IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 24-438

JOHN R. ORPHANOS, M.D.,
Defendant-Below, Petitioner,

v.

MICHAEL RODGERS,
Plaintiff-Below, Respondent.

PETITIONER JOHN R. ORPHANOS, M.D.'S OPENING BRIEF

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B. The ICA erred in failing to consider Dr. Orphanos' previous assignments of error pertaining to the issue of "recklessness" under W. Va. Code § 55-7B-9c(h)(1), including:

1. The circuit court erred in denying Dr. Orphanos' Motion for Partial Summary Judgment on Claims Other than Medical Negligence, or in the Alternative, Motion to Bifurcate.
2. The circuit court abused its discretion in denying Dr. Orphanos' Motion in Limine to Preclude Plaintiff from Asserting or Arguing that Defendant was "Reckless."
3. The circuit court erred in denying Dr. Orphanos' oral Motion for Judgment as a Matter of Law and post-trial Renewed Motion for Judgment as a Matter of Law.
4. The circuit court abused its discretion in denying Dr. Orphanos' pre-trial motions for Partial Summary Judgment and *in limine* regarding recklessness because there was no evidence obtained during discovery or presented at trial supporting a finding of recklessness.
5. The circuit court abused its discretion by giving, despite Dr. Orphanos' objection, Plaintiff's proposed jury instruction, which incorrectly defined recklessness as "an act of unreasonable character in disregard for a risk known to him or so obvious that it must be taken that he was aware of it."

C. The ICA erred in finding the circuit court did not abuse its discretion or otherwise err in reading Plaintiff's jury instruction regarding "emergency surgery."

D. The ICA erred in finding the circuit court did not abuse its discretion in permitting Plaintiff's life care planner, Nadene Taniguchi, R.N., who is not a medical doctor, to testify that the stroke

suffered by Plaintiff in 2020 was caused by care rendered by Dr. Orphanos in 2017 because she was not qualified to render medical causation opinions.

E. The ICA erred in finding that Dr. Orphanos did not preserve the issue of causation on appeal.

F. The ICA erred in finding the circuit court did not abuse its discretion in permitting Plaintiff's neurology expert, Dr. Daniel Feinberg, to render opinions on the standard of care for neurosurgeons or spine surgeons.

G. The ICA erred in finding the circuit court did not abuse its discretion in permitting Plaintiff's standard of care expert, Dr. Mark Weidenbaum, to be qualified as an expert in spinal surgery.

H. The ICA erred in finding the circuit court did not abuse its discretion in precluding Dr. Orphanos from cross-examining Plaintiff's mother with notes she made that contemporaneously describe a discussion she had with one of Plaintiff's treating physicians.

I. The ICA erred in finding the circuit court committed harmless error in denying Dr. Orphanos' motion *in limine* to preclude evidence that he miscounted vertebral bodies during the surgery.

J. The ICA erred in finding the circuit court did not abuse its discretion in failing to instruct the jury to disregard Plaintiff's use of a demonstrative pie chart in closing argument.

K. The ICA erred in failing to apply the cumulative error doctrine.

II. STATEMENT OF THE CASE

A. Statement of Facts

On June 4, 2017, Michael Rodgers ("Plaintiff") crashed his motorcycle, requiring him to be life flighted to Charleston Area Medical Center ("CAMC") General Hospital, a Level 1 Trauma Center, where he received care for his injuries as a trauma patient. J.A. 105. After a CT scan revealed spinal fractures, Plaintiff was admitted to the Surgical Trauma Intensive Care Unit. J.A. 75, 503. On June 5, 2017, in response to a request for a neurosurgery consultation, Dr. Orphanos

assessed Plaintiff and diagnosed a T5 Chance fracture (a transverse fracture through a vertebral body and neural arch). *Id*. Dr. Orphanos determined the spinal fracture was unstable and required surgery. J.A. 105, 503. The following day, after obtaining consent from Plaintiff's mother, Dr. Orphanos performed surgery, which involved placing orthopedic screws into the vertebrae to stabilize the fracture. J.A. 75, 503, 2724.

After the surgery, Plaintiff had no movement in his lower extremities, resulting in Dr. Orphanos ordering a spinal CT scan. J.A. 76, 106, 504. Because the scan did not show evidence of anything explaining the paralysis (spinal cord compression, epidural hematoma, etc.), Dr. Orphanos recommended that Plaintiff be returned to surgery. J.A. 76, 504, 2440. During the second surgery, Dr. Orphanos explored the spine but saw no evidence of compression or any interference with the spinal cord. J.A. 504, 2440. Plaintiff's paraplegia persisted and was ultimately determined to be permanent. J.A. 76, 107. According to a treating physician and defense experts, the paralysis was caused by a spinal cord infarct, *i.e*., spinal cord stroke that occurred during the surgery, which was neither predictable nor preventable.[1]

Plaintiff filed a complaint against Dr. Orphanos on May 30, 2019, alleging three breaches of the standard of care: (1) prior to the first surgery, Dr. Orphanos should have ordered an MRI of the thoracic spine; (2) during the first surgery, Dr. Orphanos should have used a system called intraoperative neurophysiological monitoring ("IONM") to monitor Plaintiff; and (3) after learning about Plaintiff's loss of function following the initial surgery, Dr. Orphanos should have ordered a CT myelogram. J.A. 108–11. Plaintiff further claimed that Dr. Orphanos' treatment amounted to

[1] Dr. Joby Joseph was one of Plaintiff's treating physicians, and during a conversation with Plaintiff's mother, Dr. Joseph said he believed Plaintiff's paraplegia was caused by a spinal cord infarct. J.A. 2422. Dr. Orphanos' causation experts, Dr. Dennis Whaley (neuroradiology) and Dr. Jodi Gehring (vascular neurologist) offered the opinion that Plaintiff's paraplegia was caused by a vascular injury sustained at the time of the motorcycle accident that infarcted the spinal cord. J.A. 223, 3381–82.

gross negligence and recklessness and sought punitive damages.[2] J.A. 111–13.

While discovery was ongoing, on July 9, 2020, Plaintiff was diagnosed at the Carilion Clinic in Virginia with a right sided, middle cerebral artery embolic stroke, which left him with left sided hemiparesis. J.A. 67, 870–71, 2440. Plaintiff never amended his complaint to allege that Dr. Orphanos' 2017 care caused or contributed to his July 2020 stroke. *See* J.A. 103–114.

B. Procedural History

1. Pre-Trial Motions

On January 21, 2021, Plaintiff filed a Motion for Partial Summary Judgment, arguing that the "Trauma Cap" in the West Virginia Medical Professional Liability Act ("MPLA"), W. Va. Code § 55-7B-9c, did not apply because two statutory exceptions were implicated: (1) the surgery did not qualify as an "emergency" under W. Va. Code § 55-7B-9c(e)(1); and (2) Dr. Orphanos' treatment and conduct were "reckless" under W. Va. Code § 55-7B-9c(h)(1). J.A. 438–446. Dr. Orphanos opposed the motion, asserting with respect to the "emergency surgery" argument that Plaintiff's emergency condition was still present at the time surgery was performed. J.A. 502–18. As to recklessness, Dr. Orphanos noted that there was no evidence (expert testimony or otherwise) supporting such conduct. The circuit court denied the motion on May 21, 2021, concluding that the jury would determine whether Plaintiff's surgery was emergent, and whether Dr. Orphanos acted recklessly. J.A. 642–47.

On January 5, 2022 (after the deadline for expert witness disclosure and shortly before the scheduled March 14, 2022, trial date), Plaintiff served a Second Amended Expert Witness Disclosure, which included a new life care plan from Nadene Taniguchi, R.N., and a new economic report by Clifford Hawley, Ph.D., both relating to a claimed connection between Plaintiff's 2020

[2] Plaintiff later abandoned his claim for punitive damages. J.A. 799 ("[T]he Plaintiff has ***never*** alleged punitive damages in this case . . . ." (emphasis in original)).

stroke and Dr. Orphanos' 2017 care. J.A. 814–37. Both reports were dated several months prior, and Plaintiff excused not serving them sooner as an oversight. J.A. 818, 823.

Dr. Orphanos moved to exclude the reports, arguing that Plaintiff had not identified an expert to causally link Dr. Orphanos' 2017 care to Plaintiff's 2020 stroke, and that the disclosure and updated reports were untimely produced. J.A. 869–88. In a separate motion, Dr. Orphanos moved to continue the trial date. J.A. 838–44. During a hearing on Dr. Orphanos' motions, Plaintiff's counsel stated he would provide Dr. Orphanos "great latitude" in responding to the new disclosures. J.A. 2368, 2553. On February 24, 2022, the circuit court denied both of Dr. Orphanos' motions. J.A. 867–68, 1350–51.

On March 7, 2022, Dr. Orphanos served his Second Supplemental Expert Witness Disclosure, which included rebuttal expert opinions to Plaintiff's new expert opinions. J.A. 1211–16. Despite the earlier assurance of "great latitude," on March 9, 2022, Plaintiff moved to strike the experts, arguing the supplemental expert disclosure was untimely and prejudicial. J.A. 1349–54. During the March 14, 2022 pre-trial hearing, the circuit court granted in part and denied in part Plaintiff's motion to strike, precluding Dr. Orphanos from offering expert testimony from Dr. Jodi Gehring discussing the effect the 2020 stroke had on Plaintiff's life expectancy. J.A. 2559.

The circuit court addressed other outstanding motions at the pre-trial hearing, including Dr. Orphanos' two motions regarding the claim that he acted with a "reckless disregard of a risk of harm to the patient" under W. Va. Code § 55-7B-9c(h)(1): (1) Motion for Partial Summary Judgment on Claims other than Medical Negligence, J.A. 648–54, 782–93, and (2) Motion *in Limine* to Preclude Plaintiff from Asserting or Arguing the Defendant was "Reckless." J.A. 1001–06. In both motions, Dr. Orphanos argued that none of Plaintiff's experts opined that he was "reckless," and that he had disclosed experts who testified that his treatment met the standard of

care. J.A. 790–91, 1003. As such, Dr. Orphanos argued that there was no evidence, and specifically no expert evidence, that his care amounted to anything beyond simple negligence; thus, Plaintiff should have been barred from arguing "recklessness" at trial. J.A. 2571–72. The circuit court denied both motions, holding that the determination of whether Dr. Orphanos was reckless would be based on the totality of all the evidence presented at trial and not on any one expert's opinion. J.A. 2571, 2573.

