No. 22-567

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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.

REPLY BRIEF OF PETITIONERS

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II. BRIEF REBUTTAL TO RESPONDENT'S STATEMENT OF THE CASE

In his *Response Brief*, Respondent Kishore K. Challa, M.D. (hereinafter "Respondent Challa") states that "this case presents a straightforward question and answer as to whether the jury should consider the fault of a defendant-physician voluntarily dismissed without prejudice by a plaintiff *even though plaintiff's expert witness holds the opinion the physician was negligent*." (*See* pg. 1 of *Respondent's Response Brief*)(*emphasis added*). Petitioners respectfully submit that Respondent's statement in this regard is an attempt to distort the specific facts of this case regarding the opinions of Petitioners' expert and the circumstances reflected in the record.

To begin with, a cursory review of the Petitioners' expert disclosure filed in the underlying matter, which contained the expert report of Scott J. Denardo, M.D., is devoid of any opinions against dismissed defendants M. Salim Ratnani, M.D. (hereinafter "Dr. Ratnani") and Professional Cardiothoracic Surgery, PLLC (hereinafter "PCS"). In fact, nowhere do the names of dismissed defendants Dr. Ratnani and PCS appear in the expert report of Dr. Denardo. (*See generally* Wingett Appx. – Vol. I: 40-43).

Also, Respondent Challa's statement that Petitioners' expert "holds the opinion" that dismissed defendants Dr. Ratnani and PCS were negligent is not based upon an independent opinion of Dr. Denardo but is based solely upon testimony elicited at his deposition. The testimony elicited from Dr. Denardo was from information regarding dismissed defendants Dr. Ratnani and PCS contained in the Notice of Claim and Screening Certificate of Merit prepared by Dr. Denardo prior to the filing of the underlying civil action, which is not permitted by the MPLA. This is clear from the testimony and the comments made by Respondent Challa's counsel during an exchange with counsel for the Petitioners at the deposition of Dr. Denardo: "Did he not sign the ***affidavit***?"…"I read his ***affidavit*** as saying Dr. Ratnani had an obligation to evaluate the patient,

and his failure – and went ahead with the implantation of a pacemaker that shouldn't have been implanted…." (*See* Wingett Appx. – Vol. I: 194)(***emphasis added***)(*See also* Wingett Appx. – Vol. I: 191-96).

Importantly, Respondent Challa represented to the Circuit Court that the testimony elicited from Dr. Denardo was based solely upon information in the Notice of Claim and Screening Certificate of Merit prepared by Dr. Denardo regarding dismissed defendants Dr. Ratnani and PCS. Specifically, Respondent Challa made the following statement, in footnote to the Circuit Court: "[m]oreover, in the deposition of Plaintiffs' expert, Dr. Denardo, he refers to the screening certificate of merit against Dr. Ratnani and testified consistently therewith." (*See* Wingett Appx. – Vol. I: 137).

Petitioners maintain that the aforesaid testimony elicited from Dr. Denardo during his deposition is not permitted pursuant to the MPLA, specifically W.Va. Code § 55-7B-6(j). Respondent Challa represented to the Circuit Court, and now this Court, that failure to disclose the contents of the referenced notices of claim and screening certificates of merits issued to Dr. Ratnani and PCS would cause a "miscarriage of justice given the circumstances of this case." (*See* Footnote 1, pg. 2 of *Respondent's Response Brief*). As set forth more fully below, Respondent Challa took no steps in the underlying matter to request a hearing as required by W.Va. Code § 55-7B-6(j) to determine if it truly would be a "miscarriage of justice."

Additionally, Respondent Challa attempts to convey to this Court that his retained expert is not critical of Dr. Ratnani's implantation of the pacemaker because he supports Respondent Challa's care of Mr. Wingett. There is no indication anywhere in the record that Respondent Challa's expert performed an analysis of whether he would be critical or not of dismissed defendants Dr. Ratnani and PCS. In fact, a cursory review of Respondent Challa's expert

disclosure shows that it is devoid of any consideration or opinions as to Dr. Ratnani and PCS. (*See* Wingett Appx. – Vol. I: 59-64). Petitioners submit that it appears from the record that Respondent Challa's expert was never asked to perform such an analysis.

III. ARGUMENT

A. THE CIRCUIT COURT ERRED IN ANSWERING ITS CERTIFIED QUESTION IN THE AFFIRMATIVE AS THE SPECIFIC FACTS OF THIS CASE AND THE WEST VIRGINIA MEDICAL PROFESSIONAL LIABILITY ACT ESTABLISH THAT THE RESPONDENT FAILED TO PROVE A CASE AGAINST THE DISMISSED DEFENDANTS.

