IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 20-0924

State of West Virginia ex rel. ROLAND F. CHALIFOUX, JR., D.O., and ROLAND F. CHALIFOUX JR., D.O., PLLC, A West Virginia Professional Limited Liability Company

Petitioners and Defendants Below,

v.

Upon Original Jurisdiction in Prohibition No. _____

THE HONORABLE JEFFREY CRAMER, Judge of the Circuit Court of the Second Judicial Circuit, and JOSEPH MOELLENDICK

Respondents.

From the Circuit Court of Marshall County, West Virginia
Civil Action No. 18-C-118

PETITION FOR WRIT OF PROHIBITION

ROLAND F. CHALIFOUX, JR., D.O., and ROLAND F. CHALIFOUX, JR., D.O., PLLC.

By Counsel

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I) QUESTION PRESENTED

Do Health Care Provider defendants enjoy the full protections of several liability under West Virginia Code Section 55-7B-9, such that the jury must consider an allocation of fault against all parties who are alleged to have proximately caused the plaintiff's injuries, or, alternatively, do they enjoy a lesser form of *partial* several liability where the jury considers an allocation of fault only against those who are sued by, or have made a settlement payment to, the plaintiff?

II) STATEMENT OF THE CASE

A) Introduction

This Writ presents a question of statutory interpretation regarding the intended meaning of the phrase "all alleged parties" as used in subsection (b) of West Virginia Section Code 55-7B-9 and the resulting scope of the several liability protections afforded to healthcare provider defendants under the West Virginia Medical Professional Liability Act, West Virginia Code Sections 55-7B-1 *et seq* ("MPLA").

Petitioners submit that the Legislature clearly intended that healthcare providers be afforded the full protections of several liability such that the trier of fact, in assessing percentages of fault, must consider the fault of <u>all</u> parties whose negligence contributed to a plaintiff's claimed injuries. Conversely, the Respondent argued, and the Circuit Court below held, that in cases governed by the MPLA the trier of fact shall consider only the fault of the parties to the litigation and those who have settled with the plaintiff. The Circuit Court's holding makes a proper assessment of Petitioner's relative fault impossible.

The Circuit Court's holding that West Virginia Code Section 55-7B-9 does not contemplate the apportionment of fault to non-litigants is inconsistent with the several liability

protections created by West Virginia statutory law and constitutes clear legal error. West Virginia Code Section 55-7-13a defines "comparative fault" as "the degree to which the fault of a person was a proximate cause of an alleged personal injury or death . . . expressed as a percentage." West Virginia Code Section 55-7-13b defines "fault" as "an act or omission of a person, which is a proximate cause of injury or death." And West Virginia Code Section 55-7-13d(a)(1) provides: "In assessing percentages of fault, the trier of fact shall consider the fault of all persons who contributed to the alleged damages regardless of whether the person was or could have been named as a party to the suit."

Nowhere in the MPLA does the Legislature demonstrate the intent to limit several liability fault allocation in MPLA cases only to the named parties in the suit. To the contrary, the MPLA and 55-7-13a-13d both evidence clear intent that fault be allocated against all persons who are alleged to have proximately caused the plaintiff's injuries. To conclude otherwise effectively nullifies the statutory protections of several liability enacted by the Legislature and creates an absurd inequity in the law whereby healthcare provider defendants, due solely to their status as healthcare providers, are denied the full protections of several liability, thereby frustrating the expressly stated goals of the MPLA.

B) Facts

This is a medical professional liability action wherein Respondent and Plaintiff below, Joseph Moellendick, alleged that Petitioners and Defendants below, Roland F. Chalifoux Jr., D.O. ("Dr. Chalifoux") and Roland F. Chalifoux Jr., D.O., PLLC, negligently performed a spinal cord stimulator trial on Mr. Moellendick, causing him to suffer a spinal hematoma.[1]

[1] Joseph Moellendick died during the pending litigation on February 11, 2020. Respondent has a pending Motion for Substitution pending before the Circuit Court which would substitute his son, Matthew Moellendick as Plaintiff. Respondent's counsel has also recently provided Petitioner's counsel a Certificate of Merit claiming the underlying alleged negligence was a cause of death. These issues are not germane to the question presented to this Court.

