IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2026 Term

FILED
November 12, 2026
released at 3:00 p.m.
C. CASEY FORBES, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 24-438

John R. Orphanos, M.D.,
Defendant Below, Petitioner,

v.

Michael Rodgers,
Plaintiff Below, Respondent.

Appeal from the Intermediate Court of Appeals
No. 23-ICA-58
(Circuit Court of Kanawha County Civil Action No. 19-C-561)

AFFIRMED, IN PART; REVERSED, IN PART

Submitted: September 9, 2026
Filed: November 12, 2026

Thomas J. Hurney, Jr. Esq.
Blair E. Wessels, Esq.
Jackson Kelly PLLC
Charleston, West Virginia

Richard D. Jones, Esq.
J. Dustin Dillard, Esq.
Flaherty Sensabaugh Bonasso, PLLC
Charleston, West Virginia
Attorneys for Petitioner

John W. Barrett, Esq.
Benjamin L. Bailey, Esq.
P. Gregory Haddad, Esq.
Kerrie L. Haddad, Esq.
Bailey Glasser, LLP
Charleston, West Virginia
Attorneys for Respondent

JUSTICE TRUMP delivered the Opinion of the Court.

SYLLABUS OF THE COURT

1. "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." Syllabus Point 1, *Chrystal R.M. v. Charlie A. L.,* 194 W.Va. 138, 459 S.E.2d 415 (1995).

2. "'[T]he ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, [and] the trial court's ruling will be reversed on appeal [only] when it is clear that the trial court has acted under some misapprehension of the law or the evidence.' Syl. [P]t. 4, in part, *Sanders v. Georgia-Pacific Corp.,* 159 W.Va. 621, 225 S.E.2d 218 (1976)." Syllabus Point 1, in part, *Andrews v. Reynolds Memorial Hospital, Inc.*, 201 W. Va. 624, 499 S.E.2d 846 (1997).

3. "If a party fails to offer an instruction regarding a particular point of law upon which he relies, he cannot later complain of the absence of such an instruction, there being no duty upon the court to so instruct the jury except when the error is so plain and the result so outrageous that the trial court must intervene to do substantial justice." Syllabus Point 2, *Berkeley Homes, Inc. v. Radosh*, 172 W. Va. 683, 310 S.E.2d 201 (1983).

4. The party seeking application of the statutory cap on damages in West Virginia Code §55-7B-9c (known as the West Virginia Medical Professional Liability Act's "Trauma Cap") bears the burden of invoking the cap and proving all predicate facts required for the cap's application to limit the other party's proven damages.

5. “This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment.” Syllabus Point 3, *Barnett v. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466 (1965).

6. “[T]he West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence and the appropriateness of a particular sanction for discovery violations are committed to the discretion of the trial court.” Syllabus Point 1, in part, *McDougal v. McCammon*, 193 W. Va. 229, 455 S.E.2d 788 (1995).

7. “A trial court is permitted broad discretion in the control and management of discovery, and it is only for an abuse of discretion amounting to an injustice that we will interfere with the exercise of that discretion. A trial court abuses its discretion when its rulings on discovery motions are clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as to shock our sense of justice and to indicate a lack of careful consideration.” Syllabus Point 1, *B.F. Specialty Co. v. Charles M. Sledd Co.*, 197 W. Va. 463, 475 S.E.2d 555 (1996).

TRUMP, Justice:

The petitioner, John R. Orphanos, M.D., appeals the June 13, 2024, decision of the West Virginia Intermediate Court of Appeals ("ICA") that: 1) affirmed the Circuit Court of Kanawha County's January 20, 2023, order denying his motion for renewed judgment as a matter of law, after finding that the Trauma Cap in West Virginia's Medical Professional Liability Act ("MPLA")[1] did not apply to limit the damages awarded in the case; 2) affirmed, in part, and reversed, in part, the circuit court's January 20, 2023, order denying Dr. Orphanos's motion for a new trial; 3) remanded the case to the circuit court with instructions to conduct a new trial on the issue of damages; and 4) reversed, in part, the circuit court's September 12, 2022, judgment order. Dr. Orphanos contends that the ICA erred in concluding that the Trauma Cap was inapplicable based on the nature of the medical care at issue in the case and in finding that a new trial was warranted based upon only one of the numerous errors he alleged to have occurred in the circuit court's proceedings below. In a cross-assignment of error, the respondent, Michael Rodgers, challenges the ICA's decision to grant Dr. Orphanos a new trial on the issue of damages

[1] The "Trauma Cap" refers to the statutory limit that West Virginia Code § 55-7B-9c places on the amount of damages a plaintiff may recover in an MPLA case for "injury to or death of 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 by the Office of Emergency Medical Services as a trauma center." We note that the Legislature amended West Virginia Code § 55-7B-9c in 2024 and that it was the 2016 version of the statute that was in effect when the circuit court entered its final judgment order below. However, the 2024 amendments to West Virginia Code § 55-7B-9c did not alter the language of the statute that governs the Trauma Cap's application in this case. We describe the Trauma Cap in greater detail in our discussion below.

after finding that the circuit court abused its discretion by striking one of Dr. Orphanos's late-disclosed expert opinions.

Upon our review of the parties' arguments, the record before us, and the applicable law, we affirm the ICA's opinion insofar as the ICA concluded that the circuit court did not err in declining to apply the MPLA's Trauma Cap to the damages awarded in this case. We also affirm the ICA's opinion insofar as the ICA partially affirmed the circuit court's denial of Dr. Orphanos's motion for a new trial. However, we reverse that portion of the ICA opinion that reversed the circuit court's order denying Dr. Orphanos's motion for a new trial and remanded the case for a new trial on the issue of damages. Accordingly, we reinstate the circuit court's September 12, 2022, judgment order.

I. FACTUAL AND PROCEDURAL BACKGROUND

This appeal arises from a medical malpractice lawsuit that Mr. Rodgers filed against Dr. Orphanos claiming injuries from a spinal surgery Dr. Orphanos performed on him in 2017. On June 4, 2017, Mr. Rodgers was life-flighted to Charleston Area Medical Center General Hospital ("CAMC"), a West Virginia designated Level I Trauma Center, for treatment following his motorcycle accident. A Computed Tomography ("CT") scan revealed that Mr. Rodgers had suffered a transverse fracture through the vertebral body and neural arch of his fifth thoracic vertebra. Mr. Rodgers was transferred from CAMC's Emergency Department to its Surgical Trauma Intensive Care Unit ("ICU") for further evaluation and treatment. The next morning, on June 5, 2017, a nurse practitioner under

Dr. Orphanos's supervision initially evaluated Mr. Rodgers's spinal fracture and recommended, as treatment, that Mr. Rodgers wear a lumbar sacral orthosis brace for six to eight weeks and observe spinal precautions. Later that day, after conducting his own evaluation of Mr. Rodgers's injury, Dr. Orphanos presented two treatment options—1) to wear a brace for a period of time, as the nurse practitioner had recommended, or 2) to undergo a spinal surgery during which Dr. Orphanos would place orthopedic hardware into Mr. Rodgers's spine to stabilize the fracture. Dr. Orphanos obtained consent for the latter treatment option and performed surgery on Mr. Rodgers the following day. Prior to the surgery, Mr. Rodgers had full sensation, motor function, and strength in all of his extremities; however, upon waking from the surgery, Mr. Rodgers had no movement or sensation below his nipple line. In an attempt to discover the cause of Mr. Rodgers's sudden-onset paraplegia, Dr. Orphanos ordered a CT scan and performed a second, exploratory surgery[2] on him, but reportedly found no evidence of interference with his spinal cord. On June 20, 2017, Mr. Rodgers was discharged from the CAMC ICU to a rehabilitation center and on July 20, 2017, he was discharged home. Mr. Rodgers's paraplegia persisted and was ultimately determined to be permanent.

