STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

FILED
November 5, 2026
released at 3:00 p.m.
C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Thomas Cummings,
Plaintiff Below, Petitioner

v.) No. 24-235 (ICA No. 22-ICA-220) (Monongalia Co. No. 20-C-86)

Ward Paine, M.D., and
Benjamin Klennert, PA,
Defendants Below, Respondents

MEMORANDUM DECISION

Petitioner (and plaintiff below) Thomas Cummings appeals the opinion of the Intermediate Court of Appeals ("ICA") that affirmed two October 15, 2022, orders of the Circuit Court of Monongalia County. *See Cummings v. Paine*, 249 W. Va. 568, 899 S.E.2d 646 (Ct. App. 2024). The petitioner asserts the circuit court erred (1) in denying the petitioner's motion asking the court not to apply West Virginia Code § 55-7B-9 (2016) ("Section 9") to reduce the jury's verdict; and (2) by applying Section 9, reducing the jury's verdict from $250,000 to $11,250, and thereby entering a substantially reduced judgment against the respondents, and defendants below, Ward J. Paine, MD, and Benjamin Klennert.[1] After considering the parties' written and oral arguments, the record on appeal, and the relevant law, we determine that a memorandum decision affirming the ICA's opinion and the circuit court's orders is appropriate. *See* W. Va. R. App. P. 21.

On March 4, 2019, Cynthia Cummings was hospitalized and underwent a right hip replacement surgery. She was discharged to a nursing home facility called Madison Center.[2] During her six weeks at Madison Center, she was treated by respondents Paine and Klennert (a physician's assistant for whom Paine admits he is vicariously responsible). While under the care of the respondents, Mrs. Cummings developed a serious infection in her surgical wound. Her infection required readmission to the hospital for two months and multiple surgeries (including one to remove her artificial right hip joint and another to remove two pounds of infected tissue) to combat the chronic infection and sepsis. Mrs. Cummings was discharged to a different nursing home, but she died on December 31, 2019.

[1] The petitioner appears by counsel Frank E. Simmerman, Jr.; Chad L. Taylor; and Frank E. Simmerman, III. The respondents appear by counsel Patrick S. Casey and Ryan P. Orth.

[2] In 2019, Madison Center was collectively owned and operated by four entities: 161 Bakers Ridge Road Operations, LLC, d/b/a Madison Center; Genesis Healthcare, LLC; Genesis Healthcare Corporation; and Genesis Healthcare Holding Company I, Inc.

In March 2020, the petitioner filed suit against the respondents and against Madison Center generally alleging they failed to properly detect, treat, and care for the infection in Mrs. Cumming's surgical wound, an infection that led to her death. As a result of mediation, the owners and operators of Madison Center settled with the petitioner for $237,500.

The petitioner proceeded to a jury trial against the respondents. The jury concluded that the respondents breached the standard of care owed to Mrs. Cummings and proximately caused pre-death injuries and damages to Mrs. Cummings. As to the parties' respective degrees of fault for Mrs. Cumming's pre-death damages, the jury found that Dr. Paine was 45% responsible; that physician's assistant Klennert was 45% responsible; that petitioner was 10% responsible; and that the owners and operators of Madison Center were not at fault. The jury assessed that petitioner was entitled to damages of $250,000.

After the trial, the petitioner filed a "Motion to Preclude [Respondents] from Receiving a Pro Tanto Verdict Reduction in Amount of [Petitioner's] Settlement with Nursing Home Defendants." In the motion, the petitioner challenged the application of Section 9 to the jury's verdict, arguing that the respondents should not receive a dollar-for-dollar reduction from the verdict equivalent to the settlement amount paid by Madison Center. Section 9 provides, in pertinent part and with emphasis added:

> To determine the amount of judgment to be entered against each defendant, the court shall first . . . *reduce the adjusted verdict by the amount of any pre-verdict settlement arising out of the same medical injury*. The court shall then, with regard to each defendant, multiply the total amount of damages remaining . . . by the percentage of fault attributed to each defendant by the trier of fact. The resulting amount of damages, together with any post-judgment interest accrued, shall be the maximum recoverable against the defendant.

