

INDEX

PAGE

The kind of proceeding and nature of the ruling of the lower Tribunal.....	1
Statement of the facts of the case.....	2
The Assignments of Error Relied Upon on Appeal and the Manner in Which They Were Decided in the Lower Tribunal.....	11
Points and Authorities Relied Upon.....	12
Discussion of the Law	
1. The Lower Court Erred In Jury Selection By:	
(A) Failing To Strike Jurors Who Stated Unequivocally That They Had Biases For Which They Could Not Judge This Case Fairly;.....	13
(B) Unfairly Assigning Additional Peremptory Challenges To The Defendants, In Violation Of W.Va.R.Civ.P.47(C);.....	18
2. The Lower Court Erred In Allowing The Defendants To Present Limited Testimony Of Plaintiffs' Expert, Thus Indirectly Informing The Jury Of A Pretrial Settlement, And Infusing The Trial With Issues Of Fault Of The Settling Defendant, In Violation Of W.Va. Code § 55-7b-9.....	21
3. The Lower Court Erred In Granting A Rule 50 Motion Of Defendant West Virginia University Board Of Governors When A Disputed Fact Remained For The Jury's Consideration.....	25
4. The Lower Court Erred By Allowing Defendants' Experts To Testify Beyond The Scope Of Their 26(B)(4) Disclosures, While Limiting Plaintiffs' Experts To The Confines Of Their Report.....	27
5. The Lower Court Erred In Allowing The Defendants To Present Evidence Of Collateral Sources, In Violation Of 55-7(B)-9(A).....	29

Relief Prayed For.....32
Addendum – Orders of Court from which Appeal is taken.....33

The Kind of Proceedings and Nature of the Ruling in the Lower Tribunal

This appeal follows a jury verdict from the Circuit Court of Ohio County, West Virginia. This civil action was brought due to the alleged medical negligence of the Defendants following the delivery of Shawn M. Murphy, Jr.

Plaintiffs brought suit against Dennis L. Burech, M.D. and the West Virginia University Board of Governors for negligence, *inter alia*, for failing to care for Shawn after resuscitation and for failing to properly instruct Dr. Burech on resuscitation. Plaintiffs alleged that these failures caused Shawn to suffer permanent, devastating neurological and psychological injuries.

Jury selection began on Monday, February 26, 2007. During jury selection, several jurors expressed unequivocally their biases against the Plaintiff and confusion with the law, yet, over Plaintiffs' challenge for cause, these jurors were allowed to remain in the venire. Also, over Plaintiffs' objection, the trial court granted the Defendants separate peremptory challenges, giving the Defendants twice the number of peremptory challenges as the Plaintiffs.

Additionally, during trial, over Plaintiffs' objection, the trial court allowed Defendants to present the testimony of Plaintiffs' expert, interjecting a pre-trial settlement, as well as the fault of other, settling parties into the case. Furthermore, the Defendants were allowed to introduce opinions of their experts, which were not disclosed in their 26(b)(4) pre-trial reports. Defendants were also permitted to cross-examine Plaintiffs' expert about collateral sources, contrary to the law. Finally, the trial court granted partial summary judgment to the Board of Governors, even though a disputed fact remained for the jury's consideration.

On March 6, 2007 the jury found for the Defendants. Post-Trial Motions were filed, and denied. A Petition to Appeal was filed, argued and granted by this Court on April 2, 2008.

Statement of the Facts of the Case

On November 26, 2002, at 9:08 p.m., the minor-Plaintiff Shawn Murphy, Jr., (“Shawn”) was born at Wheeling Hospital. Shawn was immediately evaluated. The nurses quickly realized that he was in distress; he was blue, limp, and had a faint heartbeat with a low respiratory rate. The nurses quickly gave life-saving measures and resuscitated Shawn in the delivery room. The APGAR score, the score given to newborns to determine their vitality, confirmed that Shawn was still in a fragile state; 0 at 1 minute, 4 at 5 minutes and 6 at 10 minutes of life. The nurses transferred Shawn to the nursery where again he was assessed and oxygen supplementation ordered. He was diagnosed as being in a state of acidosis; a condition of insufficient oxygenation at the cellular level, particularly in the brain cells.

Defendant Dr. Dennis Burech, was on-call, but at home, was summoned to Wheeling Hospital because Shawn was continuing to suffer in distress, with respiratory difficulties.

Dr. Burech arrived at the hospital somewhere between 9:30 and 9:45 p.m. He started to administer treatment, issued basic orders and around 10:00 p.m. decided to call the West Virginia University Hospital (“WVUH”) Neonatal Intensive Care Unit (“NICU”) for help and to arrange for the transport of Shawn to WVUH NICU.

When he called the NICU, his call was answered by Defendant WVUH Board of Governor (“BOG”) employee, neonatal nurse practitioner, Melissa Asher. Nurse Asher, who is experienced at getting such calls, listened while Dr. Burech described Shawn’s condition. She agreed with Dr. Burech that transport was appropriate, but in the meantime, she instructed Dr. Burech to give Shawn three treatments – (1) Volume, (2) Bicarbonate, and (3) Oxygen.

A factual dispute later arose between Nurse Asher and Dr. Burech – whether or not the instructions were given; but it was not disputed that no Volume or Bicarbonate was provided.

Around midnight, Nurse Asher and the WVUH transport team arrived at Wheeling Hospital. They went to the nursery and Nurse Asher immediately realized that Shawn had not received Volume or Bicarbonate. She reviewed the latest test results and vital signs and noticed that Shawn was in even worse distress than when Dr. Burech had called for the transport at 10:00 p.m., two (2) hours earlier.

She then asked to speak to Dr. Burech; however, Dr. Burech had left the hospital and returned home. Nurse Asher, was upset, but addressed the needs of the baby and ordered Volume and Bicarbonate. Shawn immediately responded positively, and his condition improved enough to be transported to WVUH for continuing care.

Unfortunately, by that time, Shawn had suffered a horrible brain injury. Plaintiffs alleged that the brain injury resulted because he was not adequately resuscitated after birth and his brain injury progressed to the point where he has permanent neurological and physical injuries.

Dr. Burech was brought into this case because he failed to provide Volume and Bicarbonate to Shawn, although instructed to do so. Dr. Burech defended his actions by asserting that Nurse Asher did not give him did not give him those instructions, and added that had he been given those instructions, there would have been "no earthly reason" not to give the medications.

Dr. Burech supported his assertion that Nurse Asher did not give him instructions for Volume, Oxygen or Bicarbonate by citing to the WVUH medical record; specifically, the medical record - admission summary.

The facts revealed that after Shawn was discharged from WVUH, an admission summary, a medical record that detailed the circumstances of Shawn's transfer from Wheeling Hospital to the WVU NICU, was sent to Dr. Burech. That original admission summary

contained a sentence by Nurse Asher that recounted her instructions to Dr. Burech to give Shawn (1) Volume, (2) Oxygen or (3) Bicarbonate. After reading that, rather than calling Nurse Asher, Dr. Burech immediately called Dr. Polak, the head of the WVUH NICU, and told Dr. Polak that he was never given those three (3) instructions.

Rather than checking with Nurse Asher, Dr. Polak altered the medical record and removed, from the admission summary, Nurse Asher's statement that she had given the instructions for (1) Volume, (2) Oxygen and (3) Bicarbonate to Dr. Burech. Dr. Burech used the altered medical record in support of his defense; that is, he could not have been given the three (3) instructions, because if he had, Dr. Polak would not have removed from the medical record Nurse Asher's sentence, detailing her alleged instructions,.

Because of these disputes in the medical record, WVU BOG was added as a party to the lawsuit.

Yet at trial, the Defendants disputed the notion that there was any misunderstanding between Dr. Burech and Nurse Asher or confusion of instructions, arguing that they were only "recommendations". The Defendants also asserted that the medications were not medically necessary at the time of the call, and that the brain damage that Shawn suffered was not caused during resuscitation, but had occurred prior to the birth.

Before jury selection, the trial court ruled that each party was to get two (2) peremptory challenges; thereby providing the Defendants with collectively twice the number of peremptory challenges of the Plaintiffs. Plaintiffs then moved the trial court to reconsider and allot peremptory challenges consistent with Rule 47(b) of the West Virginia Rules of Civil Procedure, arguing that while the Defendants were separate parties, their defenses, experts and theories were intertwined; in essence, they were not hostile to each other, but complimentary.

The Defendants resisted, claiming that they had hostile interests as a result of the factual dispute between Nurse Asher and Dr. Burech.