Mr. Rodgers filed a civil action against Dr. Orphanos on May 30, 2019, claiming that Dr. Orphanos had misplaced an orthopedic screw during surgery, causing

[2] All references to the "surgery" or "2017 surgery" in the remainder of this opinion refer to Mr. Rodgers's first June 6, 2017, surgery as opposed to the second, exploratory surgery, unless otherwise indicated.

Mr. Rodgers's paraplegia. In his complaint, Mr. Rodgers alleged that Dr. Orphanos had breached the standard of care in three ways: 1) by failing to order a dedicated preoperative MRI prior to the surgery to evaluate Mr. Rodgers's spinal cord and determine whether there was any cord compression, edema, abnormality, condition, or injury to be taken into account during the surgery; 2) by failing to use intraoperative neurophysiological monitoring during the surgery to monitor Mr. Rodgers's spinal cord while placing orthopedic hardware; and 3) by failing to order a CT myelogram following the surgery and prior to the second, exploratory surgery to determine the cause of Mr. Rodgers's sudden-onset paraplegia. Based on those allegations, Mr. Rodgers sought to recover both compensatory and punitive damages from Dr Orphanos.[3]

While discovery was underway in July 2020, Mr. Rodgers suffered a stroke which left him with left-sided hemiparesis. Mr. Rodgers did not seek to amend his complaint to add a claim that his 2017 surgery had caused or contributed to his 2020 stroke. However, on January 5, 2022, well-past the close of discovery and just over two months before the trial date, Mr. Rodgers filed an amended expert witness disclosure that included a new life care plan from his previously disclosed life care expert witness, Nurse Nadene R. Taniguchi, R.N., and an updated economic evaluation (collectively, the "new life care plan"). The new life care plan reflected increased lifetime care costs compared to Mr.

[3] We note that Mr. Rodgers appears to have abandoned his claim for punitive damages at some point during the litigation and that the jury did not award him punitive damages.

Rodgers's previously disclosed plan due to the additional limitations he suffered following his 2020 stroke. The new life care plan also referenced Mr. Rodgers's medical records related to the 2020 stroke, in which a physician (who was not an expert witness in the case) noted that Mr. Rodgers's post-surgery paraplegia likely caused bed sores that, in turn, caused his 2020 stroke.

Dr. Orphanos filed a motion to exclude the new life care plan and evaluation, arguing that the disclosures were untimely and prejudicial. More specifically, Dr. Orphanos argued that by attributing the 2020 stroke to the 2017 surgery, the new life care plan effectively added an entirely new claim to Mr. Rodgers's cause of action without identifying a qualified medical expert to "draw a causal link between the stroke in 2020 and the care rendered by Dr. Orphanos three years earlier." Dr. Orphanos also filed a contemporaneous motion asking the circuit court, in the alternative, to continue the trial, positing that the court could "cure" the prejudicial effect of the new life care plan by postponing the trial, reopening discovery, and requiring Mr. Rodgers to identify a qualified medical expert to establish causation between the surgery and the stroke. On February 24, 2022, the circuit court denied both of Dr. Orphanos's motions.

On March 7, 2022, one week before trial, Dr. Orphanos served his own set of late supplemental expert witness disclosures. The disclosures included new opinions from two of his previously disclosed experts (hereinafter, "infectious disease experts"), rebutting any claim that the 2017 surgery caused Mr. Rodgers's 2020 stroke. The

disclosures also included an opinion from another of Dr. Orphanos's previously disclosed experts, Dr. Jodi A. Gehring, M.D., concerning Mr. Rodgers's post-stroke life expectancy. Dr. Gehring estimated Mr. Rodgers's life expectancy to be 5-7 years, rebutting the 27.3 year life expectancy figure that Nurse Taniguchi had used to calculate Mr. Rodgers's new life care plan costs. Mr. Rodgers moved to strike Dr. Orphanos's late disclosures, arguing that they were untimely and prejudicial. The circuit court heard arguments on the motion to strike at a pretrial conference on March 14, 2022, the day before jury selection was set to begin.

During the pretrial hearing, the circuit court presented Mr. Rodgers with three options in response to his motion to strike Dr. Orphanos's late supplemental expert disclosures: 1) to "abandon" his late-disclosed new life care plan, in which case the court would strike all of Dr. Orphanos's late-disclosed expert opinions offered to rebut the plan; 2) to "keep" his new life care plan, in which case the court would allow all of Dr. Orphanos's late-disclosed experts to testify at trial; or 3) to "reconsider" his opposition to Dr. Orphanos's motion to continue the trial. In response, Mr. Rodgers's counsel offered that he was amenable to Dr. Orphanos offering the two late-disclosed rebuttal opinions from his infectious disease experts concerning the cause of Mr. Rodgers's 2020 stroke, so long as Dr. Gehring's life expectancy opinion (which he characterized as "absolutely unrelated" to Mr. Rodgers's own late disclosures) would not be permitted. He further argued that, unlike the causation issues implicated in his recently disclosed new life care plan, Mr. Rodgers's life expectancy had always been at issue in the case with respect to his

damages related to future care costs. If the stroke had significantly reduced Mr. Rodgers's life expectancy, his counsel argued, Dr. Orphanos would have been aware of that issue and the resultant need for expert testimony when the stroke was disclosed in 2020. In response, Dr. Orphanos's counsel argued that one of his experts had flagged Nurse Taniguchi's life expectancy figure as an issue only after reviewing Mr. Rodgers's new life care plan. The circuit court, noting that it "tend[ed] to agree" with Mr. Rodgers's arguments, allowed Dr. Orphanos's infectious disease experts to offer their late-disclosed opinions rebutting that the 2017 surgery caused the 2020 stroke, but precluded Dr. Gehring from offering her expert opinion on Mr. Rodgers's life expectancy.