W. Va. Code § 55-7B-9(d). In orders dated October 15, 2022, the circuit court denied the petitioner's motion and entered judgment on the jury's verdict. The court applied Section 9(d), deducted the $237,500 pre-verdict settlement by Madison Center from the jury's $250,000 verdict, and found the petitioner entitled to a total of $12,500. The court then deducted the petitioner's percentage of fault from the total (10%, or $1,250), and it entered a judgment that found the two respondents liable for $11,250 in damages. The petitioner appealed the circuit court's orders to the ICA which affirmed the orders. *Cummings v. Paine*, 249 W. Va. at 568, 899 S.E.2d at 646.

The petitioner now appeals to this Court. The parties' arguments on appeal center on the interpretation of Section 9. "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review." Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

The petitioner raises three arguments on appeal. First, the petitioner argues that Section 9 is ambiguous and internally inconsistent because it requires trial courts to reduce medical malpractice jury verdicts twice, by both the parties' percentages of fault and any pre-verdict settlements. As best we understand the petitioner's argument, it is that Section 9 creates ambiguity because it calls for judges to impose several liability when it allocates fault yet it incorporates

common-law, joint-liability concepts when it requires deductions of pre-verdict settlements.[3] However, like the circuit court and the ICA, we do not perceive any ambiguity or inconsistency in the language of Section 9. "Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation." Syl. Pt. 2, *Crockett v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970). While the philosophical underpinnings of the statute have certainly created a harsh outcome in this case, we have often said:

> This Court does not sit as a superlegislature, commissioned to pass upon the political, social, economic or scientific merits of statutes pertaining to proper subjects of legislation. It is the duty of the Legislature to consider facts, establish policy, and embody that policy in legislation. It is the duty of this Court to enforce legislation unless it runs afoul of the State or Federal *Constitutions.*

Syl. Pt. 2, *Huffman v. Goals Coal Co.*, 223 W. Va. 724, 679 S.E.2d 323 (2009). We find no error by the circuit court or the ICA.

The petitioner's second argument is that Section 9 can, in certain circumstances, produce an absurd and unjust result. The petitioner contends that Section 9(d) requires a "double reduction" to a medical malpractice damage verdict for both the dollar amount of any pre-verdict settlement and for the settling party's percentage of fault. Still, as applied to the facts of this case, the petitioner recognizes the speculative nature of his position when he argues that Section 9 "creates the *potential* for a double reduction of a plaintiff's recovery[.]" (Emphasis added).[4] The petitioner's third argument plays off his second, and asserts that, to the extent Section 9 does permit a double reduction to verdicts in medical malpractice cases, it violates the "certain remedy" clause of the West Virginia Constitution. *See* W. Va. Const. art. III, § 17 ("[E]very person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law[.]"). The petitioner contends it was error for the circuit court and the ICA to reject the petitioner's arguments as "a hypothetical concern." *Cummings*, 249 W. Va. at 574, 899 S.E.2d at 652.

In the instant case, the jury assigned no percentage of fault to the owners and operators of Madison Center (the pre-verdict settling party), so the double-reduction problem asserted by the petitioner never occurred. Irrespective of the logic driving the petitioner's arguments, there is no factual basis in the record supporting them. In fact, having assigned no fault to the pre-verdict settling party, the jury valued the petitioner's entire case at $250,000. If the Court were to adopt

---

[3] The petitioner asserts, because Section 9 standing alone is ambiguous by mixing several- and joint-liability concepts, that it should be construed in pari materia with another recent several liability statute, West Virginia Code § 55-7-13d. However, we decline to do so in this case. *But see State ex rel. Chalifoux v. Cramer*, No. 20-0929, 2021 WL 2420196, at *11 (W. Va. June 14, 2021) (memorandum decision) (Armstead, J., dissenting) (encouraging courts to read Section 9 and W. Va. Code § 55-7-13d in pari materia); *Wingett v. Challa*, 249 W. Va. 252, 262, 895 S.E.2d 107, 117 (2023) (Armstead, J., concurring) (encouraging courts to apply both Section 9 and W. Va. Code § 55-7-13d to medical malpractice actions).

