IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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Thomas A. Cummings,
Plaintiff Below, Petitioner

vs.) No. 22-ICA-220

Ward J. Paine, MD,
and Benjamin Klennert, P.A.,
Defendants Below, Respondents

RESPONDENTS' BRIEF

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I. STATEMENT OF THE CASE

Pursuant to W. Va. R. App. P. 10(d), for Respondents' Brief, "no statement of the case need be made beyond what may be deemed necessary in correcting any inaccuracy or omission in the petitioner's brief". As Petitioner's recitation of the relevant facts appears to be accurate, Respondents' statement of the case will be limited to the following. While Petitioner accurately provides that "[t]he settled Nursing Home Defendants appeared on the verdict form for an allocation of fault, *but the jury assigned no fault to them*", such statement is lacking the necessary context as to why the jury likely made such finding. Petitioner's Brief at p. 3 (italics in original). Notably, the Circuit Court prevented Respondents from offering any evidence whatsoever regarding the fault of the Nursing Home Defendants. A.R. 706-715. Thus, while the Nursing Home Defendants appeared on the verdict form, the Circuit Court did not permit the necessary evidence to be admitted in order to allow the jury to properly consider and allocate fault. While Respondents did not pursue this issue on appeal given the favorable outcome of the trial, this distinction is pertinent to the arguments set forth by Petitioner.

II. SUMMARY OF ARGUMENT

Petitioner is challenging the Circuit Court's *Judgment Order* (A.R. 1266-1271) and *Order Denying Plaintiff's Motions* (A.R. 1272-1286), and, as before the Circuit Court, Petitioner urges the Court to turn a blind eye to the clear and unambiguous mandates of the West Virginia Medical Professional Liability Act, W. Va. Code § 55-7B-1, *et seq*. (hereinafter "MPLA"), and to deny Respondents the mandatory post-verdict adjustments to which they are entitled to under the MPLA. The crux of Petitioner's appeal is W. Va. Code § 55-7B-9, which addresses allocation of fault, including to settled parties in a matter involving multiple defendants, and provides a basic formula for post-verdict reductions based upon the amount of any pre-verdict settlements and the

allocation of fault to the alleged parties. Petitioner asserts a laundry list of challenges to W. Va. Code § 55-7B-9, including (1) that it is ambiguous and should be construed to provide several and not joint liability, (2) that its application produces and absurd and unjust result, and (3) that it violates the certain remedy right provided by the West Virginia Constitution.

To the contrary, W. Va. Code § 55-7B-9 is decisively clear. In fact, the Circuit Court concluded that to rule otherwise "would be a blatant disregard of my oath". A.R. 1225. W. Va. Code § 55-7B-9(b) tasks the jury with assessing percentages of fault on the verdict form to all alleged parties to the action, including any settled parties. Further, W. Va. Code § 55-7B-9(d) sets forth a basic formula for post-verdict reductions based upon any pre-verdict settlements and the allocation of fault assigned to the settling parties. First, the verdict is reduced by the amount of any pre-verdict settlements, and then that adjusted verdict amount is reduced further based upon the allocation of fault assigned to the parties to reach the final verdict amount, e.g., (1) verdict – pre-verdict settlement = adjusted verdict amount; (2) percentage of fault allocated to Respondents x adjusted verdict amount = final verdict amount.[1] It is crystal clear under the MPLA that Respondents are entitled to an offset based upon (1) the amount of Petitioner's pre-verdict settlement with the Nursing Home Defendants and (2) based upon the allocation of fault assigned to the parties.

Indeed, having found W. Va. Code § 55-7B-9 to be clear and unambiguous, and not in conflict with W. Va. Code § 55-7-13d, the Circuit Court did not need to address, and indeed, could not address Petitioner's remaining equitable arguments, as addressing such arguments would

[1] In view of the Court's March 14, 2023, *Order* regarding confidentiality of certain portions of the record, application of this formula to the present matter is set forth in *Response on Behalf of Defendants Ward J. Paine, M.D., and Benjamin Klennert, P.A., in Opposition to "Plaintiff's Motion to Preclude Defendants From Receiving a Pro Tanto Verdict Reduction in Amount of Plaintiff's Settlement With Nursing Home Defendants"*. A.R. 1092.

amount to an advisory opinion because Petitioner was not subjected to a so-called double reduction. Rather, the verdict was only reduced by the amount of the pre-verdict settlement and by the percentage of fault allocated to Petitioner. However, even if the Circuit Court had addressed Petitioner's remaining equitable arguments, such arguments are not compelling, as discussed herein.