The trial court denied Plaintiffs' Motion for Reconsideration, and allowed the Defendants, collectively, two more peremptory challenges than Plaintiffs. (See Plaintiffs' Motion to Reconsider Peremptory and TT V.I, p. 6, 1.4-10¹). Trial then began with jury selection on the first day, Monday February 26, 2007.

The first juror to undergo individual *voir dire* was Dr. Donald Walter. In that this case is a medical malpractice case, Dr. Walter first joked about his contempt for these types of cases in general, but then discussed his problems with certain aspects of appropriate damages, such as pain and suffering: “[i]t would be hard to justify an amount for pain and suffering. I don’t know that there’s any way you can compensate people for that”. (Vol. I, p.49, 1.4-7). Defense counsel quickly tried to rehabilitate Dr. Walter, asking him if he would rely on the trial court’s instructions on the law, to which he feebly said he “would try”. (Vol. I, p.51, 1.4-12). Upon further questioning by defense counsel, Dr. Walter revealed that he was once a party to a medical malpractice lawsuit, which was settled, and then truthfully volunteered that: “obviously, I’m going to be a little bit prejudiced” against the system because of that case. (Vol. I, p.53, 1.7). Maybe because of that experience, Dr. Walter confessed that the only way he could ever bring such a lawsuit was, “[i]f it was a deliberate act.” (Vol. I, p.55, 1.10-14). He concluded by noting that because this is a case against a medical professional, he would weigh accountability different than he would an ordinary case. (Vol. I, p. 56, 1.5-10). Plaintiffs moved to strike for cause based on these prejudices, and the Motion was denied. (Vol. I, p. 62, 1.9).

1. References are to the transcribed trial transcript (TT), with reference to the Volume (Vol.), page number (p.), and line number (l.).

Defense counsel then jumped into rehabilitate Juror Heilman, but he only confirmed that he required intent to be proven to him in a negligence case:

“Mr. Offutt: Thank you, Your Honor. Mr. Heilman, let’s start with this idea of intent. You don’t believe that any doctor intends to hurt a patient in treating them; do you?”

Prospective Juror Heilman: I believe that it would have to be proven to me that that doctor was trying to - - or intended to hurt the person. Does it happen? I’m sure somewhere in this world, you know, there is intent, but I think it would have to be proven that there was an intent to hurt.”

(Vol. I, p. 283, l. 5-14).

Regardless of these astounding biases, the trial court sought to rehabilitate Juror Heilman and asked him the “magic question”, that is, could he follow the law, to which he, not surprisingly, answered that he could. (Vol. I, p. 291, l. 22 – p. 292, l. 11). The trial court subsequently denied Plaintiffs’ motion to strike for cause. (Vol. I, p. 295, l. 8 – 22). Trial then began with the presentation of testimony.

Initially, Plaintiffs brought this lawsuit against (1) the obstetricians who delivered Shawn, and (2) the pediatrician, Defendant Dr. Burech, who was responsible for resuscitation after delivery. Plaintiffs retained Dr. James Balducci, an obstetrician, to explain how the obstetricians breached the standard of care and what resulted. Dr. Balducci explained that Shawn suffered a pre-birth injury, but could have recovered with proper resuscitation.

Plaintiffs then settled with the obstetricians, and the remaining Defendants moved to limit Dr. Balducci’s testimony to the opinions he expressed about the pre-birth injury, which motion was granted by the trial court.

Plaintiffs' prospective need for Dr. Balducci's testimony was to confront the possibility that Defendants' experts would defend this case by claiming that this was an obstetrical case only; not a resuscitation case. The Defendants then took a very limited discovery deposition of Dr. Balducci, about the obstetrical issues, which issues had been settled, and then advised the Plaintiffs that they intended to play the deposition at trial.

Plaintiffs moved *in limine* to exclude Dr. Balducci's deposition because the sole reason to do so would be to inform the jury of a pre-trial settlement, in the suit, against parties who had settled. (Vol. I, p. 320, l. 12). Moreover, the Plaintiffs' other witnesses, Dr. Null² and Dr. Polak³, had already testified that there was a pre-birth injury as did Defendants' experts, Dr. Boyle⁴ and Dr. Cicco⁵, thus Dr. Balducci's testimony was cumulative.

Plaintiffs had offered a stipulation, to which the Defendants initially agreed, yet later reneged. (Vol. I, p. 320 – 325) The trial court denied Plaintiffs' motion and allowed Dr. Balducci's deposition to be played, wherein Dr. Balducci answered questions about Dr. Miller, the obstetrician who had settled, and her care of Laurie Murphy.⁶ Dr. Balducci was ultimately asked about issues surrounding the settling parties and their fault:

- Q. Okay. And then I understand you formed an opinion from the records and your expertise, that the failure to deliver the infant during the November 18th induction and then the four-hour delay and the final decision to perform a C-section on November the 26th is directly **related to and caused** the baby's condition and outcome –
- A. Yes, ma'am.
- Q. -- is that correct?
- A. Yes, ma'am.⁷

2. Vol. III, p.64, l. 23- p.66, l.2

3. Vol. II, p. 205.

4. See Vol. VI, p. 74, l. 6-11

5. See. Vol. VI, p. 280 – 281.

6. References are to Balducci deposition pages (Vol. V, p. 137) (See deposition pages 11-13.)

7. Balducci deposition, page 18. (emphasis added).

These questions of Dr. Balducci confirmed that other parties were at fault, and that they had settled; thus inserting prohibitive and irrelevant issues into this trial.

Next, when the Plaintiffs presented the expert testimony of their life care planner, the Defendants, over objection, questioned the expert as to whether there would be future benefits available to Shawn, which could help pay for his care. Defendants asked whether aid through his schooling, “Federal Law, Education for All Handicapped Children Act”⁸, Federal aid for disabled adults, World War I disability benefits entitled “Vocational Rehabilitation for mentally and physically handicapped”⁹, group homes¹⁰, transportation¹¹, were available to Shawn.

Plaintiffs objected that these were collateral source benefits and the fact that the Plaintiff may be entitled to future collateral benefits was inadmissible; the Defendants are not to profit by the fact that potential benefits may be available to the Plaintiff. Further, the newly enacted West Virginia Medical Legal Professional Liability Act, West Virginia Code, Section 55-7B-9(a), supported Plaintiffs’ argument that such evidence was prohibited to be used during trial, but was to be presented after the verdict. Yet the trial court overruled the Plaintiffs and allowed the evidence to be presented.

Next, through pre-trial orders, the trial court had ruled that it was limiting Plaintiffs’ experts to the opinions expressed in their disclosures. Based upon fundamental fairness, Plaintiffs requested the same treatment with Defendants’ experts, and the trial court ruled that all experts were limited to their pre-trial disclosure. (Vol. II, p. 14, l. 3-9). However, Defendants’ expert, Dr. Cicco, over objection¹², was allowed to expand upon his disclosed opinions.

8. Vol. IV, p. 66 – 67.

9. Vol. IV, p. 76

10. Vol. IV, p. 77 – 78.

11. Vol. IV, p. 79.

12. Vol. VI, p. 272, l. 5-7.

Finally, Defendant BOG moved, pursuant to W.Va.R.Civ. 50, that the Plaintiffs, as a matter of law, failed to prove their claim that if Nurse Asher failed to give an order for volume to Dr. Burech, she would have breached a duty of care to the Plaintiffs.

This court, in its ruling, accepted Defendants' scenario of the facts and granted the partial judgment before closing arguments and informed the jury, immediately before Plaintiff's closing argument, that it had dismissed part of the claim against Defendant BOG.

Closing arguments were held, and on March 6, 2007, the jury returned its verdict, stating that the Defendants were not negligent.

On March 16, 2007, Plaintiffs filed a Motion for New Trial/Post-Trial Relief pursuant to W.Va. R.C.P. 59. On March 28, 2007, pursuant to Rule 54 of the West Virginia Rules of Civil Procedure, the trial court entered final judgment on the verdict.

On April 11, 2007, the Request for Transcript of Proceedings was made for appeal. A hearing was held on the Motion for New Trial/Post-Trial Relief on May 7, 2007, and on May 11, 2007, the trial court issued its Memorandum of Opinion and Order denying the Motions for New Trial/Post-Trial Relief.

Pursuant to W.Va. R.C.P. 72 and W.Va.R.A.P. 3, since the transcript was not available, the trial court granted Plaintiffs' Motion to Extend the Appeal Period, and on October 31, 2007 Plaintiffs Petition for Appeal was filed. The Defendants filed responses, and on April 2, 2008, the Petition was argued, and granted for appeal.

