No. 22-567

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DARRELL WINGETT and
CAROL WINGETT,

Petitioners/Plaintiffs Below,

v.

KISHORE K. CHALLA, M.D.,

Respondent/Defendant Below.

BRIEF OF PETITIONERS

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Petitioners respectfully submit that the Circuit Court erred by answering its certified question as follows: "Should the jury be allowed to consider the fault of a party who was originally named as a defendant but voluntarily dismissed by the plaintiff pursuant to either West Virginia Code § 55-7b-9, West Virginia Code § 55-7-13c, and/or West Virginia Code § 55-7-13d under the specific facts set forth the instant case? The Court answers this question: Yes."

The Petitioners submit the following specific points of error that arise from the Circuit Court's answer to its certified question:

A. THE CIRCUIT COURT ERRED IN ANSWERING ITS CERTIFIED QUESTION IN THE AFFIRMATIVE AS THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE WEST VIRGINIA MEDICAL PROFESSIONAL LIABILITY ACT DOES NOT PERMIT THE JURY TO CONSIDER THE FAULT OF THE DISMISSED DEFENDANTS IN THE UNDERLYING MATTER.

B. THE CIRCUIT COURT ERRED IN ANSWERING ITS CERTIFIED QUESTION IN THE AFFIRMATIVE AS THE MODIFIED COMPARATIVE FAULT STATUTE AND RELATED SECTIONS DO NOT APPLY TO THE UNDERLYING MATTER AS IT IS GOVERNED BY THE MPLA.

C. THE CIRCUIT COURT ERRED IN ANSWERING ITS CERTIFIED QUESTION IN THE AFFIRMATIVE AS THE RESPONDENT FAILED TO PROVE A CASE AGAINST THE DISMISSED DEFENDANTS IN THE UNDERLYING MATTER.

D. THE CIRCUIT COURT ERRED IN ANSWERING ITS CERTIFIED QUESTION IN THE AFFIRMATIVE AS THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE WEST VIRGINIA MEDICAL PROFESSIONAL LIABILITY ACT DOES NOT PERMIT EVIDENCE OF FAULT OF THE DISMISSED DEFENDANTS IN THE UNDERLYING MATTER WHEN THE ONLY EVIDENCE OF FAULT ELICITED WAS FROM A SCREENING CERTIFICATE OF MERIT SUBMTITED PRE-SUIT.

E. THE CIRCUIT COURT ERRED IN ANSWERING ITS CERTIFIED QUESTION IN THE AFFIRMATIVE AS PUBLIC POLICY DICTATES THAT THE FAULT OF THE DISMISSED DEFENDANTS IN THE UNDERLYING MATTER CANNOT BE CONSIDERED BY THE JURY.

III. STATEMENT OF THE CASE

This appeal arises from the June 30, 2022, *Certified Question Order* entered by the Circuit Court of Kanawha County, West Virginia in Civil Action No. 19-C-479. (*See generally* Wingett Appx. - Vol. I: 235-243). The underlying medical malpractice action of the Petitioners, Darrell and Carol Wingett (hereinafter "Petitioners"),[1] was originally filed on or about May 10, 2019, against Respondent Kishore K. Challa, M.D. (hereinafter sometimes referred to as "Respondent" or "Respondent Challa"), South Charleston Cardiology Associates, PLLC (hereinafter "SCCA"),[2] M. Salim Ratnani, M.D. (hereinafter "Dr. Ratnani") and Professional Cardiothoracic Surgery, PLLC (hereinafter "PCS"). (*See* Wingett Appx. – Vol. I: 1) (*See also* Wingett Appx. – Vol. I: 4). Prior to the filing of their civil action, Petitioners sent, by certified mail, the aforementioned defendants a Notice of Claim and Screening Certificate of Merit to comply with the prerequisite requirements of the West Virginia Medical Professional Liability Act (hereinafter "MPLA").

In their Complaint, Petitioners alleged that in May 2014, Darrell Wingett (hereinafter sometimes referred to as "Petitioner Darrell Wingett" or "Mr. Wingett") presented to Thomas Memorial Hospital with complaints of dizziness. Subsequent to Mr. Wingett's admission to Thomas Memorial Hospital, he was evaluated by Respondent Challa. Following his evaluation of Mr. Wingett, Respondent Challa recommended that Mr. Wingett have a permanent pacemaker implanted. Upon the recommendation of Respondent Challa, underlying defendant Dr. Ratnani

[1] Petitioners note for this Honorable Court that the claims of Carol Wingett were dismissed on October 20, 2021, and Mrs. Wingett was removed from the style of the case for the underlying civil action. (*See* Wingett Appx. - Vol. I: 197-98).

[2] Petitioners further note for this Honorable Court that the claims of the Petitioners against SCCA were also dismissed on October 20, 2021, and SCCA was removed from the style of the case for the underlying civil action. (*See* Wingett Appx. - Vol. I: 197-98).

was consulted. Mr. Wingett was evaluated by Dr. Ratnani, who implanted the permanent pacemaker in Mr. Wingett. (*See* Wingett Appx. – Vol. I: 6).