Respondents respectfully request that the Court affirm the Circuit Court's holding for the reasons set forth herein, as well as those otherwise apparent from the record.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents assert that oral argument is not necessary pursuant to the criteria in W. Va. R. App. P. 18(a), as the statute in question, W. Va. Code § 55-7B-9, is unequivocally clear and the facts and legal arguments are adequately presented in the briefs and record on appeal such that the decisional process would not be significantly aided by oral argument.

IV. ARGUMENT

A. The Circuit Court did not err 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".

1. Standard of Review.

The Supreme Court of Appeals of West Virginia has held 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." *Butner v. Highlawn Mem'l Park Co.*, 247 W. Va. 479, 485, 881 S.E.2d 390, 396 (2022), quoting Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 416 (1995). Accordingly, a *de novo* standard of review is applicable.

2. W. Va. Code § 55-7B-9 is not ambiguous.

Consistent with the Circuit Court's holding, W. Va. Code § 55-7B-9 is not ambiguous whatsoever and must be given its full force and effect. Additionally, W. Va. Code § 55-7-13d does not override the statutory authority of the MPLA. The Circuit Court's holding must not be disturbed.

a. W. Va. Code § 55-7B-9 is not internally inconsistent.

The crux of Petitioner's appeal is W. Va. Code § 55-7B-9. As before the Circuit Court, Petitioner alleges that subsection (b) and subsection (d) of W. Va. Code § 55-7B-9 are in conflict, and, therefore, the statute is ambiguous. Specifically, Petitioner alleges that such subsections are in conflict because subsection (b) sets forth that the percentage of fault of settled parties shall be considered, while subsection (d) provides for a *pro tanto* credit for the amount of the settlement. Petitioner's position continues to be woefully misplaced, as it fails to acknowledge that **subsection (d) specifically addresses and requires both reductions –** ***pro tanto*** **and by allocation of fault**. W. Va. Code § 55-7B-9 provides, in pertinent part:

> (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 provided in section nine-a 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)

Thus, contrary to Petitioner's contentions, subsections (b) and (d) are not in conflict, as subsection (d) clearly contemplates and applies both forms of verdict reductions in MPLA actions. Conveniently, Petitioner continues to fail to address the latter half of subsection (d) pertaining to the dollar-for-dollar credit. Moreover, the statutory intent to apply both reductions is crystal clear, and it is apparent that the impacts of mandating both reductions were considered, including in situations like the present case where the verdict is reduced substantially. The post-verdict reductions align with the statutory purpose of the MPLA, which *inter alia* balances the interests of claimants and the medical practitioners of the State.

The Circuit Court appropriately followed and applied the mandates of W. Va. Code § 55-7B-9, holding "its text to be clear and unambiguous." A.R. 1276. The Supreme Court of Appeals of West Virginia has stated that "[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. Pt. 4, *Daily Gazette Co. v. W. Virginia Dev. Off.*, 206 W. Va. 51, 521 S.E.2d 543 (1999). W. Va. Code § 55-7B-9 is decisively clear and, contrary to Petitioner's assertions, lacks any ambiguity whatsoever. Indeed, W. Va. Code § 55-7B-9(d) provides a basic formula that must be followed by the Circuit Court: (1) verdict – pre-verdict settlement = adjusted verdict amount; (2) percentage of fault allocated to Respondents X adjusted verdict amount = final verdict amount. The Circuit Court appropriately applied the unambiguous mandates of the MPLA.

Notably, there was not a "double reduction" of any sort in this matter as the jury did not apportion any fault to the settled Nursing Home Defendants and the verdict was only reduced by the amount of the pre-verdict settlement and the fault allocated to Petitioner. Petitioner's arguments in this regard are merely hypothetical. Rather, Petitioner seeks for the Court to

invalidate W. Va. Code § 55-7B-9 and hold that only the allocation of fault reduction should apply, as that would result in a larger recovery for Petitioner.

With ambiguity lacking within the MPLA, Petitioner searches outside of the MPLA in his attempts to circumvent the statutory requirements of W. Va. Code § 55-7B-9, disregarding the unique nature of the MPLA. Petitioner goes as far as to indicate that he "is aware of no court decision permitting both methods to be used concurrently"; however, the statutory mandates of the MPLA are crystal clear requiring both reductions. Petitioner's Brief at p. 8. Critically, the case law cited by Petitioner is **not** specific to MPLA actions (or comparable actions from other jurisdictions), and consists largely of non-mandatory, out-of-state authority or dissents. While Petitioner's arguments in this regard are not compelling in view of the clear and non-ambiguous nature of the statute, Respondents must address the two cases discussed at length by Petitioner.