This Brief now follows.

The Assignments of Error Relied Upon on Appeal and the Manner in Which They Were Decided in the Lower Tribunal

1. **THE LOWER COURT ERRED IN JURY SELECTION BY:
 - (A) **FAILING TO STRIKE JURORS WHO STATED UNEQUIVOCALLY THAT THEY HAD BIASES FOR WHICH THEY COULD NOT JUDGE THIS CASE FAIRLY; AND**
 - (B) **UNFAIRLY ASSIGNING ADDITIONAL PEREMPTORY CHALLENGES TO THE DEFENDANTS, IN VIOLATION OF W.VA.R.CIV.P.47(C).****

2. **THE LOWER COURT ERRED IN ALLOWING THE DEFENDANTS TO PRESENT LIMITED TESTIMONY OF PLAINTIFFS' EXPERT, THUS INDIRECTLY INFORMING THE JURY OF A PRETRIAL SETTLEMENT, AND INFUSING THE TRIAL WITH ISSUES OF FAULT OF THE SETTLING DEFENDANT, IN VIOLATION OF W.VA. CODE § 55-7B-9.**

3. **THE LOWER COURT ERRED IN GRANTING A RULE 50 MOTION OF DEFENDANT WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS WHEN A DISPUTED FACT REMAINED FOR THE JURY'S CONSIDERATION.**

4. **THE LOWER COURT ERRED BY ALLOWING DEFENDANTS' EXPERTS TO TESTIFY BEYOND THE SCOPE OF THEIR 26(B)(4) DISCLOSURES, WHILE LIMITING PLAINTIFFS' EXPERTS TO THE CONFINES OF THEIR REPORT.**

5. **THE LOWER COURT ERRED IN ALLOWING THE DEFENDANTS TO PRESENT EVIDENCE OF COLLATERAL SOURCES, IN VIOLATION OF 55-7(B)-9(A).**

POINTS AND AUTHORITIES RELIED UPON

CASES

<i>Black v. CSX Transportation, Inc.</i> , 220 W.Va. 623, 648 S.E. 2d 610 (2007).....	14, 17
<i>Brannon v. Riffle</i> , 197 W.Va. 97, 475 S.E.2d 97 (1996).....	26
<i>Davis v. Wang</i> , 184 W.Va. 222, 226, 400 S.E.2d 230, 234 (1990)	15
<i>DeVane v. Kennedy</i> , 205 W.Va. 519, 534, 519 S.E.2d 622, 637 (1999).....	21
<i>Doe v. Wal-Mart Stores</i> , 210 W.Va. 664, 670, 558 S.E. 2d 663, 669 (2001).....	17
<i>Floyd v. Watson</i> , 163 W.Va. 65, 68, 254 S.E.2d 687, 690 (1979).....	21
<i>Horace Mann Ins. Co. v. Adkins</i> , 215 W.Va. 297, 303, 599 S.E.2d 720, 727 (2004)	21
<i>O'Dell v. Miller</i> , 211 W.Va. 285, 565 S.E.2d 407 (2002).....	13, 14, 17
<i>Pleasants v. Alliance Corp.</i> , 209 W.Va. 39, 543 S.E.2d 320 (2000).....	15
<i>Price v. Charleston Area Medical Center</i> , 619 S.E.2d 176 (W.Va. 2005).....	18, 19, 20
<i>Retlief v. Yokam</i> , 167 W.Va. 779, 280 S.E.2d 584 (1981),.....	29
<i>Sanders v. Rose-lawn Memorial Gardens, Inc.</i> , 152 W.Va. 91, 159 S.E.2d 784 (1968).	21
<i>Sexton v. Grieco, M.D., et al.</i> ; 216 W.Va. 714; 613 S.E.2d 81.....	26
<i>State ex rel. Showen v. O'Brien</i> , 89 W.Va. 634, 109 S.E. 830 (1921).....	21
<i>State v. Miller</i> , 197 W.Va. 588, 476 S.E.2d 535 (1996).....	15
<i>Walls v. Kim</i> , 250 Ga. App. 259, 260, 549 S.E..2d 797, 799 (2001).....	17
Statutes	
W.Va. Code §55-6-12.....	13
W.Va. Code §55-7B-9	22, 30, 31
W.Va.R.Civ.P. 26(b)(4),	20
W.Va.R.E. 102.....	28
W.Va.R.E. 403.....	23
West Virginia Rule of Civil Procedure 47(b)	21

Discussion of the Law

1. THE LOWER COURT ERRED IN JURY SELECTION BY:

(A) FAILING TO STRIKE JURORS WHO STATED UNEQUIVOCALLY THAT THEY HAD BIASES FOR WHICH THEY COULD NOT JUDGE THIS CASE FAIRLY.

W.Va. Code § 56-6-12 dictates that a party to a lawsuit may examine prospective jurors to ensure that the jurors have no interest in the case and are free from “bias or prejudice”.

The object of jury selection is to secure jurors who are not only free from improper prejudice and bias, but who are also free from the suspicion of improper prejudice or bias. *Voir dire* ferrets out biases and prejudices to create a jury panel, before the exercise of preemptory strikes, free of the taint or reasonably suspected prejudice or bias. Trial courts have an obligation to strike biased or prejudiced jurors for cause.

O'Dell v. Miller, 211 W.Va. 285, 288, 565 S.E.2d 407, 410 (2002).

As the *O'Dell* court added, if there is a question as to a prospective juror being biased, “trial courts should endeavor to secure those jurors who are not only free from, but who are not even subject to well-grounded suspicion of any bias or prejudice.” *Id.* at 289, S.E.2d at 411. “When in doubt, a trial court should exclude a prospective juror.” *Id.*

Unfortunately, in this case, several prospective jurors expressed their biases and prejudices, and were not excluded by the court. Juror Kevin Heilman clearly revealed his biases, by holding the Plaintiff, in a negligence case, to a criminal standard, yet was not excused.

“Mr. Cohen: **You think there should be some component of intent?**

Prospective Juror Heilman: **Oh, yeah, definitely.”**

(Vol. I, p.278, l. 21-24).

“Once a prospective juror has made a clear statement during *voir dire* reflecting or indicating the presence of a disqualifying prejudice or bias, the prospective juror is disqualified as a matter of law and cannot be rehabilitated by subsequent questioning, later retractions, or promises to be fair.” Syllabus Point 2, in *O’Dell v. Miller*, 211 W.Va. 285, 565 S.E.2d 407 (2002)(emphasis supplied).

Once Juror Heilman made his statement, he was disqualified, as a matter of law, and should have been stricken.

“Where a juror’s bias is evident, he/she should be excused for cause.” *Black v. CSX Transportation, Inc.*, 220 W.Va. 623, 628, 648 S.E. 2d 610, 615 (2007),

By failing to excuse the juror, the Plaintiffs suffered irreparable prejudice.

Unfortunately, this was not Juror Heilman’s only prejudicial statement, nor was he the only juror in the venire to display such clearly disqualifying biases and prejudices and outright refusal to follow the law.

The first juror who underwent individual *voir dire*, Dr. Donald Walter, began with an off-hand joke about his disdain for medical malpractice cases. (Vol. I, p.46). Then, when asked if he could follow the law and award legally appropriate damages, such as pain and suffering, he responded that: “[i]t would be hard to justify an amount for pain and suffering. I don’t know that there’s any way you can compensate people for that”. (Vol. I, p.49, 1.4-7).

Considering that this is a case of a child who suffered permanent, devastating neurological and physical injury, Dr. Walter’s reservations about awarding an appropriate element of damages certainly meets the criteria of a disqualifying prejudice.

Yet, defense counsel quickly tried to rehabilitate Dr. Walter, asking him if he would rely on the court’s instructions, to which he feebly said he “would try”. (Vol. I, p.51, 1.4-12).

After further questioning by defense counsel, Dr. Walter revealed that he was once a party to a medical malpractice lawsuit, which was settled, and then he truthfully volunteered that: "obviously, I'm going to be a little bit prejudiced" against the system because of that case. (Vol. I, p.53, l.7). Maybe because of that experience, Dr. Walter confessed that the only way he could ever bring such a lawsuit was, "[i]f it was a deliberate act." (Vol. I, p.55, l.10-14). He concluded by noting that since this is a case against a medical professional, he would weigh accountability different than he would an ordinary case. (Vol. I, p. 56, l.5-10).