[4] Petitioner's Brief on Appeal at 20.

the petitioner's position under these facts, it would result in a recovery for the petitioner exceeding the total value of damages that the jury assigned to the case. Our law is clear that courts are not empowered to resolve contingent or hypothetical situations or render a judgment tantamount to an advisory opinion. *See* Syl. Pt. 2, in part, *Harshbarger v. Gainer*, 184 W. Va. 656, 403 S.E.2d 399 (1991) ("Courts are not constituted for the purpose of making advisory decrees or resolving academic disputes."). Accordingly, we see no error by the circuit court or the ICA in rejecting these arguments.

Affirmed.

ISSUED: November 5, 2026

CONCURRED IN BY:

Chief Justice C. Haley Bunn
Justice William R. Wooton
Justice H. L. Kirkpatrick
Judge Jason Wharton, sitting by temporary assignment

DISSENTING:

Justice James W. Flanigan

DISQUALIFIED:

Justice Charles S. Trump IV

Flanigan, Justice, dissenting:

I respectfully dissent from the majority's affirmance of the ICA's decision because, in my view, the jury's award should not have been reduced by the settlement amount when the jury did not allocate any fault to the Nursing Home Defendants. By applying West Virginia Code § 55-7B-9 as written, the circuit court significantly reduced the jury's award of $250,000 to $11,250, causing the respondents, each allocated 45% fault, to pay less than 3% of the awarded damages. By contrast, the Nursing Home Defendants, who were not allocated any fault, were responsible for most of the awarded damages. This result is absurd, unjust, and in contravention of the plain meaning of several liability. West Virginia Code § 55-7B-9 is ambiguous and should be read alongside West Virginia Code § 55-7-13d, so the jury award would be reduced only by the proportion of fault allocated to the Nursing Home Defendants and Thomas Cummings,

individually and as executor of his wife's estate. To do otherwise runs counter to the plain meaning of several liability and could potentially result in a situation where a jury's award could be reduced by both the percentage of fault allocated to the settling party and the settlement amount, essentially a double reduction.

West Virginia Code § 55-7B-9 is Ambiguous and Leads to Unjust Results

This Court has explained that it will only interpret a statute if it is ambiguous. Syl. Pt. 1, in part, *Ohio Cnty. Comm'n v. Manchin*, 171 W. Va. 552, 301 S.E.2d 183 (1983). To determine whether Section 55-7B-9 is ambiguous, courts consider the statute's language as a whole. Syl. Pt. 3, *Meadows v. Wal-Mart Stores, Inc.*, 207 W. Va. 203, 530 S.E.2d 676 (1999) ("A cardinal rule of statutory construction is that significance and effect must, if possible, be given to every section, clause, word or part of the statute."). West Virginia Code § 55-7B-9, titled "Several liability," provides, in relevant part:

> (a) In the trial of a medical professional liability action under this article involving multiple defendants, the trier of fact shall report its findings on a form provided by the court which contains each of the possible verdicts as determined by the court. Unless otherwise agreed by all the parties to the action, the jury shall be instructed to answer special interrogatories, or the court, acting without a jury, shall make findings as to:
>
> (1) The total amount of compensatory damages recoverable by the plaintiff;
>
> (2) The portion of the damages that represents damages for noneconomic loss;
>
> (3) The portion of the damages that represents damages for each category of economic loss;
>
> (4) The percentage of fault, if any, attributable to each plaintiff; and
>
> (5) The percentage of fault, if any, attributable to each of the defendants.
>
> (b) The trier of fact shall, in assessing percentages of fault, consider the fault of all alleged parties, including the fault of any person who has settled a claim with the plaintiff arising out of the same medical injury.
>
> (c) If the trier of fact renders a verdict for the plaintiff, the court shall enter judgment of several, but not joint, liability against each defendant in accordance with the percentage of fault attributed to the defendant by the trier of fact.
>
> (d) To determine the amount of judgment to be entered against each defendant, the court shall first, after adjusting the verdict as provided in section nine-a of this article, reduce the adjusted verdict by the amount of any pre-verdict settlement arising out of the same medical injury. The court shall then, with regard to each defendant, multiply the total amount of damages remaining, with prejudgment interest recoverable by the plaintiff, by the percentage of fault attributed to each defendant by the trier of fact. The resulting amount of damages, together with any post-judgment interest accrued, shall be the maximum

