IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SCA EFiled: Jan 31 2025
01:42PM EST
Transaction ID 75554311

No. 24-438

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

v.

MICHAEL RODGERS,
Plaintiff-Below, Respondent.

PETITIONER JOHN R. ORPHANOS, M.D.'S REPLY IN SUPPORT OF APPEAL AND RESPONSE IN OPPOSITION TO CROSS-ASSIGNMENT OF ERROR

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I. INTRODUCTION

Plaintiff's Response takes liberties with both Dr. Orphanos' arguments and the record before this Court. In doing so, Plaintiff ignores certain testimony and cherry-picks other testimony to convince this Court that there was evidence in the record to support the jury's verdict. However, the verdict was premised on the circuit court's errors of law and abuses of discretion, which were compounded by Plaintiff's counsel's repeated use of the word "reckless" and reliance on non-negligent acts to support his case at trial. The jury's verdict cannot stand when the foundation for it is not supported.

As an initial matter, Plaintiff's Response includes numerous statements that are inaccurate and misstate the record:

- Plaintiff states that Dr. Orphanos performed a "perfunctory examination" because he ignored 40 hours of nursing notes and only examined Plaintiff for 19 minutes. Resp. at 2. However, Dr. Orphanos' practice includes reviewing a patient's "films to see exactly what the fractures are, the fracture site, [and] the fracture location," J.A. 2903; consulting with his mid-level practitioner who performs the initial examination, J.A. 2904; reviewing the medical records, J.A. 2908; and performing his own clinical examination on the patient, J.A. 2910. Dr. Orphanos also 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 then testified that "the most important thing is what the patient will show us, what Mr. Rodgers showed us on clinical examination." J.A. 3013. Moreover, Plaintiff presented no expert testimony that any of this breached the standard of care.

- Plaintiff claims that "Dr. Orphanos failed to obtain pre-operative testing necessary to ensure a safe and successful surgery." Resp. at 2. Dr. Orphanos' expert witnesses confirmed that a pre-operative MRI was not required by the standard of care, and that the CT scan showed all the information he needed. J.A. 3553–54.

- Plaintiff claims that had Dr. Orphanos used IONM, he would have received a "real-time alert" during surgery, and that not using IONM was the equivalent of operating "blind." Resp. at 3. Dr. Orphanos' experts countered that IONM is not the standard of care because the technology is not reliable. J.A. 3555–58. Even Plaintiff's expert agreed that the absence of IONM did not cause injury. J.A. 2703.

- Plaintiff claims that Dr. Orphanos' failure to order a CT myelogram after the first surgery was, again, the equivalent of operating "blind." Resp. at 4. Dr. Orphanos'

expert confirmed that it would have been a "mistake" to wait for testing, causing an "unnecessary delay" in Plaintiff's treatment. J.A. 3560–61.

As demonstrated, when the actual testimony of Plaintiff's experts is examined, and when that testimony is compared to the opinions of Dr. Orphanos' experts, the evidence demonstrates that this is, at best, a case of medical negligence. For these reasons, the ICA erred in sidestepping Dr. Orphanos' arguments with respect to "recklessness." In doing so, the ICA not only allowed the circuit court's errors of law to stand, but also further misinterpreted the MPLA by concluding that the Trauma Cap did not apply because Plaintiff's surgery was not an "emergency surgery."

Moreover, the circuit court's errors were compounded by the other abuses of discretion that occurred throughout the trial process. Dr. Orphanos' appeal demonstrates that the ICA should have found that the circuit court committed abuses of discretion that permeated the trial and resulted in an unfair trial and an unsupported verdict. Accordingly, the Court should grant Dr. Orphanos' request to overturn the ICA's decision, vacate the circuit court's verdict below and enforce application of the Trauma Cap, and remand the case for a new trial.

II. ARGUMENT

A. The Circuit Court and the ICA Should Have Applied the Trauma Cap to Plaintiff's Claims.

Plaintiff's arguments to preclude application of the Trauma Cap misconstrue the language of the MPLA. Plaintiff asserts two arguments for why the Trauma Cap does not apply: (1) Plaintiff's surgery did not constitute an "emergency surgery" pursuant to W. Va. Code § 55-7B-9c(e)(1); and (2) Dr. Orphanos' treatment was rendered in a reckless manner pursuant to W. Va. Code § 55-7B-9c(h)(1). As explained in Dr. Orphanos' opening brief, the ICA adopted the first argument and sidestepped the second. The ICA erred in both regards.