On May 12, 2017, nearly three (3) years following the implantation of his permanent pacemaker, Mr. Wingett presented to Charleston Area Medical Center with complaints of fever, chills and swelling at the site of his pacemaker. Mr. Wingett had developed a Methicillin-resistant Staphylococcus aureus ("MRSA") infection and his pacemaker was infected. It was determined that Mr. Wingett would benefit from an extraction of his dual chamber pacemaker system. On May 19, 2017, Mr. Wingett's pacemaker was extracted. Prior to his discharge, Petitioners alleged Mr. Wingett was advised that his pacemaker was not being utilized. (*See* Wingett Appx. – Vol. I: 6).

As a result, Petitioners asserted in their Complaint that Mr. Wingett's pacemaker was unnecessary in the first place. Specifically, Petitioners alleged that Respondent Challa deviated from the applicable standard of care by failing to accurately assess Mr. Wingett's symptoms as presented in May 2014 for permanent pacemaker implantation and by recommending implantation of a permanent pacemaker in May 2014 when it was not indicated and Mr. Wingett did not qualify for it. (*See* Wingett Appx. – Vol. I: 7). Petitioners further alleged that Dr. Ratnani deviated from the applicable standard of care by failing to accurately assess Mr. Wingett's symptoms as presented in May 2014 for permanent pacemaker implantation and by implanting a permanent pacemaker in May 2014 when it was not indicated and Mr. Wingett did not qualify for it. (*See* Wingett Appx. – Vol. I: 9-11). Petitioners also alleged that both of the aforesaid physicians' respective medical groups (i.e., SCCA and PCS) were vicariously liable for their alleged breaches of the standard of care. (*See* Wingett Appx. – Vol. I: 8-9 and 11-12).

On or about June 11, 2019, Respondent Challa and his respective medical group, SCCA, filed their Answer to the Complaint. (*See generally* Wingett Appx. – Vol. I: 14-25). On November

12, 2019, Petitioners filed their *Notice of Dismissal, without prejudice, of Defendants M. Salim Ratnani, M.D. and Professional Cardiothoracic Surgery, PLLC pursuant to Rule 41(a)(1) of the West Virginia Rules of Civil Procedure.* In their *Notice of Dismissal*, Petitioners asserted that they attempted to serve Dr. Ratnani without success. Petitioners further asserted that, upon information and belief, Dr. Ratnani no longer resided in West Virginia or the United States, but resided in Pakistan, which is not a member of the Hague Conference. As such, he could not be served with process. Petitioners also asserted that Dr. Ratnani's medical practice, PCS's license to do business in West Virginia was revoked on November 1, 2016. Moreover, Petitioners asserted that Dr. Ratnani and PCS were not necessary parties at the time of the filing of their *Notice of Dismissal.* (*See* Wingett Appx. – Vol. I: 30-31).

Respondent Challa and his respective medical practice, SCCA, filed *Defendants' Notice of Non-Party Fault* pursuant to West Virginia Code § 55-7-13d. In the *Notice of Non-Party Fault*, Respondent Challa alleged that the damages suffered by the Petitioners may have been caused in whole or in part by non-parties M. Salim Ratnani, M.D. and Professional Cardiothoracic Surgery, PLLC. The *Notice of Non-Party Fault* filed by Respondent Challa goes on to state the following:

> Defendants assert that this action is governed by the Medical Professional Liability Act (MPLA) which expressly provides "[t]he 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." W.Va. Code § 55-7B-9(b). The MPLA does not contain a notice requirement like West Virginia Code § 55-7-13d(a)(2); however, section § 55-7-13d(a)(2) does not contain language limiting its application to actions brought under the MPLA. In an abundance of caution, therefore, the Defendants, without waiving their position that this action is governed by the MPLA and not subject to section § 55-7-13d(a)(2), provide notice of non-party fault.
>
> (*See* Wingett Appx. – Vol. I: 26-29).

During the course of discovery, depositions of the parties' retained experts were taken in the underlying matter. At the deposition of the Petitioners' expert witness, Scott J. Denardo, M.D., Respondent Challa attempted, multiple times, to elicit opinions from Dr. Denardo against Dr. Ratnani based solely on Dr. Denardo's original Screening Certificate of Merit issued pre-suit. One of those exchanges during the deposition is as follows:

> Q: [...] I am trying to explore what, if any, opinions you continue to hold as it relates to Dr. Ratnani who was initially named and also referenced in your affidavit – in your certificate of merit, and was subsequently dismissed because they can't get ahold of him. But what I want to know is from the medicine is whether you're still critical of Dr. Ratnani. [...]
>
> A: So if Dr. Ratnani is a cardiothoracic surgeon, then, yes, I stand by the original certificate.

(*See* Wingett Appx. – Vol. I: 195-96).

Petitioners' expert disclosure filed in the underlying matter, which contained the expert report of Dr. Denardo, was devoid of any opinions against dismissed defendants Dr. Ratnani and PCS. (*See generally* Wingett Appx. – Vol. I: 32-43). A cursory review of Respondent Challa's expert disclosure shows that it also was devoid of any opinions against Dr. Ratnani and PCS. (*See* Wingett Appx. – Vol. I: 59-64).

During the deposition of Respondent Challa's retained expert, George H. Crossley, III, M.D., it became readily apparent that the Respondent did not retain an expert to offer opinions as to whether the actions and/or inactions of Dr. Ratnani and PCS were deviations in the standard of care and were a proximate cause of the damages suffered by the Petitioners. Respondent Challa's expert, Dr. Crossley, testified to the following at his deposition in this regard:

> Q: Dr. Crossley, as stated here in your Expert Disclosure, you are going to offer **no** opinions against Dr. Ratnani; correct?
>
> A: That's correct.