Dr. Orphanos' other motions addressed at the pre-trial conference included (1) Motion *in Limine* to Exclude Medical Expenses Not Supported by Expert Testimony, relating to the testimony of Nurse Taniguchi, J.A. 1110–13; (2) Motion *in Limine* to Exclude the Testimony of Plaintiff's Expert, David Feinberg, M.D., Regarding the Applicable Standard of Care, J.A. 1082-87; and (3) Motion *in Limine* to Exclude Evidence or Testimony Regarding Miscounting of Vertebral Bodies During Surgery. J.A. 1032–42. The circuit court denied all three motions. J.A. 2566–68, 2564–66, and 2569–70, respectively.

2. The Trial

The trial began on March 15, 2022, and lasted for seven days. J.A. 2586–3760. Because the circuit court denied Dr. Orphanos' pre-trial motions on the recklessness issue, Plaintiff's counsel actively injected recklessness at every turn, including voir dire,[3] opening statement,[4] and

[3] During voir dire, Plaintiff asked the following questions: "How about a situation where a doctor doesn't mean to hurt the patient, but the result is the patient is hurt and it's shown that a doctor is reckless. Do you believe there are situations where doctors are reckless?" J.A. 3950; "Is there a difference in your mind between making a mistake and being reckless?" J.A. 3951.

[4] During opening statements, Plaintiff argued, "First, Do No Harm. And when you think about doing no harm, when you listen to the evidence in this case and the things that Dr. Orphanos did and failed to do, it will defy logic that when a doctor makes the wrong choices and the reckless choices and doesn't treat a patient reasonably and appropriately and responsibly, he does harm. He should not be able to escape accountability or responsibility for the negligent, unreasonable and reckless choices he made during the course of Mike's care and treatment." J.A. 2598–99.

closing argument.[5] But, during trial, no witness testified Dr. Orphanos was reckless or anything close to it.

On the first day of trial, Plaintiff's mother testified. J.A. 2707. During her direct examination, Ms. Rodgers referred to personal notes she made while talking with Plaintiff's treating physicians. J.A. 2722. On cross examination, Dr. Orphanos moved to introduce the notes into evidence. J.A. 2735–38. Without objection, the court admitted the notes. J.A. 2738. Dr. Orphanos then sought to question Ms. Rodgers on her notes about a conversation she had with Dr. Joby Joseph, a treating neurologist, who told her that he believed Plaintiff's paralysis was caused by an "infarction just above T3/T4" that "would have happened at the time of accident" resulting in a "possible spinal stroke," thus supporting Dr. Orphanos' causation defense. J.A. 2738, 2422–23. Plaintiff, reversing his position, objected, arguing the admission of the notes would violate the circuit court's order on Dr. Orphanos' motion *in limine* precluding standard of care or causation opinions not previously disclosed. J.A. 2739–40. The circuit court sustained Plaintiff's objection and disallowed the previously admitted notes. J.A. 2740, 2747–48. Dr. Orphanos, thus, was precluded from inquiring about the conversation.

On March 16, 2022, Plaintiff called Dr. Mark Weidenbaum, his standard of care expert, and moved to qualify him as an expert in spine surgery. J.A. 2774, 2788–89. Dr. Orphanos objected, arguing there was an insufficient foundation regarding whether Dr. Weidenbaum had experience in treating Chance fractures (like the one suffered by Plaintiff). J.A. 2789. The circuit court overruled Dr. Orphanos' objection and qualified Dr. Weidenbaum as an expert. *Id.*[6]

[5] During closing argument, Plaintiff stated, "And how many times have we talked about the things Dr. Orphanos failed to do, neglected to do, recklessly failed to do, not because he is a bad doctor. Because he made a fatal and serious, reckless mistake when he took Mike into surgery without dotting all the Is, and crossing all the Ts to avoid this catastrophe." J.A. 3656.

[6] Over objection, the circuit court also improperly allowed Nurse Taniguchi and Dr. Feinberg to opine on

After the presentation of all the evidence, Dr. Orphanos moved for partial judgment as a matter of law under Rule 50(a) of the West Virginia Rules of Civil Procedure, arguing that the evidence presented was insufficient to allow the issue of recklessness under W. Va. Code § 55-7B-9c(h)(1) to be presented to the jury, J.A. 3611–13; specifically, none of Plaintiff's experts offered testimony demonstrating that Dr. Orphanos' alleged breaches of the standard of care were "reckless," and the evidence failed to establish recklessness. J.A. 3611. Plaintiff countered that the MPLA does not require expert testimony on the issue of recklessness, and that the jury could determine recklessness based on the totality of the evidence. J.A. 3612–13. The circuit court denied Dr. Orphanos' motion, finding that sufficient evidence had been presented for the jury to find in favor of Plaintiff on the issue of recklessness. J.A. 3613.

After the court made this ruling, Plaintiff moved for a directed verdict on whether Dr. Orphanos' surgery was an emergency surgery to preclude application of the Trauma Cap, arguing that Dr. Orphanos and the defense experts testified that "this was not an emergency surgery." J.A. 3613. Dr. Orphanos responded that whether the surgery was "emergency" has no impact on the applicability of the Trauma Cap. J.A. 3614–15. Reading directly from the MPLA, Dr. Orphanos argued that the Trauma Cap applies if a surgery is required, even after the patient is stabilized. *Id.* The circuit court denied Plaintiff's motion for directed verdict, ruling the issue was for the jury to decide. J.A. 3615–16.

Before the circuit court instructed the jury, the court directed counsel to submit a Proposed Jury Charge that reflected the parties' respective objections to ensure that all objections were preserved. J.A. 3616–17.[7] The parties jointly submitted the Proposed Jury Charge with Dr.

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issues for which they were not qualified. J.A. 3062–63, 2564–66.

[7] Regarding the Proposed Jury Charge and Instructions, the circuit court stated, "[i]t has your objections on there, so I can guess for purposes of any kind of appeal, I guess I could - - we can file the proposal that you

Orphanos' objections in red font and Plaintiff's objections in blue font. J.A. 1948–74. Dr. Orphanos objected to any instruction or interrogatory on the jury Verdict Form referencing recklessness, and to the instruction defining recklessness as misstating the law based on W. Va. Code § 55-7B-9c(h)(1) and West Virginia case law. J.A. 1963. Dr. Orphanos also objected to the inclusion of an instruction on "emergency surgery" because whether the initial surgery constituted an "emergency" was irrelevant to the application of the Trauma Cap. J.A. 1961–62. The circuit court overruled Dr. Orphanos' objections. J.A. 3615–20.

Dr. Orphanos also objected to the proposed Verdict Form because the first question asked the jury to determine whether "the first surgery performed on Michael Rodgers was an emergency surgery." J.A. 3618. He objected based on the reasons previously asserted regarding the "emergency surgery" jury instruction and arguments in response to Plaintiff's motion for directed verdict. J.A. 3618, 3614–15. He also objected to the placement of that question on the Verdict Form, arguing that it should not have been the first question posed to the jury. J.A. 3620. Rather, Dr. Orphanos argued that the first question should be on the standard of care because if the jury found that Dr. Orphanos did not breach the standard of care, then no other inquiries were needed. *Id*. The circuit court left "emergency surgery" as the first question. J.A. 3621.

During Plaintiff's closing argument, Dr. Orphanos objected to the use of a pie chart, J.A. 1977, that showed pieces of "pie" relating to the claimed damages with, by far, the largest of the "pie" pieces labeled as non-economic damages. J.A. 3689–90. Dr. Orphanos argued that the pie chart inappropriately suggested to the jury a larger amount should be awarded for non-economic damages and requested that the jury be instructed to disregard the pie chart. J.A. 3690. The circuit

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all sent in that notes the objections[.] [. . .] Yes, I think for each of these it is in parenthesis the objection and the reason for the objection. [. . .] Yes, that's why I think it would make sense to file the joint proposed charge that has the objections for each instruction." J.A. 3616–17.

court overruled the objection. J.A. 3691.

3. Post-Trial Motions

On March 24, 2022, the jury returned a verdict finding for Plaintiff. J.A. 1461–64. The jury found: (1) the first surgery performed on Plaintiff was not an "emergency surgery"; (2) Dr. Orphanos was negligent; (3) Dr. Orphanos' breach of the standard of care caused or contributed to Plaintiff's paraplegia; (4) Dr. Orphanos was reckless; (5) Dr. Orphanos' negligence caused or contributed to Plaintiff's 2020 stroke; and (6) Plaintiff was not negligent in failing to present to the emergency department prior to his 2020 stroke. *Id*. Based on these findings, the jury returned the following verdict for Plaintiff regarding his paraplegia and the 2017 surgery: Past expenses for care and treatment ($1,374,079.00); Lost Earning Capacity ($591,166.00); Future care, treatment and renovation expenses ($6,511,940.00); Past pain, suffering and loss of enjoyment of life ($1,000,000.00); and Future pain, suffering and loss of enjoyment of life ($1,500,000.00). J.A. 1462. For Plaintiff's 2020 stroke, the jury awarded: Additional future care and treatment ($1,793,690.00); and Future pain, suffering, and loss of enjoyment of life associated with his stroke ($5,000,000.00). J.A. 1463. When combined, the total verdict was $17,770,875.00.

On April 13, 2022, Dr. Orphanos filed a Motion to Reduce Verdict Consistent with the MPLA, J.A. 1465–77, which Plaintiff opposed. J.A. 1520–44. After briefing, the circuit court heard argument on April 29, 2022. J.A. 3761. On June 9, 2022, the circuit court entered an order (1) deferring ruling on Dr. Orphanos' motion to reduce the entire verdict under the MPLA's Trauma Cap; (2) applying W. Va. Code § 55-7B-8 to reduce the verdict for non-economic damages to $750,000.00; and (3) taking under advisement Dr. Orphanos' motion to reduce the award of medical expenses; the court also instructed the parties to exchange additional information on the medical bills. J.A. 52–60. The circuit court held another hearing on June 30, 2022. J.A. 3808.