"Actual bias can be shown either by a juror's own admission of bias or by proof of specific facts which show the juror has such prejudice or connection with the parties at trial that bias is presumed." Syllabus Point 5, *State v. Miller*, 197 W.Va. 588, 476 S.E.2d 535 (1996).

Plaintiffs' Motion to strike Juror Walter for cause, based on these obvious prejudices was denied. (Vol. I, p. 62, l.9).

"Any doubt the court might have regarding the impartiality of a juror must be resolved in favor of the party seeking to strike the potential juror. *O'Dell*, 211 W.Va. at 288, citing *State v. West*, 157 W.Va. 209, 200 S.E.2d 859, 866 (1973)." *Davis v. Wang*, 184 W.Va. 222, 226, 400 S.E.2d 230, 234 (1990) *overruled on other grounds by Pleasants v. Alliance Corp.*, 209 W.Va. 39, 543 S.E.2d 320 (2000).

Next, Juror Terry Bennett, an administrative assistant who worked in the risk management department of Wheeling Hospital, expressed similar reluctance about the case. She had noted her concerns in a juror questionnaire, stating that she would be prejudiced because she works at Wheeling Hospital, and it would be difficult for her to remain unbiased in this case because of where she works. (Vol. I, p. 94, l.8 – p. 96, l.2).

Although Wheeling Hospital was not a defendant in the case, the delivery and resuscitation occurred there, and a nurse who worked there, Nurse McFarland, was going to testify. Defense Counsel, through their questions, drew out answers allowing Juror Bennett to proclaim her fairness to the proceedings from Juror Bennett. (Vol. I, p. 96, 1.9 – p.99, 1.2). Considering the trial court's ruling on the first juror, Dr. Miller, Plaintiffs' motion for cause would have no traction, and ultimately Plaintiffs did not have sufficient peremptory strikes to exclude Ms. Bennett from the jury.

Finally, the remainder of Juror Heilman's answers lends further support for the argument that the Plaintiffs were prejudiced by not granting the motions to strike these prospective jurors.

Juror Heilman added that it he equated negligence in a medical malpractice case as "taking off the wrong arm or leg during surgery." (Vol. I, p.278-279). This only confirmed his earlier requirement of proof of **intent to harm** before he could find a doctor negligent; an obviously incorrect legal requirement. (Vol. I, p.278-279). Finally, as Dr. Walter had a problem with pain and suffering damages, Juror Heilman had a problem with mental anguish damages, stating that he could not award money for that. (Vol. I, p.282, l. 11-16).

Defense counsel's attempted rehabilitation of Juror Heilman, only confirmed that he required intent to be proven to him in a negligence case.¹³

Regardless of these astounding biases, the trial judge asked Juror Heilman the "magic question", seeking to find out if he could follow the law on negligence, to which he readily confirmed that he would follow the court's instructions. (Vol. I, p. 291, l. 22 – p. 292, l. 11).

13. **Mr. Offutt:** Thank you, Your Honor. Mr. Heilman, let's start with this idea of intent. You don't believe that any doctor intends to hurt a patient in treating them; do you?

Prospective Juror Heilman: I believe that it would have to be proven to me that that doctor was trying to - - or intended to hurt the person. Does it happen? I'm sure somewhere in this world, you know, there is intent, but I think it would have to be proven that there was an intent to hurt." (Vol. I, p. 283, l. 5-14).

“Trial Judges must resist the temptation to ‘rehabilitate’ perspective jurors by asking the ‘magic question’ to which jurors respond by promising to be fair when all the facts and circumstances show that the fairness of that juror could be reasonably questioned. ‘A Trial Judge should error on the side of caution by dismissing, rather than trying to rehabilitate bias jurors, because in reality, the Judge is the only person in the Courtroom whose primary concern, indeed primary duty, is to ensure the selection of a fair and impartial juror.’”

O’Dell, 211 W.Va. at 290, citing *Walls v. Kim*, 250 Ga. App. 259, 260, 549 S.E.2d 797, 799 (2001).

The trial court denied Plaintiffs’ motion to strike Juror Heilman. (Vol. I, p. 295, l.8 – 22).

“An appellate court should interfere with a trial court's discretionary ruling on a juror's qualification to serve because of bias only when it is left with a clear and definite impression that a prospective juror would be unable faithfully and impartially to apply the law.” Syllabus Point 5, *State v. Miller*, *supra*.

The Plaintiffs had to exercise their two strikes to exclude a doctor and a juror who needed criminal intent to find a doctor negligent, while leaving a hospital risk management administrative assistant on the jury. (Vol. I, p.312, l. 22-25). Ultimately, the jury returned an adverse verdict against the Plaintiffs.

Last summer, this Court reaffirmed the holding of *O’Dell*, in the *Black* case, and recognized that the failure to strike biased jurors can lead to prejudice via an adverse verdict.

“We further find that Mrs. Black was prejudiced by this erroneous ruling insofar as the jury who ultimately heard and decided her case returned an adverse verdict.” *Black*, 220 W.Va. at 630, 648 S.E.2d at 617, citing *Doe v. Wal-Mart Stores*, 210 W.Va. 664, 670, 558 S.E. 2d 663, 669 (2001).

The adverse verdict in this case proves the prejudice to the Plaintiffs, from which the Plaintiffs could not receive a fair trial.

1. THE LOWER COURT ERRED IN JURY SELECTION BY:

(B) UNFAIRLY ASSIGNING ADDITIONAL PEREMPTORY CHALLENGES TO THE DEFENDANTS, IN VIOLATION OF W.V.A.R.CIV.P.47(C).

Ensuring a fair and impartial jury is the constitutional underpinning for a fair trial.

West Virginia Rule of Civil Procedure 47(b) dictates the rule for jury selection:

(b) *Jury selection.* — Unless the court directs that a jury shall consist of a greater number, a jury shall consist of six persons. The plaintiff and the defendant shall each have two peremptory challenges which shall be exercised one at a time, alternately, beginning with the plaintiff. Several defendants or several plaintiffs may be considered as a single party for the purpose of exercising challenges, may allow additional peremptory challenges and permit them to be exercised separately or jointly.

The rule is clear that the Plaintiff and the Defendants shall each have two (2) peremptory challenges. If there are several Defendants, they may be considered as a single party for the purposes of exercising challenges.

Before jury selection in this case, without a motion being presented, the trial court granted each Defendant two separate peremptory challenges – twice the number allotted to the Plaintiffs. Plaintiffs then moved the trial court to reconsider its ruling and allot peremptory challenges consistent with Rule 47(b) of the West Virginia Rules of Civil Procedure. (Plaintiffs' Motion to Reconsider Peremptory and TT V.I, p. 6, 1.4-10).

This Court, in *Price v. Charleston Area Medical Center*, 619 S.E.2d 176 (W.Va. 2005) set forth the standard for apportioning peremptory strikes. At syllabus point 2, this Court noted that additional peremptory challenges may be given, where “the interests of the defendants are antagonistic or hostile”. *Id.*, syl. pt. 2

At syllabus point 3, the *Price* Court, set forth five criterions of what must be reviewed to determine if the defendants interests are “antagonistic or hostile for purposes of allowing separate peremptory challenges”.¹⁴ In the case at hand, while the trial court looked at that fact that separate counsel and separate answers had been filed, the trial court accepted defense counsel’s argument that they did not share a common defense theory and were antagonistic toward each other. (TT Vol. I, p. 9, 1.2-21).

However, a review of the trial testimony and evidence clearly shows that while the defendants argued this to the trial court for purposes of being rewarded with additional peremptory challenges, they did not present such a conflicting defense to the jury.

As an example, a review of the testimony of the Defendants’ respective experts, Dr. Boyle and Dr. Cicco, prove that their defense theories were not hostile, but were consistent and complimentary.

Dr. Boyle, retained by Dr. Burech, testified that he accepted the defense of co-defendant WVU BOG Nurse Asher when he was questioned by the BOG attorney (Vol. VI, p.99-101). Likewise, Dr. Cicco, retained by WVU BOG, testified that co-defendant Dr. Burech did not breach the standard of care, and, over objection by the Plaintiffs, added that there was no causation in the case. (Vol. VI, p.277-283).

Further, when it came to questioning the principal parties by their co-defendants, it is obvious that they were not hostile to each other. Nurse Asher, when questioned by counsel for co-defendant Dr. Burech, was shown more admiration than confrontation. Similarly, when Dr.

