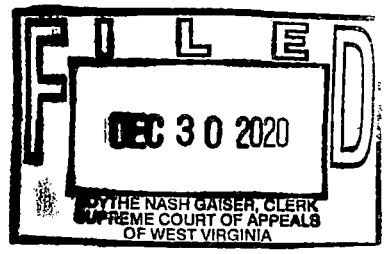
IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 20-0929



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,

vs.

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

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

MATTHEW MOELLENDICK, as
Executor of the Estate of
JOSEPH MOELLENDICK.

By Counsel

GEOFFREY C. BROWN, ESQ. (WVSB #9045)
gbrown@bordaslaw.com
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
Telephone: (304) 242-8410
Facsimile: (304) 242-3936

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I. QUESTION PRESENTED

Whether Judge Cramer acted without jurisdiction, exceeded his legitimate powers, or clearly erred, as a matter of law, when he denied the Petitioners'/Defendants' motion, pursuant to W. Va. Code § 55-7B-9 and W. Va. Code § 55-7-13d to place certain nonparty persons on the verdict form at the trial of this medical professional liability action?

II. STATEMENT OF THE CASE

This is a medical professional liability case. Respondent/Plaintiff, Joseph Moellendick (hereinafter "Respondent" or "Moellendick") claims Petitioner/Defendant, Roland F. Chalifoux, Jr., D.O., PLLC's agent, the Petitioner/Defendant, Roland F. Chalifoux, Jr., D.O., (hereinafter "Petitioners" or "Chalifoux"), was negligent in inserting a spinal cord stimulator while Moellendick was taking aspirin and Plavix. *See* Complaint, Petitioners' Appendix at 007-013.

Specifically, on April 4, 2017, Chalifoux inserted a temporary spinal cord stimulator in an area near Moellendick's spine. *Id.* at 007, ¶ 6. At this time, Chalifoux knew that Moellendick was taking aspirin and Plavix.[1] *Id.* at 008, ¶¶ 11-12. At no time prior to the insertion of the spinal cord stimulator did Chalifoux tell Moellendick to stop taking aspirin and Plavix. *Id.* at 008, ¶ 13. On April 5, 2014, Chalifoux removed the temporary spinal cord stimulator due to, in part, Moellendick's complaints of pain. *Id.* at 008, ¶ 14.

On April 7, 2017, Moellendick presented to Summa Akron City Hospital with decreased motor function and pain.[2] *Id.* at 008, ¶ 15. A thoracic spine MRI revealed a significant hematoma. *Id.* at 009, ¶ 16. On April 9, 2017, Moellendick underwent surgery that revealed "thoracic diffuse

[1] Aspirin and Plavix are medications known to increase the risk of bleeding.

[2] Petitioners identify Summa Akron City Hospital and its affiliates (hereinafter referred to as "Akron providers") as nonparty persons, who Petitioners contend should be on the verdict form for purposes of assessment of liability pursuant to West Virginia Code § 55-7B-9. *See* Petition for Writ of Prohibition, fn. 4 at Pp. 3-4.

bleeding due to aspirin and Plavix and thoracic subdural hematoma causing severe spinal cord compression." *Id.* at 009, ¶ 17.

On June 21, 2018, Moellendick filed his Complaint alleging he sustained injuries and damages due to Chalifoux's negligence, as aforesaid. *Id.* at 009, ¶¶ 18-25, 013. Moellendick also asserted a vicarious liability claim against Roland F. Chalifoux, Jr., D.O., PLLC. Chalifoux filed an Answer to the Complaint denying all allegations of negligence.