The circuit court's rulings on these issues were included in its September 12, 2022, Judgment Order. J.A. 45–51. Based on the jury's verdict and the mandatory reductions required by the MPLA, the judgment against Dr. Orphanos included: (1) past and future pain, suffering and loss of enjoyment of life totaling $750,000.00; (2) lost earning capacity totaling $591,166.00; (3) past expenses for care and treatment totaling $215,588.58; and (4) future care, treatment and renovation expenses totaling $8,305,630.00. J.A. 50. The judgment totaled $9,862,384.58. *Id*.

After the Judgment Order was entered, Dr. Orphanos filed a Renewed Motion for Judgment as a Matter of Law on the Issue of Recklessness and a Motion for New Trial. J.A. 1980, 2182. Plaintiff filed a Motion to Alter or Amend the Judgment. J.A. 2113. The circuit court held a hearing on these motions on November 22, 2022. J.A. 3832. On January 19, 2023, the circuit court denied the parties' post-trial motions. J.A. 75, 66, and 80, respectively. Dr. Orphanos timely filed his Notice of Appeal with the Intermediate Court of Appeals of West Virginia ("ICA") on February 17, 2023. J.A. 100.

4. Appeal before the Intermediate Court of Appeals

On appeal to the ICA, Dr. Orphanos asserted sixteen assignments of error. Central to Dr. Orphanos' appeal was the circuit court's failure to apply the Trauma Cap's limitation on liability for treatment of an emergency condition. J.A. 4010–18. Dr. Orphanos again argued that the Trauma Cap applies to this case, as it is undisputed that Plaintiff presented to a designated trauma center with an emergency condition, which Dr. Orphanos surgically treated. J.A. 4011. Plaintiff asserted the Trauma Cap did not apply because the surgery was not an "emergency surgery," and that Dr. Orphanos' care amounted to "reckless" conduct. J.A. 4049, 4069. Dr. Orphanos asserted the circuit court erred in allowing the jury to consider the issue of "recklessness," as there was an absence of evidence to allow the jury to make such a finding. J.A. 4015–18. Dr. Orphanos also

asserted the circuit court erred in finding that expert testimony on the issue of recklessness is not required. *Id*. Despite that, the ICA determined that the issue of recklessness did not need to be addressed, finding, instead, that there was sufficient evidence for the jury to conclude that the surgery was not an "emergency surgery" under W. Va. Code § 55-7B-9c(e)(1). *Orphanos v. Rodgers*, 903 S.E.2d 623, 634 (W. Va. Ct. App. 2024). Ignoring the clear and unambiguous language of W. Va. Code § 55-7B-9c(d), the ICA held that because the jury found that Plaintiff's surgery was not an "emergency surgery," the Trauma Cap did not apply to reduce the damages awarded. *Id.* at 635.

Regarding Dr. Orphanos' other assignments of error, the ICA found the circuit court did not abuse its discretion in permitting a jury instruction on "emergency surgery," *id.* at 637; in permitting Plaintiff's experts to render standard of care and causation opinions despite lack of qualifications, *id.* at 639–41; in precluding Dr. Orphanos from cross-examining a witness about a conversation she had with a treating physician, *id.* at 641–42; or in failing to instruct the jury to disregard a demonstrative pie chart illustrating damages used in closing, *id.* at 643–44. The ICA found the circuit court committed harmless error in allowing Plaintiff to make statements to the jury that Dr. Orphanos miscounted vertebral bodies during surgery, *id.* at 642–43; and declined to address Dr. Orphanos' arguments regarding the cumulative error doctrine. *Id.* at 644.

The sole assignment of error where the ICA found that the circuit court abused its discretion was its failure to allow Dr. Orphanos to present the testimony of experts who were designated to respond to Plaintiff's new life care plan and economic report filed two months before trial. *Id.* at 637–39. Although Dr. Orphanos was initially permitted to file supplemental expert disclosures, including new life expectancy opinions, the circuit court ultimately excluded these new opinions. The jury, thus, considered only Plaintiff's life care planner's life expectancy opinion. Because this

exclusion was an abuse of discretion, the ICA remanded the case for a new trial solely on damages. *Id.* at 639. Dr. Orphanos timely filed his Notice of Appeal to the Supreme Court of Appeals of West Virginia on August 7, 2024. J.A. 102.

III. SUMMARY OF ARGUMENT

Dr. Orphanos urges the Court to reverse the ICA's judgment. By finding that Dr. Orphanos' surgery was not an "emergency surgery" and precluding application of the MPLA's Trauma Cap, the ICA misinterpreted the MPLA and read into the statute an exception to the Trauma Cap that does not exist. Further, the ICA failed to address Dr. Orphanos' assignments of error pertaining to the issue of "recklessness" under W. Va. Code § 55-7B-9c(h)(1). By not addressing these assignments of error, the ICA ignored how Plaintiff weaponized the term "reckless" to inflame the jury with respect to liability and to increase damages. Dr. Orphanos' arguments regarding "recklessness" were an essential component of his appeal before the ICA and should have been considered in the ICA's analysis as to whether Dr. Orphanos is entitled to a new trial.

Dr. Orphanos asserts sixteen assignments of error, as the ICA incorrectly upheld the circuit court's errors of law and evidentiary rulings. Because the ICA did not address Dr. Orphanos' arguments with respect to the issue of "recklessness," Dr. Orphanos again asserts here that the circuit court erred in permitting the jury to consider the issue of whether his conduct amounted to a "reckless disregard of a risk of harm to the patient" under W. Va. Code § 55-7B-9c due to the absence of any evidence in the record. As a result, Plaintiff's counsel (but no witness) was permitted to inject "recklessness" into the trial. The court compounded this error by reading jury instructions that contained misstatements of law and providing a defective Verdict Form.

The ICA also abused its discretion by incorrectly upholding the circuit court's rulings with respect to the qualifications of Plaintiff's expert witnesses and their testimony; Plaintiff's use of

written notes when examining a witness, but denying Dr. Orphanos the opportunity to use those same notes on cross examination; Plaintiff's repeated reference to Dr. Orphanos' miscounting of the vertebral bodies; and Plaintiff's use of a pie chart during closing arguments to suggest a verdict amount to the jury for non-economic damages. Further, the ICA erred in concluding that Dr. Orphanos did not preserve the issue of causation between Dr. Orphanos' 2017 surgery and Plaintiff's 2020 stroke for appeal. Due to the circuit court's errors of law and abuses of discretion, the ICA should have found that Dr. Orphanos was entitled to a new trial for all aspects of the case, and not solely on the issue of damages.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument will aid the decisional process and should be granted under W. Va. R. App. P. 20. Rule 20 oral argument is appropriate because this case involves issues of first impression in West Virginia. The Supreme Court of Appeals has not previously interpreted several provisions of the MPLA at issue in this case, including W. Va. Code § 55-7B-9c(d), § 55-7B-9c(e), and § 55-7B-9c(h). This case provides the Court with an opportunity to clarify these statutory provisions regarding the Trauma Cap and its exceptions. Specifically, the Court has not previously interpreted the language in W. Va. Code § 55-7B-9c(d) regarding the "reasonable" amount of time between the original emergency care and follow-up surgery for purposes of determining whether the Trauma Cap applies. The Court has also not previously interpreted the meaning of "nonemergency patient" in W. Va. Code § 55-7B-9c(e)(1). Nor has the Court addressed the question of whether expert testimony is needed to demonstrate that a healthcare provider acted "[i]n willful and wanton or reckless disregard of a risk of harm to the patient" under W. Va. Code § 55-7B-9c(h)(1). This case presents an opportunity to address these previously unresolved issues related to the MPLA's interpretation.

V. ARGUMENT

A. Standard of Review

Dr. Orphanos asserts sixteen assignments of error from the ICA's decision, which affirmed in part, reversed in part and remanded the circuit court's Judgment Order, and the court's order denying Dr. Orphanos' Renewed Motion for Judgment as a Matter of Law on the Issue of Recklessness and Motion for New Trial. "As there are multiple issues arising from divergent procedural postures, we set forth the standards of review applicable to each of the issues raised in the appeal." *Reilley v. Bd. of Educ.*, 246 W. Va. 531, 536, 874 S.E.2d 333, 338 (2022).

"The appellate standard of review for an order granting or denying a renewed motion for a judgment as a matter of law after trial pursuant to Rule 50(b) of the *West Virginia Rules of Civil Procedure* is *de novo*." *Dan's Car World, LLC v. Delaney*, 246 W. Va. 289, 295, 873 S.E.2d 820, 826 (2022) (citation omitted). "Specifically, '[a]fter considering the evidence in the light most favorable to the nonmovant party, we will sustain the granting or denial of a pre-verdict or post-verdict motion for judgment as a matter of law when only one reasonable conclusion as to the verdict can be reached.'" *Id.* A circuit court's decision to grant a new trial is reviewed for an abuse of discretion. *Tennant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 104, 459 S.E.2d 374, 381 (1995). "A party is entitled to a new trial 'if there is a reasonable probability that the jury's verdict was affected or influenced by trial error.'" *Herbert J. Thomas Mem'l Hosp. Ass'n v. Nutter*, 238 W. Va. 375, 391, 795 S.E.2d 530, 546 (2016) (citation omitted).

B. The ICA Erred in Holding that the Trauma Cap was Precluded by the Jury Finding that Plaintiff's Surgery was not an "Emergency Surgery" under W. Va. Code § 55-7B-9c(e)(1).

This appeal is about ensuring the MPLA is correctly interpreted, and that the Trauma Cap is appropriately applied. W. Va. Code § 55-7B-9c(a) provides "[i]n any action . . . for injury to . .

. a patient as a result of health care services or assistance rendered in good faith and necessitated by an emergency condition for which the patient enters a health care facility designated . . . as a trauma center . . . the total amount of civil damages recovered may not exceed $500,000[.]" The Trauma Cap "also applies to any act or omission of a health care provider in rendering continued care . . . in the event that surgery is required as a result of the emergency condition within a reasonable time after the patient's condition is stabilized." W. Va. Code § 55-7B-9c(d) (emphasis added). The limitation of liability found in W. Va. Code § 55-7B-9c(a) "does not apply to any act or omission in rendering care or assistance which . . . [o]ccurs after the patient's condition is stabilized and the patient is capable of receiving medical treatment as a nonemergency patient." W. Va. Code § 55-7B-9c(e)(1). Nor does it apply "where health care or assistance for the emergency condition is rendered . . . [i]n a willful and wanton or reckless disregard of a risk of harm to the patient." W. Va. Code § 55-7B-9c(h)(1).