During the March 14, 2022, pretrial conference, the circuit court also considered Dr. Orphanos's "Motion for Partial Summary Judgment on Claims Other than Medical Negligence," in which he moved for summary judgment "on any claim above and beyond simple medical negligence."[4] In support of his motion, Dr. Orphanos argued that expert testimony is required to establish liability for recklessness under the MPLA and that none of Mr. Rodgers's medical experts had opined that Dr. Orphanos had either: 1) acted in "willful and wanton or reckless disregard of a risk of harm to the patient," which is the standard for the "recklessness exception"[5] to the MPLA's Trauma Cap to apply; or 2) acted

[4] In the same motion, Dr. Orphanos also moved the court, in the alternative, for a bifurcated trial on punitive damages. Because Mr. Rodgers abandoned his claim for punitive damages, this aspect of the motion is not at issue on appeal.

[5] West Virginia Code § 55-7B-9c(h) provides that the Trauma Cap on damages is inapplicable "where [the] health care or assistance for the emergency condition

with "actual malice toward the plaintiff . . . or a conscious, reckless and outrageous indifference to the health, safety, and welfare of others," which is required for an award of punitive damages in a civil case. W. Va. Code § 55-7-29. The circuit court also considered Dr. Orphanos's related "Motion in Limine to Preclude Mr. Rodgers from Asserting that Dr. Orphanos was Reckless," in which Dr. Orphanos reiterated his arguments in support of his partial summary judgment motion. The circuit court denied both motions, finding that whether Dr. Orphanos was reckless in providing the medical care at issue was a question for the jury to decide, based upon the totality of the evidence presented at trial.[6]

The trial commenced on March 15, 2022, and lasted for seven days. Following the close of evidence on the sixth day of trial, Dr. Orphanos verbally moved for partial judgment as a matter of law pursuant to West Virginia Rule of Civil Procedure 50(a) (hereinafter, his "Rule 50(a) motion"), arguing that there was insufficient evidence for the jury to find that Dr. Orphanos's alleged breaches of the standard of care had amounted to recklessness in the absence of expert testimony to that effect. The circuit court denied the

---

is rendered . . . [i]n willful and wanton or *reckless* disregard of a risk of harm to the patient[.]" (emphasis added). We refer to this statutory provision as the Trauma Cap's "recklessness exception" and discuss it in further detail below.

[6] The circuit court ruled on a significant number of other motions by both parties during the pretrial conference; however, in the interest of judicial economy, we omit any reference to the parties' various motions during the pretrial conference (and at other points during the litigation below) that are not relevant to our discussion.

motion, finding that there had been sufficient evidence presented for the jury to find that Dr. Orphanos was reckless.

Dr. Orphanos also filed objections to a number of Mr. Rodgers's proposed jury instructions and their corresponding verdict form interrogatories, arguing that the instructions misstated the statutory standards for whether the MPLA's Trauma Cap would apply to limit any damages the jury ultimately awarded. First, Dr. Orphanos objected to the proposed jury instruction on "recklessness," arguing that the instruction did not accurately reflect the language of the statutory "recklessness exception" to the Trauma Cap. Dr. Orphanos also objected to Mr. Rodgers's proposed instruction directing the jury to decide whether Mr. Rodgers's surgery was "an emergency surgery." Dr. Orphanos argued that, although the Trauma Cap expressly does not apply to claims where the alleged acts or omissions occurred "after the patient's condition [was] stabilized and the patient [was] capable of receiving medical treatment as a nonemergency patient," whether the surgery was an "emergency surgery" is irrelevant to the cap's application. *See* W. Va. Code §55-7B-9c(e). The circuit court overruled Dr. Orphanos's objections and allowed all of Mr. Rodgers's proposed instructions related to the Trauma Cap to be read to the jury.[7]

[7] Dr. Orphanos also objected to the circuit court providing any instruction at all to the jury concerning recklessness, based on the same arguments he made in support of his Rule 50(a) motion. The circuit court overruled that objection along with Dr. Orphanos's other objections to the proposed jury instructions.

Following deliberations, the jury returned a verdict for Mr. Rodgers on March 24, 2022, finding, with respect to the medical care Dr. Orphanos provided him in 2017: 1) that Mr. Rodgers's surgery was not an "emergency surgery;" 2) that Dr. Orphanos was negligent in his care and treatment related to Mr. Rodgers's post-surgery paraplegia; 3) that Dr. Orphanos breached the standard of care and that his negligence caused or contributed to Mr. Rodgers's paraplegia; and 4) that Dr. Orphanos was reckless in his care and treatment of Mr. Rodgers and that his recklessness caused or contributed to Mr. Rodgers's paraplegia. As a result, the jury awarded Mr. Rodgers the following damages for the injuries attributed directly to the 2017 surgery:

Past expenses for care and treatment:	$1,374,079.00
Lost earning capacity:	$ 591,166.00
Future care, treatment, renovation:	$6,511,940.00
Past pain, suffering, loss of enjoyment:	$1,000,000.00
Future pain, suffering, loss of enjoyment:	$1,500,000.00

With respect to Mr. Rodgers's 2020 stroke, the jury found: 1) that Dr. Orphanos's negligence related to the 2017 surgery caused or contributed to the stroke; 2) that Mr. Rodgers was not contributorily negligent in failing to present to an emergency department prior to the stroke; and 3) that Dr. Orphanos was 100% at fault for the stroke. The jury awarded Mr. Rodgers additional damages for his future care and treatment costs resulting from the 2020 stroke in the amount of $1,793,690.00, as well as damages for his lost earning capacity due to the stroke in the amount of $5,000,000.00. Altogether, the jury awarded Mr. Rodgers $17,770,875.00 in damages.

On April 13, 2022, Dr. Orphanos filed a "Motion to Reduce the Verdict Consistent with the West Virginia Medical Professional Liability Act," asking the circuit court to apply the Trauma Cap and other statutory reductions to the jury's verdict in calculating the final judgment amount. With respect to the Trauma Cap, Dr. Orphanos argued that the surgery "was required as a result of the emergency condition that brought Mr. Rodgers to CAMC" and thus, the cap should be applied to reduce the final judgment amount. In response, Mr. Rodgers argued that the jury's finding that Mr. Rodgers "was a nonemergency patient"[8] placed his claims outside of the Trauma Cap's application. The circuit court heard arguments on the parties' motions related to the final judgment calculation in two separate hearings prior to entering its September 12, 2022, judgment order. In its order, the circuit court did not apply the Trauma Cap to reduce the final judgment amount, reciting the jury's findings that Mr. Rodgers's surgery was not "an emergency surgery" and that Dr. Orphanos was "reckless in his care and treatment of Mr. Rodgers." However, the circuit court noted in its order that it "deferred" ruling upon Dr. Orphanos's motion to apply the Trauma Cap by agreement of the parties, as those issues were "more appropriately addressed by post-trial motion practice." The final judgment order awarded Mr. Rodgers a total judgment amount of $9,862,384.58,[9] including damages for:

[8] We acknowledge that the jury found that the surgery was not "an emergency surgery," not that Mr. Rodgers was a "nonemergency patient."