On or about August 20, 2019, Chalifoux filed a Notice of Fault Pursuant to West Virginia Code § 55-7-13d, contending that nonparty persons, *i.e.*, Akron providers, should be on the verdict form for purposes of assessing and apportioning fault.[3] *See* Notice of Fault Pursuant to West Virginia Code § 55-7-13d, Petitioners' Appendix at 014-018. On February 6, 2020, Chalifoux filed 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 (hereinafter "Motion") requesting, *inter alia*, that the nonparty persons, Akron providers, be included on the verdict form in the trial of this matter to allow the fact finder to assess and apportion fault amongst all alleged parties and nonparties. *See* 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. *Id.* at 067-075. On February 11, 2020, Moellendick filed his Memorandum in Opposition to Chalifoux's Motion. *See* Memorandum in Opposition to Chalifoux's Motion, *Id.* at 076-084. On or about February 27, 2020, Chalifoux filed his Reply to Moellendick's Memorandum in Opposition. *See* Reply to Moellendick's Memorandum in Opposition, *Id.* at 086-094. On September 25, 2020, the Circuit Court entered an Order denying

[3] Petitioners did not file a third-party complaint against the Akron providers. Moreover, Respondent has neither filed a claim nor settled a claim arising out of his medical claim with any other person, including the Akron providers.

Chalifoux's Motion. *See* Order Denying Chalifoux's Combined Motion for Placement of Alleged Non-parties on Verdict Form. *Id.* at 001-006.

III. SUMMARY OF THE ARGUMENT

W. Va. Code § 55-7B-9 *solely* governs the several liability protections afforded to Petitioners under the West Virginia Medical Professional Liability Act, West Virginia Code Sections 55-7B-1 *et seq.* ("MPLA"). Specifically, W. Va. Code § 55-7B-9 provides for the assessment and apportionment of fault in cases involving *multiple defendants.*[4] *See* W. Va. Code § 55-7B-9(a) (Emphasis supplied). W. Va. Code § 55-7B-9(b)'s application is *limited* to the fact finders' assessment and apportionment of 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." Notwithstanding the clarity of W. Va. Code § 55-7B-9(b), Petitioners seek to have the trier of fact assess and apportion the fault of nonparty persons, Akron providers, who have not settled a claim with Respondent. W. Va. Code § 55-7B-9(b) clearly and unambiguously distinguishes a "party" from a "person." § 55-7B-9(b) simply does not contemplate the trier of fact to assess and apportion the fault of any person. § 55-7B-9(b) only applies to "alleged parties." As will be more fully set forth below, the unspecified Akron providers that Chalifoux wishes to include on the verdict form are not "alleged parties." The Plaintiff has not sued any of those providers. Chalifoux contends that he cannot (and, therefore, will not) bring the Akron providers into the case. An entity that is not, cannot be, and will not be, a party to a case is not an "alleged party."

Petitioners contend the Circuit Court's decision to deny Chalifoux's Motion makes a proper assessment of Petitioners' relative fault impossible. *See* Petition for Writ of Prohibition at

[4] For purposes of W. Va. Code §55-7B-9, Roland F. Chalifoux, Jr., D.O. and Roland F. Chalifoux, Jr., D.O., PLLC should be viewed as one defendant as the *only* claim against Roland F. Chalifoux, Jr., D.O., PLLC is for vicarious liability. Accordingly, fault would not be apportioned between these Defendants.

P. 1. This argument is not based in fact or in law concerning nonparties. Accordingly, Respondent asserts that this Court need not even reach the issue as to whether the Circuit Court erred in denying Chalifoux's Motion. Alternatively, this Honorable Court should deny Petitioners' claim for relief because Petitioners have not attempted to join the Akron providers into the action as parties. Furthermore, assuming they can marshal the facts necessary to support it, the affirmative defense of intervening cause is available to Petitioners.

It is undisputed that West Virginia Code § 55-7-13d does not apply to the MPLA, and the instant case; and therefore, it should not be read and applied together to unnecessarily conflate what the West Virginia Legislature intended when it carefully established § 55-7B-9(b).

IV. STATEMENT RESPECTING ORAL ARGUMENT AND DECISION

Oral argument is appropriate pursuant to Rules 18(a) and 19 of the West Virginia Rules of Appellate Procedure.

V. ARGUMENT

A. Standard

"Pursuant to West Virginia Code § 53-1-1, 'the writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers.'" *State ex rel. Leung v. Sanders*, 213 W.Va. 569, 573, 584 S.E.2d 203, 207 (2003). Petitioners do not dispute that the circuit court enjoyed jurisdiction over this matter; rather, they contend that it exceeded its legitimate powers in declining to allow the fact finder to assess the liability of nonparties, and persons who did not settle a claim with plaintiff arising out of the same medical injury in the trial of this matter. For the reasons more fully set forth herein, this argument is misplaced.