In his *Response Brief*, Respondent Challa claims that sufficient evidence exists to establish the elements of proof required by the MPLA as against dismissed defendants Dr. Ratnani and PCS. Respondent Challa asserts that he properly relied upon Dr. Denardo's *opinions* as evidence of fault against dismissed defendants Dr. Ratnani and PCS. (*See generally*, pgs. 19-26 of *Respondent's Response Brief*)(*emphasis added*). Petitioners respectfully submit that Respondent Challa's argument improperly characterizes the "opinions" of Dr. Denardo and ignores the clear statutory language of the MLPA.

The MPLA states that "[t]he following are necessary elements of proof that an injury or death resulted from the failure of a health care provider to follow the accepted standard of care: (1) [t]he 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) [s]uch failure was a proximate cause of the injury or death. *See* W.Va. Code § 55-7B-3. The MPLA requires that the standard of care and breach thereof as set forth in the aforesaid requisite elements of proof be established by the testimony of a knowledgeable and competent expert witness. *See* W.Va. Code § 55-7B-7. Respondent Challa does not dispute these MPLA requirements. (*See* pg. 20 of *Respondent's Response Brief*).

Respondent Challa insists that he appropriately, through Petitioners' expert witness, identified sufficient supporting evidence pursuant to the MPLA to allow the jury to consider the fault of dismissed defendants Dr. Ratnani and/or PCS. *Id.* However, the supporting evidence referenced by Respondent Challa does not exist in the written opinions of the Petitioners' expert, Dr. Denardo. A cursory review of the Petitioners' expert disclosure filed in the underlying matter, which contained the expert report of Dr. Denardo, is devoid of any opinions against dismissed defendants Dr. Ratnani and PCS. The names of these dismissed defendants are nowhere to be found in the expert report of Dr. Denardo. (*See generally* Wingett Appx. – Vol. I: 40-43).

Given the inability to rely on written opinions and having no expert of its own on the matter, Respondent Challa turned to the testimony of Dr. Denardo and claims that he testified, under oath, that Dr. Ratnani committed a violation of the standard of care as evidenced by the failure to follow the 2012 guidelines. (*See* pg. 21 of *Respondent's Response Brief*). Respondent Challa's position that he properly relied upon Dr. Denardo's opinions as evidence of fault against dismissed defendants Dr. Ratnani and PCS fails for two reasons.

First, it is apparent that the testimony elicited during Dr. Denardo's deposition regarding dismissed defendant Dr. Ratnani was based solely upon the information set forth in Dr. Denardo's screening certificate of merit prepared prior to the filing of the underlying civil action. It was not based upon an independent opinion of Dr. Denardo rendered during the litigation in this matter. This is readily apparent from the deposition testimony of Dr. Denardo and the comments made by Respondent Challa's counsel during an exchange with counsel for the Petitioners at Dr. Denardo's deposition, discussed *supra*. (*See* Wingett Appx. – Vol. I: 194)(*See also* Wingett Appx. – Vol. I: 191-96).

It is also apparent that the testimony elicited during Dr. Denardo's deposition regarding dismissed defendant Dr. Ratnani was based solely upon the information set forth in Dr. Denardo's screening certificate of merit as Respondent Challa represented to the Circuit Court, in Footnote 1 of its response 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*, the following: "[m]oreover, in the deposition of Plaintiffs' expert, Dr. Denardo, he refers to the screening certificate of merit against Dr. Ratnani and testified consistently therewith." (*See* Wingett Appx. – Vol. I: 137).

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***). Thus, Petitioners submit that Respondent Challa is prohibited by the MPLA from relying on Dr. Denardo's deposition testimony regarding Dr. Ratnani, that was based solely upon the information set forth in Dr. Denardo's screening certificate of merit prepared prior the filing of the underlying civil action.

Second, Respondent Challa has maintained in this matter that failure to disclose the contents of the notices of claim and screening certificates of merits issued to Dr. Ratnani and PCS would cause a miscarriage of justice given the circumstances of this case. Particularly, Respondent Challa claims that it "raised and therefore preserved" the argument that it would cause a miscarriage of justice if not disclosed. (*See* Footnote 1, pg. 2 and Footnote 83, pg. 26 of *Respondent's Response Brief*).