First, Petitioner cites extensively to *McDermott, Inc. v. Amclyde*, 511 U.S. 202 (1994), an admiralty action before the United States Supreme Court arising out of the Southern District of Texas, wherein a crane owner sued manufacturers seeking damages regarding a crane accident and where the Supreme Court found that the proportionate share reduction should apply. However, *McDermott* is clearly distinguishable as (1) it is an out-of-state matter arising out of Texas; (2) it involves admiralty claims and does not involve any medical malpractice claims; and (3) there was no statutory authority, such as W. Va. Code § 55-7B-9 of the MPLA, expressly providing for both a dollar-for-dollar credit as well as a reduction based upon allocation of fault.

Next, Petitioner references at length *Krieser v. Hobbs*, 166 F.3d 736 (5th Cir. 1999), a medical malpractice action before the United States Court of Appeals for the Fifth Circuit arising out of the Northern District of Mississippi, wherein the Fifth Circuit held that a non-settling defendant is not entitled to a dollar-for-dollar credit for the settlement amount, but instead is only

responsible for the percentage of fault allocated to it. Likewise, *Krieser* is readily distinguishable from the current matter as (1) it is an out-of-state matter arising originally out of the Northern District of Mississippi, and (2) while *Krieser* is a medical malpractice action where the Fifth Circuit determined what method of reduction to apply with regard to a pre-verdict settlement, critically, there was no statutory authority, such as W. Va. Code § 55-7B-9 of the MPLA, expressly providing for both a dollar-for-dollar credit as well as a reduction based upon allocation of fault.

The out-of-state authority relied upon by Petitioner is simply not compelling because whether other jurisdiction apply **either** a dollar-for-dollar credit for pre-verdict settlement amounts or a proportionate share approach based upon the jury's allocation of fault in **non-MPLA** matters is irrelevant, because, here, W. Va. Code § 55-7B-9 specifically requires that both reductions be applied.

Accordingly, W. Va. Code § 55-7B-9 is not internally inconsistent.

b. W. Va. Code § 55-7B-9 is not inconsistent with W. Va. Code § 55-7B-13d.

Next, Petitioner contends that the State's several liability statute, W. Va. Code § 55-7-13d, should trump the mandates of the MPLA, specifically W. Va. Code § 55-7B-9. W. Va. Code § 55-7-13d(a)(3) provides:

> 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.

Petitioner suggests that this statute takes precedence over the statutory reductions set forth in W. Va. Code § 55-7B-9. Petitioner's position is misplaced.

Significantly, the legislature had the opportunity to revise W. Va. Code § 55-7B-9 in its 2016 revision following the enactment of W. Va. Code § 55-7-13d in 2015, but no such revisions were made. Indeed, the Circuit Court provided:

> Analysis of Plaintiff's argument reveals that W. Va. Code § 55-7-13d was enacted in 2015, while W. Va. Code § 55-7B-9, the MPLA's several liability statute, was last modified in 2016. Thus, the legislature had an opportunity to revise W. Va. Code § 55-7B-9 in view of W. Va. Code § 55-7-13d and made the conscious decision to keep both the *pro tanto* reduction and the reduction based upon allocation of fault in place for MPLA actions.

A.R. 1278.

Further, Petitioner confoundingly asserts that when the two statutes are read together that "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." Petitioner's Brief at p. 16. The opposite is true, as the pertinent part of W. Va. Code § 55-7B-9(d), is unequivocal that both offsets shall be applied:

> [T]he court **shall first** . . . 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)

Accordingly, W. Va. Code § 55-7B-9 is clear and does not need to be considered in concert with the more general statute, W. Va. Code § 55-7-13d.

Petitioner relies upon Justice Armistead's **dissenting opinion** in the 2021 memorandum decision, *State ex rel. Chalifoux v. Cramer*, 2021 WL 2420196 (W. Va. June 14, 2021). As a memorandum opinion and a dissent, the *Chalifoux* decision is not controlling authority. *See* Syl. Pt. 5, *State v. McKinley*, 234 W. Va. 143, 764 S.E.2d 303 (2014) ("While memorandum decisions

may be cited as legal authority, and are legal precedent, their value as precedent is necessarily more limited"). Further, *Chalifoux* is readily distinguishable.