1. Dr. Orphanos did not waive any arguments with respect to his Rule 50(b) motion.

In arguing that the ICA correctly found that the Trauma Cap was precluded by a "nonemergency exemption" to the Trauma Cap, Plaintiff asserts that Dr. Orphanos waived "any argument that the surgery was not subject to the nonemergency exemption from the MPLA trauma caps" because he failed "to raise the issue in [his] appeal of the Rule 50(b) ruling." Resp. at 11. This is simply not true. Dr. Orphanos' Rule 50(b) motion was titled "Renewal of Motion for Judgment after Trial and Joinder in Defendant's Contemporaneously Filed Motion for New Trials." J.A. 1980. Dr. Orphanos expressly incorporated the arguments set forth in his Motion for New Trial as part of his Rule 50(b) motion. J.A. 1981. In his Motion for New Trial, Dr. Orphanos argued that whether the surgery performed constituted an "emergency" did not matter for purposes of determining the Trauma Cap's applicability. J.A. 2449. Dr. Orphanos raised these same arguments before the ICA. *See* J.A. 4035, 4110–11. Thus, because Dr. Orphanos incorporated arguments from his Motion for New Trial as part of his Rule 50(b) motion and asserted those arguments on appeal, he did not waive any arguments.[1]

2. The ICA should have found that the circuit court erred in allowing the jury to consider whether the surgery was an "emergency."

Plaintiff relies on W. Va Code § 55-7B-9c(e)(1) to argue that the Trauma Cap should not apply to the jury's verdict because Plaintiff's condition had "stabilized," and he was "capable of receiving treatment as a nonemergency patient." Resp. at 12. Latching onto the phrase "nonemergency patient," Plaintiff argues that whether the Trauma Cap applies depends on if the surgery performed was an "emergency surgery." To put another way, if the surgery performed is not an "emergency," then the patient must be a "nonemergency patient." Based on this argument,

[1] Notably, Plaintiff failed to raise this argument before the ICA, thus waiving his ability to assert it now.

the ICA concluded there was sufficient evidence for a jury to conclude that Dr. Orphanos' surgery was not an "emergency." *Orphanos v. Rodgers*, 903 S.E.2d 623, 634–35 (W. Va. Ct. App. 2024).

To reach this holding, both the ICA and Plaintiff ignore the statutory language of W. Va. Code § 55-7B-9c(d). Plaintiff mischaracterizes Dr. Orphanos' argument and reliance on section 9c(d), stating "[a]s [Dr. Orphanos] would have it, once a patient is admitted to a trauma center with a condition, any care the patient received from that point forward is covered by the trauma cap." Resp. at 13. But that is not Dr. Orphanos' argument. Section 9c(d) states that the Trauma Cap applies "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). 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. Even Plaintiff acknowledges this: "No one denies Rodgers' spine was 'unstable,' but the records and Orphanos' own testimony establish that at the time of the surgery, Rodgers['] condition 'was clinically stable.'" Resp. at 14. The fact that Plaintiff was stable enough to undergo the necessary surgery does not somehow negate the emergency condition. Plaintiff was not suffering from any "condition," and did not receive any generic "care." Per the language of section 9c(d), Dr. Orphanos performed necessary *surgery* to treat Plaintiff's *emergency condition* of a fractured spine.

Plaintiff also dismisses Dr. Orphanos' reliance on section 9c(d) by boldly asserting that Dr. Orphanos' statutory arguments are "irreconcilable with, and render[] meaningless, the Section 9c(e) exclusion." Resp. at 15. However, the very opposite is true. Plaintiff claims that "the 9c(e) exclusion applies not when the patient's injury is unstable, but when the patient's condition was stable." *Id.* at 14. Plaintiff's interpretation offers no explanation for how to compatibly read sections 9c(e)(1) and 9c(d) together. Nor does it make sense as both sections 9c(e) and 9c(d)

contemplate the patient's condition being stable. As Dr. Orphanos has consistently argued, application of the Trauma Cap does not hinge on whether the patient is "stable;" rather, whether the Trauma Cap applies depends on the specific condition for which the patient was admitted to the trauma center, and whether surgery was required to treat that condition. If the patient is not suffering from an emergency condition, or if surgery is not required, then section 9c(e) may preclude application of the Trauma Cap. That is not the case here.

Plaintiff tries to point to evidence in the record to demonstrate that "surgery was not required." Resp. at 13–14.[2] Specifically, Plaintiff points to the treatment option of a back brace. *Id.* at 14. But at trial, Dr. Orphanos clarified that the back brace was ordered by his nurse practitioner, and he testified that "the better treatment option for Mr. Rodgers was a surgery to fix the spine." J.A. 2930. He also testified that he would not expect his nurse practitioner to "make the full clinical decision especially surgical decisions." J.A. 3012. Thus, the initial recommendation of a back brace by Dr. Orphanos' nurse practitioner does not negate the need for surgery. Moreover, even Plaintiff's expert acknowledged that surgery was needed. J.A. 1106. And the other evidence Plaintiff relies on is not focused on the issue of whether surgery is required; instead, the evidence is about whether the surgery is an "emergency." As explained, whether the surgery is an "emergency" is irrelevant for purposes of determining whether the Trauma Cap