Respondent's claims relate to Dr. Chalifoux's care of Mr. Moellendick from February through April of 2017, and, in particular, arise from a spinal cord stimulator trial ("SCS" or "SCS Trial") which was performed on April 4, 2017.[2] See Compl. p. 1, ¶¶ 5-6, Appendix p.7. In the procedure, two SCS leads were placed adjacent to the spine in the epidural space. The next day, April 5, 2017, Mr. Moellendick returned to Dr. Chalifoux's office for removal of the SCS leads due to discomfort. See Compl. p.2, ¶ 14, Appendix p.8. Mr. Moellendick generally alleges that the SCS Trial was not indicated, and that it was a breach of the standard of care to perform it while he was taking Plavix and Aspirin. See Compl., pp.3-4, ¶ 19, Appendix pp.9-10. Plaintiff alleges further that these breaches in the standard of care proximately caused him to suffer a spinal hematoma, resulting in multiple medical problems, including paraplegia.[3] See Compl. p. 4, ¶¶ 21-22, Appendix p.10.

After leaving Dr. Chalifoux's office on April 5, 2017, Mr. Moellendick presented to the emergency department at Weirton Medical Center, in Weirton, West Virginia, at about 4:41 PM, complaining of having passed a blood clot in his urine. He was evaluated in the emergency department and, after examination and work-up for possible spinal insult and bleeding, including negative CT imaging, was discharged. The discharge nurse specifically noted: "there is also no evidence of bleeding from your recent procedure."

On April 7, 2017, around mid-day, Mr. Moellendick presented to the emergency department of Summa Health System, Akron City Hospital via ambulance.[4] He was seen by Dr.

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[2] Spinal Cord Stimulation is an implantable pain relief therapy. Implants referred to as "leads" send low electric current to the spinal cord to block pain signals traveling to the brain. Essentially, the electric current acts as a gate, blocking pain signals from reaching the receptors.

[3] Petitioners' deny that Dr. Chalifoux breached the standard of care, and that any treatment performed by Dr. Chalifoux caused Mr. Moellendick's injuries.

[4] Portions of the discovery which Petitioners wish to undertake would be to fully identify the proper legal entities which are responsible for Mr. Moellendick's alleged injuries. Petitioners anticipate this may include Summa Health d/b/a Summa Health System Akron Campus aka Akron City Hospital and/or one or more of its affiliates such as:

Christopher Lloyd. He reported left hip pain, inability to ambulate, and a history of having recently fallen at home. His condition was not diagnosed in the emergency department, but he was admitted to the hospital for further evaluation and management.

It appears that it was not until Mr. Moellendick was seen by neurosurgeon, Paul Hartzfield, M.D., at 11:00 AM on April 9, 2017, that any healthcare provider at Akron appropriately evaluated his alarming neurological symptoms and considered the possibility that he was suffering from a spinal hematoma. Dr. Hartzfield, however, ordered a STAT MRI of the spine, which revealed a hematoma. Mr. Moellendick was then taken for emergent surgery to evacuate the subdural hematoma. However, the operative note appears to state that the subdural clot identified was not completely removed due to excessive bleeding.

C) Procedure

During the discovery stage, the Defendants identified potential breaches of the standard of care from the Akron Providers. Though the Petitioners maintain West Virginia Code 55-7-13d does not apply to MPLA actions (as the Circuit Court agreed), out of an abundance of caution they filed a Notice of Non-Party Fault on August 20, 2019. See Defendants Notice of Fault, Appendix pp.14-18. This notice identified the Akron Providers as entities or individuals which Petitioners anticipated placing on the verdict form. *Id.*

Under the MPLA, a Defendant's liability is several only. Consequently as a matter of procedure and law, they cannot file a third-party complaint against non-party entities who are potentially liable for Respondent's injuries.[5] However, Petitioners have received medical expert

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Summa Health System, Summa Health System Corporation, or Summa Physicians, Inc., and/or one or more health care providers working there (sometimes hereinafter collectively "Akron Providers").