In *Chalifoux*, the issue on appeal pertained to whether "all alleged parties" in W. Va. Code § 55-7B-9 included non-parties to the litigation. In the majority opinion, the Supreme Court of Appeals of West Virginia did not consider the issue at hand here, i.e., whether medical malpractice defendants should receive both a dollar-for-dollar verdict reduction and a reduction based upon allocation of fault, nor did it consider whether W. Va. Code § 55-7-13d trumps W. Va. Code § 55-7B-9. However, critically and fatal to Petitioner's contentions, "the circuit court examined West Virginia Code § 55-7B-9 and found it to be **clear and unambiguous**". *Chalifoux*, 2021 WL 2420196 at *4 (emphasis added). Further, the circuit court's order in *Chalifoux* provided, in part: "As in any case where statutory language i[s] clear and unambiguous, the [circuit c]ourt **is obligated to apply the statute as written**." *Id.* (emphasis added). The Supreme Court of Appeals of West Virginia upheld the circuit court's decision. *Id.*

Likewise, the dissent upon which Petitioner relies **does not address whatsoever** whether medical malpractice defendants are entitled to both a dollar-for-dollar verdict reduction and reduction based upon allocation of fault. Rather, the dissent addresses the issue actually in controversy in *Chalifoux*—what constitutes "all alleged parties" under W. Va. Code § 55-7B-9(b)—and disagreed with the majority's opinion that "all alleged parties" did not include non-parties to the litigation. *Id.* Further, the dissent quotes the circuit court's order, which is lethal to Petitioner's position: "W. Va. Code § 55-7-13d must be read in conjunction with W. Va. Code § 55-7-13c, **which is expressly inapplicable to MPLA claims** like the present." *Id.* at *12 (emphasis added).

Moreover, the MPLA is a specific subset of civil litigation, and the provisions of the MPLA apply to all medical professional liability claims. As the Circuit Court held:

> Notably, W. Va. Code § 55-7-13d and W. Va. Code § 55-7B-9 **are two separate statutory schemes**. Generally, W. Va. Code § 55-7-13d applies to action for tortious injuries. However, W. Va. Code § 55-7B-9 was enacted by the legislature and specifically applies to causes of action alleging medical professional liability. **The MPLA is a specific subset of civil litigation, and the provisions of the MPLA "apply to all causes of action alleging medical professional liability.**" W. Va. Code § 55-7B-10. Therefore, Plaintiff's contention that W. Va. Code § 55-7B-9 should be read *in pari materia* with W. Va. Code § 55-7-13d **fails** in this case regarding medical professional liability, in which the MPLA was specifically designed to apply. Further, reading the statutes *in pari materia* may eliminate the *pro tanto* reduction required by the MPLA, rending a provision of the MPLA meaningless.

A.R. 1278 (emphasis added). Consistent with the Circuit Court's holding, the intent of the legislature could not be any more clear and the MPLA's "distinct legislative construction" should remain undisturbed. A.R. 1278-1279. Accordingly, it is apparent that W. Va. Code § 55-7-13d does not overcome W. Va. Code § 55-7B-9.

It is readily apparent that W. Va. Code § 55-7B-9 is not internally inconsistent, nor is it in conflict with W. Va. Code § 55-7-13d in view of the unique nature of the MPLA. Accordingly, the statute is clear and unambiguous, and, as such, the Circuit Court's holding should not be disturbed.

3. Application of the verdict reductions set forth in W. Va. Code § 55-7B-9 does not produce an absurd and/or unjust result.

Without the law on his side, Petitioner contends that the Court should disregard W. Va. Code § 55-7B-9, specifically the dollar-for-dollar credit for the amount of Petitioner's pre-verdict settlement with the Nursing Home Defendants, because its application would allegedly produce an absurd and unjust result, and, instead, the Court should only reduce the verdict by the allocation of fault. Petitioner's position is misplaced and confounds absurd and unjust with unfavorable. The

crux of Petitioner's argument is simply discontent with the outcome of the trial; however, mere discontent is not sufficient to circumvent the clear and unambiguous statutory mandates of the MPLA, which balance the interests of all litigants, not just plaintiffs. This matter is a prime example of the statute working as intended when viewing the jury's verdict, i.e., the value of the case against all parties, and the pre-verdict settlement amount.