[2] Plaintiff criticizes Dr. Orphanos by stating that "Orphanos seems to think he can forego having a jury make factual findings supporting his own defense, and then on appeal complain about the need to determine the very same factual issues that he failed to present for the jury's consideration." Resp. at 14, n.3. As an initial matter, Plaintiff's statement seems to assume that Dr. Orphanos somehow carries the burden of proof. Further, despite Plaintiff's accusations to the contrary, Dr. Orphanos objected to Plaintiff's jury instructions for "emergency surgery," which the circuit court overruled. J.A. 3616–17. These objections were preserved for appeal. J.A. 3616. Specifically, in his objections, Dr. Orphanos noted that "whether this surgery was an 'emergency surgery' or not is irrelevant to any aspect of this case." J.A. 1961. Dr. Orphanos went on to state that "[i]t is undisputed that Mr. Rodgers had an unstable fracture," and then he provided the statutory language from W. Va. Code § 55-7B-9c(d). J.A. 1961–62. Thus, the issue is not whether Dr. Orphanos failed to have the jury make factual findings supporting his defense; the issue is whether the circuit court properly instructed the jury, which it did not.

applies. Based on Dr. Orphanos' testimony, and testimony from both his and Plaintiff's experts, surgery was required to treat Plaintiff's unstable spinal fracture. *See* J.A. 2801, 2949, 2694–95, 1106.

Accordingly, because the ICA misinterpreted the statutory language of both W. Va. Code §§ 55-7B-9c(d) and 9c(e), the ICA's decision requires reversal.

3. The ICA should have considered Dr. Orphanos' arguments on the issue of "recklessness."

As explained in his opening brief, the ICA did not address Dr. Orphanos' arguments with respect to whether his treatment was rendered "[i]n a willful and wanton or reckless disregard of a risk of harm to the patient" such that application of the Trauma Cap is precluded. W. Va. Code § 55-7B-9c(h)(1). By failing to address these arguments, not only did the ICA fail to consider key aspects of Dr. Orphanos' appeal, but it also allowed the circuit court's errors of law to stand regarding the court's interpretation and application of the MPLA's exceptions to the Trauma Cap.

a. The MPLA requires expert testimony to support a finding of "recklessness."

Plaintiff asserts that because "the text of the recklessness exception says nothing about an expert testimony requirement," that alone "eviscerates" Dr. Orphanos' argument. Resp. at 16. He then goes on to conclude that because expert testimony is referenced in the MPLA's standard of care provision (W. Va. Code § 55-7B-7), but not in W. Va. Code § 55-7B-9c(h)(1), this "'necessarily' means that no such testimony is required to demonstrate recklessness." *Id.* at 17. But this Court 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 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 . . . ."); *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).

There is no question that MPLA cases require expert testimony. *See* W. Va. Code § 55-7B-7(a). 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) (recognizing the "common knowledge" exception to the expert testimony requirement). To require expert testimony to prove a physician was negligent but not 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)). In this case dealing with complex spinal surgery, experts were clearly required. Notably, Plaintiff has presented no argument otherwise.

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, applicable to the subject matter, . . . 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.

With West Virginia's statutory scheme in mind, Plaintiff's reliance on *Ballard v. Kerr*, 378 P.3d 464 (Idaho 2016) is misplaced. In Idaho, the statute addressing limitations on noneconomic damages states the limitation "shall not apply to: (a) [c]auses of action arising out of willful or reckless misconduct." Idaho Code § 6-1603(4)(a). This provision is *not* included in Idaho's medical malpractice statute (Idaho Code §§ 6-1001, *et. seq.*), but instead applies to a wide range of personal injury actions. In the context of Idaho's statutory makeup, the decision in *Ballard* makes sense because not every personal injury action will require expert testimony. But W. Va. Code § 55-7B-9c(h)(1) applies only to MPLA cases and does not have any broader implications. The lack of any corresponding language in Idaho's statute requiring a plaintiff to prove that there was a "disregard of a risk of harm to a patient" matters. The issue here is not just whether Dr. Orphanos was "reckless;" rather, it is if any "willful and wanton or reckless" conduct constitutes a "disregard of a risk of harm to the patient." Because the MPLA requires expert testimony, the connection between reckless conduct and a patient's treatment cannot be proven without it.

b. Expert testimony on the issue of "recklessness" is not a legal conclusion.

Plaintiff asserts that if experts are required to "label" a physician's actions as "reckless," their testimony would be an impermissible opinion on a question of law. Resp. at 18. But Dr. Orphanos did not argue that experts could testify as to the meaning of W. Va. Code § 55-7B-9c(h)(1). Nor is the issue whether any expert said the word "reckless." The issue is whether any expert testified that Dr. Orphanos' conduct was so far removed from reasonable as to be considered a "reckless disregard of a risk of harm to the patient." An expert can provide this testimony without saying the words "willful and wanton or reckless." *See, e.g.*, *Stephens v. Rakes*, 235 W. Va. 555, 567, 775 S.E.2d 107, 119 (2015) (expert testified that defendant's treatment "was as bad a care as I've ever seen in my 30 years in a three-day hospitalization").