[5] These limitations on third-party actions where alleged tortfeasors are severally liable only has received recent support from both the Northern and Southern Districts of West Virginia, both of which have recognized this Court's finding that these relatively new statutes "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.*, 774 S.E.2d 555, 567 n.12 (W. Va. 2015). In *Clovis v. J.B. Hunt Transport, Inc.*, Third-Party Plaintiff J.B. Hunt

opinion evidence which attributes negligence and fault to non-parties who treated Mr. Moellendick in Akron, Ohio. On December 13, 2019, Defendants disclosed Dr. Francis Farhadi, M.D., who holds the opinion that the emergency department physicians who treated Mr. Moellendick in Akron, Ohio, breached the standard of care and proximately caused or contributed to his injuries. See Defendants' Expert Disclosure, Appendix pp.21-23. Dr. Farhadi also believes that the surgical team, and perhaps other Akron Providers may have breached the standard of care and proximately injured Mr. Moellendick, but has indicated to counsel that he needs additional information in the form of witness depositions to reach a firm opinion.

The Petitioners' recognized that substantial discovery would need to be performed to fully discover the negligence of the Akron Providers, therefore on February 6, 2020, Petitioners filed *Defendants, Roland F. Chalifoux, Jr., D.O., And Roland F. Chalifoux, Jr., D.O., PLLC's Notice of Alleged Non-Party Fault And Combined Motion For Placement Of Alleged Non-Parties On Verdict Form And Request For Rule 16 Pretrial Management Conference* ("Motion"). See Motion, Appendix pp.67-75.

On February 11, 2020, the Respondent filed a Memorandum in Opposition of Defendants' Motion, and the arguments presented by the Plaintiff were essentially adopted wholesale by the Circuit Court and are thus addressed *infra*. See Plaintiff's Memorandum in Opposition to Motion, Appendix pp.76-84. The Defendants timely filed their Reply. See

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brought a claim for contribution against Ryder Truck Rental. No. 1:18-CV-147, 2019 WL 4580045, at *1-2 (N.D.W. Va. Sept. 20, 2019). The Third-Party Defendant filed a motion to dismiss the third-party complaint as the claim against it rested only in contribution, and thus was not permissible as the Defendants would be severally liable only. *Id* at *2. The Court agreed and dismissed the third-party complaint. The Honorable Judge Thomas Kleeh found that because West Virginia Code Sections 55-7-13a-13d mandated that this third-party defendant would be severally liable only, a claim in contribution did not arise. *Id* *3-5. The Court dismissed the third-party complaint noting that none of the limited exceptions to several liability applied. The SDWV, applying *Clovis*, reached the same conclusion, and citing the limited West Virginia Supreme Court *dicta* on West Virginia Code Section 55-7-13a-13d, wrote: "In effect, this broad rule amounts to 'the near total abolition of claims for contribution." *French v. XPO Logistics Freight, Inc.*, No. 2:18-CV-1544, 2020 WL 1879472, at *3 (S.D.W. Va. Apr. 15, 2020), citing *Bateman v. CMH Homes, Inc.*, No. 3:19-0449, 2020 WL 597564, at *2 (S.D. W. Va. Feb. 6, 2020).