Based on these exceptions, Plaintiff has asserted two arguments for why the Trauma Cap does not apply: (1) Plaintiff's surgery did not constitute as an "emergency surgery" pursuant to subsection 9c(e)(1), and (2) Dr. Orphanos' treatment was rendered in a reckless manner pursuant to subsection 9c(h)(1). In its holding, the ICA adopted Plaintiff's first argument and sidestepped the second, ignoring Dr. Orphanos' arguments regarding the lack of evidence to support a finding of recklessness and how the injection of "recklessness" into the trial by Plaintiff tainted the jury. By precluding application of the Trauma Cap based on W. Va. Code § 55-7B-9c(e)(1), the ICA misinterpreted the MPLA and ignored the plain and unambiguous language of W. Va. Code § 55-7B-9c(d). Whether the surgery performed by Dr. Orphanos was an "emergency" is irrelevant to the analysis of whether the Trauma Cap applies here.

As the ICA recognized, "everyone agrees that Mr. Rodgers came into the designated

trauma center with an emergency condition." *Orphanos*, 903 S.E.2d at 634. The MPLA defines an emergency condition as "any acute traumatic injury . . . which . . . involves a significant risk of death or the precipitation of significant complications or disabilities, [or] impairments of bodily functions[.]" W. Va. Code § 55-7B-2(d). When Dr. Orphanos performed surgery, Plaintiff was suffering from an emergency condition—an unstable spine fracture. The language of W. Va. Code § 55-7B-9c(d) is clear: the Trauma Cap applies to surgical care rendered "as a result of the emergency condition within a reasonable time after the patient's care is stabilized." Dr. Orphanos' surgery was performed to treat Plaintiff's spinal fracture within two days after Plaintiff was admitted to CAMC. Although the MPLA is silent as to the definition of "reasonable time," two days is a short enough duration to qualify, especially since Plaintiff remained in the Intensive Care Unit and was receiving treatment as a trauma patient.

Rather than apply this straightforward analysis, the ICA instead chose to examine whether the surgery itself was an "emergency." As an initial matter, the phrase "emergency surgery" does not appear anywhere in the MPLA. Plaintiff extrapolates on the term "nonemergency patient" in W. Va. Code § 55-7B-9c(e)(1) to argue that the Trauma Cap is precluded because Dr. Orphanos' surgery was not an "emergency surgery." From that, the ICA looked to whether there was sufficient evidence in the record to reach the conclusion that the surgery was not an "emergency surgery." *Orphanos*, 903 S.E.2d at 634. Based on the testimony of Dr. Orphanos and his expert witnesses, as well as the presentation of an alternative treatment option of a back brace, the ICA concluded that there was sufficient evidence for a jury to conclude that Dr. Orphanos' surgery was not an "emergency." *Id.* at 634–35.

But the ICA (and the circuit court below) asked the wrong question. The Trauma Cap's applicability is not based on the "type" of surgery performed; instead, it depends on why the

surgery is being performed. Put another way, if the surgery is to treat the emergency condition for which a patient was admitted, the Trauma Cap applies based on the plain reading of the statute. *See W. Va. Dep't of Health, Off. of the Chief Med. Exam'r v. Cipoletti*, 902 S.E.2d 133, 140 (W. Va. 2024) ("This Court has held that in deciding the meaning of a statutory provision, '[w]e look 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.'") (citation omitted).

Here, the language of W. Va. Code § 55-7B-9c(d) answers the question. There is no dispute that Plaintiff's emergency condition had not changed when the surgery was performed. Plaintiff's expert Dr. Weidenbaum testified, "this type of fracture here was three columns which means its unstable which means you have to do something." J.A. 2801. Dr. Orphanos also testified that "[t]his was a surgery that was an urgent operation that needed to be done to stabilize his spine so that we could mobilize him better." J.A. 2949. Even Plaintiff's other expert, Dr. Feinberg, recognized that Plaintiff was suffering from an unstable spine fracture that required surgical treatment. J.A. 2694–95.[8]

The fact that Plaintiff was displaying normal neurological functions preoperatively and could have selected a different treatment option against Dr. Orphanos' recommendation, *see* J.A. 2930, does not change his status as a trauma patient with an unstable, fractured spine. Even if Plaintiff's condition was stabilized at the time of the surgery (it was not), W. Va. Code § 55-7B-9c(d) acknowledges that the Trauma Cap still applies if the surgery "is required as a result of the emergency condition." The word "stabilized" in W. Va. Code § 55-7B-9c(d) contradicts Plaintiff's

[8] Dr. Feinberg was asked, "And we can agree that he [Mr. Rodgers] came to CAMC as a trauma patient, correct"? To which he responded, "Yes." Dr. Feinberg was then asked, "We can agree that he had - - Mr. Rodgers [had] an unstable fracture, correct?" He responded, "Correct." And then Dr. Feinberg was asked, "But you will agree that the purpose of the surgery was to stablize the fracture?" And he responded, "That's correct." J.A. 2694–95; *see also* J.A. 1106.

argument and the ICA's conclusion that W. Va. Code § 55-7B-9c(e)(1) applies to this situation. By definition, a "stabilized" patient does not require "emergency surgery." *See State ex rel. AMFM, LLC v. King*, 230 W. Va. 471, 478, 740 S.E.2d 66, 73 (2013) ("As such, our consideration of the governing statutes will be guided by our well-established rules of statutory construction whereby we defer to the intent of the Legislature in enacting its laws and give effect to every word and phrase thereof to ensure their true meaning is accomplished.").

Because Dr. Orphanos' surgery was performed to treat Plaintiff's emergency condition, the ICA's analysis should have stopped there.[9] By misinterpreting the plain language of the MPLA, the ICA has read into the statute an exception to the Trauma Cap that does not exist. Accordingly, the Court must reverse the ICA's holding.

C. The ICA Erred in Failing to Address Dr. Orphanos' Arguments on the Issue of "Recklessness."

Instead of addressing Dr. Orphanos' arguments regarding the issue of "recklessness,"[10] the ICA chose to preclude application of the Trauma Cap, and therefore uphold the circuit court's denial of Dr. Orphanos' Renewed Motion for Judgment as a Matter of Law, by finding that Dr. Orphanos' surgery was not an "emergency surgery." However, by sidestepping the "recklessness" issue, the ICA allowed the circuit court's errors of law to stand. As demonstrated through Dr. Orphanos' pre-trial Motion for Partial Summary Judgment on Claims Other than Medical Negligence, his Motion for Judgment as a Matter of Law made at the conclusion of the evidence,

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[9] The ICA asserts that "Dr. Orphanos does not directly argue in his brief about the emergency surgery applicability aspect under the MPLA Trauma Cap . . . ." *Orphanos*, 903 S.E.2d at 634. However, this is not accurate. Dr. Orphanos addressed Plaintiff's "emergency surgery" argument in both his opening brief and reply. *See* J.A. 4034–36 and 4110–11.

[10] "However, for the above-mentioned reasons, regarding the issue of recklessness in this case, this Court declines to address these arguments. The jury in this case found that the surgery performed was not an emergency surgery, and thus finding a separate reason to eliminate the Trauma Cap, this court concludes the issue of recklessness is not dispositive and we will not further address it." *Orphanos*, 903 S.E.2d at 635 n.11.

and his post-trial Renewed Motion for Judgment as a Matter of Law, the circuit court should never have allowed the jury to consider the issue of "recklessness" because there was no evidence to support Plaintiff's claim that Dr. Orphanos' conduct amounted to a "reckless disregard of a risk of harm to the patient" under W. Va. Code § 55-7B-9c(h)(1). In denying Dr. Orphanos' motions, the circuit court permitted Plaintiff's counsel to inject "recklessness" into the trial at every opportunity without evidentiary support, thereby inflaming the jury against Dr. Orphanos and resulting in a large damages award.

The ICA's failure to consider Dr. Orphanos' "recklessness" arguments is especially concerning because, in denying Dr. Orphanos' Renewed Judgment as a Matter of Law, the circuit court concluded that "an expert is not required to opine regarding recklessness," and that "nothing in W. Va. Code § 55-7B-9c(h)(1) require[es] specific expert testimony that a health care provider was 'reckless.'" J.A. 78. This holding is contradictory to the language and spirit of the MPLA. As Dr. Orphanos argued to the ICA, and asserts again here, the circuit court misinterpreted and misapplied the provisions of the MPLA governing exceptions to the Trauma Cap. As such, the ICA should have reversed the circuit court's holdings and found that the Trauma Cap applies.

1. The circuit court erred in finding that the MPLA does not require expert testimony on the issue of "recklessness."

Although the ICA did not address Dr. Orphanos' arguments regarding "recklessness," the court stated in a footnote that "we note that under the MPLA there is no mandatory language requiring expert testimony on recklessness." *Orphanos*, 903 S.E.2d at 634 n.7. Reading between the lines, the ICA's footnote suggests that, if it had considered Dr. Orphanos' arguments, it would have upheld the circuit court's conclusion that expert testimony is not needed to support a finding of "recklessness." The ICA would have been wrong.

a. Principles of statutory interpretation support the conclusion that the

MPLA requires expert testimony on the issue of "recklessness."

The MPLA expressly requires that a defendant's failure to meet the standard of care shall be established by expert testimony. *See* W. Va. Code § 55-7B-7(a) ("The applicable standard of care and a defendant's failure to meet the standard of care, if at issue, shall be established in medical professional liability cases by the plaintiff by testimony of one or more knowledgeable, competent expert witnesses if required by the court."); *see also Farley v. Shook*, 218 W. Va. 680, 685, 629 S.E.2d 739, 744 (2006) ("It has been explained further that '[i]t is the general rule that in medical malpractice cases negligence or want of professional skill can be proved only by expert witnesses.'") (citation omitted). Requiring expert testimony on whether a physician acted in a "willful and wanton or reckless disregard of a risk of harm to the patient" for Plaintiff to avoid the Trauma Cap is consistent with this language.