Having an expert testify as to reckless conduct is necessary to help the jury apply the law to the facts. This case involves complicated issues surrounding the treatment of a spinal fracture. No lay juror could be expected to understand the complexities involved, 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 v. Shook*, 218 W. Va. 680, 685–86, 629 S.E.2d 739, 744–45 (2006) ("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[.]"). The jury's job is to apply the law to the facts, but if the jury cannot understand what facts constitute "reckless" conduct, and is not properly instructed, then the jury's verdict will be unsupported.

c. West Virginia's punitive damages statute illustrates the point that determinations of "recklessness" require expert testimony.

Plaintiff's arguments about the inapplicability of the punitive damages statute answer a question that Dr. Orphanos did not pose. Dr. Orphanos did not argue that a plaintiff's burden to prove recklessness under W. Va. Code § 55-7B-9c(h)(1) should be "clear and convincing." Instead, Dr. Orphanos pointed to the statute and cases addressing the sufficiency of evidence for punitive

damages to demonstrate the necessity of expert testimony in determining whether certain conduct is "willful and wanton or reckless." As addressed in Dr. Orphanos' opening brief, both *Stephens v. Rakes* and *Karpacs-Brown v. Murthy* are instructive here. Pet. Br., at 23–24. Although neither addresses the Trauma Cap, the Court in both cases examined the record to determine whether the evidence was sufficient to support punitive damages. The evidence was sufficient in *Stephens v. Rakes*, 235 W. Va. at 566–67, 775 S.E.2d at 118–19, where plaintiff's expert described the defendant's conduct as "dangerous" and "as bad a care as I've ever seen in my 30 years," but not in *Karpacs-Brown v. Murthy*, 224 W. Va. 516, 527, 686 S.E.2d 746, 757 (2009), where no punitive damages instruction was given because there was a lack of "sufficient evidence in the record" based on the conflicting testimony regarding whether the physician breached the standard of care. Dr. Orphanos asserts that the Court's analysis of the sufficiency of the evidence to establish punitive damages is directly persuasive in examining whether the Trauma Cap's requirement of "willful and wanton or reckless disregard of a risk of harm to the patient" conduct was satisfied.

d. The evidence upon which Plaintiff relies to support his claim that Dr. Orphanos was reckless was heavily disputed at trial and does not support a finding of recklessness.

Plaintiff admonishes Dr. Orphanos for providing a "slanted" view of the facts and claims that Dr. Orphanos' arguments about the lack of sufficient evidence to support a finding of "recklessness" are not relevant for appeal. Resp. at 22. Plaintiff asserts that because the evidence was "conflicting," it was all the more reason for the jury to decide whether Dr. Orphanos' conduct amounted to "recklessness." But the conflicting evidence Plaintiff references goes to negligence, and specifically whether Dr. Orphanos breached the standard of care in three discrete areas. Critically, for each area, Dr. Orphanos' experts opined that he met the standard of care.

Plaintiff points to testimony from Dr. Weidenbaum regarding why Dr. Orphanos should

have obtained an MRI prior to the first surgery. Resp. at 23. At trial, Dr. Orphanos testified that an MRI was not needed because the CT scan revealed "a bony Chance fracture . . . that involved . . . three columns of the spine that fractured through the front and back part of the bone. I did not feel that an MRI would have given me any further information[.]" J.A. 3013. Dr. Orphanos' judgment was supported by his neurosurgical expert, Dr. Berkman, who testified that a preoperative MRI was not required because everything Dr. Orphanos needed to see would have been on the CT scan, and that "if [Mr. Rodgers] was my patient, I wouldn't have ordered an MRI scan." J.A. 3554. Dr. Berkman soundly rejected the idea that the standard of care required a preoperative MRI: "There [are] tons of patients at Vanderbilt that are just like Mr. Rodgers that we never get an MRI scan on." J.A. 3554.

Regarding whether Dr. Orphanos should have used IONM during surgery, Plaintiff again relies on Dr. Weidenbaum, who testified that failing to use the technology was the equivalent of operating "blind." Resp. at 23. However, Dr. Berkman testified that the use of IONM is not the standard of care because the technology is not "reliable," because "75 percent of the time," an IONM alarm is "a false alarm," resulting in an interrupted surgery or a change in the operation for no reason. J.A. 3555–57. Even if the IONM alarm happens to alert a problem, "the vast majority of the times when you lose signals and it's real, you can't change anything." J.A. 3557.