(*See* Wingett Appx. – Vol. I: 124-25)(**emphasis added**).

Prior to the initial Pre-Trial Conference set in the underlying matter, Petitioners filed *Plaintiffs' Motions in Limine*, which contained *Plaintiffs' Motion in Limine to Preclude Defendants Kishore K. Challa, M.D. and South Charleston Cardiology Associates, PLLC from any Admission of Evidence, Testimony or Argument of Non-Party Fault.* In their *Motion in Limine*, Petitioners' argued that Respondent Challa had not proven a case of medical malpractice against dismissed defendants Dr. Ratnani and PCS. Respondent Challa did not file a notice of claim, certificate of merit, or a third-party complaint against Dr. Ratnani and PCS, and did not retain an expert to offer opinions against them. Petitioners further noted that any attempt by Respondent Challa to rely on any testimony elicited from the Screening Certificate of Merit issued by the Petitioners pre-suit against Dr. Ratnani and PCS was prohibited by W.Va. Code § 55-7B-6(j). (*See generally* Wingett Appx. – Vol. I: 93-98).

Petitioners also argued that the statutory language of the MPLA related to assessing percentages of fault found in W.Va. Code § 55-7B-9 referenced in Respondent Challa's *Notice of Non-Party Fault* did not apply as dismissed defendants Dr. Ratnani and PCS were no longer defendants or parties in the civil action and did not settle with the Petitioners. (*See generally* Wingett Appx. – Vol. I: 93-98).

Furthermore, Petitioners argued in their *Motion in Limine* that Respondent Challa is not permitted to rely on the non-party fault provisions contained West Virginia Code § 55-7-13c and/or West Virginia Code § 55-7-13d as the language of the statute specifically excludes the application of its statutory scheme to cases that fall under the MPLA, and that another Circuit Court reached the same conclusion. (*See generally* Wingett Appx. – Vol. I: 93-98) and (*See also* Wingett Appx. – Vol. I: 126-31). Based upon these arguments, Petitioners contemporaneously filed a *Motion to*

Change the Style of Case to officially remove dismissed defendants Dr. Ratnani and PCS from the case caption prior to trial. (*See* Wingett Appx. – Vol. I: 98).

Respondent Challa responded to Petitioners' *Motion in Limine to Preclude Defendants Kishore K. Challa, M.D. and South Charleston Cardiology Associates, PLLC from any Admission of Evidence, Testimony or Argument of Non-Party Fault* by arguing that Dr. Ratnani and PCS are "alleged parties" within the meaning of W.Va. Code § 55-7B-9 of the MPLA and should be considered by the trier of fact in determining allocation of fault. (*See* generally Wingett Appx. – Vol. I: 134-41). Respondent Challa further argued that while he will not argue that Dr. Ratnani and PCS violated the standard of care with respect to their treatment of Mr. Wingett at trial, there was sufficient evidence and expert testimony for the jury to consider their fault pursuant to the MPLA. Respondent Challa based this argument on the fact that Petitioners served a Notice of Claim with a Screening Certificate of Merit against Dr. Ratnani and PCS, filed a Complaint naming Dr. Ratnani and PCS and certain testimony elicited from Petitioners' retained expert, Scott J. Denardo, M.D. (*See generally* Wingett Appx. – Vol. I: 134-41). For these reasons, Respondent Challa argued against removing Dr. Ratnani and PCS from the case caption prior to trial. (*See generally* Wingett Appx. – Vol. I: 134-41).

Prior to the scheduled Pre-Trial Conference, the Petitioners and Respondent Challa met and conferred and reached certain agreements and/or conclusions regarding the motions *in limine* filed by the parties. The Petitioners and Respondent Challa advised the Circuit Court of Kanawha County, West Virginia, pursuant to an *Agreed Order Regarding Motions in Limine*, that Court intervention would be required on *Plaintiffs' Motion in Limine to Preclude Defendants Kishore K. Challa, M.D. and South Charleston Cardiology Associates, PLLC from any Admission of*

Evidence, Testimony or Argument of Non-Party Fault and *Plaintiffs' Motion to Change Style of Case.* (*See* Wingett Appx. – Vol. I: 199-200)(*See also* Wingett Appx. – Vol. I: 213, 217).

On June 1, 2022, a Pre-Trial Conference was held in the underlying matter. During the hearing, the Circuit Court of Kanawha County, West Virginia considered *Plaintiffs' Motions in Limine*, which contained *Plaintiffs' Motion in Limine to Preclude Defendants Kishore K. Challa, M.D. and South Charleston Cardiology Associates, PLLC from any Admission of Evidence, Testimony or Argument of Non-Party Fault* and *Plaintiffs' Motion to Change Style of Case.* The Court determined and entered an *Agreed Order Regarding Pretrial Hearing* that the issue raised in these *Motions in Limine* would more appropriately be submitted to the Supreme Court of Appeals of West Virginia as a certified question and directed the Petitioners and Respondent Challa to submit a proposed certified question to the Circuit Court. (*See* Wingett Appx. – Vol. I: 232-234).