The applicable standard in such a case is found in Syllabus point 4 of *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996):

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court 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 lower tribunal's order is an oft repeated error 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. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Petitioners very briefly address these important factors in their writ. After a thorough consideration of the above five-factor test, it becomes clear that the Petitioners have failed to meet their burden in showing the lower court exceeded its legitimate powers warranting this extraordinary remedy. And although all five factors need not be satisfied, Respondent asserts that Petitioners have failed to satisfy even one.

First, Petitioners, in one self-serving, conclusory statement, summarily address the first factor as follows: "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." *See* Petition for Writ of Prohibition at P. 8. While Petitioners provide nothing more than a simple denial that alternative, adequate means exist to obtain their requested relief, Respondent will nevertheless attempt to address Petitioners' arguments' shortcomings.

Without more, Petitioners assert "[i]t is apparent on its face," that no other adequate means for relief is available other than by seeking this Honorable Court's intervention via writ rather than

direct appeal. While the Respondent does not concede that other avenues of adequate relief, including direct appeal, are indeed unavailable, any such procedural roadblocks precluding Petitioners' typical channels of relief have set in motion by virtue of Petitioners' failure to attempt to avail themselves of the proper channels, including an attempt to join the Akron providers by way of Rule 14 of the West Virginia Rules of Civil Procedure and/or the development of *prima facie* case to support the affirmative defense of intervening cause. Having failed to do so, the Court is being asked to entertain Petitioners' thinly-veiled attempt to create a wholly new mechanism by which they can seek to avoid liability at the Respondent's expense. Respondent prays this Court will decline to acquiesce to such attempts.

Secondly, Petitioners assert they will suffer prejudice as their own error cannot be corrected on appeal. Without rehashing the many reasons this argument fails, Respondent simply states that one's own failures cannot bring about prejudice.

Third, and again in summary fashion, Petitioners state that the lower court's ruling is clearly erroneous. In one sentence, their support for this position is stated as follows: "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 law of the State of West Virginia – the Petitioners contend this was clearly not the Legislature's intent." *See* Petition for Writ of Prohibition at P. 9. Again, Petitioners seek to blame their own shortcomings on the lower court. The lower court properly denied Chalifoux's unfounded request to place nonparties and/or persons who have not settled a claim with the plaintiff arising out of the same medical injury on the jury's verdict form. This, in turn, put the Circuit Court as well as the Plaintiff in the rare position of having to argue and make rulings on the statutory interpretation of § 55-7B-9. Respondent will elaborate in the fifth and final consideration below. With respect to Petitioners' unsupported

assertion that the lower court's ruling is clearly erroneous, Respondent asserts the Circuit Court's ruling was correct, and relies on its analysis in Section V, Subsection B, below.

Fourth, for reasons which should be readily apparent by now, Petitioners' position that "[t]his issue is at risk of becoming an oft repeated error" (which it is not), is not based in fact. *See* Petition for Writ of Prohibition at P. 9. There is a perfectly obvious reason this issue, which is not in error, will likely not be repeated, as it also appears to have not come up before: parties are expected to use the available avenues rather than create new theories of doing such.

Fifth, and finally, the Petitioners assert the instant writ presents legal issues of first impression. Respondent does not argue that an attempt to place a nonparty or a person who has not settled a claim with the plaintiff arising out of the same medical claim on a verdict form isn't a novel one. Again, this is the direct result of the Petitioners' failure to attempt to join the nonparty persons, Akron providers, into the action, or establish a *prima facie* case for intervening cause. Respondent would posit this novel theory has never been addressed because Petitioners' procedural failures have uniquely positioned them to be the first to try this unwarranted approach. The "issue of verdict apportionment of nonparties in [the] MPLA" has not been addressed by this Court for good reason: nonparties are just that – nonparties. Simple joinder would have the oft followed result of transforming nonparty persons, Akron providers, into parties. It's not a magic trick; it's what every other defendant who properly follows the Rules does. Thus, Respondent asserts that this Court need not even reach the issue of statutorily interpreting the definition of "all alleged parties" in W. Va. Code § 55-7B-9.