14. (1) whether the defendants are charged with separate acts of negligence or wrongdoing,
(2) whether the alleged negligence or wrongdoing occurred at different points of time,
(3) whether negligence, if found against the defendants, is subject to apportionment,
(4) whether the defendants share a common theory of defense and,
(5) whether cross-claims have been filed.
Id. at syllabus point 3.

Burech was questioned by counsel for co-defendant BOG, he was shown no antagonism, and his answers were consistent with their complimentary theories of defense.¹⁵ Moreover, the Defendants, at several points in the case shared witnesses, such as Dr. Katz, Patricia Constantini and Daniel Selby, and switched the lead task in presenting these witnesses.¹⁶

As Judge Starcher cautioned in the *Price* decision, the trial court must ensure that “there is a serious, honest dispute between the co-parties, not a tactical fake dispute merely so the parties can get more strikes.” *Id.*

While the Defendants’ argument to support the trial court’s granting them separate peremptory challenges was founded upon the conflict between the testimony of Dr. Burech and Nurse Asher, once trial began, it was eminently clear that the presentation of the case proved that the Defendants did not have conflicting or competing interests which justified the rewarding of additional peremptory challenges. (Vol. II, p.116-132 and p.244-250).

The lack of hostility or antagonistic positions proved that the foundation for giving Defendants additional peremptory challenges was without basis, which led to actual prejudice in selecting the jury. The Defendants, by being given twice the number of peremptory challenges as the Plaintiffs, were able to influence the jury selection process to the actual prejudice of the Plaintiffs. As noted in the earlier section, the Plaintiffs had to exercise their two strikes to exclude a doctor and a juror who required criminal intent to find a doctor negligent, while leaving a hospital risk management administrative assistant on the jury. (Vol. I, p.312, l. 22-25).

The additional peremptory strikes given to the Defendants, along with the rehabilitation of several jurors who were not stricken for cause, led to an unfair and biased jury, from which the Plaintiffs were prejudiced and an adverse verdict resulted.

15. See. Vol. II, p.116-132, Vol. II, p.244-250.

16. Vol. VI, p.5, Vol. V, p.23 and Vol. V, p.97, respectively.

2. **THE LOWER COURT ERRED IN ALLOWING THE DEFENDANTS TO PRESENT LIMITED TESTIMONY OF PLAINTIFFS' EXPERT, THUS INDIRECTLY INFORMING THE JURY OF A PRETRIAL SETTLEMENT, AND INFUSING THE TRIAL WITH ISSUES OF FAULT OF THE SETTLING DEFENDANT, IN VIOLATION OF W.VA. CODE § 55-7B-9.**

Initially, Plaintiffs brought this lawsuit against (1) the obstetricians who delivered the minor-Plaintiff, and (2) the pediatrician, Defendant Dr. Burech, who was responsible for resuscitation after delivery. Plaintiffs retained Dr. James Balducci, an obstetrician, to explain how the obstetricians breached the standard of care and what resulted there from. Dr. Balducci was also retained to explain that Shawn suffered a pre-birth injury, but could have recovered if proper resuscitation had been given to Shawn after birth.

Before trial, the Plaintiffs had settled with the obstetricians; reaching a compromise on issues, which goal this Court has encouraged on numerous occasions.

[W]e have held that "[t]he law favors and encourages the resolution of controversies by contracts of compromise and settlement rather than by litigation; and it is the policy of the law to uphold and enforce such contracts if they are fairly made and are not in contravention of some law or public policy." Syl. pt. 1, *Sanders v. Rose-lawn Memorial Gardens, Inc.*, 152 W.Va. 91, 159 S.E.2d 784 (1968). Accord, *DeVane v. Kennedy*, 205 W.Va. 519, 534, 519 S.E.2d 622, 637 (1999) ("reiterating... that settlements are highly regarded and scrupulously enforced, so long as they are legally sound"); *Floyd v. Watson*, 163 W.Va. 65, 68, 254 S.E.2d 687, 690 (1979) ("The general rule is that a compromise or settlement agreement is favored by law[.]").(fn9) Cf. W. Va. Trial Court Rule 25.11 ("No party may be compelled by these rules, the court, or the mediator to settle a case involuntarily or against the party's own judgment or interest."); Syl. pt. 5, *State ex rel. Showen v. O'Brien*, 89 W.Va. 634, 109 S.E. 830 (1921) ("The rule that the courts favor compromise settlements by parties to prevent vexatious and expensive litigation only applies where the legal and equitable rights and interests of all parties concerned in a judgment are regarded and respected in good faith.").

Horace Mann Ins. Co. v. Adkins, 215 W.Va. 297, 303, 599 S.E.2d 720, 727 (2004)

Yet, this was thwarted by the Defendants in the way that they wished to use Dr. Balducci's testimony.

After settlement, the remaining Defendants moved to limit Dr. Balducci's testimony, pursuant to W.Va.R.Civ.P. 26(b)(4), to the opinions he expressed in his report about the pre-birth injury. The motion was granted by the trial court. Next, the Defendants then took a very limited discovery deposition of Dr. Balducci, and then advised that they intended to play the deposition at trial.

Plaintiffs offered a stipulation, and when that was reneged on by the Defendants, Plaintiffs moved *in limine* to exclude Dr. Balducci's deposition based on several grounds. (Vol. I, p. 316, l.23 – p. 317, l. 21). First, Plaintiffs moved to strike Dr. Balducci's testimony in that the only purpose for it to be played before a jury would be to insinuate that there was another suit against parties against whom a case had been settled, in violation of W.Va. Code §55-7B-9. (Vol. I, p. 320, l. 12).

West Virginia Code § 55-7b-9 was enacted with specific pronouncements that a jury must be prohibited from considering the fault of parties who are not in litigation at the time of the verdict. The sole reason the Defendants wanted Dr. Balducci's deposition played was to interject the issue of other parties' fault, and their settlement into this case. By allowing the presentation of Dr. Balducci's testimony, the fault of parties who were not in the litigation was infused into the case by telling the jury that the Plaintiffs had hired an expert who concluded that there were other responsible parties, who were at fault for damages before birth. (Vol. II, p. 6 – 8). The jury could not infer anything else than that there was a settlement, and the fault of parties who were not there to be judged by them; something §55-7B-9 was intended to prohibit.

Second, Plaintiffs moved, pursuant to Rule of Evidence 403 to exclude the deposition as cumulative of the other expert's testimony, and that its probative value did not outweigh the highly prejudicial effect to the Plaintiffs.

Dr. Balducci's testimony was cumulative of the testimony of Plaintiffs' other experts who testified at trial and who acknowledged a pre-birth injury. (See Dr. Null's testimony, Vol. III, p. 64, l. 23 – p. 66, l.2). It was also highly prejudicial and detrimental to the Plaintiffs to have their own expert displayed before the jury via limited testimony, to offer his opinions on uncontested obstetrical issues in this case, when those opinions applied to the joint tortfeasors with whom a settlement had been reached.

Defendants claim that they needed the testimony of Dr. Balducci because they did not have an obstetrician who could explain the injury pre-birth. However, before Dr. Balducci's testimony was played, Dr. Null and Dr. Polak¹⁷ testified wherein they agreed that there was a pre-birth injury, and had explained how it occurred. Further, after Dr. Balducci's deposition was played, Defendants elicited the same opinions from their own experts, Dr. Boyle¹⁸ and Dr. Cicco.¹⁹

There was no need for Dr. Balducci's testimony. The Defendants' reasoning that his testimony was crucial was artificial, especially when they knew that their own experts would provide the same opinions. The only reason for Dr. Balducci's testimony would be to introduce a pre-trial settlement, which was highly prejudicial and extraneous to the issues before the jury.

The jury was left with the factual impression that the Plaintiffs were not calling their own expert who laid fault on the obstetrical issues in the case, which issues were not being presented

17. Vol. II, p. 205.

18. See Vol. VI, p. 74, l. 6-11

19. See. Vol. VI, p. 280 – 281.

to them. Specifically, Dr. Balducci was asked, and answered a question about Dr. Miller, the obstetrician who had settled, and about the care she provided to Laurie Murphy, who was pregnant with Shawn.²⁰ (See Balducci deposition, pages 11-13). Dr. Balducci was then asked questions wherein his answers clearly placed fault on others who were not at trial:

- Q. Okay. And then I understand you formed an opinion from the records and your expertise, that the failure to deliver the infant during the November 18th induction and then the four-hour delay and the final decision to perform a C-section on November the 26th is **directly related to and caused** the baby's condition and outcome –
- A. Yes, ma'am.
- Q. -- is that correct?
- A. Yes, ma'am.²¹

These questions of Dr. Balducci confirmed for the jury that other parties were at fault; requiring the jury to speculate about the fault of other parties, whose fault they were statutorily prohibited from considering.