In accordance with the Circuit Court's *Agreed Order Regarding Pretrial Hearing*, the parties submitted a proposed Certified Question Order to the Circuit Court. On June 30, 2022, the Circuit Court entered its *Certified Question Order* which contained findings of fact and conclusions of law. (*See* Wingett Appx. – Vol. I: 235-43). In addition, the Circuit Court found that the Supreme Court of Appeals of West Virginia had reviewed a similar issue in *State ex rel. Chalifoux v. Cramer*, but that the issues were not directly on point to the specific facts and issues in the instant matter. As such, the Circuit Court concluded that the following question be certified to the West Virginia Supreme Court of Appeals and answered it as follows: "Should the jury be allowed to consider the fault of a party who was originally named as a defendant but voluntarily dismissed by the plaintiff pursuant to either West Virginia Code § 55-7b-9, West Virginia Code §

55-7-13c, and/or West Virginia Code § 55-7-13d under the specific facts set forth in the instant case? The Court answers this question: Yes." (*See* Wingett Appx. – Vol. I: 242).

Petitioners respectfully submit that under the specific facts in the underlying matter and the law in West Virginia, neither West Virginia Code § 55-7B-9 nor West Virginia Code § 55-7-13c and/or West Virginia Code § 55-7-13d permit the jury to consider the fault of dismissed defendants Dr. Ratnani and PCS. The Petitioners respectfully submit that the Circuit Court erred in answering the certified question contained in its *Certified Question Order* in the affirmative. For these and other reasons more fully set forth in the Petitioners' brief herein, the Petitioners respectfully request that this Honorable Court disagree with conclusion of the Circuit Court and answer the certified question contained in the *Certified Question Order* as No.

IV. SUMMARY OF ARGUMENT

The Circuit Court should not have answered the certified question contained in its *Certified Question Order* in the affirmative. The specific facts of the underlying matter do not permit the jury to be allowed to consider the fault of dismissed defendants Dr. Ratnani and PCS pursuant to either West Virginia Code § 55-7B-9, West Virginia Code § 55-7-13c, and/or West Virginia Code § 55-7-13d.

The Circuit Court erred in answering its certified question in the affirmative as Dr. Ratnani and PCS are not "defendants" or "parties" and did not have any "allegations" against them for the jury to be able to consider their fault as "alleged parties" pursuant to the MPLA; specifically, West Virginia Code § 55-7B-9. Dr. Ratnani and PCS were also not parties that entered into a settlement with the Petitioners pursuant to West Virginia Code § 55-7B-9(b).

The Circuit Court also erred in answering its certified question in the affirmative as West Virginia Code § 55-7-13c specifically states that it does not apply to the MPLA. Since the several

liability and allocation of fault provisions contained in W.Va. Code § 55-7-13c are not applicable to the MPLA, the Circuit Court also erred in not recognizing that the statutory scheme on the determination of such fault contained in W.Va. Code § 55-7-13d is also not applicable to the underlying matter governed by the MPLA. W.Va. Code § 55-7-13c is the section of the modified comparative fault statute that creates several liability, which permits defendants to include non-parties on the verdict form. Moreover, W.Va. Code § 55-7-13d, in comparison to W.Va. Code § 55-7B-9 of the MPLA, shows that the two are not completely compatible and certain provisions cannot be reconciled in practical application.

In its *Certified Question Order,* the Circuit Court recognized that its certified question was answered in the affirmative based upon the specific facts set forth in the instant case. The Petitioners respectfully submit that the specific facts set forth in the underlying matter do not support answering the certified question in the affirmative, as the Respondent did not prove a case of medical negligence against dismissed defendants Dr. Ratnani and PCS as required under the MPLA, the modified comparative fault statute and related sections or West Virginia common law. Additionally, the Circuit Court erred in rendering a certain finding of fact in its *Certified Question Order* as the MPLA does not permit the type of evidence contained within the Circuit Court's finding of fact to be elicited because it was based solely on a screening certificate of merit submitted pre-suit.

Finally, the Circuit Court failed to consider the public policy implications in answering its certified question in the affirmative under the specific facts in underlying matter. Petitioners submit that the Circuit Court did not balance the specific facts and circumstances in this case with the policy considerations of allowing a jury to consider the fault of dismissed defendants Dr. Ratnani and PCS when no case of medical negligence has been proven against them by the

Respondent. The Petitioners respectfully submit that to consider the fault of Dr. Ratnani and PCS under the specific facts of this case would not be a fair and efficient method of assisting the jury and would be prejudicial to the Petitioners. Accordingly, public policy dictates that the jury should not be permitted to consider the fault of dismissed defendants Dr. Ratnani and PCS in the underlying matter.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to this Honorable Court's Order dated February 27, 2023, this matter has been set for oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure during the September 2023 Term of Court. The Petitioners submit that the decisional process by this Honorable Court will be significantly aided by oral argument.

VI. ARGUMENT

"The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*." Syl. Pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 475 S.E.2d 172 (W.Va. 1996). It is well settled that the West Virginia Supreme Court of Appeals' review of a circuit court's answer to a certified question that interprets a statute is *de novo*. *Phillips v. Larry's Drive-In Pharmacy, Inc.* 647 S.E.2d 920, 924 (W.Va. 2007). "[W]here the issue...is clearly a question of law or involving the interpretation of a statute, we apply a *de novo* standard of review." *Id.* at 924. (citing Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 459 S.E.2d 415 (W.Va. 1995).