Dr. Orphanos' experts also contested Plaintiff's claim that a CT myelogram should have been performed after the initial surgery and before taking Plaintiff back to surgery. As Dr. Berkman testified, time was of the essence, and "it would have been a mistake to wait for a CT myelogram" because obtaining a CT myelogram can take hours, causing "an unnecessary delay." J.A. 3561–63. Dr. Berkman confirmed that "what Dr. Orphanos did was exactly what I would have done[.]" J.A. 3563.

As this evidence demonstrates, the record was insufficient to allow the jury to consider whether Dr. Orphanos' conduct amounted to a "reckless disregard of a risk of harm to the patient." Plaintiff's experts testified to negligence and nothing more. Conflicting evidence on negligence does not give rise to "recklessness." Despite the absence of any evidence of recklessness, Plaintiff's counsel injected recklessness every time they had an opportunity to directly address the jury, including during voir dire, opening statement, and closing argument. Pet. Br., at 6–7. Because the evidence in this case involved nothing more than negligence, the circuit court should have precluded the jury from considering recklessness, or granted Dr. Orphanos' post-trial Motion for Judgment as a Matter of Law and applied the Trauma Cap. *See, e.g.*, Syl. Pt. 2, *Jones v. Setser*, 224 W. Va. 483, 485, 686 S.E.2d 623, 625 (2009) ("'Great latitude is allowed counsel in argument of cases, but counsel must keep within the evidence, not make statements calculated to inflame, prejudice or mislead the jury, nor permit or encourage witnesses to make remarks which would have a tendency to inflame, prejudice or mislead the jury.'") (citing Syl. Pt. 2, *State v. Kennedy*, 162 W. Va. 244, 249 S.E.2d 188 (1978)).

This case is of vital importance. This Court should reverse the circuit court and establish the evidentiary standard required to avoid the application of the Trauma Cap. Otherwise, if Plaintiff's approach is affirmed, plaintiffs will be able to (and will) argue that every MPLA jury can consider "recklessness" even without any expert testimony.

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

1. The ICA should have held that the circuit court abused its discretion in denying Dr. Orphanos' pre-trial motions on the issue of "recklessness."

Plaintiff asserts that Dr. Orphanos' argument regarding why the circuit court erred in denying Dr. Orphanos' partial Motion for Summary Judgment should not be considered because

he did not raise the issue before the ICA. This is not true because the argument was raised below. *See* J.A. 4010–12, 4102. As argued below and here, the circuit court's denial of Dr. Orphanos' pre-trial motions on the issue of "recklessness" permitted Plaintiff to interject "recklessness" into the trial without any evidence or testimony to support it, resulting in a tainted and unsupported jury verdict. *See* Syl. Pt. 6, in part, *Smith v. Clark*, 241 W. Va. 838, 828 S.E.2d 900, 905 (2019) ("[T]he verdict of the jury will not be set aside unless plainly contrary to the evidence or without sufficient evidence to support it." (emphasis added) (citation omitted)).

2. The ICA should have found that the circuit court abused its discretion in giving jury instructions that misstated the law.

The Supreme Court of Appeals has held that a trial court abuses its discretion when "a particular instruction misstates or mischaracterizes the applicable law." *Tracy v. Cottrell ex rel. Cottrell*, 206 W. Va. 363, 376, 524 S.E.2d 879, 892 (1999). The Court has also held that jury instructions must be "accurate and fair to both parties." Syl. Pt. 6, *Tennant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 459 S.E.2d 374 (1995). The instructions here were neither.

With respect to the circuit court's "emergency surgery" jury instruction, Plaintiff argues that framing the jury instruction in terms of "emergency surgery" rather than "nonemergency patient" "is a distinction without a difference." Resp. at 26. For the reasons explained in Section II.A.2, the ICA should have found that the circuit court abused its discretion because the instruction misled the jury as to the legal standard for precluding the Trauma Cap. Further, contrary to both Plaintiff and the ICA, the record reflects that Dr. Orphanos did propose an alternative jury instruction on this issue, which was rejected by the circuit court. J.A. 1962, 3616–17.

Regarding Dr. Orphanos' arguments on the "recklessness" jury instruction, Plaintiff claims that the language in the instruction tracks the language used in *Cline v. Joy Mfg. Co.*, 172 W. Va. 769, 772 n.6, 310 S.E.2d 835, 838 n.6 (1983) because in *Cline*, the Court held that the words

willful, wanton, and reckless are used "synonymously." But omitted from the circuit court's instruction is the key phrase "disregard of a risk of harm to the patient" from W. Va. Code § 55-7B-9c(h)(1). This omission matters because had the court read the entire definition of "recklessness" from *Cline*, the jury would have been instructed that it needed to find that Dr. Orphanos 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. It usually is accompanied by a conscious indifference to the consequence[.]" 172 W. Va. at 772 n.6, 310 S.E.2d at 838 n.6. Because the MPLA defines "negligence" based on a reasonableness standard, *see* W. Va. Code § 55-7B-3(a)(1), merely finding that a health care provider acted "unreasonably" is not enough to cross the threshold into "recklessness." The standard for recklessness requires (and should require) much more and, here, the jury was unaware of the requisite burden of proof.