While the Defendants focused their case upon a pre-birth injury, the probative nature of Dr. Balducci's testimony was limited, at best, because the theory was presented by the Defendant's own experts, elicited on cross-examination from Plaintiffs' other experts, and extrapolated by counsel in their opening and closing argument. By allowing this testimony, the trial court allowed testimony of others fault to enter this case.

Plaintiffs ask that this court reverse the trial court, exclude the testimony of Dr. Balducci and return this case to trial for reconsideration by a new jury.

20. References are to the deposition which was played at trial, but not transcribed by the court reporter, but in the record. (Vol. V. p. 137)

21. Balducci deposition, page 18.

3. THE LOWER COURT ERRED IN GRANTING A RULE 50 MOTION OF DEFENDANT WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS WHEN A DISPUTED FACT REMAINED FOR THE JURY'S CONSIDERATION.

The trial court partially granted the BOG's Rule 50 Motion, ruling that the Plaintiffs, as a matter of law, failed to prove their claim that Nurse Asher failed to give an order for volume to Dr. Burech. The factual scenario is complicated, but crucial to understand for this issue.

After Shawn was born, Dr. Burech arrived at Wheeling Hospital to evaluate Shawn. He then wrote Orders at 10:00 p.m. (Vol. II, p. 228, l. 21-23).

Included on that order sheet was an order, #10, which was an order for Volume, however, he then cancelled the order by crossing it out. (Vol. V. p. 169, l. 9 – 10).

At about the same time that he was writing and rescinding his order, Dr. Burech called Nurse Asher. IN that call, Nurse Asher recommended to Dr. Burech that he provide Shawn with, among other things, Volume. (Vol. II, p. 97, l. 12).

However, neither Dr. Burech nor Nurse Asher testified that they had spoken about Order #10, nor was there any evidence that the order for Volume was on the Order sheet at the time that they spoke, or that Nurse Asher knew that Dr. Burech had written an Order for Volume. (Vol. V, p. 173 l. 17 – 23, and Vol. VI, p. 162, l. 10 – p. 163, l. 9).

Nevertheless, after the testimony was presented, the trial court ruled that since Order #10 was on Dr. Burech's medical orders when he spoke to Nurse Asher, then she had no duty to make the recommendation, and thus Nurse Asher, and her employer BOG, were relieved of liability. (Vol. VI, p. 289 – 291).

Yet, in making this ruling, the court admittedly based its ruling on assumed facts not in evidence, and on the standard of “more likely than not”, rather than the required standard for summary judgment that only one reasonable conclusion can be drawn from the facts. (Vol. VI, p. 291).

The appellate standard of review for the granting of a motion for a [judgment as a matter of law] pursuant to Rule 50 of the West Virginia Rules of Civil Procedure is de novo. On appeal, this court, after considering the evidence in the light most favorable to the nonmovant party, will sustain the granting of a [judgment as a matter of law] when **only one reasonable conclusion** as to the verdict can be reached. But if reasonable minds could differ as to the importance and sufficiency of the evidence, a circuit court's ruling granting a [judgment as a matter of law] will be reversed.

Sexton v. Grieco, M.D., et al.; 216 W.Va. 714; 613 S.E.2d 81, *Accord* Syl. pt. 3, *Brannon v. Riffle*, 197 W.Va. 97, 475 S.E.2d 97 (1996). (emphasis supplied).

The trial court ruled, only after accepting a version of facts established on cross-examination of Plaintiffs' expert; facts established by the “more likely than not” standard. “[W]ith respect to volume, he agreed with Mr. Wright, that it's more likely than not that the volume order was in place at the time of the phone conversation. And then he, furthermore, agreed that, that being said, that being the case, there was no deviation from the standard of care concerning the volume issue.” (Vol. VI, p. 291, l. 4 – 10).

Yet, this does not rise to the certainty and “one reasonable conclusion” required for a Rule 50 Motion, and more importantly, is based upon an assumption that when Nurse Asher gave her instructions for Volume, she *knew about Dr. Burech's volume order*, despite her testimony to the contrary. (Vol. VI, p. 162, l. 10 – p. 163, l. 9).

One must ask, as the jury may have, if Nurse Asher had just been told by Dr. Burech that he had written an order for Volume, why would she then make the same “recommendation” for Volume? If she knew it was there, why would she make a redundant instruction to Dr. Burech? The only logical conclusion that could be drawn is that she did not know about the Volume order. If she did not know about the Volume order, the basis for the trial court’s ruling fails. (Vol. VI, p. 291, l. 4 – 10).

The granting of judgment at that point of trial, not only undermined the Plaintiffs’ case, but informed the jury, before closing statements, that a claim against the Board of Governors lacked evidence. This granting of judgment at this inopportune time was prejudicial to the Plaintiffs in that it implied to the jury that the Plaintiffs’ case lacked merit.

4. THE LOWER COURT ERRED BY ALLOWING DEFENDANTS’ EXPERTS TO TESTIFY BEYOND THE SCOPE OF THEIR 26(B)(4) DISCLOSURES, WHILE LIMITING PLAINTIFFS’ EXPERTS TO THE CONFINES OF THEIR REPORT.

Through pre-trial orders, the trial court ruled that it was limiting Plaintiffs’ experts to the opinions expressed in their disclosures. Based upon fundamental fairness, Plaintiffs requested the same treatment with Defendants’ experts, and the trial court ruled that all experts were limited to their pre-trial disclosure. (Vol. II, p. 14, l. 3-9).

However, during the Defendants’ case in chief, they presented the testimony of Dr. Cicco whose pre-trial report was limited to opinions on the standard of care. Before he testified, Defense counsel confirmed that standard of care opinions was the extent of the testimony to be elicited from Dr. Cicco. (Vol. VI, p. 221, l. 14 – 20).

Yet, when it came time for Dr. Cicco to testify, over the objection of the Plaintiffs²², the co-Defendants were allowed to elicit causation testimony from Dr. Cicco that exceeded the disclosed opinions. (Vol. VI, p. 277 - 278).

Illogically, Defense counsel argued that Plaintiffs' counsel had "opened the door" to causation questions, when standard of care questions were asked. (Vol. VI, p. 274 - 276). The trial court accepted this reasoning and allowed the defendant's causation questions to be asked. (Vol. VI, p. 276, l. 8-13). If this is truly the standard, then any question of an expert would "open the door" to any opinion.

Further, it is fundamentally unfair to hamstring one party by pre-trial rulings limiting their experts, yet not rule the same way as to all parties. The rules of evidence must be fairly assessed against the parties. W.Va.R.E. 102.

As was clear, the Plaintiffs were limited by their pre-trial reports of their experts. (Vol. II, p. 14, l. 3-9). Yet, Dr. Cicco, upon cross by the co-defendant was allowed to expand upon his pre-trial report to add causation opinions. (Vol. VI, p. 277, l. 10-13). While it was argued that these opinions were expressed in pre-trial discovery depositions²³, it is equally certain that while Plaintiffs experts were questioned extensively in their depositions, they were limited to their pretrial reports by pre-trial rulings.²⁴

Such testimony greatly prejudiced the Plaintiffs by allowing the defense experts to testify beyond their disclosures, violated fundamental fairness, the rules of court and this court's pre-trial orders.

22. Vol. VI, p. 272, l. 5-7.

23. (Vol. VI, p. 276, l. 18 - p. 277, l. 1).

24. (See Oder of Court, 10/6/06, limiting testimony of Plaintiffs' expert Dr. Adler.)

5. THE LOWER COURT ERRED IN ALLOWING THE DEFENDANTS TO PRESENT EVIDENCE OF COLLATERAL SOURCES, IN VIOLATION OF 55-7(B)-9(A).

Since 1981, this Court has adhered to the holding in *Retlief v. Yokam*, 167 W.Va. 779, 280 S.E.2d 584 (1981), wherein it recognized the collateral source rule that was established: “to prevent the Defendant from taking advantage of payments received by the Plaintiff as a result of his own contractual arrangements entirely independent of the Defendant.”