B. The Circuit Court's Order denying Chalifoux's Motion to include Akron providers on the verdict form is in accord with West Virginia Code § 55-7B-9.

W. Va. Code § 55-7B-9, states, in relevant part, as follows:

> (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.***

(Emphasis supplied).

"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 Hosp. Corp.*, 240 W.Va. 663, 815 S.E.2d 474 (2018); *see also* Syl. Pt. 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951) ("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.").

In this case, the Circuit Court determined W. Va. Code § 55-7B-9(b) is clear, unambiguous and does not apply to the assessment of fault of the Akron providers, who are nonparty persons who have not settled a claim with the Respondent. *See* Order Denying Chalifoux's Combined Motion for Placement of Alleged Non-parties on Verdict Form, Petitioners' Appendix at 004-006.

This Honorable Court is not required to consider every possible iteration and application of the term "alleged parties." Instead, the Court need only determine whether nonparty persons, Akron providers, are "alleged parties" with respect to this case. The Respondent respectfully submits that they clearly are not.

W. Va. Code § 55-7B-9(b) is clear and unambiguous. § 55-7B-9(b) mandates the trier of fact to assess percentages of 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." § 55-7B-9(b) does *not* mandate the trier of fact to assess percentages of fault of "all alleged persons." The Akron providers fall into the class of nonparty persons who have *not* settled a claim with Respondent arising out of the same medical injury; therefore, § 55-7B-9(b) does not contemplate the Akron providers as "alleged parties."

The West Virginia Legislature clearly intended the phrase "all alleged parties" to *exclude* persons who *never were defendants* and/or have *not settled* a claim with plaintiff arising out of the same medical injury, evidenced by the West Virginia Legislature's 2016 amendments to § 55-7B-9(b). Respondent agrees with Petitioners that prior to July 1, 2016, § 55-7B-9(b) only authorized the fact finder's assessment of liability of "parties in the litigation at the time the verdict is rendered." *See* Petitioner for Writ of Prohibition at Pp. 10-11. Effective July 1, 2016 however, the West Virginia Legislature amended § 55-7B-9(b) to include "any person who has settled a claim with the plaintiff arising out of the same medical injury" in the class of "all alleged parties" for the purpose of the fact finder's assessment of fault. *Id.* at P. 11. Petitioners contend because the Legislature modified the phrase "parties in the litigation at the time the verdict is rendered" to "all alleged parties," this means that the word "parties" now includes the universe of all "persons." If the Legislature intended to include "all alleged persons" or "all alleged parties, including persons

who have *not* settled a claim with the plaintiff arising out of the medical injury" to the class of "all alleged parties," the statute would state as such. Consequently, W. Va. Code § 55-7B-9 simply does not authorize a fact finder to assess and apportion the fault of a nonparty, or a person who has not settled a claim with the plaintiff arising from the same medical injury.

Petitioners ask this Court to essentially substitute W. Va. Code § 55-7B-9 with W. Va. Code § 55-7-13d, which provides:

> 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.

W. Va. Code § 55-7-13d.

"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." Syl. Pt. 8, *Barber v. Camden Clark Memorial Hosp. Corp.*, 240 W.Va. 663, 815 S.E.2d 474 (2018).

Here, Petitioners concede the subject matter of W. Va. Code § 55-7-13d does not apply to the MPLA. *See* Petition for Writ of Prohibition at P. 11; *see also* W. Va. Code § 55-7-13(c)(i)(3). Consequently, the subject matter of W. Va. Code § 55-7-13d does not apply to this case, or W. Va. Code § 55-7B-9. It is noteworthy that the amendments to W. Va. Code § 55-7B-9 were made *after* the establishment of W. Va. Code § 55-7-13d. *See* Petition for Writ of Prohibition at Pp. 10-11. Hence, there is little room for doubt that if the Legislature intended W. Va. Code § 55-7-13d to be the rule governing several liability under the MPLA it simply would have stated as such. Because W. Va. Code § 55-7-13d does not relate to the same subject matter of W. Va. Code § 55-7B-9, W.