The Supreme Court of Appeals has consistently recognized that all parts of a statute must be construed together. *See* Syl. Pt. 3, *Smith v. State Workmen's Comp. Com'r*, 159 W. Va. 108, 109, 219 S.E.2d 361, 362 (1975) ("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."). Because "statutes are not to be construed in a vacuum," W. Va. Code § 55-7B-7 and § 55-7B-9c must be read together as part of the overall makeup of the MPLA. *Cmty. Antenna Serv., Inc. v. Charter Commc'ns VI, LLC*, 227 W. Va. 595, 604–05, 712 S.E.2d 504, 513–14 (2011) ("'Accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent properly.'") (citation omitted).

Requiring expert testimony does not change or amend W. Va. Code § 55-7B-9c(h)(1) but is consistent with the purpose and intent of the MPLA. *See, e.g.*, W. Va. Code § 55-7B-1 ("[T]he

Legislature has determined that reforms in the common law and statutory rights of our citizens must be enacted together as necessary . . . .");[11] *State ex rel. W. Va. Univ. Hosps., Inc. v. Scott*, 246 W. Va. 184, 193, 866 S.E.2d 350, 359 (2021) (explaining that "the Legislature's intent in enacting—and amending—the MPLA" must be considered when determining what claims are encompassed under the MPLA). Only where the circuit court finds the acts are within the common knowledge of the jury are experts not required. *See Totten v. Adongay*, 175 W. Va. 634, 638, 337 S.E.2d 2, 6 (1985).

Here, Plaintiff's experts testified to three breaches of the standard of care: (1) Dr. Orphanos did not order a pre-operative MRI of the thoracic spine; (2) during the surgery, Dr. Orphanos did not use IONM; and (3) after learning about Plaintiff's loss of function, Dr. Orphanos did not order a CT myelogram. J.A. 108 –11. To be clear, Plaintiff's experts did not testify that any other conduct by Dr. Orphanos breached the standard of care. Nevertheless, throughout the trial, Plaintiff referred to various other acts by Dr. Orphanos that Plaintiff claimed amounted to "reckless" behavior, including that Dr. Orphanos "rushed" Plaintiff to surgery, J.A. 2622; did not take enough time to evaluate the patient, J.A. 3661; failed to review forty hours of nursing notes, *id.*; failed to obtain proper consent, J.A. 2611–12; and miscounted the vertebrae. J.A. 2627. Plaintiff even suggested to the jury that Dr. Orphanos' miscounting of the vertebrae showed recklessness when his own expert admitted it was not a breach of the standard of care. J.A. 2826. But none of Plaintiff's experts testified that any of these actions were negligent, much less that Dr. Orphanos acted in a "reckless disregard of a risk of harm to the patient."

To require expert testimony to prove a physician was negligent but not require it to prove

[11] The Legislature specifically recognized "[i]t is the duty and responsibility of the Legislature to balance the rights of our individual citizens to adequate and reasonable compensation with the broad public interest in the provision of services by qualified health care providers and health care facilities who can themselves obtain the protection of reasonably priced and extensive liability coverage[.]" W. Va. Code § 55-7B-1.

that he or she acted with a "willful and wanton or reckless disregard of a risk of harm to the patient"—a higher level of culpability beyond a breach of the standard of care—is nonsensical. *See Smith*, 159 W. Va. at 116, 219 S.E.2d at 365–66 ("That which is necessarily implied in a statute, or must be included in it in order to make the terms actually used have effect . . . is as much a part of it as if it had been declared in express terms.") (citation omitted). This case involves complicated neurosurgical issues surrounding the treatment of a spinal fracture. No lay juror could be expected to understand the complexities involved in this treatment, let alone understand when a breach of the standard of care crosses the threshold into a "reckless disregard of a risk of harm to a patient." *See Farley*, 218 W. Va. at 685–86, 629 S.E.2d at 744–45 ("These medical issues and alleged breaches relate to complex matters of diagnosis and treatment that are not within the understanding of lay jurors . . . . Therefore, expert testimony was required . . . ."). An unsupported verdict is the exact situation the Legislature sought to avoid by enacting W. Va. Code § 55-7B-7.

Further, W. Va. Code § 55-7B-9c(h)(1) was enacted *after* § 55-7B-7, and the Supreme Court of Appeals has explained that it is "'presumed that the legislators who drafted and passed it were familiar with all existing law, . . . and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.'" *State ex rel. Hall v. Schlaegel*, 202 W. Va. 93, 97, 502 S.E.2d 190, 194 (1998) (emphasis added) (citation omitted). Because the Legislature had already declared the need for expert testimony in MPLA cases prior to the enactment of W. Va. Code § 55-7B-9c(h)(1), for the two statutory provisions to be in "harmony," expert testimony is required to preclude the application of the Trauma Cap.

b. West Virginia case law supports the position that determinations of "recklessness" require expert testimony.

Although the Supreme Court of Appeals has never explicitly ruled expert testimony is

necessary to prove "recklessness" with respect to the Trauma Cap, the Court has relied on expert testimony to support a finding of punitive damages. Similar to W. Va. Code § 55-7B-9c(h)(1), a punitive damage claim requires evidence "that a defendant acted with wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others to appear or where the legislature so authorizes." Syl. Pt. 8, *Karpacs-Brown v. Murthy*, 224 W. Va. 516, 686 S.E.2d 746, 749 (2009) (citation omitted).

In *Stephen v. Rakes*, 235 W. Va. 555, 775 S.E.2d 107 (2015), the Court affirmed the denial of a physician's motion for summary judgment on a claim for punitive damages because plaintiff "provided evidence that Dr. Stephens' care of the decedent was 'dangerous, and at the very least, reckless.'" 235 W. Va. at 566, 775 S.E.2d at 118. The plaintiff's expert testified that the treatment "was as bad a care as I've ever seen in my 30 years . . . ." *Id.* at 567, 775 S.E.2d at 119. Another of the plaintiff's experts specifically called the defendant's conduct "reckless." *Id.* Thus, the Court ruled the testimony "sufficiently established" that defendant's conduct was reckless. *Id.* at 566–67, 775 S.E.2d at 118–19; *see also Karpacs-Brown*, 224 W. Va. at 527, 686 S.E.2d at 757 (finding that the circuit court did not err in refusing to give punitive damages jury instruction because there was not "sufficient evidence in the record to support an instruction on punitive damages").

Here, the standard the Court applies to evidence supporting punitive damages should apply to determinations of "willful and wanton or reckless disregard of a risk of harm to the patient" in W. Va. Code § 55-7B-9c(h)(1). This is consistent with the MPLA's statutory requirements regarding establishing breaches of the standard of care, as well as the Court's concern in assisting "lay jury in determining whether the injuries incurred by the plaintiff were indeed the result of a breach of the duty of care or lack of requisite skill by the defendant-physician." *Totten*, 175 W. Va. at 638, 337 S.E.2d at 6. If lay jurors are not expected to know when a physician's actions are

negligent without expert testimony, then lay jurors cannot be expected to know when that negligence crosses the threshold into being considered "reckless."

2. Because the MPLA requires expert testimony to establish "recklessness," the circuit court erred in denying Dr. Orphanos' Motion for Judgment as a Matter of Law, as there was legally insufficient evidence to support Plaintiff's claim.

Dr. Orphanos asserts that the MPLA requires expert testimony to establish that a physician's conduct amounted to a "willful and wanton or reckless disregard of risk of harm to a patient" and preclude application of the Trauma Cap. By failing to offer expert testimony supporting a finding of "recklessness," Plaintiff failed to meet his burden of proof on this issue as a matter of law. Despite numerous opportunities during discovery and at trial to testify that Dr. Orphanos' alleged breaches of the standard of care rose to the level of "willful and wanton or reckless disregard of a risk of harm to the patient," no expert ever did.

When Plaintiff's expert Dr. Feinberg was questioned about whether Dr. Orphanos breached the standard of care by failing to use IONM during surgery, Dr. Feinberg merely testified that, "I think it should have been used." J.A. 2690. And when discussing the use of IONM during surgeries, Dr. Feinberg qualified his opinion by stating that "[i]n Philadelphia the spine surgeons that would operate on the thoracic spine would always use this technology." *Id.* He never testified that the use of IONM was considered a national standard of care. Dr. Feinberg was presented with the opportunity to testify that Dr. Orphanos' failure to use IONM amounted to "reckless" conduct—but he did not. Nor could Dr. Feinberg even explain how Dr. Orphanos' actions during the initial surgery caused Plaintiff's paraplegia. J.A. 2675–76 ("My opinion is that the spinal cord injury was sustained during the surgery.").

Dr. Weidenbaum, when testifying about what Dr. Orphanos should have done prior to the second surgery, stated that Dr. Orphanos was negligent for failing to order a CT myelogram. J.A.

2864–65. But he never testified that the failure amounted to anything more than simple medical negligence. The only assertions that Dr. Orphanos' conduct was egregious enough to be considered "reckless" came from Plaintiff's counsel.[12] Such assertions are not evidence. To be clear, the point is not just whether an expert uttered the term "reckless." The point is that no expert testified that Dr. Orphanos' conduct was so far removed from reasonable to be considered reckless.

In contrast, Dr. Orphanos presented expert testimony in support of his medical treatment, explaining the rationale for his decisions, as well as demonstrating that his choices were reasonable and within the standard of care. Dr. Richard Berkman, Dr. Orphanos' neurosurgery expert, testified that Dr. Orphanos was not required to order a preoperative MRI before the initial surgery to satisfy the standard of care because the CT provided all the radiological evidence that was needed. J.A. 3553.[13] He also confirmed that Dr. Orphanos was not required to use IONM during surgery to satisfy the standard of care because Dr. Orphanos was not going to be manipulating the spinal cord, *see* J.A. 3555, 3558,[14] nor was he required to obtain a CT myelogram before proceeding with the second surgery, as doing so would have delayed getting the patient back to surgery without

[12] The Supreme Court of Appeals has consistently held that arguments of counsel are not evidence. *See Perrine v. E.I. du Pont de Nemours & Co*., 225 W. Va. 482, 532 n.56, 694 S.E.2d 815, 865 n.56 (2010) ("'Every trial judge knows, as every trial lawyer knows, and every appellate court judge should know, that the statements of counsel in an argument are not evidence but are merely the expression of his individual views[.]'") (quoting *Crum v. Ward*, 146 W. Va. 421, 457, 122 S.E.2d 18, 38 (1961)); *see also W. Va. Fire & Cas. Co. v. Mathews*, 209 W. Va. 107, 112 n.5, 543 S.E.2d 664, 669 n.5 (2000) ("Statements made by lawyers do not constitute evidence in a case.").