Defendants' Reply, Appendix pp.86-94. On September 15, 2020, the Court's Law Clerk sent an e-mail to all counsel staring that the Defendants' Motion is denied, and requested the Plaintiff's counsel prepare an Order for review and entry. See E-Mail from Court, Appendix p.95. Plaintiff provided a draft order via e-mail on September 21, 2020. See E-mail from Respondent Counsel, Appendix pp.96-103. The Plaintiff's proposed order was executed, unchanged, on September 25, 2020 when the Circuit Court entered an *Order Denying Defendants, Roland F. Chalifoux, Jr., D.O., And Roland F. Chalifoux, Jr., D.O., PLLC's Notice of Alleged Non-Party Fault and Combined Motion For Placement of Alleged Non-Parties on Verdict Form.* See Order, Appendix pp.1-6. It is out of this Order that this Petition for Writ arises.

III) SUMMARY OF THE ARGUMENT

The Circuit Court committed clear legal error in ruling that even if Petitioners presented sufficient evidence at trial for a jury to determine that the Akron Providers had breached the standard of care and proximately caused Mr. Moellendick's injuries, that the Akron Providers could not be placed on the verdict form.

In its Order, the Circuit Court made three primary findings supporting its denial of Petitioners' Motion: (1) The Circuit Court determined that West Virginia Code Section 55-7B-9(a)-(b) plainly contemplated that "all alleged parties" did not include Health Care Providers which were not actual parties to the underlying litigation, or which had not previously settled with the Plaintiff; (2) that because case law pre-dating the several liability provisions of the MPLA does not allow Health Care Providers to avoid liability for the intervening negligence of subsequent health care, the Appellants would be liable for the entirety of any verdict rendered, and thus "there is no reason to ask the jury to attribute any responsibility" to the Akron healthcare providers; and (3) because it would cause the Plaintiff-Respondent to suffer prejudice

because he elected to not sue the Akron Providers, and under Rule 14 of the West Virginia Rules of Civil Procedure, prejudice can be considered. See Order, Appendix pp.1-6.

Petitioners contend that the Circuit Court's denial of their Motion and all three reasons offered for denial constitute clear legal error.

IV) STATEMENT RESPECTING ORAL ARGUMENT AND DECISION

Oral argument is appropriate pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure to aid in this Court's consideration of this case. Argument is proper pursuant to Rule 19 because this case involves, *inter alia*, assignments of error in the application of settled law and an exercise of discretion that is unsustainable. *See* W. Va. R. App. P. 19 (a)(1), (2).

V) ARGUMENT

A) Standard

When considering whether to entertain and issue a writ of prohibition pursuant to W. Va. Code Section 53-1-1, and Rule 16 of the West Virginia Rules of Appellate Procedure, where it is alleged that the lower tribunal exceeded its legitimate powers, this Court has held that it will examine five factors:

> (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the tribunal's order is an oft repeated error of law or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression.

Syl. Pt. 2, *State ex rel. Caton v. Sanders*, 215 W. Va. 755, 601 S.E.2d 75 (2004). "Although all five factors need not be satisfied, the clear error factor should be given substantial weight." Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

1) There is no other adequate means to obtain the desired relief

It is apparent on its face that there is clearly no other adequate means to obtain the desired relief as no other appeal options are available to the Petitioners.

2) The Petitioners will suffer prejudice that is not correctable on appeal

Second, the Petitioners will be damaged and prejudiced if this ruling stands, as it cannot be corrected on appeal. The Circuit Court has ruled that as a matter of law, Akron Providers cannot be placed on the verdict form. The Petitioners initially sought a ruling on this issue under Rule 16 of the West Virginia Rules of Civil Procedure as to not waste time and resources by undertaking significant discovery on Akron Providers, only to be precluded from placing them on the verdict form after trial. Without any benefit to undertaking substantial, time-consuming, and expensive discovery, Petitioners would elect to forgo this discovery. Thus, if this issue were addressed on appeal after a verdict, the remedy of placing Akron Providers on the verdict form would be lacking, as no discovery on their liability would have been undertaken.