A. THE CIRCUIT COURT ERRED IN ANSWERING ITS CERTIFIED QUESTION IN THE AFFIRMATIVE AS THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE WEST VIRGINIA MEDICAL PROFESSIONAL LIABILITY ACT DOES NOT PERMIT THE JURY TO CONSIDER THE FAULT OF THE DISMISSED DEFENDANTS IN THE UNDERLYING MATTER.

In its *Certified Question Order*, the Circuit Court concluded that the underlying civil action was governed by the MPLA. (*See* Wingett Appx. – Vol. I: 240). The Circuit Court's certified

question stated, in part, that: "[s]hould the jury be allowed to consider the fault of a party who was originally named as a defendant but voluntarily dismissed by the plaintiff pursuant to ...W.Va. Code § 55-7b-9 ... under the specific facts set forth in the instant case?" (*See* Wingett Appx. – Vol. I: 242). Contrary to the Circuit Court's affirmative answer to its certified question, Petitioners respectfully submit that the specific facts set forth in the underlying matter and the clear and unambiguous language of the MPLA do not permit the jury to consider the fault of the dismissed defendants in the underlying matter.

On November 14, 2019, Petitioners filed their *Notice of Dismissal, without prejudice, of Defendants M. Salim Ratnani, M.D. and Professional Cardiothoracic Surgery, PLLC pursuant to Rule 41(a)(1) of the West Virginia Rules of Civil Procedure.* In their *Notice of Dismissal*, Petitioners asserted that Dr. Ratnani and PCS were not necessary parties at the time of the filing. (*See* Wingett Appx. – Vol. I: 31). Respondent Challa and his respective medical practice, SCCA, filed *Defendants' Notice of Non-Party Fault.* In the *Notice of Non-Party Fault*, Respondent Challa alleged that the damages suffered by the Petitioners may have been caused in whole or in part by non-parties Dr, Ratnani and PCS. The *Notice of Non-Party Fault* filed by Respondent Challa asserted, in part, that "this action is governed by the Medical Professional Liability Act (MPLA) which expressly provides "[t]he 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." (*See* Wingett Appx. – Vol. I: 26).

The MPLA has a specific statutory section titled "Several Liability." In the MPLA's "Several Liability" section, it states that "[i]n 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."

See W.Va. Code § 55-7B-9(a). This section goes on to state that "[...] the jury shall be instructed to answer special interrogatories...as to...[t]he percentage of fault, if any, attributable to each of the ***defendants***." *See* W.Va. Code § 55-7B-9(a)(5)(***emphasis added***). This section of the MPLA further states that "[t]he 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." *See* W.Va. Code § 55-7B-9(b)(***emphasis added***).

This Court has held that in deciding the meaning of a statutory provision, it looks first to the statute's language. If the text, given its plain meaning, answers the interpretive question, the language must prevail and further inquiry is foreclosed." *See Appalachian Power Co. v. State Tax Dep't of West Virginia,* 466 S.E.2d 424, 438 (W.Va. 1995); *see also* Syl. Pt. 2, *Crockett v. Andrews,* 172 S.E.2d 384 (W. Va. 1970)("Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation."); and Syl. Pt. 2, *State v. Epperly,* 65 S.E.2d 488 (W.Va. 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 the case *sub judice*, upon the filing of Petitioners' *Notice of Dismissal, without prejudice, of Defendants M. Salim Ratnani, M.D. and Professional Cardiothoracic Surgery, PLLC pursuant to Rule 41(a)(1) of the West Virginia Rules of Civil Procedure*, Dr. Ratnani and PCS were no longer "defendants" or "parties" in the underlying civil action and there were no longer "allegations" against either. Additionally, Dr. Ratnani and PCS were not parties that entered into a settlement with the Petitioners. *See State ex rel. Chalifoux v. Cramer*, 2021 WL 2420196 at *4-5 (W.Va. 2021)(finding prohibitory relief was not entitled to an appellant where a circuit court held that because there were no claims or allegations against certain health care providers, the

health care providers were not "alleged parties" under W.Va. Code § 55-7B-9).

Accordingly, the Circuit Court was in error to answer its certified question in the affirmative as the clear language of W.Va. Code § 55-7B-9 does not permit the jury to consider the fault of the dismissed defendants in the underlying matter.

B. THE CIRCUIT COURT ERRED IN ANSWERING ITS CERTIFIED QUESTION IN THE AFFIRMATIVE AS THE MODIFIED COMPARATIVE FAULT STATUTE AND RELATED SECTIONS DO NOT APPLY TO THE UNDERLYING MATTER AS IT IS GOVERNED BY THE MPLA.

The Circuit Court's certified question set forth in its *Certified Question Order* states, in part: "[s]hould the jury be allowed to consider the fault of a party who was originally named as a defendant but voluntarily dismissed by the plaintiff pursuant to either W.Va. Code § 55-7-13c and/or W.Va. Code § 55-7-13d ... under the specific facts set forth in the instant case?" (*See* Wingett Appx. – Vol. I: 242). Contrary to the Circuit Court's affirmative answer to its certified question, Petitioners respectfully submit that the allocation of fault and/or non-party fault provisions contained in West Virginia Code § 55-7-13c and/or West Virginia Code § 55-7-13d do not apply as the underlying civil action is governed by the MPLA.