[9] Dr. Orphanos also requested other verdict reductions unrelated to the Trauma Cap in his "Motion to Reduce the Verdict Consistent with the West Virginia Medical Professional Liability Act," including that the circuit court apply the limit in West

Past expenses for care and treatment:	$ 215,588.58
Lost earning capacity:	$ 591,166.00
Future care, treatment, renovation:	$ 8,305,630.00
Past and future pain, suffering, loss of enjoyment:	$ 750,000.00

On September 21, 2022, Dr. Orphanos filed a motion for a new trial pursuant to Rule 59(a), alleging that the court had committed various errors in its pretrial and trial proceedings, and a renewed motion for judgment as a matter of law on the issue of recklessness pursuant to Rule 50(b) (hereinafter, his "Rule 50(b) motion"), renewing the Rule 50(a) motion he made during trial. In support of his motion, Dr. Orphanos once again argued that there had been insufficient evidence to support the jury's finding that he was reckless in providing medical care to Mr. Rodgers in 2017 and, therefore, he was "statutorily entitled" to application of the Trauma Cap to reduce the final judgment amount.[10] After conducting a hearing on Dr. Orphanos's motions, the circuit court denied each motion by separate written orders, both entered on January 20, 2023. On May 22, 2023, Dr. Orphanos appealed the orders to the ICA, setting forth assignments of error and supporting arguments that are substantially the same as those presented on appeal to this Court.

Virginia Code §55-7B-8 on the amount of noneconomic damages that may be recovered in an MPLA case. The circuit court applied that limit and other reductions to calculate the final judgment amount.

[10] Notably, nothing in the record indicates that Dr. Orphanos filed a post-judgment motion pursuant to Rule 59(e) or otherwise moved the circuit court to amend or alter its judgment based on his previous argument that, contrary to the jury's finding that Mr. Rodgers's surgery was not an "emergency surgery," the surgery was "necessitated by an emergency condition" for the purposes of the Trauma Cap's application.

In affirming the circuit court's order denying Dr. Orphanos's Rule 50(b) motion, the ICA concluded that the jury's finding that Mr. Rodgers's surgery was not "an emergency surgery" precluded the Trauma Cap's application regardless of whether the recklessness exception applied. Therefore, the ICA declined to reach Dr. Orphanos's assignments of error on the issue of recklessness. The ICA then affirmed, in part, and reversed, in part, the circuit court's January 20, 2023, order denying Dr. Orphanos's motion for a new trial, finding that the circuit court had abused its discretion in only one of the rulings challenged on appeal—the decision to strike Dr. Gehring's late-disclosed expert opinion on Mr. Rodgers's life expectancy. Based on that finding of reversible error, the ICA remanded the case to the circuit court for a new trial "solely on damages" in which Dr. Orphanos would be permitted to offer expert rebuttal testimony on Mr. Rodgers's life expectancy. Consequently, the ICA also reversed, in part, the circuit court's September 12, 2022, judgment order. We elaborate further on the ICA's reasoning, where relevant, in the course of our discussion below.

II. STANDARD OF REVIEW

Dr. Orphanos's first assignment of error challenges the ICA's conclusion, based on the jury's finding that Mr. Rodgers's surgery was not an "emergency surgery," that the MPLA's Trauma Cap did not apply to the damages awarded in this case. His second assignment of error challenges the ICA's resultant refusal to decide whether the recklessness exception to the Trauma Cap also applied. In considering those assignments of error, "[w]here 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).

Dr. Orphanos's remaining assignments of error challenge the ICA's partial affirmance of the circuit court's denial of his motion for a new trial pursuant to Rule 59(a), and Mr. Rodgers's cross-assignment of error challenges the ICA's decision to partially reverse the circuit court's denial of that motion. "[W]e review a circuit court's rulings on a motion for a new trial under an abuse of discretion standard." *Tennant v. Marion Health Care Found., Inc.*, 194 W. Va. 97, 104, 459 S.E.2d 374, 381 (1995) (internal citation omitted). To clarify how this deferential standard applies in practice, we have held that

> "the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, [and] the trial court's ruling will be reversed on appeal [only] when it is clear that the trial court has acted under some misapprehension of the law or the evidence." Syl. [P]t. 4, in part, *Sanders v. Georgia-Pacific Corp.,* 159 W.Va. 621, 225 S.E.2d 218 (1976)."

Syl. Pt. 1, in part, *Andrews v. Reynolds Mem'l Hosp., Inc.*, 201 W. Va. 624, 499 S.E.2d 846 (1997). With these standards in mind, we consider the parties' arguments.

III. DISCUSSION

For the purposes of our discussion, we divide Dr. Orphanos's numerous assignments of error into three categories and address them accordingly.[11] First, we address

[11] We have reordered Dr. Orphanos's assignments of error, where necessary, to comport with our analysis.

Dr. Orphanos's first assignment of error challenging the ICA's determination that the MPLA's Trauma Cap did not apply to the damages awarded in this case. Second, we address Dr. Orphanos's contention that the ICA should have reached his assignments of error on the issue of recklessness and his reassertion of those assignments of error on appeal to this Court. And third, we address Dr. Orphanos's assignments of error challenging the ICA's decision to partially affirm the circuit court's denial of his motion for a new trial, thereby declining to grant him a new trial based on all but one of his allegations of reversible error in the proceedings below. Finally, we address Mr. Rodgers's single cross-assignment of error, asserting that the ICA erred in partially reversing the circuit court's denial of Dr. Orphanos's motion for a new trial and in remanding the case to the circuit court for a new trial on the issue of damages.

A. The MPLA's Trauma Cap

Dr. Orphanos challenges the ICA's conclusion that the MPLA's Trauma Cap did not apply to the damages awarded in this case due to the jury's finding that Mr. Rodgers's surgery was not an "emergency surgery." Once again, since this assignment of error centers on questions of law and statutory interpretation, we review the ICA's opinion and the circuit court's underlying decision not to apply the Trauma Cap in its judgment order de novo. *See Chrystal R.M.*, 194 W.Va. 138, 459 S.E.2d 415, Syl. Pt. 1. While we agree with the ICA's ultimate conclusion that the circuit court did not err by declining to apply the Trauma Cap in rendering its final judgment order, we express our own reasoning for reaching that conclusion in the discussion below.