Plaintiff tries to salvage the circuit court's instruction for recklessness by arguing that the omission of the "intentional" language from *Cline* is irrelevant because the evidence at trial demonstrates that Dr. Orphanos committed "a series of failures" before, during, and after surgery that resulted in a "'catastrophic'" effect. Resp. at 27. But as explained, the "evidence" Plaintiff relies on here goes to negligence and was heavily disputed at trial. *See supra*, Section II.A.3.d. With this conflicting testimony, there is simply no evidence that Dr. Orphanos' choices were done "with a conscious indifference to the consequences," nor was it "highly probable that harm would follow." Because the circuit court's instruction did not track *Cline*'s language, the jury was provided with an incomplete definition of recklessness that lowered the standard Plaintiff needed to satisfy to preclude the application of the Trauma Cap.

The jury's instructions for "emergency surgery" and "recklessness" were misstatements of law that severely prejudiced Dr. Orphanos because the jury was improperly instructed on what was

required to preclude application of the Trauma Cap. The ICA should have concluded that the circuit court abused its discretion in reading these instructions to the jury. Reversal of the jury verdict is warranted on this point of error alone.

3. The ICA should have held that the circuit court abused its discretion in qualifying Plaintiff's expert witnesses.

The circuit court abused its discretion in qualifying Nurse Taniguchi, Dr. Feinberg, and Dr. Weidenbaum based on each expert's qualifications and testimony regarding their own expertise. *See Kiser v. Caudill*, 210 W. Va. 191, 196, 557 S.E.2d 245, 250 (2001) (finding the circuit court did not abuse its discretion in limiting expert's testimony based on his admissions regarding his unfamiliarity with the standard of care or the way certain procedures were performed).

Regarding Nurse Taniguchi, Plaintiff claims that "Nurse Taniguchi did what life care planners do: she drew pertinent information from Rodgers' medical records . . . to calculate what would be necessary for his future care." Resp. at 28. The problem with Plaintiff's characterization is that at trial Nurse Taniguchi was asked to read Plaintiff's medical records to the jury and provide a "medical translation." J.A. 3100–01; *see also Orphanos*, 903 S.E.2d at 640 n.23. As Plaintiff acknowledges in his Response,[3] Nurse Taniguchi's testimony is the *only* testimony causally linking Plaintiff's 2020 stroke to the 2017 surgery. Because Plaintiff utilized the 2020 stroke to support his claims for damages, Plaintiff was required to produce expert testimony demonstrating how Dr. Orphanos' negligence resulted in those damages.[4] *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

[3] Plaintiff's Response states: "Uncontested evidence showed that, due to his paralysis, Mr. Rodgers developed an infected bed sore which caused bacterial sepsis, which caused bacterial vegetation to form on the heart valves that broke off and traveled to his brain, resulting in stroke. J.A. 3100–04. No witness testified as to any other cause of the cerebral stroke." Resp. at 7 (emphasis added).

[4] Plaintiff argues that the ICA was correct in finding that Dr. Orphanos did not preserve the issue of causation for appeal. Dr. Orphanos addresses those arguments in his opening brief at page 34.

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"). As Nurse Taniguchi was unqualified to provide causation testimony, the ICA should have concluded that the circuit court abused its discretion in permitting her testimony on causation.

Dr. Feinberg was also not qualified to render the opinions he gave at trial. As an initial matter, Plaintiff questions Dr. Orphanos' challenge to Dr. Feinberg's qualifications because he did not object at trial. Resp. at 29. What Plaintiff ignores is that Dr. Orphanos did challenge Dr. Feinberg's qualifications in a pre-trial motion *in limine*. J.A. 1082–87. As Dr. Orphanos pointed out in this opening brief, the circuit court denied this motion. Pet. Br., at 6; J.A. 2564–66. During his deposition and at trial, Dr. Feinberg admitted that he could not testify as to the standard of care for neurosurgeons or spine surgeons. J.A. 1107, 2696. He admitted at trial that 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. The combination of these admissions proves that Dr. Feinberg was not qualified to render expert opinions on standard of care in this case. *See Kiser*, 210 W. Va. at 196, 557 at 250.