In its *Certified Question Order*, the Circuit Court recognized and concluded that the underlying civil action was governed by the MPLA and that West Virginia Code § 55-7-13c does not apply to the MPLA. (*See* Wingett Appx. – Vol. I: 240). The language of the statute states the following regarding its inapplicability to the MPLA:

"(i) This section does not apply to the following statutes:

(1) Article twelve-a, chapter twenty-nine of this code;

(2) Chapter forty-six of this code; and

(3) Article seven-b, chapter fifty-five of this code.

See W.Va. Code § 55-7-13c(i)(3)**(emphasis added)**.

The Circuit Court also concluded in its *Certified Question Order* that West Virginia Code § 55-7-13d provides "[i]n 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. W.Va. Code § 55-7-13d(1)." The Circuit Court further concluded that "[f]ault of a nonparty shall be considered if the plaintiff entered into a settlement agreement with the nonparty or if a defendant 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...W.Va. Code § 55-7-13d(2)." (*See* Wingett Appx. – Vol. I: 240).

Petitioners respectfully submit that since the several liability and allocation of fault provisions contained in W.Va. Code § 55-7-13c are not applicable to the MPLA, the statutory scheme on the determination of such fault contained in W.Va. Code § 55-7-13d is also not applicable to the underlying matter governed by the MPLA. While W.Va. Code § 55-7-13d does not contain the specific exempt language regarding the MPLA as W.Va. Code § 55-7-13c, W.Va. Code § 55-7-13c is the section of the modified comparative fault statute that creates several liability, which permits defendants to include non-parties on the verdict form.

As a practical matter, it is obvious that the West Virginia Legislature did not intend for W.Va. Code § 55-7-13c or W.Va. Code § 55-7-13d to apply to civil actions brought pursuant to the MPLA. A cursory review of the language in these two sections compared to the MPLA's "Several Liability" section found in W.Va. Code § 55-7B-9 shows that the two are not completely compatible and certain provisions cannot be reconciled in practical application. For example, W.Va. Code § 55-7B-9 states, in part, that "[t]o 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 from the same medical injury." *See* W.Va. Code § 55-7B-9(d). W.Va. Code § 55-7-13d(a)(3) states, in part, that "where a plaintiff has settled with a party or non-party before verdict, that plaintiff's recovery will be reduced in proportion to the percentage of fault assigned to the settling party or non-party, rather than by the amount of the non-party's or party's settlement." *See* W.Va. Code § 55-7-13d(a)(3). Simply put, the MPLA allows for the reduction of the verdict for pre-verdict settlements, while the modified comparative fault statute and related sections allow for reduction of the plaintiff's recovery by the percentage of fault assigned to the party or non-party that settled.

The Circuit Court's *Certified Question Order* clearly acknowledges that West Virginia Code § 55-7-13c does not apply to matters governed by the MPLA. However, it still affirmatively deems a jury should be allowed to consider the fault of a party who was originally named as a defendant but voluntarily dismissed in a civil action brought pursuant to the MPLA. In so doing, the Circuit Court overlooked the total statutory scheme between the several liability and allocation of fault provisions contained in W.Va. Code § 55-7-13c and the determination of such fault contained in W.Va. Code § 55-7-13d. The Circuit Court did not consider the practical application of these sections with the MPLA to determine if they were compatible or reconcilable. Accordingly, Petitioners respectfully submit that the allocation of fault and/or non-party fault provisions contained in West Virginia Code § 55-7-13c and/or West Virginia Code § 55-7-13d do not apply to the underlying civil action, which is governed by the MPLA.

C. THE CIRCUIT COURT ERRED IN ANSWERING ITS CERTIFIED QUESTION IN THE AFFIRMATIVE AS THE RESPONDENT FAILED TO PROVE A CASE AGAINST THE DISMISSED DEFENDANTS IN THE UNDERLYING MATTER.

The certified question contained within the Circuit Court's *Certified Question Order* was

answered in the affirmative based upon the specific facts set forth in the instant case. (*See* Wingett Appx. – Vol. I: 242). Petitioners respectfully submit that the specific facts set forth in the underlying matter do not support answering the certified question in the affirmative as Respondent Challa did not prove a case of medical negligence against dismissed defendants Dr. Ratnani and PCS as required under the MPLA, the modified comparative fault statute and related sections and West Virginia common law.

Once the Petitioners filed their *Notice of Dismissal, without prejudice, of Defendants M. Salim Ratnani, M.D. and Professional Cardiothoracic Surgery, PLLC pursuant to Rule 41(a)(1) of the West Virginia Rules of Civil Procedure*, Respondent Challa had notice that Dr. Ratnani and PCS were no longer parties in the underlying MPLA matter. Despite receiving this *Notice of Dismissal*, Respondent Challa took no steps to prove a case of medical negligence against them pursuant to the MPLA. Respondent Challa did not file a notice of claim, certificate of merit or a third-party complaint against Dr. Ratnani or PCS. Moreover, Respondent Challa did not retain an expert to offer opinions against them as required by the MPLA. Once Dr. Ratnani and PCS were dismissed from the underlying action, Respondent Challa had every opportunity to file a notice of claim, certificate of merit, and a third-party complaint against them and/or retain an expert to offer opinions as to whether Dr. Ratnani and PCS's actions and/or inactions were a breach in the standard of care and a proximate cause of the Petitioners' damages.

If Respondent Challa believed that Dr. Ratnani and PCS were responsible in the underlying matter, they should have done what the MPLA requires them to do and file a notice of claim, certificate of merit, and a third-party complaint against them and retain an expert to offer opinions against them. Respondent Challa did not do it in the underlying matter. Thus, Respondent Challa did not prove a case of medical negligence against dismissed defendants Dr. Ratnani and PCS

under the MPLA.