> recoverable against the defendant. To determine the amount of judgment to be entered against each defendant when there is no preverdict settlement, the court shall first, after adjusting the verdict as provided in section nine-a of this article, multiply the total amount of damages remaining with any prejudgment interest recoverable by the plaintiff, by the percentage of fault attributed to each defendant by the trier of fact. The resulting amount of damages, together with any post-judgment interest accrued, shall be the maximum amount recoverable damages against each defendant.
>
> (e) When any defendant's percentage of the verdict exceeds the remaining amounts due the plaintiff after the mandatory reductions, each defendant shall be liable only for the defendant's pro rata share of the remainder of the verdict as calculated by the court from the remaining defendants to the action. The plaintiff's total award may never exceed the jury's verdict less any statutory or court-ordered reductions.

In examining Section 55-7B-9, under subsection (a), the trier of fact, in this case, the jury, must determine the total compensatory damages. *Id.* § 55-7B-9(a)(1). The jury must then allocate a percentage of fault to each plaintiff and each defendant. *Id.* §§ 55-7B-9(a)(4), (5). The jury must also consider "the fault of all alleged parties," expressly including "any person who has settled a claim with the plaintiff arising out of the same medical injury." *Id.* § 55-7B-9(b). Subsection (c) clarifies that the awarded judgment is "several, but not joint . . . against each defendant in accordance with the percentage of fault attributed to the defendant by the trier of fact." *Id.* § 55-7B-9(c).

Subsection (d) of Section 55-7B-9 provides settlement credit to prevent double recovery by directing the court to, after reducing the award as provided in West Virginia Code § 55-7B-9a,[5] "reduce the adjusted verdict by the amount of any pre-verdict settlement arising out of the same medical injury." Then, after reducing the award by the settlement amount, the court multiplies the remaining damages by the percentage of fault allocated to each defendant; in doing so, the award is necessarily reduced by the percentage of fault the jury allocated to the plaintiff and any settling parties.

Section 55-7B-9 establishes a comprehensive scheme that allocates fault to all parties, commands several, not joint, liability, and aims to prevent injured plaintiffs from recovering twice by reducing the awarded damages by the settlement amount. As written, this statutory scheme reduces the total awarded damages several times: first, by the settlement amount; second, by the plaintiff's own percentage of fault; and third, by the percentage of fault attributed to settling parties. Only after these reductions will the defendants attributed fault be liable for the awarded damages. This statutory scheme is ambiguous and internally inconsistent with the Legislature's grant of several liability and leads to absurd results. By reducing the jury's award by the settlement

[5] West Virginia Code § 55-7B-9a provides for a reduction in certain awarded damages for payments to the plaintiff from collateral sources. This section is not at issue in this appeal.

amount, regardless of the amount of fault allocated to the settling party, the settling party becomes jointly, not severally, liable for the plaintiff's damages.