West Virginia Code § 55-7B-9c, the "Trauma Cap statute," limits the amount of damages the plaintiff in an MPLA suit may recover to "$500,000, for each occurrence" of "injury to or death of 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 by the Office of Emergency Medical Services as a trauma center[.]"[12] W. Va. Code § 55-7B-9c(a) (emphasis added). An "emergency condition" is defined, in relevant part, as "any acute traumatic injury or acute medical condition which, according to standardized criteria for triage, involves a significant risk of death or the precipitation of significant complications or disabilities, [or] impairment of bodily functions[.]" W. Va. Code § 55-7B-2(d). If the alleged acts or omissions giving rise to an MPLA claim occurred after the patient's condition was stabilized, the statute specifies that the cap still applies "in the event that surgery [was] *required* as a result of the emergency condition *within a reasonable time after the patient's condition [was] stabilized*." W. Va. Code § 55-7B-9c(d) (emphasis added). However, the Trauma Cap expressly "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) (emphasis added). In a provision referred to as the Trauma Cap's "recklessness exception," the statute also provides that the cap does not apply "where [the] health care or assistance for the

[12] The parties do not dispute that CAMC is a "trauma center" for purposes of the MPLA or that Mr. Rodgers was initially admitted to CAMC due to an emergency condition.

emergency condition is rendered . . . [i]n willful and wanton or *reckless* disregard of a risk of harm to the patient[.]" W. Va. Code § 55-7B-9c(h) (emphasis added).

The ICA examined the applicability of the Trauma Cap in considering Dr. Orphanos's assignment of error challenging the circuit court's denial of his post-judgment Rule 50(b) motion on the issue of recklessness. Recognizing that the circuit court's ruling on that motion could only be at issue on appeal with respect to whether the recklessness exception to the Trauma Cap applied,[13] the ICA considered whether the nature of Mr. Rodgers's surgery triggered the Trauma Cap's application in the first instance. Pointing to the jury's finding that Mr. Rodgers's surgery was not an "emergency surgery," the ICA concluded that it did not. Then, having decided that the nonemergency nature of Mr. Rodgers's surgery placed his claim "outside of the Trauma Cap" regardless of whether the recklessness exception applied, the ICA declined to reach Dr. Orphanos's assignments of error on the issue of recklessness. On appeal to this Court, Dr. Orphanos asserts that the ICA erred in that regard, arguing that whether Mr. Rodgers's surgery was an "emergency surgery" is not relevant to the Trauma Cap statute's application. We decline to adopt the ICA's reasoning that the jury's "emergency surgery" finding, by itself, necessarily precluded the Trauma Cap's application in this case; however, we find that Dr. Orphanos's failure to meet his burden of proving certain predicate facts did.

[13] *See* notes 21 and 22, *infra*.

Dr. Orphanos is correct that the phrase "emergency surgery" does not appear anywhere in the MPLA, and there is no statutory requirement that a surgery underlying an MPLA claim be found to be an "emergency surgery" to trigger the Trauma Cap's application. However, we reject the suggestion that the absence of more specific jury findings relevant to the Trauma Cap's application in this case is due to any error on the part of the circuit court. It is well-settled law that

> [i]f a party fails to offer an instruction regarding a particular point of law upon which he relies, he cannot later complain of the absence of such an instruction, there being no duty upon the court to so instruct the jury except when the error is so plain and the result so outrageous that the trial court must intervene to do substantial justice.

Syl. Pt. 2, *Berkeley Homes, Inc., v. Radosh*, 172 W.Va. 683, 310 S.E.2d 201 (1983). That is because it is a party's responsibility (and not the trial court's) to prove the party's theory of the case. We have remarked that it is the parties' lawyers, and not the courts, who "are responsible for trying law suits—it is the lawyers who must present a theory of the case, present the evidence necessary to prove that theory, and then offer appropriate [jury] instructions." *Id.* at 686, 310 S.E.2d at 203. Similar to a party's responsibility to prove his theory of the case or the well-settled burden of a defendant to prove his own affirmative defense to liability,[14] the Trauma Cap's application turns on questions of fact that

[14] *See, e.g.*, Syl. Pt. 1, *Bluefield Supply Co. v. Frankel's Appliances*, Inc., 149 W. Va. 622, 142 S.E.2d 898 (1965) (explaining with respect to affirmative defense of payment that "the burden of proof to establish it rests upon the party who relies upon such defense"); Syl. Pt. 3, *Skaggs v. Elk Run Coal Co.*, 198 W. Va. 51, 479 S.E.2d 561 (1996) (explaining with respect to claim for reasonable disability accommodation under the Human Rights Act that "[u]ndue hardship is an affirmative defense, upon which the employer bears the burden of persuasion"); *Voorhees v. Guyan Machinery Co.*, 191 W.Va.

necessitate placing the burden of invoking the cap and proving its application upon the party seeking its benefit. Unlike the MPLA's statutory cap on noneconomic damages,[15] which apply in every MPLA case and which a trial court may mechanically apply to a jury's award of noneconomic damages after trial, the Trauma Cap's application hinges on numerous predicate facts that must be established in the course of the litigation. As such, we find it incumbent upon the defendant in an MPLA case to present his theory that the Trauma Cap applies to reduce his potential liability in the case and to set about offering the evidence (and any proposed jury instructions and verdict form questions) needed to prove that theory. Dr. Orphanos cannot, on appeal, shift responsibility to the trial court or respondent for any lack of factual development that was needed to affirmatively establish the Trauma Cap's application to limit *his* liability. Accordingly, we now hold that the party seeking application of the statutory cap on damages in West Virginia Code §55-7B-9c (known as the West Virginia Medical Professional Liability Act's "Trauma Cap") bears the burden of invoking the cap and proving all predicate facts required for the cap's application to limit the other party's proven damages.

450, 456, 446 S.E.2d 672, 678 (1994) (explaining "defense of mitigation of damages is an affirmative defense, the burden of which lies entirely upon the party asserting it") (internal citation omitted).

[15] *See* W. Va. Code § 55-7B-8 (capping "maximum amount recoverable as compensatory damages for noneconomic loss" in MPLA cases subject to certain narrow exceptions).

Consistent with our holding today, it was Dr. Orphanos's burden to invoke the Trauma Cap and prove all predicate facts required for the circuit court to apply the cap in rendering its final judgment order. Although Dr. Orphanos invoked the Trauma Cap statute in the proceedings below, he fell short of meeting his burden to prove that the necessity and timing of Mr. Rodgers's surgery placed his claims within its application under West Virginia Code § 55-7B-9c(d). The jury's finding that Mr. Rodgers's surgery was not an "emergency surgery" is consistent with Dr. Orphanos's own admission in the record that Mr. Rodgers "was clinically stable" at the time of his surgery and that "there was no emergency situation that required [Dr. Orphanos] to rush [Mr. Rodgers] to the operating room because of fear of deterioration that might prejudice or jeopardize his life or limb[.]"[16] Once it was established that Mr. Rodgers's surgery occurred after his condition was stabilized, Dr. Orphanos needed to prove that the surgery was: 1) "*required* as a result of [his] emergency condition" and 2) performed "within a *reasonable time* after [his] condition [was] stabilized" in order to demonstrate that Mr. Rodgers's claims were