Regarding Dr. Weidenbaum's qualifications, Plaintiff asserts that Dr. Orphanos "ignores the liberal standard for expert qualifications under Rule 702 and confuses fodder for cross-examination with grounds for disqualification." Resp. at 30. Yet, Dr. Orphanos' cross-examination of Dr. Weidenbaum proves exactly why he should not have been qualified as an expert on Chance fractures. He could not recall (1) when he last performed surgery on a patient with a Chance fracture, (2) when he first performed surgery on a patient with a Chance fracture, or (3) how many Chance fracture procedures he had performed in total. J.A. 2866–67. Even under the "casual familiarity" standard, Dr. Weidenbaum falls short because he was unable to provide a basis for

having a casual familiarity with treating Chance fractures. *See Fortney v. Al-Hajj*, 188 W. Va. 588, 594, 425 S.E.2d 264, 270 (1992) (finding that plaintiff's expert, a general surgeon, was qualified to give expert standard of care opinion as to defendant emergency room doctor's care of the patient's impacted food blockage because he had experience treating similar patients).

The record establishes that Plaintiff's experts were not 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 unreliable. A new trial is required.

4. The ICA should have held that the circuit court abused its discretion in precluding Dr. Orphanos from cross examining Plaintiff's mother with notes she made while consulting with Plaintiff's treating physicians.

Plaintiff argues that Dr. Orphanos is doing "an-about-face" with respect to questioning Ms. Rodgers about her notes because of his motion *in limine* to exclude testimony regarding statements made by Plaintiff's health care providers. Resp. at 31. Dr. Orphanos' motion is specifically concerned with precluding hearsay statements. J.A. 1114. Here, Plaintiff and the ICA ignore Dr. Orphanos' arguments regarding the purpose for which the notes were being offered. Dr. Orphanos was not offering the notes for the truth of Dr. Joseph's statements. Rather, the notes were offered and are relevant to show that, shortly after the surgery, Dr. Joseph told Ms. Rodgers that Plaintiff may have had a spinal stroke. As explained here and before the ICA, this evidence contradicts Plaintiff's repeated insistence that Dr. Orphanos and his experts ginned up an unpreventable spinal cord infarct defense for trial. Further, the ICA should have found that the notes were admissible under Rule 612(b).[5]

5. The ICA should have held that the circuit court abused its discretion in denying Dr. Orphanos' motion *in limine* to preclude evidence regarding the miscounting of vertebral bodies.

[5] Plaintiff claims that Dr. Orphanos is raising his Rule 612(b) argument for the first time on appeal. This is not correct. These arguments were raised before and ruled on by the ICA. J.A. 4032, 4108.

Plaintiff argues that the miscounting of the vertebral bodies is relevant to Dr. Weidenbaum's testimony on why the failure to use IONM breached the standard of care. Resp. at 33. Plaintiff conflates the miscounting of the vertebral bodies with the placement of the screw at the T5 vertebrae, but these are separate and distinct acts. Dr. Weidenbaum confirmed that the process of placing a screw in the vertebrae could create the risk of "some movement of the bony structure across the fracture," and that IONM could be used to alert a surgeon if a screw is placed in the wrong location. J.A. 2826, 2860. Dr. Weidenbaum did not testify that these acts were reliant on or caused by Dr. Orphanos miscounting the vertebral bodies.

Plaintiff also attempts to rewrite the record by insisting that "Plaintiff's counsel never stated or implied that the miscounting of the vertebrae was evidence of negligence." Resp. at 33. Conveniently, what Plaintiff fails to acknowledge is that each time Plaintiff's counsel referenced the miscounting of the vertebral bodies, he did so to reinforce his position that Dr. Orphanos was negligent and/or reckless. For example, during closing arguments, Plaintiff's counsel referred to Dr. Orphanos as "reckless" and "flying blind" within the same context of describing Dr. Orphanos miscounting the vertebrae. J.A. 3671–72. The proximity of these statements clearly misled the jury into believing that the miscounting was a breach of the standard of care, as demonstrated by the jury's finding that Dr. Orphanos was "reckless." J.A. 1462. This substantial error was not harmless.

6. The ICA should have held that the circuit court abused its discretion in failing to instruct the jury to disregard Plaintiff's demonstrative pie chart.

Plaintiff dismisses Dr. Orphanos' argument regarding the demonstrative pie chart as "much ado about nothing" because the jury's non-economic damages award was ultimately capped at $750,000. Resp. at 34. Plaintiff's argument, and the ICA's conclusion, misses the point. By suggesting that the jury should award a proportionally larger amount for non-economic damages, the entirety of the jury's verdict is tainted. Once again, contrary to Plaintiff's misstatement of the

record, Dr. Orphanos did not forfeit any arguments regarding the pie chart "by failing to object to the pie chart while it was before the jury." Resp. at 34. Dr. Orphanos objected while Plaintiff was still presenting his closing argument on damages, and during a time when a curable instruction could still be given to the jury. J.A. 3688–90. The pie chart was "taken down" because Plaintiff's counsel, faced with the objection, announced she would not use the chart anymore. J.A. 3690. But the damage was done. This abuse of discretion combined with the other assignments of error demonstrate that Dr. Orphanos was deprived of a fair trial.