Contrary to Respondent Challa's assertion, to preserve such an argument, the MPLA clearly required Respondent Challa to take certain steps with the Circuit Court. In particular, the MPLA required Respondent Challa to request the Circuit Court hold a hearing to determine if the failure to disclose the contents of Dr. Denardo's screening certificate of merit as to Dr. Ratnani would cause a miscarriage of justice. *See* W.Va. Code § 55-7B-6(j). Respondent Challa took no steps in the underlying matter to request a hearing or seek a determination by the Circuit Court as required by MPLA at any time during the pendency of the underlying matter; especially not before the deposition of Dr. Denardo or the pre-trial conferences in the matter. Accordingly, Petitioners submit that Respondent Challa has waived any right to such determination in this matter for his failure to adhere to the requirements set forth in W.Va. Code § 55-7B-6(j).

In addition, Respondent Challa argues that the Petitioners' suggestion that he was required to file a crossclaim or third-party complaint against Dr. Ratnani and/or PCS is unsupported. In turn, Respondent Challa relies on the *State ex. rel. March-Westin Co., Inc. v. Gaujot,* 879 S.E.2d 770 (W.Va. 2022) for the proposition that the jury cannot properly assess the liability, if any, of Respondent Challa without also assessing the fault of dismissed defendant Dr. Ratnani. (*See* pgs. 21 and 24 of *Respondent's Response Brief*). While recognizing the *March-Westin* case dealt with W.Va. Code § 55-7-13d, Respondent Challa believes that the allocation of fault analysis therein can also be applied to the MPLA; specifically, W.Va. Code § 55-7-9(b). *Id.* at 22.

The *March-Westin* case dealt with whether fault could be assessed to a non-party governmental entity subject to the West Virginia Governmental Tort Claims and Insurance Reform Act (W.Va. Code § 29-12A-1 *et. seq.*) and consideration of the deliberate intent statute (W.Va. Code 23-4-2 *et seq.*) in such circumstances. 879 S.E.2d 770. As Respondent Challa has repeatedly represented to this Court, this action is governed by the MPLA; and thus, Petitioners submit that

the analysis in *March-Westin* is not instructive in this matter. Simply stated, Respondent Challa had every opportunity to follow the requirements of the MPLA and prove or develop a case of medical negligence against Dr. Ratnani or PCS, but took no steps to do so (i.e., notice of claim, certificate of merit, third-party complaint and/or retain an expert). As more fully discussed *infra*, by filing a third-party complaint against Dr. Ratnani or PCS and retaining an expert to render opinions against them, the trier of fact would have been able to assess fault against them under the MPLA. However, Respondent Challa made the strategic decision not to do so in this matter.

Based upon the specific facts in the underlying matter, Petitioners respectfully submit that the Circuit Court erroneously relied on Dr. Denardo's testimony in answering its certified question in the affirmative, as said testimony was based solely upon his pre-suit screening certificate of merit, which the MPLA does not permit.

B. THE PLAIN MEANING OF THE CLEAR AND UNAMBIGUOUS LANGUAGE CONTAINED IN THE WEST VIRGINIA MEDICAL PROFESSIONAL LIABILITY ACT AND ITS LEGISLATIVE HISTORY DOES NOT PERMIT THE JURY TO CONSIDER THE FAULT OF THE DISMISSED DEFENDANTS; AND THUS, THE CIRCUIT COURT ERRED IN ANSWERING ITS CERTIFIED QUESTION IN THE AFFIRMATIVE.

Petitioners agree with Respondent Challa that the underlying civil action is governed by the MPLA; in particular, W.Va. Code § 55-7B-9. However, Respondent Challa submits to this Court that the fault of dismissed defendants Dr. Ratnani and PCS must be considered by trier of fact as they are "alleged parties" pursuant to the language of W.Va. Code § 55-7B-9. In support, Respondent Challa relies primarily on the dissent in *State ex rel. Chalifoux v. Cramer*, 2021 WL 2420196 (W.Va. 2021) in favor of the Circuit Court answering its certified question in the affirmative. (*See generally* pgs. 7-12 and 13-15 of *Respondent's Response Brief*). Petitioners respectfully submit that the plain meaning W.Va. Code § 55-7B-9 is to be accepted and applied without resort to Respondent Challa's interpretation.

In the MPLA's "Several Liability" section, W.Va. Code § 55-7B-9, 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 ***plaintiff***…. each of the ***defendants***." *See* W.Va. Code § 55-7B-9(a)(5)(***emphasis added***). Nowhere does this subsection include "non-parties," and the language clearly limits the assessment of fault to solely the plaintiff and each of the defendants.