3) The Circuit Court's ruling constitutes clear legal error

Third, this ruling is clearly erroneous. The Circuit Court's ruling misapplies West Virginia Code 55-7B-9, and provides MPLA defendants *less* several liability protection than every other defendant under the laws of the State of West Virginia—the Petitioners contend this was clearly not the Legislature's intent.

4) This issue is at risk of becoming an oft repeated error

Fourth, though Petitioners are not aware that this an oft repeated error, it is an issue which may become an oft repeated error if not addressed by this Court.

5) The legal issues herein are matters of first impression to this Court

And fifth, neither the issue of third-party complaints in light of several liability only claims, or the issue of verdict apportionment of non-parties in MPLA have been squarely addressed by this Court. Petitioners submit that Circuit Courts need guidance on how the fault of non-parties and third-parties should be considered in MPLA cases.

Because this case implicates questions of law, including interpretation of statutes and legislative rules, the Court applies *de novo* review to the Circuit Court's decision. *State ex rel. City of Bridgeport v. Marks*, 233 W. Va. 449, 453, 759 S.E.2d 192, 196 (2014).

B) The Circuit Court's Order Violates the Several Liability Protections Afforded to Health Care Providers

The Circuit Court ruled that W.Va. Code Section 55-7B-9 does not contemplate the apportionment of fault to non-litigant parties who were not sued by the Plaintiff, or who did not make a settlement payment to the Plaintiff at any time. See Order, Appendix pp.3-4. This erroneous position leads to the absurd result of MPLA-defendants having an inferior form of several liability protection as compared to almost every other defendant and is rooted in a misreading of subsection (b), and how it interacts with subsection (a).

1) The Circuit Court's Order leads to an absurd result as it holds Petitioners liable for other parties whose negligence contributed to the Plaintiff's injuries

The heart of the legal question before the Court is whether health care provider defendants are entitled to the full protections of several liability under the law. Petitioners submit that the clear legislative intent underpinning both the several liability provisions of the MPLA

and W.Va. Code 55-7-13(a)-(d) is to extend to health care provider defendants the full protections of several liability now afforded under West Virginia law to nearly every category of civil defendant. To conclude otherwise creates an absurd inequity in the law whereby health care provider defendants, due solely to their status as health care providers, are denied the full protections of several liability.

The applicable West Virginia Code Section 55-7B-9(a)-(c) reads:

> (a) In the trial of a medical professional liability action under this article involving multiple defendants, the trier of fact shall report its findings on a form provided by the court which contains each of the possible verdicts as determined by the court. Unless otherwise agreed by all the parties to the action, the jury shall be instructed to answer special interrogatories, or the court, acting without a jury, shall make findings as to:
>
> (1) The total amount of compensatory damages recoverable by the plaintiff;
> (2) The portion of the damages that represents damages for noneconomic loss;
> (3) The portion of the damages that represents damages for each category of economic loss;
> (4) The percentage of fault, if any, attributable to each plaintiff; and
> (5) The percentage of fault, if any, attributable to each of the defendants.
>
> (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.

(**emphasis added**). The language found is subsection "(b)" is relatively new. Prior to July 1, 2016, this section read in relevant part "[i]n 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." The statute was changed from explicitly including only "parties to the litigation" to "all alleged parties" demonstrating the clear intent of the Legislature that more than sued parties are to be included on the verdict form.

The Legislature's intent to hold parties severally liable only is further emphasized by legislation passed in 2015, just a year prior to the above-noted amendment to the MPLA, and passed by the same 82nd West Virginia Legislature. In 2015, the Legislature passed sweeping reforms to joint and several liability actions. These changes effectively held defendants severally liable only in almost all civil litigation. See West Virginia Code 55-7-13a-13d. In particular, West Virginia Code Section 55-7-13d provides a specific mechanism to allocate the fault of nonparties to be placed on the verdict form:

> Fault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defending party gives notice no later than one hundred eighty days after service of process upon said defendant that a nonparty was wholly or partially at fault. Notice shall be filed with the court and served upon all parties to the action designating the nonparty and setting forth the nonparty's name and last known address, or the best identification of the nonparty which is possible under the circumstances, together with a brief statement of the basis for believing such nonparty to be at fault;

Though this section does not appear to apply to the MPLA per West Virginia Code Section 55-7-13d(h)(3)(i), it does show the clear intent of the Legislature that the fault of all alleged parties be considered by the jury, not only those entities and individuals chosen by the plaintiff. Petitioners submit that it is not the case that MPLA defendants were intended by the Legislature to receive *less* protections than every other defendant.

