioner respectfully requests that this Court reverse the Circuit Court's denial of Petitioner's *Motion to Preclude Defendants from Receiving a Pro Tanto Verdict Reduction*, and direct the Circuit Court to enter a Judgment Order which does not reduce the jury's damage award to Petitioner by the amount of his pre-trial settlement with the Nursing Home Defendants.

Respectfully submitted,
Petitioner Thomas A. Cummings,
by counsel:



Frank E. Simmerman, Jr. (WVSB # 3403)
Chad L. Taylor (WVSB# 10564)
Frank E. Simmerman, III (WVSB # 11589)
Simmerman Law Office, PLLC
254 East Main Street
Clarksburg, West Virginia 26301
Phone: (304) 623-4900
Facsimile: (304) 623-4906

William Richard McCune, Jr. (WVSB # 2429)
Wm. Richard McCune, Jr., PLLC
128 Eden Court
Martinsburg, West Virginia 25403-1038
Phone: (304) 671-5323

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
No. 22-ICA-220

THOMAS A. CUMMINGS,
Individually and as Executor of the Estate of
Cynthia M. Cummings,

Plaintiff below, Petitioner,

vs.

Appeal from an order of the Circuit Court of Monongalia County (Civil Action No. 20-C-86)

WARD J. PAINE, MD, and,
BENJAMIN KLENNERT, PA,

Defendants below, Respondents.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the attached "*Petitioner's Brief*" was served upon the following counsel of record, by the File&ServeXpress system on February 15, 2023:

Patrick S. Casey Ryan P. Orth Casey & Chapman, PLLC 1140 Chapline Street Wheeling, WV 26003 pscasey@cclawpllc.com rporth@cclawpllc.com *Counsel for Respondents*	

Chad L. Taylor (WVSB# 10564)