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***). Again, nowhere does this subsection include "non-parties." The plain meaning dictates that "all alleged parties" are those referred to in subdivision (4) and (5) of this section of the MPLA; specifically, the plaintiff and the defendant(s) before the trier of fact. The plaintiff and the defendant(s) before the trier of fact are the ones that the medical negligence case was either "brought by" or that there are allegations "against" at the time of trial. (*See* definition of "Party" on pg. 9 of *Respondent's Response Brief*).

This subsection's plain language does not limit consideration of fault to the alleged parties. The language allows but also limits the trier of fact to consider 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). By its plain language, this subsection only allows the trier of fact to assess the percentages of fault of all the alleged parties at the time of trial (i.e., plaintiff(s) and defendant(s)), with the limited allowance for the trier of fact to also asses the fault of "any person" who has settled with

the plaintiff arising out of the same medical injury. Simply put, the plain language of this section of the MPLA allows the trier of fact to assess the fault of the plaintiff(s) and defendant(s) at the time of trial and "any person" who settled with the plaintiff at any time during the litigation.

A cursory review of this entire section of the MPLA will find that there is no mention of "non-parties," and the remaining subsections provide the parameters for determining the amount of judgment to be entered against each defendant. Given the plain meaning of the clear and unambiguous language of W.Va. Code § 55-7B-9, Respondent Challa's argument that this section of the MPLA requires the fault of dismissed defendants Dr. Ratnani and PCS to be considered by the trier of fact is misplaced. *See Appalachian Power Co. v. State Tax Dep't of West Virginia,* 466 S.E.2d 424, 438 (W.Va. 1995)(holding 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).

While the plain meaning of the clear and unambiguous language of W.Va. Code § 55-7B-9 alone does not permit the fault of dismissed defendants Dr. Ratnani and PCS to be considered and assessed by the trier of fact, the recent legislative history also does not support such an interpretation. Prior to its revision in 2016, W.Va. Code § 55-7B-9(b) stated: "[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: *Provided,* That, upon the creation of the Patient Injury Compensation Fund provided for in article twelve-c, chapter twenty-nine of this code, or of some other mechanism for compensating a plaintiff for any amount of economic damages awarded by the trier of fact which the plaintiff has been unable to collect, 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." *See* W.Va. Code § 55-7B-9(b)(2015).

The Patient Injury Compensation Fund was underfunded and the elimination of such was asked to be considered by the West Virginia Legislature as there were no viable sources of permanent funding. As a result, Senate Bill 602 was introduced and the final version, in part, provided temporary alternative funding of unsatisfied claims made under the Patient Injury Compensation Fund and closed the Patient Injury Compensation Fund to future claims. *See generally,* Relating to Patient Injury Compensation Fund, S.B. 602, Regular Legislative Session (2016). In turn, W.Va. Code § 55-7B-9 was revised to eliminate the parts that referenced or dealt with the Patient Injury Compensation Fund.

As part of the revision, this segment of subsection (b) was eliminated: "[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:…" *See,* Relating to Patient Injury Compensation Fund, S.B. 602, Regular Legislative Session (2016). A comparison of the plain meaning of the clear language of this subsection of the MPLA to the current version of this subsection of the MPLA shows that the legislature simply intended for the trier of fact to now assess the fault of the plaintiff(s) and defendant(s) at the time of trial and solely those who settled with the plaintiff. This was not formerly allowed under the previous version of the W.Va. Code § 55-7B-9(2015).

Petitioners respectfully submit that the plain meaning of the clear language "all alleged parties" in W.Va. Code § 55-7B-9(b) does not include parties both named and unnamed in the litigation. Dr. Ratnani and PCS were not "alleged parties" at the time of trial for the trier of fact to

assess fault against and are not what the Legislature intended for that subsection to cover. 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.[1]

IV. CONCLUSION

WHEREFORE, for the reasons set forth herein and in the *Brief of Petitioners*, 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.

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[1] Petitioners respectfully submit that the *Brief of Petitioners* sufficiently addressed their argument regarding the implications and/or application of West Virginia Code § 55-7-13c and/or West Virginia Code § 55-7-13d in this matter; and thus, Petitioners believe that a reply to the argument contained on pages 15-19 of *Respondent's Response Brief* will not additionally aide this Court's decision in this matter.

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Respondent/Defendant Below.

CERTIFICATE OF SERVICE

I, Andrew D. Byrd, counsel for Petitioners/Plaintiffs Below, certify that on this 14th day of June, 2023, a true copy of the foregoing ***"Reply Brief of Petitioners,"*** was served upon counsel of record via the File&ServeXpress system and U.S. Mail addressed as follows:

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