Read together, West Virginia Code Sections 55-7-13a-13d and West Virginia Code Section 55-7B-9 indicate a clear requirement that Health Care Provider defendants are provided

full several liability, not several liability to a lesser degree than almost every other defendant in West Virginia. "When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syl. Pt. 7, *Barber v. Camden Clark Memorial Hospital Corp.*, 240 W.Va. 663, 815 S.E.2d 474 (2018). *See also*, Syl. Pt. 8, *Barber v. Camden Clark Memorial Hospital Corp.*, 240 W.Va. 663, 815 S.E.2d 474 (2018) ("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.").

Nowhere in either the MPLA or W.Va. Code Section 55-7-13(a)-(d) does the Legislature demonstrate the intent to limit several liability fault allocation only to the named parties in the suit. To the contrary, the MPLA and 55-7-13a-13d both evidence clear legislative intent that fault be allocated against all persons who are alleged to have proximately caused the plaintiff's injuries ("all alleged parties"), nonparties to the suit included.

Under the Circuit Court's reading of the statute, a MPLA-defendant is held hostage to whichever Health Care Providers the Plaintiff elects to claim damages against. This ruling effectively requires Petitioners to be held jointly liable for the Akron Providers' alleged negligence and allows them no recourse to avoid being held joint liabile for the negligent acts of parties not sued by the plaintiff.

2) The Circuit Court Misapplied the Language of the MPLA

Subsection (b) of 55-7B-9 clearly does *not* limit the jury's consideration of fault to the parties to the litigation. It does not read that the trier of fact shall, in assessing percentages of fault, consider the fault of **all parties to the litigation**. Rather, it states that "[t]he trier of fact shall, in assessing percentages of fault, consider the fault of **all alleged parties.**" (Emphasis

added). The Circuit Court adopted the position of the Respondent in determining "all alleged parties" means all parties to the action and those who have settled with the Plaintiff, but this is clearly not the case.

The term "party" is not defined in the MPLA. But it must include more than Plaintiffs, Defendants, and those who settled their case with the Plaintiff. Considering that 55-7B-9(a) already provides that the fault of all plaintiffs and defendants shall be considered by the jury, it would be redundant for the phrase "all alleged parties" to refer only to the parties to the action.

Subsection (b) also requires an assessment of fault against "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). The inclusion of the above underlined phrase, and the use of the word "including" (shown above in bold), demonstrate conclusively that the jury shall consider the fault of nonparties to the action. Former parties to the litigation, who are decidedly not parties at the time of the verdict, are clearly intended subjects for fault allocation *if they were alleged parties to the same medical injury*. So too are all parties to the medical injury who have settled a claim with the plaintiff. Obviously, persons who settled a claim with the plaintiff before suit was filed were **never** parties to the litigation. Therefore, the Circuit Court's conclusion that fault allocation required by 55-7B-9(b) applies only to the parties which the Plaintiff has chosen is misplaced.