[13] Dr. Berkman was asked, "So do you have an opinion to a reasonable degree of medical probability as to whether or not the standard of care required a preoperative MRI?" He responded, "Yes, it does not. There is no question about it. [. . .] And even so, in my opinion in this case, even if they had an MRI, it would not have changed the outcome and that's important too." J.A. 3554. Dr. Berkman also testified that "if [Mr. Rodgers] was my patient, I wouldn't have ordered an MRI scan." *Id*.

[14] Dr. Berkman was asked, "Do you have an opinion to a reasonable degree of medical probability whether intraoperative monitoring was required to be used by Dr. Orphanos?" And he responded, "Yeah. It's not." J.A. 3559. Dr. Berkman further testified to the unreliability of IONM, explaining that with IONM "75 percect of the time it was a false alarm, and that's the problem. It's a false alarm. I stopped your surgery. I changed your operation for no reason at all." J.A. 3557.

providing any additional information to aid in that surgery. J.A. 3560–61.[15]

Because there was conflicting evidence regarding whether Dr. Orphanos even breached the standard of care, the circuit court erred in permitting the jury to consider the issue of "recklessness." In *Karpacs-Brown v. Murthy*, the Supreme Court of Appeals was asked to determine if the trial court erred in refusing to give the jury an instruction regarding punitive damages. *Id.* at 527, 686 S.E.2d at 757. The Court concluded that because the defendant presented a medical expert who testified that the defendant did not commit medical malpractice, there was insufficient evidence in the record to support an instruction on punitive damages. *Id.* Had Plaintiff sought punitive damages at trial, the competing expert testimony regarding whether Dr. Orphanos met the standard of care would have prevented the jury from considering the issue under *Karpacs-Brown*. The same analysis should apply to the jury's consideration of recklessness here.

Even assuming, solely for the sake of argument, the MPLA does not require expert testimony to establish recklessness, the totality of the evidence presented at trial still failed to establish recklessness as a matter of law. Plaintiff did not present any evidence that came close to demonstrating that Dr. Orphanos acted with a "reckless disregard of a risk of harm to the patient." For example, Plaintiff's counsel rails that Dr. Orphanos did not read Plaintiff's entire chart and ignored forty hours of nursing notes. But at trial, Dr. Orphanos explained that "[t]he nurses' notes are documentation that's passed on from nurse to nurse and shift to shift." J.A. 2925–26. He testified that rather than "bury myself in a computer," he speaks to the nurses, and they examine the patient together. *Id*. Dr. Orphanos took pains to explain his process in evaluating and treating Plaintiff, including the importance of the clinical examination: "[T]he most important thing is what

[15] Dr. Berkman was asked, "So do you have an opinion to a reasonable degree of medical probability whether the standard of care required Dr. Orphanos to get a CT myelogram after the first surgery?" And he responded, "Yeah, I think it would have been a mistake to wait for a CT myelogram. I think he did exactly what - - I know he did exactly what I would have done." J.A. 3561.

the patient will show us, what Mr. Rodgers showed us on clinical examination." J.A. 3013.

This is not a case where the physician was unqualified, proceeded to do a procedure that was prohibited, or was under the influence.[16] Rather, Plaintiff presented evidence only on how Dr. Orphanos breached the standard of care in three discrete areas, which were disputed by Dr. Orphanos and his expert witnesses. Plaintiff through counsel then broadly argued Dr. Orphanos' care was "reckless" without any evidentiary foundation. The circuit court should have determined that the absence of any evidence demonstrating Dr. Orphanos acted in "reckless disregard of a risk of harm to the patient" was legally insufficient to sustain a verdict finding him to be reckless.

The importance of this issue cannot be overstated. If allowed to stand, the circuit court's holding on the necessity of expert witnesses to support a finding of "recklessness" could undermine the entire legislative purpose in establishing the Trauma Cap. The ICA should have considered Dr. Orphanos' arguments on this issue, reversed the circuit court's decision, and found that the MPLA does require expert testimony to establish that a physician was "reckless" to preclude application of the Trauma Cap. Should the Court ultimately conclude that expert testimony is not necessary to establish "recklessness," the Court should nevertheless find that the evidence elicited at trial here does not establish recklessness, as a matter of law.

D. The ICA Should Have Concluded that the Circuit Court Abused its Discretion in Denying Dr. Orphanos' Motion for New Trial.

Except for the ICA's holding that the circuit court abused its discretion in excluding Dr. Orphanos' supplemental expert witness disclosure, the ICA erred in concluding that the circuit

[16] *See Short v. Downs*, 537 P.2d 754, 759 (Colo. App. 1975) (holding that the physician acted with "wanton and reckless disregard" when the physician injected patient with silicone that was labeled "not for human use"); *Cash v. Kim*, 342 S.E.2d 61, 64 (S.C. Ct. App. 1986) (sustaining punitive damages award when plaintiff's expert testified that defendant-physician "lacked the skill required of a physician" when defendant tore a blood vessel after six unsuccessful attempts to insert a catheter into a patient's heart); *Med. Protective Co. v. Duma*, 478 F. App'x 977, 985 (6th Cir. 2012) (Rogers, J., dissenting) (defendant physician who drank a fifth of vodka and delivered a baby was determined to be reckless).

court did not abuse its discretion with respect to the other assignments of error raised below, as well as erred in holding that Dr. Orphanos was not entitled to a new trial on all issues.

1. The ICA should have held that the circuit court erred in denying Dr. Orphanos' partial Motion for Summary Judgment and abused its discretion in failing to grant Dr. Orphanos' motion *in limine* on the issue of "recklessness."

Although not addressed by the ICA, the circuit court erred in denying Dr. Orphanos' other pre-trial motions on the issue of "recklessness." As previously addressed, *see supra* Section V.C., pp. 20–28, in the absence of evidence demonstrating "willful and wanton or reckless disregard of a risk of harm to the patient," the circuit court committed clear error and abused its discretion in denying these motions and finding that "whether Dr. Orphanos was reckless will be based upon the totality of all the evidence and not any one expert's opinion." J.A. 2571. Critically, this ruling prejudiced Dr. Orphanos because it allowed Plaintiff's counsel to argue "recklessness" without evidentiary support in the record, thus resulting in a tainted jury verdict based on unsubstantiated claims and legally insufficient evidence. *See Brown v. Berkeley Fam. Med. Assocs., Inc.*, No. 16-0572, 2017 W. Va. LEXIS 629, at *7 (W. Va. Sept. 1, 2017) (upholding ruling that plaintiff's counsel was precluded from using certain words such as "rule," "danger," and "dangerous" because the terms "were potentially confusing and misleading to jurors").

2. The ICA should have held that the circuit court abused its discretion in giving jury instructions on "recklessness" and "emergency surgery" that misstated the law.

"[A] jury instruction is erroneous if it has a reasonable potential to mislead the jury as to the correct legal principle or does not adequately inform the jury on the law. An erroneous instruction requires a new trial unless the error is harmless." *Tracy v. Cottrell ex rel. Cottrell*, 206 W. Va. 363, 376, 524 S.E.2d 879, 892 (1999) (citation omitted). While trial courts have "broad discretion in formulating its charge to the jury," when "a particular instruction misstates or

mischaracterizes the applicable law, a trial court abuses its discretion." *Id.*; *see also* Syl. Pt. 5, *Gen. Pipeline Const., Inc. v. Hairston*, 234 W. Va. 274, 277, 765 S.E.2d 163, 166 (2014) ("It is reversible error to give an instruction which is misleading and misstates the law . . . ."). Further, jury instructions "given as a whole" must be "accurate and fair to both parties." Syl. Pt. 6, *Tennant*, 194 W. Va. at 102, 459 S.E.2d at 379.

a. The ICA should have found that the circuit court abused its discretion in providing a jury instruction for "emergency surgery."

The circuit court read the following instruction regarding "emergency surgery": "The court instructs the jury that Michael Rodgers has asserted that the surgery carried out two days after his admission to the hospital was not an emergency surgery. If you find that the surgery carried out by the Defendant was not an emergency surgery, then you should answer the special interrogatory on the verdict form accordingly." J.A. 3636. The first question posed on the verdict form was, "Do you find that the first surgery performed on Michael Rodgers was an emergency surgery?" J.A. 1461. Despite Dr. Orphanos' argument that this instruction failed to use the correct language from W. Va. Code § 55-7B-9c(e)(1), the ICA found that the use of "emergency surgery," instead of "nonemergency patient," is a distinction without a difference, and concluded[17] that the "jury instruction given was sufficient enough for the jury to determine whether or not the surgery performed was an emergency surgery." *Orphanos*, 903 S.E.2d at 635 n.12, 636–37.

As explained in Section V.B., the ICA and the circuit court misinterpreted the MPLA because whether the surgery qualifies as an "emergency" is irrelevant for purposes of determining

[17] The ICA criticized Dr. Orphanos by noting that as the opposing party, Dr. Orphanos had the burden to propose a jury instruction he believed was "more in accordance with the law, and here, Dr. Orphanos only objected to such an instruction without proposing an instruction he deemed proper." *Orphanos*, 903 S.E.2d at 636 n.14. However, this statement does not accurately reflect the record. In Dr. Orphanos' objections to the jury instructions, he specifically referenced the entirety of the statutory language for W. Va. Code § 55-7B-9c(e)(1), as well as cited to and argued for the applicability of W. Va. Code § 55-7B-9c(d). J.A. 1962.

whether the Trauma Cap applies. For that reason alone, the ICA should have found that circuit court abused its discretion because the instruction misled the jury as to the legal standard for precluding the Trauma Cap.

b. The ICA should have considered Dr. Orphanos' arguments on the "recklessness" jury instruction.