Va. Code § 55-7-13d and W. Va. Code § 55-7B-9 should *not* be read and applied together to conflate the Legislature's intent behind W. Va. Code § 55-7B-9. The Court should not countenance Petitioners' request to have this Honorable Court to legislate from the Bench.

Without basis, Petitioners contend the Circuit Court's decision to deny the fact finders' assessment of the Akron providers' fault provides them "no recourse to avoid being held joint (sic) liable for the negligent acts of parties not sued by the plaintiff." *See* Petition for Writ of Prohibition at P. 12. However, Petitioners failed to attempt to utilize Rule 14 of the West Virginia Rules of Civil Procedure, which provides a mechanism for nonparty persons to be joined in the litigation as parties. Rule 14 provides, in pertinent part:

> At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served ***upon a person not a party to the action*** who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff.

Rule 14 of the West Virginia Rules of Civil Procedure (Emphasis supplied). Stated otherwise, in order for a "person" to become a "party," the person must be properly joined to the action pursuant to Rule 14.

Petitioners cite to *Modular Bldg. Consultants of W.Va., Inc. v. Poerio, Inc.*, 235 W.Va. 474, 774 S.E.2d 555, 567 n.12 (2015), and *Clovis v. J.B. Hunt Transport, Inc.*, No. 1:18-CV-147, 2019 WL 4580045, at *1-2 (N.D.W. Va. Sept. 20, 2019), to support their argument "they cannot file a third-party complaint against non-party persons who are potentially liable for Respondent's injuries." *See* Petition for Writ of Prohibition at P. 4. However, neither of these cases support the Petitioners' argument. Remarkably, in both cases, the First-Party Defendant filed a third-party complaint. *See Modular Bldg. Consultants of W.Va., Inc.*, 235 W.Va. at 477, 774 S.E.2d at 558-59; *Clovis*, 2019 WL 4580045, at *1-2.

The Court in *Modular Bldg. Consultants of W. Va., Inc.* ultimately held that where a tortfeasor settles with an injured plaintiff and obtains a release for a joint tortfeasor, such release ***preserves*** the settling tortfeasor's right of contribution against the released joint tortfeasor. *Modular Bldg. Consultants of W. Va. Inc.*, 235 W.Va. at 484, 774 S.E.2d at 565. (Emphasis supplied) (Circuit court erred when it concluded that Modular Building Consultants of W. Va., Inc.'s claim of contribution was extinguished as a matter of law by its settlement with the plaintiff.) The Court in *Modular Bldg. Consultants of W. Va., Inc.* did not state First-Party Defendants cannot utilize Rule 14 of the West Virginia Rules of Civil Procedure to either have the fact finder assess the fault of a Third-Party Defendant, or at least preserve the First-Party Defendant's right to contribution from the Third-Party Defendant. On the contrary, the Court in *Modular Bldg. Consultants of W. Va., Inc.* determined Modular Building Consultants of W. Va., Inc. properly preserved its right to seek contribution based on a fact finder's assessment of the liability of all alleged defendants, despite Modular Building Consultants of W. Va., Inc.'s settlement with the plaintiff.

Similarly, in *Clovis*, the First-Party Defendant filed a third-party complaint; however, the United States District Court for the Northern District of West Virginia determined that the third-party complaint was flawed. Therefore, the court dismissed the third-party complaint, but nonetheless determined that pursuant to W. Va. Code § 55-7-13d, which does not apply to the facts of this case, the First-Party Defendant had preserved its opportunity to have the trier of fact to assess and apportion fault of any alleged tortfeasor, including the Third-Party Defendant. *Clovis*, 2019 WL 4580045, at *4. Thereby, the Court in *Clovis* arguably preserved the First-Party Defendant's right to several liability and seek contribution from dismissed Third-Party Defendant.

In any event, *Clovis* does not support Petitioners' position that West Virginia Rule of Civil Procedure 14 is not available to them.

In this case, the Petitioners did not attempt to file a third-party complaint against nonparty persons, Akron providers, which would have made the Akron providers "alleged parties" to the litigation W. Va. Code § 55-7B-9(b). Therefore, the Petitioners, not the Circuit Court, precluded any opportunity for the fact finder to assess the fault of the Akron providers pursuant to W. Va. Code § 55-7B-9(b).