Of course, it is self-evident that nonparties to the lawsuit might very well be *parties to the medical injury which gives rise to it*. Given the nature of several liability, which concerns itself with the fault of all parties who caused the plaintiff's injuries, and where the phrase "all alleged parties" demonstratively includes categories of persons that are NOT *parties to the litigation*, the term "allege parties" cannot refer exclusively to the parties in the action. Rather, the clear legislative intent is to require the jury to consider an allocation of fault *against all alleged parties*

to the plaintiff's medical injury. This interpretation is entirely consistent with the tort doctrine of several liability generally, and with 55-7-13a specifically, which defines comparative fault as "the degree to which the fault of a person was a proximate cause of an alleged personal injury or death . . . expressed as a percentage." This interpretation is also supported by 55-7-13b which defines "fault: as "[a]n act or omission of a person, which is a proximate cause of injury or death . . . ." Finally, Petitioners' position is in complete harmony with 55-7-13d(a)(1) which provides: "In assessing percentages of fault, the trier of fact shall consider the fault of all persons who contributed to the alleged damages regardless of whether the person was or could have been named as a party to the suit." (Underlining added).

C) The Circuit Court Erred in Ruling that Several Liability is Essentially Inapplicable when a Defendant is not Permitted to Argue Subsequent Negligence as an Intervening Cause

The Circuit Court also determined that placing the nonparty Health Care Providers on the verdict form is futile because the Petitioners are nevertheless liable for the negligence of the Akron Providers in the case of an adverse jury verdict. The Circuit Court's ruling on this issue is inconsistent with several liability, and relies on outdated law. Citing only caselaw which preceded the 2003 changes to the MPLA creating the several liability provisions, the Circuit Court ruled that "[a] negligent physician is liable for the aggravation of injuries resulting from subsequent negligent medical treatment, if foreseeable, where that subsequent medical treatment is undertaken to mitigate the harm caused by the physician's own negligence." Syl. Pt. 1, *Rine By & Through Rine v. Irisari*, 187 W. Va. 550, 551, 420 S.E.2d 541, 542 (1992). The Circuit Court also cited *Thornton v. CAMC*, as follows:

> 2. If an injured person uses ordinary care in selecting a physician or hospital, then the law regards an injury resulting from the negligence of the physician or hospital as a part of the immediate and direct damages which naturally flow from the original injury.

> 3. As the law regards the negligence of the one who caused the original injury as the proximate cause of the aggravated injuries occurring by reason of the negligence of the treating physician or hospital, the original tort-feasor is liable for all damages, including the successive damages inflicted by the physician or hospital.

Syl. Pts. 2 & 3, Thornton v. Charleston Area Med. Ctr., 158 W. Va. 504, 504, 213 S.E.2d 102, 103 (1975).

This argument completely ignores the legal effect of several liability in place since 2003 in medical negligence matters. The several liability changes to medical liability actions do not overrule *Rine* or *Thornton*, but it does alter their application. To bring into harmony these two doctrines is simple: negligent Health Care Providers are "liable for the aggravation of injuries resulting from subsequent negligent medical treatment, if foreseeable, where that subsequent medical treatment is undertaken to mitigate the harm caused by the [Health Care Provider's] own negligence," but the subsequent tortfeasor may still be held severally liable for its portion of the fault. In other words, a Health Care Provider may not argue that subsequent-related negligent health care is an intervening cause relieving it of liability, but each should still only be severally liable for its portion of the negligence. Further, W.Va. Code 55-7B-9(c) expressly provides that "the court shall enter judgment of several, but not joint, liability against each defendant **in accordance with the percentage of fault attributed to each defendant by the trier of fact.**" (Emphasis added). It cannot be seriously argued, therefore, that if the jury were permitted to allocate fault to the Akron Providers at trial, Defendants will nevertheless be held jointly liable for the entire judgment. Such a result would essentially overrule the Legislature.

Simply stated, the Circuit Court's decision relied on concepts and caselaw which predate the statutory creation of several liability in West Virginia and did not address the central issues regarding several liability raised in Petitioners' Motion. The Circuit Court's decision also

directly contradicts the provisions of W.Va. Code 55-7B-9(c) and (d) which provide that defendants shall not be held liable for the fault of other parties who have proximately caused plaintiff's injuries.