As discussed *supra*, Petitioners submit that West Virginia Code § 55-7-13c and/or West Virginia Code § 55-7-13d do not apply to the underlying civil action as it is governed by the MPLA. Assuming *arguendo* that it does, Respondent Challa also did not prove a case of medical negligence against Dr. Ratnani and PCS under the modified comparative fault statute and related sections. West Virginia Code § 55-7-13a states that "'comparative fault' means the degree to which the fault of a person was a proximate cause of an alleged injury or death..." *See* W.Va. Code § 55-7-13a(a). Importantly, West Virginia Code § 55-7-13d(6)(D) states "[t]he burden of alleging and proving comparative fault shall be upon the person who seeks to establish such fault..."

As set forth above, Respondent Challa did not take any steps to prove a case of medical negligence against dismissed defendants Dr. Ratnani and PCS. While Petitioners submit that the modified comparative fault statute and related section are not applicable to the underlying MPLA matter, it is clear from the specific facts herein that Respondent Challa did not meet the burden of proving a case of medical negligence against Dr. Ratnani and PCS under these statutes.

Furthermore, this Honorable Court has held that "[i]t is improper for counsel to make arguments to the jury regarding a party's omission from a lawsuit or suggesting that the absent party is solely responsible for the plaintiff's injury where the evidence establishing the absent party's liability has not been fully developed." *See* Syl. Pt. 2, *Doe v. Wal-Mart Stores, Inc.*, 558 S.E.2d 663 (W.Va. 2001). As set forth above, Respondent Challa took no steps to prove a case of medical negligence against Dr. Ratnani and PCS and did not fully develop evidence against them under the MPLA; and therefore, West Virginia common law prohibits the jury from considering their fault.

Based upon the foregoing, Petitioners respectfully submit that Respondent Challa did not prove a case of medical negligence against dismissed defendants Dr. Ratnani and PCS in the underlying action. Respondent Challa had every opportunity to prove or develop a case of medical negligence against them, but took no steps to do so. Accordingly, the specific facts set forth in the underlying matter do not support the Circuit Court's affirmative answer of its certified question, as Respondent Challa did not fulfill his burden and prove a case of medical negligence against dismissed defendants Dr. Ratnani and PCS as required under the MPLA, the modified comparative fault statute and related sections and West Virginia common law.

D. THE CIRCUIT COURT ERRED IN ANSWERING ITS CERTIFIED QUESTION IN THE AFFIRMATIVE AS THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE WEST VIRGINIA MEDICAL PROFESSIONAL LIABILITY ACT DOES NOT PERMIT EVIDENCE OF FAULT OF THE DISMISSED DEFENDANTS IN THE UNDERLYING MATTER WHEN THE ONLY EVIDENCE OF FAULT ELICITED WAS FROM A SCREENING CERTIFICATE OF MERIT SUBMTITED PRE-SUIT.

In its *Certified Question Order*, the Circuit Court rendered the following finding of fact "[a]t deposition, Plaintiff's expert witness, Scott J. Denardo, M.D. was critical of Dr. Ratnani and testified that the opinions he held as to Dr. Ratnani contained in his original screening certificate of merit and testified to at deposition were the same as those expressed against Dr. Challa particularly regarding the violation of the standard care." (*See* Wingett Appx. – Vol. I: 238). Petitioners respectfully submit that the Circuit Court erroneously rendered this finding of fact in support of answering its certified question in the affirmative as the MPLA does not permit this type of evidence to be elicited, which is based solely on a screening certificate of merit submitted pre-suit.

As this Honorable Court well knows, the MPLA has specific prerequisites a plaintiff must meet before formally filing a civil lawsuit against a health care provider. One of those prerequisites

is serving a notice of claim and screening certificate of merit on each health care provider the plaintiff intends to file a civil lawsuit against. *See generally*, W.Va. Code § 55-7B-6. Petitioners complied with these prerequisites and served and/or attempted to serve notices of claim and screening certificates of merit in the underlying matter.

During the course of discovery and nearly a year after Petitioners dismissed Dr. Ratnani and PCS, the deposition of Petitioners' retained expert, Scott J. Denardo, M.D., was taken in the underlying matter. Several times during the deposition, Respondent Challa attempted to elicit testimony regarding the opinions Dr. Denardo rendered against dismissed defendant Dr. Ratnani in his screening certificate of merit that was issued pre-suit. One of Respondent Challa's attempts to elicit such testimony from Dr. Denardo based upon his screening certificate of merit is as follows:

> Q: [...] **I am trying to explore what, if any, opinions you continue to hold as it relates to Dr. Ratnani who was initially named and also referenced in your affidavit – in your certificate of merit**, and was subsequently dismissed because they can't get ahold of him. But what I want to know is from the medicine is whether you're still critical of Dr. Ratnani. [...]
>
> A: So if Dr. Ratnani is a cardiothoracic surgeon, then, yes, I stand by the original certificate.

(*See* Wingett Appx. – Vol. I: 195-96)(**emphasis added**).

It is apparent that the testimony elicited during Dr. Denardo's deposition regarding dismissed defendant Dr. Ratnani was based solely on the opinions held in Dr. Denardo's screening certificate of merit.