Petitioners theorize Chalifoux cannot make a third-party claim against the Akron providers pursuant to Rule 14 of the West Virginia Rules of Civil Procedure. *See* Chalifoux's Motion at P. 6, Petitioners' Appendix at 072. However, Petitioners do not offer any authority to support their position. Moreover, the Petitioners **have not** alleged that the Akron providers should be parties. The Petitioners argue they **cannot** make these claims as a matter of law. The Petitioners cannot simultaneously argue that the Akron providers are "alleged parties" pursuant to W. Va. Code § 55-7B-9(b) while conceding, at the same time, that such allegations are impossible.

In conclusion, Judge Cramer properly determined W. Va. Code § 55-7B-9(b) does not apply to the assessment of fault of the Akron providers, who are non-party persons who have not settled a claim with the Respondent/Plaintiff; and therefore, Judge Cramer properly denied Chalifoux's Combined Motion for Placement of Alleged Non-parties on Verdict Form.

C. The Circuit Court did not rule that several liability is inapplicable when a defendant is not permitted to argue subsequent negligence as an intervening cause.

The Circuit Court did not rule that several liability is inapplicable to the MPLA. Furthermore, the Circuit court did not rule Petitioners are not permitted to argue the subsequent negligence of the Akron parties as an intervening cause. In deciding the way it did, the Circuit

Court merely cited to longstanding precedent 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. Jrisari*, 187 W. Va. 550, 551, 420 S.E.2d 541, 542 (1992). *See* Court Order at P. 4, Petitioners' Appendix at 101. In further support of its decision, 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). *See Id.* at P. 5, Appendix at P. 102.

The Petitioners assert the Circuit Court's ruling on this issue is inconsistent with several liability, and relies on outdated law, by citing only case law which preceded the 2003 changes to the MPLA creating the several liability provisions. Petitioners assert this holding completely ignores the legal effect of several liability in place since 2003 in medical negligence matters. It does not.

The Petitioners admit the several liability changes to medical professional liability actions do not overrule *Rine* or *Thornton*; however, they incorrectly argue that it alters their application. *See* Petitioner for Writ of Prohibition at P. 14. Without any authority to support their position, Petitioners seek to rewrite the longstanding law and substitute their own novel theory of what they believe the law ought to be, by asserting:

> "[t]o 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.

Id. at P. 15 Thus, Petitioners contend, "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." *Id.* The Petitioners' analysis in this regard is flawed because it is premised upon the ability of the trier of fact to lawfully assess and apportion the fault of a nonparty person, who has not settled a claim with plaintiff arising out of the same medical injury pursuant to W. Va. Code § 55-7B-9(b), which § 55-7B-9(b) does not contemplate.

The Petitioners are essentially asking this Honorable Court to allow them to blame unnamed healthcare providers for unspecified conduct. More than that, they are asking the Court to allow this even though they concede that the Akron providers will not be named parties to this case and will, thus, have no incentive to defend themselves. This would force the Respondent into the position of having to defend the unnamed Akron providers against ambiguous charges, all at enormous cost. This is a perversion of W. Va. Code § 55-7B-9.

Before that statute, a plaintiff had no obligation to sue and collect from each person he blamed for his injuries. He could sue one joint tortfeasor and collect all of his damages from that single defendant. Under W. Va. Code § 55-7B-9, a plaintiff now has an obligation to collect from

each defendant *he blames* for his injuries. What that statute does not say, however, is now a medical malpractice defendant can casually cast blame on individuals who were not and cannot be blamed by the plaintiff himself.

If the Petitioners wish to pursue the affirmative defense of intervening cause, they can presumably try as the Court did not preclude this available defense. Ultimately, the jury would be instructed that the Petitioners bear the burden of proof on that claim.

For obvious (but prejudicial reasons), the Petitioners would rather just have somebody ("non-party Akron providers"?) on the verdict form and make the Respondent and the jury sort all of that out. Notably, because the Petitioners haven't said who, exactly, they want to blame, the Respondent would have to consider the fault of and defend perhaps dozens of healthcare providers, including ER doctors, ER nurses, radiologists, floor nurses, internists and surgeons among other possibilities. The Respondent respectfully submits that this is not appropriate and need not be allowed.