“Part of the rationale for this rule is that the party at fault should not be able to minimize his damages by offsetting payments received by the injured party through his own independent arrangements.” *Id.*

Yet, the Defendants introduced evidence that the minor-Plaintiff would be entitled to future benefits, in the form of aid through his schooling, “Federal Law, Education for All Handicapped Children Act”²⁵, Federal aid for disabled adults, World War I disability benefits entitled “Vocational Rehabilitation for mentally and physically handicapped”²⁶, group homes²⁷, transportation²⁸, among other things.

The trial court overruled objections that these benefits were collateral sources, and allowed the questioning to continue. (Vol. IV, p. 53 – 54).

The fact that the Plaintiff may be entitled to future collateral benefits is inadmissible in this type of case. It is axiomatic that the Defendants are not to profit by the fact that potential benefits may be available to the Plaintiff.

25. Vol. IV, p. 66 – 67.

26. Vol. IV, p. 76

27. Vol. IV, p. 77 – 78.

28. Vol. IV, p. 79.

Allowing the Defendants to insinuate that speculative future collateral benefits are available, sent the message to the jury that, regardless of fault, regardless of responsibility, the Plaintiffs were not to be trusted; they were not credible because they were seeking compensation for benefits that they already had coming to them. This was exemplified in Defendant Burech's closing when he again referred to the potential future collateral benefits, and contrasted that to the Plaintiffs' life care plan, accusing the Plaintiffs of overreaching in their case.²⁹

While the jury did not reach the issues of damages, and while it may then be argued that the error was harmless, this Court must address this issue because the Defendants arguments, in addition to poisoning the entire trial, expressly violated and is prohibited by the newly enacted West Virginia Medical Legal Professional Liability Act, West Virginia Code § 55-7B-9(a).

Section 55-7B-9(a) expressly holds that if the Defendant is found liable for economic losses, then **after the verdict**, the Defendant is entitled, **at a subsequent hearing**, to argue for a reduction of the verdict based upon the cost of potential future collateral benefits.

The statute is clear that it is only at that hearing, after the jury has rendered its verdict, that the Defendant is permitted to present evidence that the Plaintiff is entitled to future payments from collateral sources and that "to a reasonable degree of certainty" they would be paid to the Plaintiff. At that hearing, if the court finds, "to a reasonable degree of certainty" that the Plaintiff is entitled to future benefits, the verdict can be reduced. § 55-7B-9(a).

The trial court circumvented the intent of the statute and allowed the Defendants to present inadmissible arguments, while suggesting that the Plaintiffs would be entitled to potential future collateral benefits, without any modicum of certainty as required by statute. Although the

29. Vol. VII, p. 36-41.

jury did not reach the issue of damages, the court's ruling presented the Defendants with the opportunity to use a statutorily prohibited argument to not only try to reduce its exposure, but to also *discredit* the Plaintiffs, and their proof.

Additionally, this issue cannot be considered harmless because it has not been interpreted by this court to give guidance on this statute.

Assume, hypothetically, that the jury had returned a verdict against the Defendants. By allowing this argument to persist, it would perpetuate the false assumption that it is permissible, thus giving the Defendants two proverbial bites at the apple to reduce their exposure to damages; once by presenting potential future collateral benefits at trial (as occurred here, without proof), and second at Section 55-7B-9(a) post-verdict hearing.

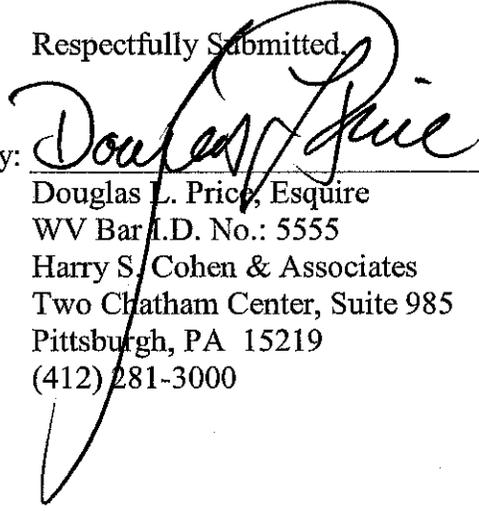
Considering the Medical Professional Liability Act, this issue is of great importance, Plaintiffs ask this Court to consider this issue and overturn the trial court's ruling and order a retrial to correct for the improperly allowed evidence.

Relief Prayed For

Plaintiffs request that this Court reverse the Lower Court's rulings on jury selection, presentation of experts, scope of expert reports, collateral sources and Rule 50 Motions, and remand the case for a New Trial for the Plaintiffs.

Respectfully Submitted,

By:

A handwritten signature in cursive script, appearing to read "Douglas L. Price", is written over a horizontal line. The signature is written in black ink and is positioned to the right of the word "By:".

Douglas L. Price, Esquire
WV Bar I.D. No.: 5555
Harry S. Cohen & Associates
Two Chatham Center, Suite 985
Pittsburgh, PA 15219
(412) 281-3000

Addendum- Orders of Court
from which Appeal is taken

- Judgment Order following Jury Verdict dated March 28, 2007.
- Memorandum of Opinion and Order denying Plaintiffs Post-Trial Motions, dated May 11, 2007

Handwritten initials/signature in the top left corner.

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

FILED
FEB 27 3 13
CLERK

LAURIE ANN MURPHY and SHAWN M. MURPHY, SR., individually and as parents and natural guardians of SHAWN M. MURPHY, Jr., a minor,

Plaintiffs,

Civil Action No. 04-C-444

v.

DENNIS L. BURECH, M.D., PEDIATRIC CARE and WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS,

Defendants.

JUDGMENT ORDER

On the 26th day of February, 2007, a duly-impaneled jury was seated in the above matter. After hearing the evidence and deliberating the issues submitted to them, the jury returned the following verdict on March 6, 2007.

JURY VERDICT FORM

QUESTION NO. 1

Do you find, by a preponderance of the evidence, that Dennis L. Burech, M.D., deviated from the applicable standard of care in his care and treatment of Shawn Murphy, Jr.?

Yes

No

If you answered "No" to Question No. 1, please go to Question No. 3 and do not answer Question 2. If you answered "Yes" to Question No. 1, proceed to Question 2.

QUESTION NO. 2

Do you find, by a preponderance of the evidence, that Dennis L. Burech's failure to follow the applicable standard of care was a proximate cause of injuries to Shawn Murphy, Jr.?

Yes

No

Regardless of your answers to Questions 1 and 2, proceed to Question 3.

QUESTION NO. 3

Do you find, by a preponderance of the evidence, that the West Virginia Board of Governors through its agent, Melissa Asher, deviated from the applicable standard of care in its care and treatment of Shawn Murphy, Jr.?

Yes

No

If you answered "Yes" to Question No. 3 proceed to Question 4. If you answered "No" to Question 3, proceed to the Instruction following Question 4.

QUESTION NO. 4

Do you find, by a preponderance of the evidence, that the West Virginia Board of Governors' failure to follow the applicable standard of care through its agent, Melissa Asher, was a proximate cause of injuries to Shawn Murphy, Jr.?

Yes

No

If you answered "No" to Questions 1 and 3 or 2 and 4, the Foreperson should sign the verdict form and advise the Deputy Sheriff that you have reached a verdict. If you answered "Yes" to Questions 1, 2, 3 and 4, proceed with Question 5 and Question 6. If you answered "Yes" to

Questions 1 and 2 and "No" to Questions 3 and 4, or "No" to Questions 1 and 2 and "Yes" to Questions 3 and 4, skip Question No. 5 and proceed to Question 6.

QUESTION NO. 5

Please state the percentage of negligence, if any, of all persons contributing to Shawn Murphy, Jr.'s injuries:

Dennis L. Burech, M.D. _____ %

West Virginia Board of Governors _____ %

100 %

(If you are required to answer this question, then the total must amount of negligence must equal 100%)

QUESTION NO. 6

What are the total reasonable amount of damages sustained by Shawn Murphy, Jr., as a result of the negligence you found to have occurred by a preponderance of the evidence?

Past Medical Bills \$ _____

Future Life Care/Medical Expenses \$ _____

Future Lost Earning Capacity \$ _____

Past Mental Pain & Suffering \$ _____

Future Mental Pain & Suffering and
Loss of Capacity to Enjoy Life \$ _____

TOTAL DAMAGES \$ _____

The undersigned does hereby attest that he or she is the foreperson of the jury in this case and that the foregoing answer or answers are the unanimous decision of the jury.