West Virginia Code § 55-7B-6 states "[n]otwithstanding any other provision of this code, a notice of claim, a health care provider's response to any notice claim, a screening certificate of merit, and the results of any mediation conducted pursuant to the provisions of this section **are confidential and are not admissible as evidence in any court proceeding** unless the court, upon

hearing, determines that failure to disclose the contents would cause a miscarriage of justice." *See* W.Va. Code § 55-7B-6(j)(**emphasis added**). Petitioners' *Motion in Limine to Preclude Defendants Kishore K. Challa, M.D. and South Charleston Cardiology Associates, PLLC from any Admission of Evidence, Testimony or Argument of Non-Party Fault* argues and references this prohibition contained within the MPLA. (*See* Wingett Appx. – Vol. I: 96).

In the present case, Respondent Challa never sought a hearing from the Circuit Court to use the contents of the screening certificate of merit at deposition or at any time during the underlying matter. Also, any argument by Respondent Challa in an attempt to meet the "miscarriage of justice" relief contained in W.Va. Code § 55-7B-6(j) is meritless based upon his own failure to prove a case of medical negligence against Dr. Ratnani. This is further supported by the fact that Respondent Challa maintained and represented to the Circuit Court in the underlying matter that he does "not allege and will not argue at trial" that Dr. Ratnani and PCS "were negligent with respect to the care and treatment of Darrell Wingett." (*See* Wingett Appx. – Vol. I: 135).

Based upon the specific facts in the underlying matter, Petitioners respectfully submit that the Circuit Court erroneously rendered its finding of fact regarding Dr. Denardo's testimony, which was based solely on his pre-suit screening certificate of merit, as the MPLA does not permit this type of evidence.

E. THE CIRCUIT COURT ERRED IN ANSWERING ITS CERTIFIED QUESTION IN THE AFFIRMATIVE AS PUBLIC POLICY DICTATES THAT THE FAULT OF THE DISMISSED DEFENDANTS IN THE UNDERLYING MATTER CANNOT BE CONSIDERED BY THE JURY.

As discussed *supra*, Petitioners submit that the Circuit Court erred in answering the certified question in the affirmative in its *Certified Question Order*. In so doing, the Circuit Court did not balance the specific facts and circumstances in this case with the policy considerations of

allowing a jury to consider the fault of dismissed defendants Dr. Ratnani and PCS when no case of medical negligence has been proven against them by Respondent Challa as discussed in Section C, *supra*. The Petitioners respectfully submit that under the specific facts and circumstances in this case, public policy dictates that the jury cannot consider the fault of Dr. Ratnani and PCS.

In weighing the policy considerations such as the burden of establishing and putting forth evidence of the fault of a non-party to assist a jury and making an affirmative showing at trial that the non-party is liable to assist a jury in apportioning fault, such policy considerations clearly weigh against a jury considering the fault of Dr. Ratnani and PCS in the underlying matter. Here, Respondent Challa took no steps to prove a case or fully develop evidence of medical negligence against Dr. Ratnani and PCS pursuant to the MPLA. Additionally, and more importantly, Respondent Challa represented to the Circuit Court that he does not plan to argue or make an affirmative showing at trial that Dr. Ratnani and PCS were negligent with respect to the care and treatment of Darrell Wingett." (*See* Wingett Appx. – Vol. I: 135).

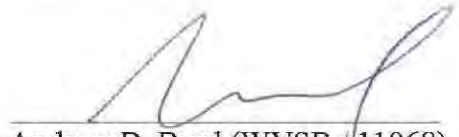
In light of the foregoing, Petitioners respectfully submit to this Honorable Court the following rhetorical questions: How is it a fair and efficient method to allow the jury to consider the fault of Dr. Ratnani and PCS under the MPLA when no such evidence has been established against them by Respondent Challa? How is it a fair and efficient method to allow the jury to consider the fault of Dr. Ratnani and PCS under the MPLA when Respondent Challa is not even going to allege or argue at trial that they were negligent with respect to their care and treatment of Petitioner Darrell Wingett? Simply put, to consider the fault of Dr. Ratnani and PCS under the specific facts of this case would not be a fair and efficient method of assisting the jury and would be prejudicial to the Petitioners. Accordingly, public policy dictates the jury should not be

permitted to consider the fault of dismissed defendants Dr. Ratnani and PCS in the underlying matter.

VII. CONCLUSION

WHEREFORE, for the reasons set forth herein, Petitioners Darrell and Carol Wingett, by and through counsel, respectfully pray that this Honorable Court disagree with the conclusion of the Circuit Court and answer the certified question contained in the Circuit Court's *Certified Question Order* as No. In addition, Petitioners further pray for such further and full relief as this Honorable Court deems appropriate under the circumstances.

Submitted by:



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No. 22-567

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DARRELL WINGETT and
CAROL WINGETT,

Petitioners/Plaintiffs Below,

v.

KISHORE K. CHALLA, M.D.,

Respondent/Defendant Below.

CERTIFICATE OF SERVICE

I, Andrew D. Byrd, counsel for Petitioners/Plaintiffs Below, certify that on this 10th day of April, 2022, a true copy of the foregoing ***"Brief of Petitioners,"*** and ***"Appendix of Exhibits to the Certified Question on Appeal – Volume I"*** was served upon counsel of record via the File&ServeXpress system and hand delivery addressed as follows:

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