Courts must read the statutes as a whole, harmonizing all parts to effectuate legislative intent and avoid unjust or absurd results. Syl. Pt. 2, *Click v. Click*, 98 W. Va. 419, 127 S.E. 194 (1925) ("It is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold the law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity."). Looking to the statute, Section 55-7B-9(c) commands several liability: "The court shall enter judgment of several, but not joint, liability against each defendant in accordance with the percentage of fault attributed to the defendant by the trier of fact." That language matters. It directs courts to translate the jury's fault allocation into several judgments pegged to each defendant's allocated percentage of fault. Additionally, the statute is titled "Several liability." That language reinforces the Legislature's intent to make tortfeasors under the MPLA severally, not jointly, liable for awarded damages. *See* Syl. Pt. 2, *City of Huntington v. State Water Comm'n*, 135 W. Va. 568, 64 S.E.2d 225 (1951) ("In construing an ambiguity in a statute, this Court will examine the title to the Act of the Legislature as a means of ascertaining the legislative intent, and the overall purpose of the legislation.").

Section 55-7B-9(d) shows the Legislature's intent to prevent plaintiffs from recovering twice for the same injury. It requires courts to "reduce the adjusted verdict by the amount of any pre-verdict settlement arising out of the same medical injury." This follows directly after the statute commands the courts to adjust the awarded damages under West Virginia Code § 55-7B-9a, which reduces certain awarded damages based on payments the plaintiff received from collateral sources. Both reductions show that the Legislature wishes to prevent plaintiffs from recovering additional damages when they have already received settlement monies or monies from collateral sources for the same injury.

The Legislature created the MPLA's several liability and settlement credit provisions to limit "the financial strain on the trauma care system of our state," which increases "costs for all users of the trauma care system and impact[s] the availability of these services." West Virginia Code § 55-7B-1. The Legislature stated that the purpose of the MPLA generally is to provide "adequate and reasonable compensation to those persons who suffer from injury or death as a result of professional negligence," balanced 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[.]" West Virginia Code § 55-7B-1. The several liability command and the settlement credit provision should be harmonized to effectuate this legislative intent and prevent unjust, unreasonable, or absurd outcomes.

In this case, the jury awarded $250,000 to Mr. Cummings and allocated Mr. Cummings 10% fault, the respondents 45% fault each, and the Nursing Home Defendants 0% fault. In following West Virginia Code § 55-7B-9, the circuit court reduced the award by the settlement amount from the Nursing Home Defendants. It then reduced the award by Mr. Cummings's 10% fault, leaving a remaining $11,250 award to Mr. Cummings. By simple math, each respondent is responsible for paying $5,625 of that award, a mere 2.25% of the jury's $250,000 award. As a result, the Nursing Home Defendants, who were not allocated any fault, paid most of Mr. Cummings' awarded damages, and the respondents, each allocated 45% fault, pay less than 3% of

the awarded damages. This result is absurd, unjust, and in contravention of the plain meaning of several liability.

In practice, as here, applying Section 55-7B-9 as written leads to nonsensical results. As written, the statute provides for both several liability and an automatic settlement amount discount. Allowing the awarded damages to be reduced by the settlement amount makes the settling party jointly, not severally, liable for the damages—a result that is inconsistent with several liability. It is the "duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity." *Click*, 98 W. Va. at 419, 127 S.E. at 194, Syl. Pt. 2. It should come as no surprise that Section 55-7B-9 is ambiguous; indeed, this Court has previously noted that Section 55-7B-9 contains ambiguities. *See, e.g.*, *State ex rel. W. Va. Univ. Hosps., Inc. v. Gaujot*, 248 W. Va. 11, 19 n.23, 886 S.E.2d 346, 354 n.23 (2023) (encouraging the Legislature to resolve an ambiguity in West Virginia Code § 55-7B-9(g) "as applied to multi-agent cases"). As demonstrated, Section 55-7B-9 is ambiguous and, as written, leads to absurd results. Therefore, it must be constructed to avoid the ridiculous result that occurred in this case, and others like it.

