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 REPLY BRIEF

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I. STATEMENT OF THE CASE

Petitioner is compelled to correct an inaccuracy in Respondents' Statement of the Case. Response Brief at p. 1. While Respondents agree that the settled Nursing Home Defendants appeared on the verdict form for an allocation of fault, and the jury assigned no fault to them (*Id.*), they inaccurately represent that "the Circuit Court prevented Respondents from offering any evidence whatsoever regarding the fault of the Nursing Home Defendants." *Id.* Respondents then cite to a portion of the trial transcript (A.R. 706-715) concerning Petitioner's objection to Respondents' attempt to elicit opinions critical of the Nursing Home Defendants from one of Petitioner's expert witnesses.

By sustaining the instant objection to Respondents' counsel's examination of Petitioner's expert, the Circuit Court in no way stonewalled Respondents' desire to introduce evidence critical of the then-settled Nursing Home Defendants. At no point prior to the above-cited examination in the middle of trial did Respondents ever indicate a desire to offer evidence critical of the Nursing Home Defendants. Respondents asserted no cross-claim against the Nursing Home Defendants in their Answer to Petitioner's Complaint (A.R. 27) and Respondents did not identify the Nursing Home Defendants as parties potentially at fault in response to written discovery requests served by Petitioner. Quite the contrary, during this action, Respondents shared an expert witness (Stephen F. Conti, MD) with the Nursing Home Defendants; Respondents did not cross-designate Petitioners' expert witnesses nor in any manner indicate pre-trial a desire to elicit opinions from Petitioners' experts critical of the Nursing Home Defendants; and Respondents' counsel even advised the jury during his opening statement regarding Mrs. Cummings' unfortunate outcome that:

> [a]ll of this happened to Mrs. Cummings without negligence by anyone, Dr. Klein, **the Madison**, Dr. Paine, Mr. Klennert. All this happened without negligence by anybody because of Mrs. Cummings's ill health and the risk that she was undertaking.

Emphasis added, A.R. 228.[1] Thus, the Respondents never took the position that the Nursing Home Defendants caused and/or contributed to Mrs. Cummings' injuries.

Further, to the extent Respondents wished to change their tune, and attempt to place blame upon the Nursing Home Defendants after Petitioner reached a settlement with them, Respondents had plenty of time in which to do so, but did not. As set forth in Petitioner's Brief, Petitioner reached a settlement with the Nursing Home Defendants on August 12, 2021. Trial of this matter did not begin until February 22, 2022 – over six (6) months later. At no point during that intervening period did Respondents move to amend their pleadings or in any other way attempt to put Petitioner and the Court on notice of their newfound desire to point the finger at the Nursing Home Defendants – as required so as not to ambush the opposing party at trial. *See Graham v. Wallace,* 214 W.Va. 178, 184, 588 S.E.2d 167 (2003)("trial by ambush is not contemplated by the Rules of Civil Procedure."), quoting *McDougal v. McCammon,* 193 W.Va. 229, 237-37, 455 S.E.2d 788, 795-96 (1995).

As Respondents conceded in their Response Brief, they did not pursue this issue on appeal, and did not assert any cross-assignments of error. Accordingly, it is a non-issue in the instant appeal and should not confuse this Court as to the Petitioner's properly-asserted assignments of error.

II. 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

[1] Please recall that 161 Bakers Ridge Road Operations, LLC, d/b/a Madison Center was among the settled Nursing Home Defendants.

importance, and involves constitutional questions regarding the validity and interpretation of a statute.

III. 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.

Based upon the Respondent's brief, the parties are in agreement that a *de novo* standard of review is applicable. Resp. Brief at p. 3.

2. The statute at issue, W.Va. Code § 55-7B-9 is ambiguous, and if enforced literally, produces an absurd and unjust result.

As reflected by their Response Brief, Respondents substantially, if not solely, rely upon the language of W.Va. Code § 55-7B-9, asserting its provisions to be crystal clear in requiring both *pro tanto* and allocation of fault reductions of verdicts. However, as evidenced by a recent decision of the West Virginia Supreme Court, the MPLA, and § 55-7B-9 specifically, is not impervious to a finding of ambiguity. *See e.g.* FN 23, *State ex rel. W.Va. Univ. Hosps., Inc. v. Gaujot*, 2023 W.VA. LEXIS 84, 2023 WL 2727666 (Mar. 31, 2023). Concerning subparagraph (g) of § 55-7B-9, our Supreme Court commented that it "would encourage the Legislature to resolve the ambiguity in the statute as applied to multi-agent cases." *Id.*

In the case at bar, despite several briefs and arguments on this issue over the course of one year's time, the Respondents have yet to identify a single instance in which a W.Va. Court (circuit court or Supreme Court) has permitted both *pro tanto* and allocation of fault reductions of verdicts. Therefore, a statute which purports to require both methods of verdict reduction is ambiguous as

it is patently unfair and contrary to W.Va. common law and other statutory law.

In several instances in their Response Brief, Respondents incorrectly assert that § 55-7B-9's purported double verdict reduction formula aligns with the MPLA's statutory purpose to "balance[] the interests of the claimants and the medical practitioners of the State." Response Brief at p. 4, 11, 14. What the MPLA actually says is:

> 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. Petitioner submits that 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. Respondents' representation that § 55-7B-9's purported double verdict reduction formula provides "a level playing field for medical plaintiffs and health care providers" could not be further from the truth.

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

Respondents merely re-cite caselaw on this subject cited in Petitioner's Brief and essentially assert that because § 55-7B-9 "does not restrict **completely** a medical plaintiff's recovery", then it does not violate the certain remedy right of W.Va. Const. art. III, § 13. *Emphasis added,* Response Brief, p. 14. Respondents' statement, however, is not the test for compliance with the Constitution. More specifically, a statute does not have to completely deny a right/remedy before it is unconstitutional. Rather, a legislative enactment implicates the certain remedy provision of the W.Va. Constitution when it *substantially impairs* vested rights or *severely limits* existing procedural remedies. *Emphasis added,* Syl. pt. 6, *Gibson v. West Virginia Dept. of*

Highways, 185 W.Va. 214, 406 S.E.2d 440 (1991). W.Va. Code § 55-7B-9's purported double verdict reduction formula clearly impairs and limits a medical malpractice plaintiff's rights and remedies. Therefore, the certain remedy provision is implicated.

Respondents concede that § 55-7B-9 has not previously been subjected to a certain remedy analysis in the Courts. Response Brief at p. 14. As set forth in Petitioner's Brief, there is no clear social or economic problem which W.Va. Code § 55-7B-9 can be claimed to reasonably curtail. Accordingly, the double 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.

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

The instant appeal does not represent a hypothetical situation or mere academic exercise. Petitioner has been harmed by the ambiguous and inconsistent provisions of § 55-7B-9. The current version of this statute, titled "Several liability", clearly contemplates that medical malpractice defendants be severally liable, yet contains conflicting language left over from the days of joint and several liability. This inconsistency and ambiguity, as applied by the Circuit Court, produces an absurd and unjust result. There is nothing hypothetical or advisory about that fact.

IV. CONCLUSION

For the reasons and authority set forth in Petitioner's Brief and above, 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,
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by counsel:

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the attached "*Petitioner's Reply Brief*" was served upon the following counsel of record, by the File&ServeXpress system on April 20, 2023:

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