As discussed herein, the MPLA clearly contemplates and requires that both a dollar-for-dollar offset, and a reduction based upon allocation of fault must be applied to a verdict in a matter involving multiple defendants under the MPLA. The prior version of W. Va. Code § 55-7B-9, which did not allow for allocation of fault to non-parties/pre-verdict settlements, is irrelevant because when the statute was amended in 2016, subsection (d) remained unchanged. As the Circuit Court held, this was a conscious decision by the legislature. A.R. 1278. The statutory intent to apply both reductions is crystal clear and aligns with the statutory purpose of the MPLA, which *inter alia* balances the interests of the claimants and the medical practitioners of the State. Contrary to Petitioner's allegations, the MPLA does not serve to stifle settlements.

Moreover, Petitioner wildly asserts without any legal support whatsoever, that Respondents should not receive the dollar-for-dollar verdict reduction in the amount of the pre-verdict settlement because a substantial portion of those proceeds were used to satisfy medical bills and liens and because the jury did not award Petitioner damages for Mrs. Cummings' medical expenses. Critically, how Petitioner allocated the funds of his prior settlement, including attorneys' fees and expenses, medical expenses, etc., is not a consideration as to whether statutory verdict reductions are applied. Indeed, contrary to Petitioner's assertion, Respondents did not "receive an offset for damages which were not even awarded", i.e., medical expenses. Petitioner's Brief at p. 20. Rather, Respondents received a statutorily mandated offset in the amount of

Petitioner's pre-verdict settlement with the Nursing Home Defendants—Petitioner's allocation of such settlement funds is irrelevant to the statutory verdict reduction. Further, Petitioner's arguments turn a blind eye to the inherent risks of a jury trial.

Moreover, Petitioner continues to inject a red herring with regard to the supposed double reduction. As discussed herein, the jury did not allocate any fault to the Nursing Home Defendants, nor were Respondents permitted by the Circuit Court to present evidence regarding any fault of such Nursing Home Defendants. Accordingly, the verdict was only adjusted by the dollar-for-dollar amount of the Petitioner's pre-verdict settlement with the Nursing Home Defendants, rendering Petitioner's assertions with regard to a double reduction as mere hypotheticals. Point of fact, the Circuit Court held that to consider such arguments would amount to an advisory opinion: "Because the issue Plaintiff advances does not actually exist in this case, reaching the merits of Plaintiffs argument would result in an advisory opinion, which this Court may not entertain." A.R. 1277.

Accordingly, application of the statutory verdict reductions under W. Va. Code § 55-7B-9 does not produce an absurd and/or unjust result, and as such, the Circuit Court's holding must not be disturbed.

4. W. Va. Code § 55-7B-9 does not violate the certain remedy right provided by the West Virginia Constitution.

Petitioner contends that W. Va. Code § 55-7B-9 is in violation of the certain remedy provision of the West Virginia Constitution, specifically, W. Va. Const. Art. III, § 17. At the heart of Petitioner's argument is the hypothetical double reduction provided by the statute; however, it is critical to note that the so-called double reduction is not applicable here, as the verdict was only reduced by the amount of the pre-verdict settlement and the fault allocated to Petitioner, rendering

any opinion in this regard advisory, as detailed below. Nonetheless, Respondents must address Petitioner's contentions in this regard.

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." Generally:

> There 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. W. Virginia Dep't of Highways*, 185 W. Va. 214, 406 S.E.2d 400 (1991). As an initial matter, Petitioner cannot overcome the presumption of constitutionality with regard to W. Va. Code § 55-7B-9. Plaintiff merely asserts, without any basis, that the statute implicates the certain remedy provision due to the so-called double reduction; however, W. Va. Code § 55-7B-9 does not "severely limit" a medical plaintiff's recovery nor does it restrict access to the courts. For example, here, the jury awarded $250,000 in damages, allocating 90% of the fault to Respondents, 10% of the fault to Petitioner, and 0% fault to the Nursing Home Defendants. Thus, even if there had not been a pre-verdict settlement, Petitioner's recovery would have been the same, as there was no fault allocated to the Nursing Home Defendants. Petitioner's contention that the certain remedy provision is implicated by the statute is nothing more than a mere hypothetical, and the certain remedy analysis should terminate. However, in the alternative, Petitioner's remaining arguments must be addressed.

If the certain remedy provision is implicated, the Supreme Court of Appeals of West Virginia has held:

> When legislation either substantially impairs vested rights or severely limits existing procedural remedies permitting court adjudication, thereby implicating the

> certain remedy provision of article III, section 17 of the Constitution of West Virginia, the legislation will be upheld under that provision if, first, a reasonably effective alternative remedy is provided by the legislation or, section, 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 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.