West Virginia Code § 55-7B-9 Should Be Read *Pari Materia* with § 55-7-13d

To solve the ambiguities in Section 55-7B-9 and harmonize and preserve the legislative intent of the MPLA, West Virginia Code § 55-7B-9 should be read in *pari materia* with West Virginia Code § 55-7-13d, which provides, in relevant part: "Where a plaintiff has settled with a party or nonparty before verdict, that plaintiff's recovery will be reduced in proportion to the percentage of fault assigned to the settling party or nonparty, rather than by the amount of the nonparty's or party's settlement." W. Va. Code § 55-7-13d(a)(3). It is well established that when a statute is ambiguous or unclear, the Court may read it *pari materia* with a statute relating to the same common purpose to effectuate the Legislature's intent. *See* Syl. Pt. 5, in part, *Fruehauf Corp. v. Huntington Moving & Storage Co.*,159 W. Va. 14, 217 S.E.2d 907 (1975) ("Statutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent.").

Considering West Virginia Code § 55-7B-9 and West Virginia Code § 55-7-13d together is not novel. In 2023, Justice Armstead concurred in *Wingett v. Challa*, 249 W. Va. 252, 895 S.E.2d 107 (2023) (C. J. Armstead concurring), suggesting that the Court read West Virginia Code § 55-7B-9 with West Virginia Code § 55-7-13d to support the conclusion that the jury should consider the fault of a doctor and medical PLLC who were dismissed from the action but did not settle with the plaintiff. *See also State ex rel. Chalifoux v. Cramer*, 2021 W.Va. LEXIS 317, 2021 WL 2420196, at *11–13 (2021) (memorandum decision) (J. Armstead dissenting) (explaining that West Virginia Code § 55-7B-9 should be read *pari materia* with West Virginia Code § 55-7-13d).

Here, reading West Virginia Code § 55-7B-9 with West Virginia Code § 55-7-13d clarifies Section 55-7B-9's statutory scheme, and effectuates the Legislature's intent to impose several liability and prohibit double recovery. The statutory text of Section 55-7B-9 already supplies the needed tools: allocation of all parties' fault, several liability tied to each defendant's percentage of fault, and a credit for pretrial settlements. West Virginia Code § 55-7-13d requires a jury's award to be reduced only by the percentage of *fault* allocated to that settling party or nonparty. Read with

West Virginia Code § 55-7-13d, Section 55-7B-9 would require any pretrial settlements to be credited only to the percentage of *faul*t allocated to the settling party.

Considering these two statutes together and giving effect to all provisions of Section 55-7B-9 would result in the jury still allocating a percentage of fault to the plaintiff, defendants, and any settling party. Then, the court would reduce the awarded damages in proportion to the percentage of fault allocated to the plaintiff and the settling party. Any settlement amount would be credited against the portion of fault allocated to that settling party only. The court may then calculate any damages owed by defendants in proportion to their allocated fault. This approach preserves subsection (b)'s allocation function, enforces subsection (c)'s several-liability command, and honors the no–double-recovery principle without invading the several-liability command.

Reading the statutes together also aligns with the MPLA's stated purpose of balancing adequate compensation for injured patients with the availability of professional services and insurance. *See* West Virginia Code § 55-7B-1 (explaining the Legislature's intent 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"). Additionally, by adopting this reading, in cases like this one, where a settling party is not allocated any fault, the settling party would not be responsible for the majority of the awarded damages, and the defendants allocated the majority of fault by the jury would be required to pay the majority of the damages award. This result makes logical sense and preserves the legislative intent of several liability.

I believe the Court should read the West Virginia Code § 55-7B-9 *pari materia* with West Virginia Code § 55-7-13d, to maintain the MPLA's structure in which the jury determines total damages, allocates fault to all actors (including settling parties), the plaintiff's own fault reduces the plaintiff's award, liability is several, each non-settling defendant's judgment is tied to that defendant's allocated percentage of fault, and any settlement is credited against the awarded judgment in proportion with that settling party's allocated share of fault only. Instead, the majority adopts a construction that is at odds with several liability. For these reasons, I would have reversed ICA's decision and remanded to the circuit court with directions to calculate the damages as explained in this dissent.