D) The Court Erred in Considering the Prejudice to the Respondent and by Finding Such Prejudice was Present

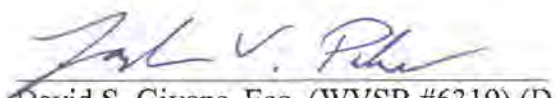
Finally, the Circuit Court considered the prejudice to the Respondent if a nonparty were permitted to be placed on the verdict form. See Order, Appendix pp.5-6. In doing so, the Circuit Court incorrectly noted that "Defendants concede the relief they are requesting is something akin to the inclusion of Akron health care providers under Rule 14 of the West Virginia Rules of Civil Procedure," and proceeded to weigh the factor or prejudice under Rule 14. *Id.* The entire argument of Petitioners was that this is *not* a third-party action, nor can it be a third-party action. The Respondent below had ample time to identify Akron Providers as a negligent party in this action and elected to not file suit against them. The change from joint liability to several liability is a significant one, and the impact to plaintiffs can be severe, but this does not equate with unfair prejudice. This is simply the law taking its intended effect.

VI) CONCLUSION

For the foregoing reasons, this Court should grant the writ of prohibition and direct that all entities or individuals which Petitioners introduce sufficient evidence for a jury to find negligence shall be placed on the verdict form for apportionment of fault.

ROLAND F. CHALIFOUX, JR., D.O., and ROLAND F. CHALIFOUX, JR., D.O., PLLC.

By Counsel



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Respondents.

**From the Circuit Court of Marshall County, West Virginia
Civil Action No. 18-C-118**

VERIFICATION

STATE OF WEST VIRGINIA
COUNTY OF OHIO, to-wit:

I, Roland F. Chalifoux, Jr., D.O., individually and on behalf of Roland F. Chalifoux, Jr., D.O., PLLC, Petitioners herein, being first duly sworn, depose, and say that I am duly empowered to verify pleadings in this action; that I have read the Petition for Writ of Prohibition and that I have personal knowledge of the facts set forth therein or, to the extent I do not have personal knowledge, I believe, based upon information made known to me, the same to be true.

Roland F. Chalifoux, Jr., D.O.

Taken, subscribed and sworn to before the undersigned Notary Public this 18th day of November, 2020.

My commission expires August 13, 2025.

Keri L. Schultz
Notary Public

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. _____

State of West Virginia ex rel.
ROLAND F. CHALIFOUX, JR., D.O., and
ROLAND F. CHALIFOUX JR., D.O., PLLC,
A West Virginia Professional Limited Liability Company

Petitioners and
Defendants Below,

v.

Upon Original Jurisdiction
in Prohibition
No. _____

THE HONORABLE
JEFFREY CRAMER, Judge of the
Circuit Court of the Second Judicial Circuit,
and JOSEPH MOELLENDICK

Respondents.

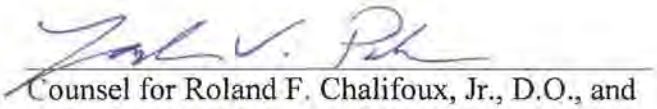
From the Circuit Court of Marshall County, West Virginia
Civil Action No. 18-C-118

CERTIFICATE OF SERVICE

I, Jordan V. Palmer, counsel for the Defendants, Roland F. Chalifoux, Jr., D.O., and Roland F. Chalifoux, Jr., D.O., PLLC, do hereby certify that a true and exact copy of the foregoing "Petition for Writ of Prohibition" has been served upon counsel of record and the Court via regular mail this 18th day of November, 2020, and addressed to the following:

Geoffrey C. Brown, Esq.
Bordas & Bordas, PLLC
1358 National Road
Wheeling, WV 26003
Counsel for Plaintiff

Honorable Jeffrey Cramer, Judge
Circuit Court of Marshall County
Marshall County Courthouse
600 Seventh Street
Moundsville, WV 26041



Counsel for Roland F. Chalifoux, Jr., D.O., and
Roland F. Chalifoux, Jr., D.O., PLLC

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