[16] We find no merit to Dr. Orphanos's argument on appeal and during trial that because Mr. Rodgers's spine itself may have been physically unstable at the time of surgery—in the sense that surgery or long-term bracing was required to stabilize the movement of the vertebrae—that his condition was not stabilized within the meaning of the Trauma Cap statute. Interpreting "stability" to refer to the structural stability of a patient's body part rather than the clinical stability of the patient's condition for the purposes of the Trauma Cap would render absurd results. For example, the condition of a patient admitted into the emergency room for a poisonous snake bite or suicidal ideation might be considered to be stabilized, whereas the condition of a person undergoing a weeks' long course of treatment with a brace or cast to stabilize and treat a fracture might not be considered to be stabilized. *See* W. Va. Code § 2-2-10 ("Statutes are construed to avoid absurd results"). Dr. Orphanos does not dispute that, at the time of surgery, Mr. Rodgers's condition was clinically stable, as described in his own testimony.

subject to the Trauma Cap. W. Va. Code § 55-7B-9c(d). Yet Dr. Orphanos has not pointed to any portion of the record demonstrating that he presented evidence or proposed jury instructions or verdict form questions to establish both of those predicate facts.[17] Having failed to develop those facts below, Dr. Orphanos now argues that "the Trauma Cap's applicability is not based on the 'type' of surgery performed; instead, it depends on why the surgery is being performed" and any time a "surgery is to treat the emergency condition for which a patient was admitted, the Trauma Cap applies[.]" On the contrary, the Trauma Cap's application to claims involving a surgery performed *after* the patient's condition was stabilized is expressly limited based on *characteristics* of the surgery—specifically, its necessity and timing. Therefore, we find no merit to Dr. Orphanos's argument.

We have long held that "[t]his Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment." Syl. Pt. 3, *Barnett v. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466 (1965).[18] Because we observe that Dr. Orphanos did not meet his statutory burden of

[17] Conversely, Mr. Rodgers presented evidence in support of his position that the surgery was not strictly "required" at the time it was performed and that Mr. Rodgers was "capable of receiving medical treatment as a nonemergency patient" once his condition was stabilized. W. Va. Code § 55-7B-9c(e). That evidence included deposition testimony from Dr. Orphanos himself, acknowledging that that the surgery was only one of two treatment options he presented to Mr. Rodgers on the day following the accident, the other being longer term treatment with a back brace.

[18] *See also Murphy v. Smallridge*, 196 W. Va. 35, 36-37, 468 S.E.2d 167, 168-69 (1996) ("An appellate court is not limited to the legal grounds relied upon by the

proving that the necessity and timing of Mr. Rodgers's surgery placed his claims within the Trauma Cap's application under West Virginia Code § 55-7B-9c(d), we affirm the ICA's conclusion that the circuit court did not err in declining to apply the Trauma Cap to reduce the final judgment amount in its judgment order.

B. Recklessness

Next, Dr. Orphanos asserts that the ICA "erred in failing to consider [his] previous assignments of error pertaining to the issue of 'recklessness' under [West Virginia] Code § 55-7B-9c(h)(1)," citing to the Trauma Cap statute's recklessness exception. Before this Court, Dr. Orphanos renews the assignments of error and supporting arguments that he presented to the ICA on that issue, arguing that the circuit court erred in denying his Rule 50(a) motion during trial, his post-judgment Rule 50(b) motion, and other motions he presented to the circuit court advancing his theory that there was insufficient evidence to support a finding that he was reckless in rendering the medical care at issue in the case.[19] Dr. Orphanos also assigns error to the circuit court's jury instruction on recklessness, which he contends misstated the statutory standard required for the Trauma Cap's recklessness exception to apply. Having already determined that Dr. Orphanos failed

---

circuit court, but it may affirm or reverse a decision on any independently sufficient ground that has adequate support.").

[19] Specifically, Dr. Orphanos also assigns error to the circuit court's denial of his "Motion for Partial Summary Judgment on Claims Other than Medical Negligence" and his pretrial "Motion in Limine to Preclude Plaintiff from Asserting or Arguing that Defendant was 'Reckless.'"

to meet his burden of proving that the necessity and timing of Mr. Rodgers's surgery placed his claims within Trauma Cap's application *regardless* of whether Dr. Orphanos was reckless, we find that it was proper for the ICA to refrain from reaching Dr. Orphanos's assignments of error on the issue of recklessness.[20]

The question of whether Dr. Orphanos acted recklessly in providing medical care to Mr. Rodgers was only ever at issue in this case in two respects—first, with respect to Mr. Rodgers's initial demand for punitive damages (which the jury did not award)[21] and second, with respect to Mr. Rodgers's arguments that the recklessness exception to the

[20] However, we find that it was improper for the ICA to affirm the circuit court's order denying Dr. Orphanos's Rule 50(b) motion on the issue of recklessness after the ICA expressly declined to consider the issues raised in Dr. Orphanos's assignment of error challenging that order. Once the ICA concluded that the nature of Mr. Rodgers's surgery made the Trauma Cap inapplicable as a threshold matter, the ICA should have simply explained that it was unnecessary to review that order.

Additionally, we disapprove of the footnote in the ICA's opinion stating, in part, that "there is no mandatory language [in the MPLA] requiring expert testimony on recklessness," and we caution future litigants not to rely on that footnote as persuasive authority or precedent. *Orphanos v. Rodgers*, 250 W. Va. 442, 453, n. 7, 903 S.E.2d 623, 634, n. 7 (Ct. App. 2024). Having determined that it was unnecessary to decide the issues raised in Dr. Orphanos's assignments of error on the issue of recklessness, the ICA should have exercised judicial restraint and refrained from issuing unnecessary dicta on that issue.

[21] To receive an award of punitive damages in a civil case, a plaintiff must establish "by clear and convincing evidence that the damages suffered were the result of the conduct that was carried out by the defendant with actual malice toward the plaintiff or a conscious, *reckless* and outrageous indifference to the health, safety and welfare of others." W. Va. Code § 55-7-29 (emphasis added). However, because the jury did not award punitive damages in this case, the jury needed only to find that Dr. Orphanos was negligent in providing medical care in order to find him liable for the compensatory (nonpunitive) damages that it did award. *See* W. Va. Code § 55-7B-3.

Trauma Cap precluded the cap's application. Dr. Orphanos's arguments make clear that, in challenging the circuit court's denial of his various motions on the issue of recklessness, he ultimately seeks to reverse the circuit court's decision not to apply the Trauma Cap in its final judgment order. In other words, based on his argument that there was insufficient evidence to support a finding that he was reckless, Dr. Orphanos argues that the recklessness exception to the Trauma Cap *did not* apply; that the Trauma Cap, therefore, *did* apply; and that the circuit court should have reduced the final judgment amount accordingly. Before the ICA, Dr. Orphanos emphasized in his arguments concerning recklessness that "[a]t the heart of this appeal is whether the Trauma Cap applies to [Mr. Rodgers's] claims." Likewise, Dr. Orphanos argues before this Court that his "appeal is about ensuring the MPLA is correctly interpreted, and that the Trauma Cap is appropriately applied."[22] In sum, apart from a vague assertion that Mr. Rogers's arguments concerning recklessness during trial somehow "tainted" the jury's verdict, Dr. Orphanos makes clear that his assignments of error on the issue of recklessness are all about the Trauma Cap.