/s/ Melissa Schrebe

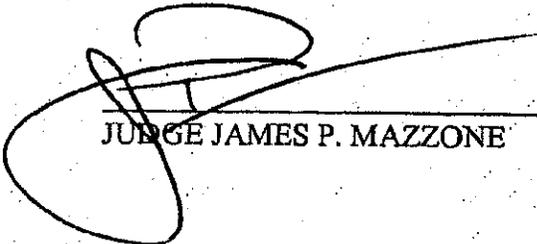
Foreperson

3/6/07

Date

Based on the foregoing verdict, it is hereby ORDERED that judgment is entered in favor of Defendants, Dennis L. Burech, M.D. and West Virginia University Board of Governors, and all costs are taxed to the Plaintiffs. Pursuant to Rule 54 of the West Virginia Rules of Civil Procedure, this Order constitutes a final judgment and there is no just reason for delay.

Dated this 28th day of MARCH, 2007.



JUDGE JAMES P. MAZZONE

WH148875.1

A copy, Teste:

Brenda L. Miller
Circuit Clerk

ENTERED IN CIVIL
ORDER BOOK 147
PAGE 141
as stated on Order

Brenda L. Miller
CLERK OF THE CIRCUIT
COURT OF OHIO COUNTY, WV

file by peng

IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

LAURIE ANN MURPHY and
SHAWN M. MURPHY, SR.,
individually and as parents
and natural guardians of
SHAWN M. MURPHY, JR., a minor,

Plaintiffs,

v.

CASE NO. 04-C-444

LAURA MILLER, D.O.; JOHN BATTAGLINO,
JR., M.D.; DENNIS L. BURECH, M.D.;
WHEELING HOSPITAL, INC.; and
WEST VIRGINIA BOARD OF GOVERNORS,

Defendants.

MEMORANDUM OF OPINION AND ORDER

Now pending before the Court are Plaintiff's Motion for New Trial/Post-Trial Relief and Plaintiff's Renewed Motion for Costs. These post-trial motions have been timely filed following a trial by jury with respect to the Plaintiffs' claims against Defendants Dennis Burech, M.D., and West Virginia Board of Governors, in which a verdict was returned in favor of the Defendants. A settlement was previously reached with respect to the Plaintiffs' claims against Defendants Laura Miller, D.O., John Battaglino, Jr., M.D., and Wheeling Hospital, Inc. Having reviewed the parties' respective motions and memoranda, and having given each of the parties an opportunity for oral argument during a hearing held on May 7, 2007, the Court is now prepared to issue its decision.

I.
PLAINTIFFS' MOTION FOR NEW TRIAL/POST-TRIAL RELIEF

The law that guides the Court's consideration of a motion for new trial is embodied in Rule 59 of the West Virginia Rules of Civil Procedure, which states in pertinent part:

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law.

W.V.R.C.P. 59(a)(1)(in part) (2007). In interpretation of this Rule, the West Virginia Supreme Court of Appeals has explained:

A motion for a new trial is governed by a different standard than a motion for a directed verdict. When a trial judge vacates a jury verdict and awards a new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, the trial judge has the authority to weigh the evidence and consider the credibility of the witnesses. If the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. A trial judge's decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion.

Syl. pt. 3, In re State Pub. Bldg. Asbestos Litig., 193 W.Va. 119, 454 S.E.2d 413 (1994). Rule 59 motions require the trial court to consider the sufficiency of the evidence presented during the trial:

When a case involving conflicting testimony and circumstances has been fairly tried, under proper instructions, the verdict of the jury will not be set aside unless plainly contrary to the weight of the evidence or without sufficient evidence to support it.

Syl. pt. 5, Toler v. Hager, 205 W.Va. 468, 519 S.E.2d 166 (1999), quoting Syl. pt.

4, Laslo v. Griffith, 143 W.Va. 469, 102 S.E.2d 894 (1958).

In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.

Syl. pt. 7, Toler v. Hager, 205 W.Va. 468, 519 S.E.2d 166 (1999), *quoting* Syl. pt. 5, Orr v. Crowder, 173 W.Va. 335, 315 S.E.2d 593 (1983), cert. denied, 469 U.S. 981, 105 S.Ct. 384, 83 L.Ed.2d 319 (1984).

Additionally, while not in syllabus, Justice Cleckley provided further direction for a trial court in considering a Rule 59 motion for new trial:

The lower court must always temper the decision whether to grant a new trial because of trial error by considering the importance to the litigants of receiving a fair and final judgment with society's interest, as expressed through our Legislature, that unless error affected the outcome of the trial a new trial should not usually be granted.

Tennant v. Marion Health Care Foundation, Inc., 194 W.Va. 97, 106, 459 S.E.2d 374, 383 (1995).

The Court has carefully considered each of the issues raised in the Plaintiffs' Motion for New Trial/Post-Trial Relief in light of the above standard and accordingly hereby

ORDERS that Plaintiffs' Motion for New Trial/Post-Trial Relief is **DENIED**.

II.
PLAINTIFFS' RENEWED MOTION FOR COSTS

The Plaintiffs have renewed their Motion for Costs seeking the Court to order counsel for Dr. Burech to pay the deposition cancellation fee of \$2500.00 charged by Dr. Balducci. Following a hearing on the Plaintiffs' original motion, the Court requested additional documentation from Dr. Balducci indicating that he lost time from work as a result of the cancellation. The Court has now been advised that no such documentation exists. Instead, the fee represents Dr. Balducci's standard fee for scheduling a half day off of work. Absent evidence of actual lost time from work, the Court is not inclined to shift the cost of the cancelled deposition to counsel for Dr. Burech under these circumstances. In particular, counsel for Dr. Burech did not notice the deposition; additionally, the cancellation came about because of the Plaintiffs' settlement with several defendants, and it was unknown at that time whether Dr. Balducci would be involved in the case against the non-settling defendants, as his opinions appeared to be directed primarily, if not exclusively, toward the settling group of defendants.

It is hereby

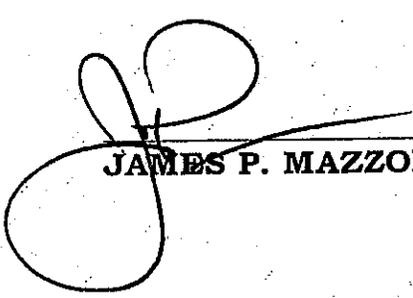
ORDERED that the Plaintiffs' Renewed Motion for Costs is **DENIED**.

All exceptions and objections are noted and preserved.

It is further

ORDERED that the Circuit Clerk provide attested copies of this order upon entry to Harry S. Cohen, Esq. and Douglas L. Price, Esq., HARRY S. COHEN & ASSOCIATES, P.C., Two Chatham Center, Suite 985, Pittsburgh PA 15219; D.C. Offutt and Cheryl A. Simpson, Esq., OFFUTT FISHER & NORD, 812 Quarrier Street, Suite 600, PO Box 2833, Charleston WV 25330-2833 and James C. Wright, Esq., STEPTOE & JOHNSON, PLLC, 1233 Main Street, Suite 3000, PO Box 751, Wheeling WV 26003.

ENTERED this 11th day of May, 2007.


JAMES P. MAZZONE, JUDGE

A copy, Teste:


Circuit Clerk

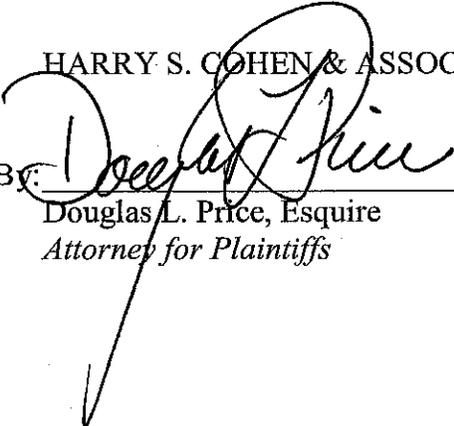
CERTIFICATE OF SERVICE

I, Douglas L. Price, Esquire, hereby certify on the 2nd day of May 2008, a true and correct copy of the Appellants' Brief was sent by first class mail to the following:

D. C. Offutt, Esquire
OFFUTT & NORD
949 Third Avenue, Suite 300
P.O. Box 2868
Huntington, WV 25728-2868
(Counsel for Defendant Burech)

Amy M. Smith, Esquire
Steptoe & Johnson
P.O. Box 2190
Clarksburg, WV 26302-2190
(Counsel for Defendant West Virginia University Board of Governors)

HARRY S. COHEN & ASSOCIATES, PC

By: 

Douglas L. Price, Esquire
Attorney for Plaintiffs