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

Although the cumulative error doctrine is used sparingly, that does not mean it should not be used at all. The combination of errors herein warrants application of the doctrine because the jury's verdict is unreliable and not supported by the evidence. Syl. Pt. 8, *Tennant*, 194 W. Va. at 102, 459 S.E.2d at 379. As demonstrated, in sidestepping Dr. Orphanos' "recklessness" arguments, the ICA ignored the inflammatory effect repeated references to recklessness had on the jury's findings on fault and damages, which ultimately resulted in an unreliable verdict. As such, the ICA's holding allowed an unfair trial verdict to stand. The Court must vacate the decisions below and award Dr. Orphanos a new trial. Otherwise, circuits courts will be inundated with medical negligence cases spun as "recklessness" cases before juries.

C. Plaintiff's Cross-Appeal Should Be Denied.

After examining the factors in *State ex rel. Tallman v. Tucker*, 234 W. Va. 713, 769 S.E.2d 502 (2015), the ICA held that the circuit court abused its discretion in striking Dr. Orphanos' rebuttal expert witness while permitting Plaintiff's late disclosed expert. *Orphanos*, 903 S.E.2d at 637. Plaintiff argues that in reaching this ruling, the ICA "disregarded the context" within which the ruling was made, and then provides a "timeline" of dates purporting to explain why the circuit

court precluded Dr. Orphanos from using Dr. Gehring's life expectancy opinions at trial. Resp. at 36. However, Plaintiff's timeline leaves out several pertinent facts:

- Plaintiff filed an Amended Expert Witness Disclosure on December 15, 2020. J.A. 265.
- On April 16, 2021, Dr. Orphanos' counsel sent an email to Plaintiff's counsel noting that Plaintiff's life care plan had been prepared on January 21, 2020, prior to Plaintiff's stroke in July 2020, and asked if Plaintiff planned to produce updated reports. No response was received. J.A. 966.
- The circuit court's last amended scheduling order, entered on October 7, 2021, noted that expert disclosures had been made, and that discovery was completed. J.A. 812.
- Nurse Taniguchi's new life care plan was prepared in September 2021. J.A. 823. Dr. Hawley's new economic report was prepared in October 2021. J.A. 818.
- Plaintiff waited until January 5, 2022—two months before trial—to supplement and provide these disclosures to Dr. Orphanos. J.A. 813.
- Dr. Orphanos' motion to continue the trial and his reply in support of the motion discuss the need to evaluate Plaintiff's new life care plan. J.A. 840, 864 ("the defense will need to update its life care plan – which Dr. Orphanos has already requested his life care planner prepare").
- At the February 18, 2022 hearing, Dr. Orphanos' counsel informed the court about issues regarding Plaintiff's new life care plan: "First I need to have this updated life care plan reviewed [] by my own life care planner . . . . Once I get an updated life care plan from my life care planner, I need [that to be] evaluated by my economist to establish a present value." J.A. 4130.

What this revised timeline demonstrates is that both Plaintiff and the circuit court were aware that Dr. Orphanos sought to utilize rebuttal expert opinions with respect to life expectancy.

Plaintiff argues that the circuit court did not abuse its discretion in striking Dr. Gehring's life expectancy opinions "because Orphanos had been on notice of that issue for years, Dr. Gehring had the stroke-related medical records for almost a year, and defense counsel acknowledged sending her the updated life care plan in January, with no disclosure until the eve of trial." Resp. at 38. Each of Plaintiff's arguments is flawed. Dr. Orphanos was not "on notice" about these issues because he specifically asked if Plaintiff planned on updating his life care plan in April 2021 and

received no response. Thus, whether Dr. Gehring was in possession of the stroke-related medical records for a year does not matter because again, Plaintiff failed to inform Dr. Orphanos that he would be utilizing the records to support his case for increased damages. Finally, Plaintiff sat on these updated reports for several months, failed to timely disclose them to Dr. Orphanos, and then criticized Dr. Orphanos for his late disclosure, which was due to Plaintiff's failure to timely disclose his new expert reports.

Contrary to Plaintiff's characterization, this was not a "balanced, case-specific judgment call." Resp. at 38. The ICA was right to apply the *Tallman* factors because as the Supreme Court of Appeals recognized, "[t]he bedrock of our judicial system is fairness to all parties." *Tallman*, 234 W. Va. at 717, 769 S.E.2d at 506. Here, fairness was not shown to Dr. Orphanos. Accordingly, the Court should deny Plaintiff's cross-appeal.

III. CONCLUSION

Dr. Orphanos requests that the Court vacate the ICA's decision and the circuit court's verdict below and enforce application of the Trauma Cap, or remand the 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 January 31, 2025, I have served the foregoing ***Petitioner John R. Orphanos, M.D.'s Reply in Support of Appeal and Response in Opposition to Cross-Assignment of Error*** 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)