As with Dr. Orphanos' other "recklessness" arguments, the ICA did not address Dr. Orphanos' arguments on the "recklessness" jury instruction. The circuit court read the following instruction to the jury: "Recklessness means an act of unreasonable character in disregard for a risk known to him or so obvious that it must be taken that he was aware of it." J.A. 3636. This instruction woefully misstates the law because, to exclude applicability of the Trauma Cap, the MPLA refers to acts that are "in willful and wanton or reckless disregard of a risk of harm to the patient." W. Va. Code § 55-7B-9c(h)(1). Further, the circuit court's definition of "recklessness" is also inconsistent with the Supreme Court of Appeals' interpretation of "willful, wanton or reckless" in other contexts. For a person's conduct to be considered "reckless," the Court has explained that the person "has intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to the consequence . . . ." *Cline v. Joy Mfg. Co.*, 172 W. Va. 769, 772 n.6, 310 S.E.2d 835, 838 n.6 (1983). The instruction cribs only part of the language from *Cline*, particularly leaving out the requirement that the act must be "intentionally done."

This omission is crucial because had the court read the entire definition of "recklessness," the jury would have been instructed that it needed to find that Dr. Orphanos had acted "intentionally" in his treatment choices, such that the risk of harm to the patient was "so great as to make it highly probable that harm would follow" and that Dr. Orphanos had "a conscious

indifference to the consequence . . . ." *Id.* at 772 n.6, 310 S.E.2d at 838 n.6. Because the MPLA defines "negligence" based on reasonableness, *see* W. Va. Code § 55-7B-3(a)(1), merely finding that a physician acted "unreasonably" is insufficient to cross the threshold into "recklessness." The standard for recklessness requires more. Given the absence of evidence that Dr. Orphanos was reckless, this erroneous charge was not harmless.

3. The ICA should have held that the circuit court abused its discretion by permitting Plaintiff's expert witnesses to render opinions on topics for which they were not qualified.

Dr. Orphanos asserts that three of Plaintiff's expert witnesses—Nurse Taniguchi, Dr. Feinberg, and Dr. Weidenbaum—were not qualified to render opinions on the topics to which they testified at trial based on their own admissions. For each of these witnesses, the ICA erroneously found that the circuit court did not abuse its discretion in permitting their testimony.

a. The ICA erred in finding that the circuit court did not abuse its discretion in permitting Plaintiff's life care planner, Nurse Taniguchi, to render medical causation opinions, and erred in holding that Dr. Orphanos did not preserve the issue of causation for appeal.

On appeal to the ICA, Dr. Orphanos argued that Nurse Taniguchi was improperly permitted to testify as to a causal connection between Dr. Orphanos' 2017 care and Plaintiff's 2020 stroke, as she was the only witness who offered testimony causally linking the two events. The ICA disagreed, finding that Nurse Taniguchi did not render a medical opinion and instead "drew pertinent information from Mr. Rodgers' medical records, which she then used to determine the goods and services that would be necessary for Mr. Rodgers' future care." *Orphanos*, 903 S.E.2d at 640. After reaching this conclusion, the ICA found, in a footnote, that Dr. Orphanos did not preserve "the issue of no causation opinion testimony for appeal." *Id.* at 640 n.20.[18]

[18] The ICA's opinion contradicts itself. In footnote 21, the ICA notes that "Nurse Taniguchi admitted that as a nurse, she lacks the requisite skill, experience, training, or education needed to opine as to the causal relationship between the 2017 surgery and Mr. Rodgers' 2020 stroke." *Orphanos*, 903 S.E.2d at 640 n.21.

Contrary to the ICA's finding, the record establishes that Nurse Taniguchi offered causation opinions. At trial, Nurse Taniguchi was asked to read Plaintiff's medical records into the record and provide a "medical translation." J.A. 3100. The records she read include that Plaintiff was positive for an "[o]verwhelming infection" which "seems to have caused septic embolic right CVA." J.A. 3101. Nurse Taniguchi explained that an "[e]mbolic is a clot." *Id.* She was then asked to identify the source of the infection, to which she read "[a]bscess due to decubitus ulcer." J.A. 3102. Finally, Nurse Taniguchi read "[e]tiology of the stroke is likely the aortic valve vegetation," and confirmed that the records state "the infection that [] went from the ulcer then lodged in the valve of the heart and then broke off and went to the brain." J.A. 3103.

Nurse Taniguchi may have admitted that she lacks the qualifications to render causation opinions, J.A. 3061–62, but when looking at the specific context within which her testimony was offered, Plaintiff clearly utilized her testimony so that the jury would hear testimony linking Dr. Orphanos' 2017 care to Plaintiff's 2020 stroke. Nurse Taniguchi's testimony was the only testimony offered at trial connecting these events. As Dr. Orphanos argued below, because Plaintiff used his 2020 stroke to support his claims for damages, he was required to produce expert testimony demonstrating how Dr. Orphanos' negligence resulted in those damages. *See Stoudt v. Eads*, 248 W. Va. 583, 589, 889 S.E.2d 305, 311 (W. Va. Ct. App. 2023) (upholding summary judgment award because plaintiff failed "to produce expert testimony connecting the alleged negligence and her damages" because "[w]ithout such expert testimony, no jury could reasonably infer a causal connection in this case"). Nurse Taniguchi's testimony does not make the cut.

However, in footnote 23, the court acknowledges that "[a]t one point during Nurse Taniguchi's testimony, she was asked to explain the meaning of a specific line and comment in Mr. Rodgers' medical records, specifically a statement by Dr. Bansil she relied on. However, she never gave a causation opinion, she simply explained, for clarity, what was meant by Dr. Bansil's record." *Id.* at 640 n.23. By explaining and interpreting Plaintiff's medical records, Nurse Taniguchi opined to the jury that the 2017 surgery and Plaintiff's 2020 stroke were connected. This is improper causation testimony.

Despite Dr. Orphanos raising these arguments below, the ICA concluded that Dr. Orphanos failed to preserve the issue of causation. *Orphanos*, 903 S.E.2d at 640 n.20. But in the same footnote, the ICA acknowledged that Dr. Orphanos did "reference" the argument within the context of his assignment of error regarding Nurse Taniguchi. *Id.* The Supreme Court of Appeals has held that "we liberally construe briefs in determining issues presented for review," and only when issues are "mentioned only in passing but are not supported with pertinent authority, are [they] not considered on appeal." *State v. LaRock*, 196 W. Va. 294, 302, 470 S.E.2d 613, 621 (1996). Here, the record is clear that Dr. Orphanos expressly asserted that Plaintiff failed to present expert testimony tying the causation of Dr. Orphanos' 2017 surgery to Plaintiff's 2020 stroke. J.A. 4024–26. Because the issue was fully briefed, the ICA erred in finding that Dr. Orphanos waived this issue on appeal. Accordingly, the Court should find that the circuit court abused its discretion in allowing Nurse Taniguchi's testimony.

b. The ICA erred in holding that the circuit court did not abuse its discretion in finding that Dr. Feinberg was qualified to render opinions on the standard of care.

Plaintiff disclosed Dr. Feinberg to testify that "[t]o the extent IONM is available, the standard of care requires IONM be used during surgery." J.A. 1082. At trial, the circuit court ruled that Dr. Feinberg was a qualified expert in neurology, neurophysiology, neuromuscular medicine, and IONM. J.A. 2673. The ICA concluded "based on the record the circuit court did not abuse its discretion in permitting Dr. Feinberg to testify about the importance of the IONM and the standard of care associated therewith." *Orphanos*, 903 S.E.2d at 641. In reaching this conclusion, the court was persuaded by the fact that he is board-certified neurologist, and that "as many as 4,000 spine surgeries are performed every year at the hospital he oversees." *Id.* at 640.

This ruling ignores Dr. Feinberg's deposition and trial testimony. At deposition, he

admitted that he could not "testify as to the standard of care for neurosurgeons or spine surgeons." J.A. 1107. During trial, he was again asked, "you don't know what the standard of care is for a neurosurgeon, do you?" J.A. 2696. He responded, "Correct, I may know what it is, but I can't give an opinion about it." *Id.* At trial, he also admitted he could not opine to any "elements of the procedure" for treating a Chance fracture, nor could he specifically identify what happened during the surgery to cause Plaintiff's paralysis. J.A. 2695. And he admitted that "[l]ack of use of intraoperative monitoring didn't cause the spinal cord injury." J.A. 2704.

Based on these admissions, the circuit court's decision to permit Dr. Feinberg's testimony (and the ICA's decision to uphold it) was an abuse of discretion as he was not qualified under Rule 702 of the West Virginia Rules of Evidence to opine on the standard of care. W. Va. R. Evid. 702(a) (expert testimony must be based on the requisite "knowledge, skill, experience, training, or education"). Consistent with Rule 702, the MPLA requires that expert witnesses possess "professional knowledge and expertise coupled with knowledge of the applicable standard of care to which his or her expert testimony is addressed." W. Va. Code § 55-7B-7(a). Dr. Feinberg's testimony demonstrates that in no way could his opinions "assist the trier of fact" in rendering a verdict in this case, and as such, it should have been excluded. *Kiser v. Caudill*, 210 W. Va. 191, 196, 557 S.E.2d 245, 250 (2001) ("Given Dr. Brill's own admissions about his limited knowledge of neurosurgery, we do not find that the circuit court erred by limiting his testimony at trial to the field of neurology.").

c. The ICA erred in holding that the circuit court did not abuse its discretion in finding that Dr. Weidenbaum was qualified to be recognized as an expert in spine surgery.

At trial, Dr. Weidenbaum was qualified as an expert on spine surgery over Dr. Orphanos' objections regarding his lack of experience treating Chance fractures J.A. 2789. The ICA

determined that, based on Dr. Weidenbaum's qualifications, he "possessed extensive qualifications to assess the standard of care for spinal surgeries." *Orphanos*, 603 S.E.2d at 641. But based on Dr. Weidenbaum's testimony, the circuit court's decision to permit his testimony was an abuse of discretion because, as revealed on cross examination, his familiarity and knowledge of Chance fractures was remarkedly limited. He could not recall when he first performed a surgery involving a Chance fracture, how many times he had done so, or when he last performed such a surgery. J.A. 2866–67. In determining whether someone is qualified as an expert witness under Rule 702 of the West Virginia Rules of Evidence, the Supreme Court of Appeals has held that "a circuit court must determine that the expert's area of expertise covers the particular opinion as to which the expert seeks to testify." Syl. Pt. 5, *Gentry v. Mangum*, 195 W. Va. 512, 515, 466 S.E.2d 171, 174 (1995); *see also Kiser*, 210 W. Va. at 195–96, 557 S.E.2d at 249–50 (noting that "[t]o qualify a witness as an expert…the party offering the witness must establish that the witness has more than a causal familiarity with the standard of care and treatment commonly practiced by physicians engaged in the defendant's specialty."). Dr. Weidenbaum's admissions reveal he was not qualified to render opinions on the "area of expertise" for which he was disclosed, *i.e.*, "the diagnosis and treatment of a Chance fracture in the thoracic spine." J.A. 266–68.