Lewis v. Canaan Valley Resorts, Inc., 185 W. Va. 684, 408 S.E.2d 634 (1991). W. Va. Code § 55-7B-9 does not restrict completely a medical plaintiff's recovery, nor does it force a plaintiff to sue no more than one defendant or to forego any pre-verdict settlements as Petitioner contends. Thus, no alternative remedy is necessary. Further, the 2016 revisions to W. Va. Code § 55-7B-9 are consistent with the statutory intent of the MPLA, which *inter alia* balances the interests of claimants and the medical practitioners of the State. The post-verdict reductions mandated under the statute accomplish this purpose, providing a level playing field for medical plaintiffs and health care providers. Thus, Petitioner's arguments fail under *Lewis*.

Moreover, while it does not appear that W. Va. Code § 55-7B-9 has undergone a certain remedy analysis, another provision of the MPLA, W. Va. Code § 55-7B-8 which imposes a cap on noneconomic damages, has undergone such analysis. *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 was upheld because it furthers the purpose of the MPLA. In *MacDonald*, the Supreme Court of Appeals of West Virginia held that the 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. Thus, while W. Va. Code § 55-7B-9 has not undergone a certain

remedies analysis, it is readily apparent that the 2016 amendments to the statute are in furtherance of the purpose of the MPLA, and as such, its constitutionality should be upheld.

Accordingly, W. Va. Code § 55-7B-9 does not violate the certain remedy right provided by the West Virginia Constitution.

5. A decision in this matter would constitute an advisory opinion.

Petitioner's final argument is that a decision in this matter would not constitute an advisory opinion, contrary to the holding of the Circuit Court. Petitioner's position is misplaced and without merit. Before the Circuit Court and throughout this appeal, Petitioner has alleged that W. Va. Code § 55-7B-9 should be disregarded as it provides for the verdict to be reduced first by the amount of any pre-verdict settlements and then by allocation of fault. A critical flaw to Petitioner's contentions is the fact that the verdict was only reduced by the amount of the pre-verdict settlement, as no fault was assigned to the Nursing Home Defendants, as addressed herein. Therefore, there was no double reduction, nor was Petitioner impacted by two verdict reductions. Petitioner's arguments are nothing more than a mere hypothetical.

The Supreme Court of Appeals of West Virginia has established that courts are not permitted to issue advisory opinion: "Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes." Syl. Pt. 2, *Harshbarger v, Gainer*, 184 W. Va. 656, 403 S.E.2d 399 (1991) (citation omitted). Moreover, as provided by the Circuit Court: "An advisory opinion exists where an issue is considered a 'contingent possibility.' A 'hypothetical' scenario presented to argue what the law should be amounts to an advisory opinion when 'no real issue' exists." A.R. 1276 (citations omitted).

Notably, the Circuit Court rejected Petitioner's assertions that the statute produces an absurd and/or unjust result on these grounds, because Petitioner was not subject to a double reduction:

> Plaintiff's argument fails because it rests on hypothetical grounds that are not applicable to this case. Here, the jury did not assign any fault to the settling Madison Center Defendants and Plaintiff is not subject to a double reduction. Plaintiff is subject only to a reduction of the 10% fault the jury found attributable to Plaintiff and the pre-trial settlement amount between Plaintiff and Madison Center Defendants. Because the issue Plaintiff advances does not actually exists in this case, reaching the merits of Plaintiffs [*sic*] argument would result in an advisory opinion, which this Court may not entertain.

A.R. 1276-1277. The Circuit Court's reasoning holds true for purposes of this appeal. Accordingly, the Court should refrain from addressing Petitioner's arguments in this regard as it would amount to an impermissible advisory opinion.

V. CONCLUSION

Respondents respectfully request that this Court to affirm that Circuit Court's denial of Petitioner's *Motion to Preclude Defendants from Receiving a Pro Tanto Verdict Reduction*, and to affirm the Circuit Court's *Judgment Order*.

WARD J. PAINE, M.D. and BENJAMIN KLENNERT, P.A.,
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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

Thomas A. Cummings,
Plaintiff Below, Petitioner

vs.) No. 22-ICA-220

Ward J. Paine, MD,
and Benjamin Klennert, P.A.,
Defendants Below, Respondents

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing RESPONDENTS' BRIEF was served upon counsel of record by the File&SeveXpress system on March 31, 2023:

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