However, as we explained in Section A of our discussion, Dr. Orphanos did not, as a threshold matter, meet his burden of proving that the necessity and timing of Mr. Rodgers's surgery placed his claims within the Trauma Cap's application under West

[22] Dr. Orphanos's Rule 50(b) motion to the circuit court acknowledged that the motion was aimed at reducing the damages in the final judgment order, explaining that absent "an exclusion contained within the Trauma Cap bar[ring] its application, [he was] statutorily entitled to the application of the cap."

Virginia Code § 55-7B-9c(d). As a result, the burden never shifted to Mr. Rodgers to prove that an exception to the Trauma Cap applied. Even if we were to assume arguendo that Dr. Orphanos was *not* reckless in providing the medical care at issue in this case, Dr. Orphanos's failure to meet his burden of proving the Trauma Cap's application in the first instance would still have precluded the circuit court from applying the cap in its final judgment order. Because the question of whether Dr. Orphanos acted recklessly has no bearing on whether the Trauma Cap applies to the damages awarded in this case, deciding that question "would avail nothing in the determination of controverted rights." Syl. Pt. 1, *State ex rel. Lilly v. Carter*, 63 W. Va. 684, 60 S.E. 873 (1908).[23] Finding Dr. Orphanos's assignments of error on the issue of recklessness to be moot on that basis, we decline to address them further.[24]

---

[23] *See also, e.g.*, *Coffield v. Robinson*, 245 W. Va. 55, 63, n. 14, 857 S.E.2d 395, 403, n. 14 (2021) (finding resolution of one assignment of error rendered other assignments and cross-assignments of error "moot" and declining to address them); *Wheeling Park Comm'n v. Dattoli*, 237 W. Va. 275, 282, n.6, 787 S.E.2d 546, 553, n.6 (2016) (explaining disposition of petitioner's first assignment of error was dispositive of appeal, making second assignment of error "moot"); *State v. Bookheimer*, 221 W. Va. 720, 723, n.2, 656 S.E.2d 471, 474, n.2. (2007) (declining to address merits of "mooted assignments of error" where the reversal of conviction based on first assignment of error was dispositive); *Casto v. Dupuy*, 204 W. Va. 619, 621, n. 2, 515 S.E.2d 364, 366 n. 2 (1999) (declining to reach other assignments of error where one assignment rendered the other issues moot).

[24] Nonetheless, we express our gratitude to the organizations that submitted a brief in amici curiae on this topic and commend their scholarship. Those organizations include the West Virginia University Board of Governors; West Virginia Health Care Association; American Medical Association; West Virginia State Medical Association; West Virginia United Health System, Inc. DBA West Virginia University Health System; West Virginia Hospital Association; Marshall Health Network Inc.; Charleston Area Medical Center, Inc.; and Defense Trial Counsel of West Virginia.

C. Dr. Orphanos's Motion for a New Trial

Next, Dr. Orphanos argues that the ICA erred in partially affirming the circuit court's order denying his motion for a new trial. Before the ICA, Dr. Orphanos assigned error to a number of the circuit court's rulings rendered prior to and during trial, each of which he alleged amounted to an abuse of the circuit court's discretion and entitled him to a new trial. The ICA affirmed all but one of the challenged rulings, concluding that only the circuit court's decision to strike Dr. Gehring's late-disclosed expert opinion on life expectancy amounted to reversible error and necessitated a new trial "solely on damages."[25] With respect to Dr. Orphanos's other assignments of error challenging the circuit court's denial of his motion for a new trial, the ICA found no abuse of discretion and affirmed the circuit court's underlying rulings. Now, on appeal to this Court, Dr. Orphanos reasserts his assignments of error challenging those rulings,[26] asking this Court to reverse the ICA's partial affirmance and grant him an entirely new trial. Upon our review, we agree with the ICA's conclusion that Dr. Orphanos is not entitled to a new trial

[25] We address the ICA's reversal on this ground in Section D of our discussion below.

[26] In Dr. Orphanos's assignments of error listed at the outset of his petition, he asserts that the ICA erred in finding that he did not "preserve the issue of causation on appeal." However, there is no corresponding heading or distinct argument section in support of that listed assignment of error as required by required by Rule 10(c)(7) of our Rules of Appellate Procedure. Rather, the listed assignment of error appears to be subsumed into his arguments challenging the testimony of Mr. Rodgers's life care plan expert. As such, we decline to review the assertion as a standalone assignment of error.

based on those assignments of error, and we summarily affirm the ICA's opinion with respect to them. *See Orphanos*, 250 W. Va. at 454-63, 903 S.E.2d at 635-44.[27]

D. Mr. Rodgers's Cross-Assignment of Error

Finally, we reach Mr. Rodgers's cross-assignment of error. Mr. Rodgers asserts that the ICA erred in partially reversing the circuit court's order denying Dr. Orphanos's motion for a new trial after finding that the court's decision to strike Dr. Gehring's late-disclosed expert opinion on life expectancy amounted to an abuse of discretion. In response, Dr. Orphanos argues that "fairness was not shown to Dr. Orphanos" and that the ICA was "right to apply" the guiding factors this Court identified in *State ex rel. Tallman v. Tucker*, 234 W. Va. 713, 769 S.E.2d 502 (2015) ("the *Tallman* factors") to conclude that the circuit court erred in striking Dr. Gehring's opinion. In *Tallman*, this Court identified certain factors that "may assist a court in deciding whether to permit [a party's] late supplemental expert witness disclosure," which include:

[27] Specifically, we summarily affirm the ICA opinion with respect to Dr. Orphanos's assignments of error asserting that the circuit court abused its discretion: 1) by reading the jury instruction regarding "emergency surgery;" 2) by permitting Nurse Taniguchi to offer testimony that he characterized as unqualified expert medical testimony on causation between Mr. Rodgers's 2017 surgery and 2020 stroke; 3) by qualifying one of Mr. Rodgers's medical experts to testify on the standard of care for neurosurgeons or spine surgeons; 4) by qualifying one of Mr. Rodgers's medical experts to testify on spinal surgery involving a certain type of fracture; 5) by precluding Dr. Orphanos's counsel from cross-examining Mr. Rodgers's mother with certain contemporaneously prepared notes; 6) by denying Dr. Orphanos's motion in limine to exclude evidence or testimony regarding miscounting of vertebral bodies during surgery; 7) by refusing to instruct the jury to disregard Mr. Rodgers's counsel's use of a demonstrative pie chart in closing argument; and 8) by virtue of the cumulative effect of the aforementioned alleged errors, which Dr. Orphanos argues entitle him to a new trial under the "cumulative error doctrine." *Id.*

> (1) the explanation for making the supplemental disclosure at the time it was made; (2) the importance of the supplemental information to the proposed testimony of the expert, and the expert's importance to the litigation; (3) potential prejudice to an opposing party; and (4) the availability of a continuance to mitigate any prejudice.