Pursuant to W. Va. Code §55-7B-3, in order to prevail on his claims, the Respondent must prove:

> (1) The health care provider failed to exercise that degree of care, skill and learning required or expected of a reasonable, prudent health care provider in the profession or class to which the health care provider belongs acting in the same or similar circumstances; and
>
> (2) Such failure was a proximate cause of the injury or death.

The Circuit Court's decision does not relieve the Plaintiff of this burden. The Petitioner appears to believe that whatever he did or didn't do, the responsibility for Mr. Moellendick's devastating injuries, and eventual death, were really the fault of Mr. Moellendick's subsequent treating physicians in Akron. If that's how he feels, he may attempt to prove an intervening or

superseding cause defense if he can. However, simply placing such subsequent treating healthcare providers on the verdict form is not the solution to Chalifoux's problems.

Were the Petitioners' argument correct, West Virginia would revert to the "bad old days" of shotgun litigation. The Notice of Claim and Screening Certificate of Merit provisions of the MPLA, W. Va. Code § 55-7B-6, require a plaintiff in a medical malpractice case to sue only those physicians against whom he has meritorious claims that he is prepared to support through expert testimony. If a defendant could include other healthcare providers on the verdict form simply by asking that they be included, plaintiffs will be forced to name more defendants, needlessly increasing the cost to all involved.

Contrary to the Petitioners' position the Circuit Court's decision does *not* directly contradict 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. *Id.* at Pp. 15-16. The Circuit Court simply held that the nonparty persons, Akron providers, are not "alleged parties" within the meaning W. Va. Code § 55-7B-9(b). For these reasons, the Court should affirm the Circuit Court's decision to deny Chalifoux's motion and deny the Petition for Writ of Prohibition.

D. The Circuit Court properly determined that Respondent would suffer prejudice and prejudice was present.

Petitioners assert that the Circuit Court incorrectly noted "Defendants concede the relief they are requesting is *something akin* to the inclusion of [the Akron providers] 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.* (Emphasis supplied.)

The Court addressed Rule 14 and cited to Syl. Pt. 1, *Cava v. National Union Fire Ins., Co.*, 232 W. Va. 503, 753 S.E.2d 1 (2013), in part, because Chalifoux raised issues concerning Rule 14

in its Motion, and found the guidance of the West Virginia Supreme Court of Appeals in *Cava* to be instructive. *See* Chalifoux's Motion, Petitioners' Appendix at 071-72.

VI. CONCLUSION

For all of the reasons above, the Respondent/Plaintiff respectfully asks this Honorable Court to DENY the Petition for Writ of Prohibition, and affirm the Circuit Court's decision to deny Petitioners/Defendants' motion to allow the fact finder to assess and apportion the fault of nonparty persons, Akron providers, who have not settled a claim with Respondent/Plaintiff arising out of the same medical injury.

JOSEPH MOELLENDICK,

Respondent/Plaintiff,

By: _____

GEOFFREY C. BROWN, ESQ. WV Bar #9045
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
Telephone: (304) 242-8410
Counsel for Respondent-Plaintiff

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

No. 20-0929

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,	*
vs.	*
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

Service of the foregoing ***Response to Petition for Writ of Prohibition*** was had upon the defendants herein by lodging a true and correct copy thereof with the clerk, this 29th day of December, 2020.

David S. Givens, Esq.
Jordan V. Palmer, Esq.
FLAHERTY SENSABAUGH BONASSO PLLC
1225 Market Street
P.O. Box 6545
Wheeling, WV 26003
Counsel for Petitioners/Defendants Roland F. Chalifoux, Jr., D.O. and Roland F. Chalifoux, Jr. D.O., PLLC

The Honorable Jeffrey Cramer, Judge
Circuit Court of Marshall County
Marshall County Courthouse
600 Seventh Steet
Moundsville, West Virginia 26041

JOSEPH MOELLENDICK,

Respondent-Plaintiff,

By: _____

GEOFFREY C. BROWN, ESQ. WV Bar #9045
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
Telephone: (304) 242-8410
Counsel for Respondent-Plaintiff