Contrary to the ICA's holding, the record establishes that neither Dr. Weidenbaum nor Dr. Feinberg were qualified to render the opinions they put forth at trial. Without qualified expert testimony, Plaintiff cannot establish that Dr. Orphanos breached the standard of care, thus rendering the jury's verdict in this case unreliable. A new trial is required.

4. The ICA erred in holding that the circuit court did not abuse its discretion in precluding Dr. Orphanos from cross examining Plaintiff's mother with notes she made while consulting with Plaintiff's treating physicians.

At trial, Dr. Orphanos sought to question Ms. Rodgers on cross examination about a July

19, 2017, conversation she describes in the notes between herself and Dr. Joby Joseph, [19] one of Plaintiff's treating neurologists at CAMC, in which Dr. Joseph explained that he believed Plaintiff's paraplegia was caused by a spinal cord infarct. J.A. 2739. The ICA found that it was not an abuse of discretion for the circuit court to exclude these notes based on the circuit court's prior rulings on a motion *in limine* prohibiting Plaintiff or his family or friends from testifying regarding the standard of care or causation, and a motion *in limine* precluding expert opinions not previously disclosed. *Orphanos*, 903 S.E.2d at 642.

Neither of these motions *in limine* apply to Ms. Rodgers' notes. Dr. Orphanos' motion *in limine* prohibiting expert opinions not previously disclosed specifically sought to prohibit expert witnesses from introducing new opinions not previously disclosed. J.A. 1108. And Dr. Orphanos' motion *in limine* prohibiting family or friends from testifying as to causation or the standard of care was limited to ensuring that fact witnesses do not testify regarding matters for which they are not qualified. J.A. 1110. Thus, there was no ruling on a motion *in limine* precluding this evidence.

Further, Rule 612(b) of the West Virginia Rules of Evidence permitted the admissibility of these notes. Ms. Rodgers was questioned on direct examination about a conversation she had with Dr. Orphanos, in which he indicated "[t]hat there may be either a blood clot or a blockage somewhere." J.A. 2726. Rule 612(b) provides that adverse parties have the right to "have the writing or object produced at the trial," "cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony." Because her testimony was related to causation, Dr. Orphanos should have been permitted to question her on the portion of her notes related to Dr. Joby Joseph's comments.

[19] Ms. Rodgers' notes state: "Dr. Joseph came back by. He thinks there was an infarction just above T3/T4 – if a contusion, then paralysis would have happened at time of accident and there would have been no movement of the lower extremities when he got to trauma unit, possible spinal stroke." J.A. 2422–23.

The ICA also ignored Dr. Orphanos' arguments regarding the purpose for which the notes were offered. Under Rule of Evidence 401, the notes were relevant because they supported Dr. Orphanos' position that Plaintiff's paraplegia was caused by an unpreventable spinal cord infarct that occurred during surgery and not because of a breach of the standard of care. J.A. 3381–82, 2935. The notes were also relevant because they flatly refuted Plaintiff's counsel's comments during cross examination suggesting that Dr. Orphanos' causation defense was simply made up for trial, an accusation repeated in closing argument, which likely misled and inflamed the jury.[20]

5. The ICA erred in finding the circuit court committed harmless error in denying Dr. Orphanos' motion *in limine* to preclude evidence that he miscounted vertebral bodies.

Prior to trial, Dr. Orphanos sought to preclude Plaintiff from introducing evidence that he miscounted the vertebral bodies during surgery because none of Plaintiff's experts testified that this action was a breach of the standard of care. J.A. 1032. The ICA determined "while it is questionable that this testimony should have been excluded, any such error is harmless." *Orphanos*, 903 S.E.2d at 642. This error was not harmless. During Plaintiff's opening statement[21] and closing argument,[22] Plaintiff's counsel repeatedly stated that the miscounting of the vertebral

[20] During closing arguments, Plaintiff's counsel stated "[Y]ou read where Dr. Orphanos had no idea about this segmental artery business until he raised it three years into this litigation. Three years. Think about it." J.A. 3734.

[21] Plaintiff's opening statement: "He miscounted the vertebra. Now, I will tell you this, there are occasions where miscounting can occur. The problem is when you're tapping in to get that screw in, you're messing with a bad fracture and you're making what they want to say is an unstable fracture, how - - if it's unstable and he's fixed either by bracing or surgery, how good is it for where that fracture to be pounded - - to have a screw pounded into it and screwed in. He put it in the wrong place and it now becomes a point where he goes right through the fracture line with that screw." J.A. 2627.

[22] Plaintiff's closing argument: "And we talked about him putting in the screws in the wrong place. And again, miscounting the vertebrae I guess it happens. Dr. Weidenbaum says it does. It can. But he's counting - - tapping in this needle so he can put a screw right across the fracture line. Right into where the spinal cord space is. It's right against the spinal cord and it's compressing it, combined with that epidural fat and that's what you saw on the CT myelogram." J.A. 3672.

bodies—a non-negligent act as confirmed by Plaintiff's own expert—was indicative of Dr. Orphanos' negligence and recklessness. Whether Dr. Orphanos miscounted the vertebral bodies was of no consequence to the case. This evidence, along with Plaintiff's other references to non-negligent acts, *see supra* Section V.C.1.a, was not only irrelevant but highly prejudicial. *See Potomac Comprehensive Diagnostic & Guidance Ctr., Inc. v. L.K.*, 902 S.E.2d 434, 451 (W. Va. 2024) (finding the "circuit court failed in its gatekeeping function by allowing the admission of irrelevant and highly prejudicial evidence"). In permitting Plaintiff's counsel's statements, the jury was misled into believing that the miscounting was a breach of the standard of care, as apparent by the jury's finding that Dr. Orphanos was "reckless." J.A. 1462. The ICA should have found that the circuit court abused its discretion.

6. The ICA erred in finding the circuit court did not abuse its discretion in failing to instruct the jury to disregard Plaintiff's demonstrative pie chart.

During Plaintiff's closing argument, Dr. Orphanos objected to Plaintiff's use of a demonstrative pie chart because the chart suggested to the jury that it should award Plaintiff more non-economic damages than his claimed economic damages. J.A. 2561. The pie chart clearly shows a larger "pie slice" for non-economic loss than the pie slices contributing to economic loss. J.A. 1977. However, the ICA found that Dr. Orphanos failed to show how the pie chart influenced the jury's verdict. *Orphanos*, 903 S.E.2d at 643. The proof is in the jury's verdict. After being shown the pie chart, the jury returned a $7,500,000.00 non-economic verdict amount for Plaintiff. J.A. 1464. This large amount indicates that the jury was improperly influenced by the pie chart. *See* Syl. Pt. 7, in part, *Bennett v. 3 C Coal Co.*, 180 W. Va. 665, 667, 379 S.E.2d 388, 390 (1989) (holding, in part, that suggesting a verdict amount to a jury for non-economic damages "may result in reversible error where the verdict is obviously influenced by such statement"). And contrary to the ICA's conclusion, this argument is not "moot" because this abuse of discretion combined with

Dr. Orphanos' other assignments of error deprived Dr. Orphanos of a fair trial.

7. The ICA should have applied the cumulative error doctrine and awarded Dr. Orphanos a new trial.

When considering whether to award a new trial, the Supreme Court of Appeals has held "[a] party is entitled to a new trial 'if there is a reasonable probability that the jury's verdict was affected or influenced by trial error.'" *Herbert J. Thomas Mem'l Hosp. Ass'n*, 238 W. Va. at 391, 795 S.E.2d at 546 (citation omitted). Further, "[t]he cumulative error doctrine may be applied in a civil case when it is apparent that justice requires a reversal of a judgment because the presence of several seemingly inconsequential errors has made any resulting judgment inherently unreliable." Syl. Pt. 8, *Tennant*, 194 W. Va. at 102, 459 S.E.2d at 379. And "[w]e have made clear that 'the trial court has an obligation to all parties to ensure that the trial is conducted in a fair manner.'" *Potomac*, 902 S.E.2d at 451 (citation omitted).

The combination of the errors made the jury's verdict in this case unreliable. The ICA should have concluded that the circuit court's rulings created an unfair trial and prejudiced Dr. Orphanos. The ICA, by rejecting Dr. Orphanos' arguments, concluded the single error related to Plaintiff's expert was not sufficient to show cumulative error. But by sidestepping Dr. Orphanos' arguments with respect to "recklessness," the ICA ignored a crucial part of Dr. Orphanos' appeal—the inflammatory effect repeated references to recklessness that influenced the jury's findings of fault and damages, thus permitting an unfair trial verdict to stand. To correct this injustice, the Court must vacate the decisions below and grant Dr. Orphanos a new trial.

VI. CONCLUSION

For these reasons, Dr. Orphanos respectfully requests that this Court vacate the ICA's decision, as well as the circuit court's verdict below, overturn the circuit court's recklessness verdict, enforce the Trauma Cap, and remand this case for a new trial.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 24-438

JOHN R. ORPHANOS, M.D.,
Defendant-Below, Petitioner,

v.

MICHAEL RODGERS,
Plaintiff-Below, Respondent.

CERTIFICATE OF SERVICE

I, Thomas J. Hurney, Jr., counsel for the Petitioner John R. Orphanos, M.D., certify that on November 18, 2024, I have served the foregoing ***Petitioner John R. Orphanos, M.D.'s Opening Brief*** on all counsel of record via the Court's E-Filing system.

/s/ Thomas J. Hurney, Jr.
Thomas J. Hurney, Jr. (WV Bar No. 1833)