Id., Syl. Pt. 2. By specifying that these factors "*may* assist" trial courts in managing late discovery disclosures, the *Tallman* Court expressly refrained from imposing a mandatory balancing test on the circuit courts.

In fact, this Court has long recognized that "the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence and the appropriateness of a particular sanction for discovery violations are committed to the discretion of the trial court." Syl Pt. 1, in part, *McDougal v. McCammon,* 193 W.Va. 229, 455 S.E.2d 788 (1995). Propounding on that standard, we have further held that

> [a] trial court is permitted broad discretion in the control and management of discovery, and it is only for an abuse of discretion amounting to an injustice that we will interfere with the exercise of that discretion. A trial court abuses its discretion when its rulings on discovery motions are clearly against the logic of the circumstances then before the court and so arbitrary and unreasonable as to shock our sense of justice and to indicate a lack of careful consideration.

Syl. Pt. 1, *B.F. Specialty Co. v. Charles M. Sledd Co.*, 197 W. Va. 463, 475 S.E.2d 555 (1996). Undoubtedly, a circuit court has the discretion to strike a supplemental expert opinion disclosed on the eve of trial. *See* W. Va. R. Civ. P. 37(c)(1) (preventing parties from using information or witnesses not disclosed as required by Rule 26(a) or (e) unless

"substantially justified" or "harmless"); *see also* W. Va. R. Civ. P. 26(e) (imposing duty on parties to supplement expert opinion disclosures and requiring "[a]ny additions or changes" be disclosed at least 30 days before trial).

Yet, in reviewing the circuit court's decision to strike Dr. Gehring's late-disclosed expert opinion on life expectancy, the ICA performed its own *Tallman* analysis and, finding that "three [of the four] factors weigh[ed] in favor of Dr. Orphanos," concluded that the circuit court abused its discretion. The ICA opinion misapprehended the *Tallman* factors as a mandatory balancing test rather than what the *Tallman* Court expressly intended them to be—guiding principles that "may assist" trial courts in managing late supplemental expert witness disclosures.[28] In doing so, the ICA stepped into the circuit court's shoes to determine how *it* would have applied the *Tallman* factors to decide Mr. Rodgers's motion to strike Dr. Gehring's opinion, rather than examine whether the circuit court's decision was so arbitrary or unreasonable as to constitute an injustice and, in turn, an abuse of its discretion under Rule 37. *See B.F. Specialty Co.*, 197 W. Va. 463, 475 S.E.2d 555, Syl. Pt. 1. This was error. The question before an appellate court on appeal of a trial court's discovery ruling is "not whether [the appellate court] would have imposed a more lenient penalty had [it] been the trial court, but whether the trial court abused its

[28] We further note that this Court's procedural posture and standard of review in *Tallman* was different than in this case, since *Tallman* involved a petition for an extraordinary writ rather than a direct appeal of a circuit court's ruling.

discretion in imposing the sanction." *Bartles v. Hinkle*, 196 W. Va. 381, 389-90, 472 S.E.2d 827, 835-36 (1996).

Applying the appropriate level of deference to the circuit court's ruling, we now consider whether the court's decision to preclude Dr. Gehring's late-disclosed expert opinion on life expectancy was so arbitrary or unreasonable as to constitute an injustice under the circumstances before it. *See B.F. Specialty Co.*, 197 W. Va. 463, 475 S.E.2d 555, Syl. Pt. 1. In its pretrial conference, the circuit court heard arguments from both parties and noted that it "tend[ed] to agree" with Mr. Rodgers's argument that, while Mr. Rodgers's own late-disclosed life care plan might have justified Dr. Orphanos's late-disclosed expert opinions rebutting a causal link between the 2017 surgery and 2020 stroke, it did not justify a late-disclosed expert opinion on Mr. Rodgers's life expectancy. Indeed, Mr. Rodgers's life expectancy was always relevant to his claim for damages related to future care costs, both before and after his stroke. Unlike the causation issues that Mr. Rodgers's new life care plan introduced shortly before trial, any impact that Mr. Rogers's 2020 stroke may have had on his life expectancy would have been a known issue in the case when Mr. Rodgers disclosed his medical records related to his stroke. In fact, Dr. Gehring testified in a deposition that she had reviewed those records almost a year before trial. Thus, the circuit court's decision to permit Dr. Orphanos's late-disclosed expert testimony on the cause of Mr. Rodgers's 2020 stroke, but not the longer-standing issue of his life expectancy, appears to have been neither "arbitrary or unreasonable" nor "against the logic of the

circumstances" before the court.[29] *Id.* We therefore disagree with the ICA and find that the circuit court did not abuse its discretion under Rule 37 when it granted Mr. Rodgers's motion to strike Dr. Gehring's late-disclosed expert opinion on life expectancy. Likewise, we find that the circuit court did not abuse its discretion when it later denied Dr. Orphanos's motion for a new trial on that basis, observing no misapprehension of the law or evidence in the record surrounding that decision. *See Andrews*, 201 W. Va. 624, 499 S.E.2d 846, Syl. Pt. 1. We therefore conclude that the ICA erred in partially reversing the circuit court's denial of Dr. Orphanos's motion for a new trial and in remanding this matter to the circuit court for a new trial on the issue of damages, and in partially reversing the circuit court's judgment order.

IV. CONCLUSION

For the foregoing reasons, we hereby affirm the ICA's opinion in *Orphanos v. Rodgers*, 250 W. Va. 442, 903 S.E.2d 623 (Ct. App. 2024), with respect to the ICA's conclusion, as modified in this Opinion, that the circuit court did not error by declining to

[29] We caution the lower courts that fairness considerations could, in some circumstances, require an appellate court to reverse a trial court's discovery rulings if the appellate record demonstrates that the court has given one party significant leeway in disclosing late discovery while imposing harsh sanctions against the other party for similar disclosures without a legitimate rationale. *Cf. Tallman*, 234 W. Va. at 717-18, 769 S.E.2d at 506-07 (granting writ of prohibition against order precluding petitioner's late supplemental expert disclosures six weeks before trial where "fairness was not shown to [the petitioner]" because a "late and inadequate disclosure by [the other party] was the cause of [petitioner's] inability to fully disclose the opinions of his own experts within the initial and subsequent discovery cut-off dates" and ruling was found to be clearly erroneous as a matter of law).

apply the MPLA's Trauma Cap to reduce the damages awarded in this case. Additionally, we affirm the ICA's partial affirmance, as modified in this Opinion, of the circuit court's January 20, 2023, order denying Dr. Orphanos's motion for a new trial. However, we reverse the ICA's opinion insofar as the ICA partially reversed the circuit court's January 20, 2023, order denying Dr. Orphanos's motion for a new trial; remanded the case to the circuit court for a new trial on the issue of damages; and partially reversed the circuit court's judgment order. Accordingly, the circuit court's September 12, 2022, judgment order is hereby reinstated.

Affirmed, in part, and reversed, in part.