

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**APPEAL NO. 07-174**

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

**Appellants,**

**v.**

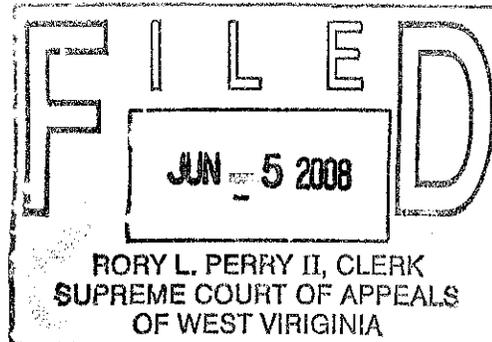
**DENNIS L. BURECH, M.D.; PEDIATRIC CARE, INC.;  
and WEST VIRGINIA BOARD OF GOVERNORS,**

**Appellees.**

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**BRIEF OF APPELLEE, DENNIS L. BURECH, M.D.**

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## **I. INTRODUCTION**

This case is before the West Virginia Supreme Court of Appeals by way of Appellants' appeal from the May 11, 2007 Memorandum of Opinion and Order of the Ohio County Circuit Court denying Plaintiffs' Motion for New Trial/Post-Trial Relief and Plaintiffs' Renewed Motion for Costs. The Circuit Court denied Plaintiffs' motions after carefully considering the sufficiency of the evidence presented at trial as required by Rule 59 of the West Virginia Rules of Civil Procedure and this Court's analysis and interpretation of Rule 59. Plaintiff subsequently filed a Petition for Appeal.

The Appellee, Dennis L. Burech, M.D., hereby files the following Brief in response to Appellant's Brief pursuant to the April 2, 2008 Order of this Court granting Plaintiffs' Petition for Appeal. For the reasons set forth herein, the West Virginia Supreme Court of Appeals should affirm the Circuit Court's rulings on jury selection, presentation of experts, scope of expert reports, collateral sources and Rule 50 motions.

## **II. STATEMENT OF FACTS**

On November 26, 2002, the infant Plaintiff, Shawn Murphy, Jr., was delivered via C-section at Wheeling Hospital. Upon his birth, Shawn Murphy, Jr., experienced severe distress which required resuscitation efforts. Dr. Dennis L. Burech, a board certified pediatrician, was on call at Wheeling Hospital the night of Shawn Murphy's birth. He was called at home after the birth and came immediately to the hospital. Dr. Burech participated in the resuscitation efforts and, as part of this effort, obtained a blood gas from the infant Plaintiff and administered supplemental oxygen. At approximately 10:00 p.m., Dr. Burech telephoned the Neonatal Intensive Care Unit (NICU) at West Virginia University Hospitals (WVUH) to arrange for Shawn Murphy's transfer. During this telephone call, Dr. Burech spoke with Melissa Asher-Carunchia (Nurse Asher), a neonatal nurse practitioner.

At the trial of this matter, Nurse Asher maintained that during her conversation with Dr. Burech and based upon the results of the blood gas, she advised Dr. Burech to order the administration of bicarbonate, volume, and generous oxygen to treat the

infant Plaintiff. However, Dr. Burech refuted this testimony and testified at trial that Nurse Asher never advised him concerning the administration of bicarbonate, volume, and generous oxygen to treat the infant Plaintiff. Dr. Burech testified that if Nurse Asher had advised him to administer bicarbonate, volume and oxygen, he would have done so and there was no medical reason for him not to follow any reasonable instructions received from Nurse Asher.

Although Dr. Burech did not order bicarbonate, at approximately 10:00 p.m., he ordered volume. Later, Dr. Burech rescinded the order for volume. However, the order for volume was in effect during Dr. Burech's conversation with Nurse Asher. At trial, Plaintiffs' own expert, Dr. Donald M. Null, a neonatologist, admitted that Dr. Burech properly exercised his own independent judgment in his resuscitation efforts of Shawn Murphy.

At approximately midnight on November 26, 2002, Nurse Asher arrived at Wheeling Hospital to help facilitate Shawn Murphy's transfer to the NICU at WVUH. Upon examining Shawn Murphy, Nurse Asher ordered bicarbonate and volume. Thereafter, Shawn Murphy was transferred to WVUH at approximately 2:00 a.m.

On October 25, 2004, Petitioners/Plaintiffs filed a medical malpractice action against Defendants Laura Miller, D.O., Medical Park Physician Associates, John Battaglino, Jr., M.D., Dennis L. Burech, M.D., and Wheeling Hospital.<sup>1</sup> See Complaint. In the complaint, Petitioners/Plaintiffs alleged Dr. Burech was negligent in his care and treatment of Shawn M. Murphy, Jr., which resulted in neurological injury. See Complaint. Specifically, Plaintiffs' claimed that Shawn Murphy, Jr.'s, neurological injury, sustained prior to birth, was increased due to Dr. Burech's failure to administer increased volume and perform a repeat blood gas during the first three hours following Shawn Murphy, Jr.'s, birth.

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<sup>1</sup> The complaint was later amended to include a claim against West Virginia University Board of Governors. The claims against Dr. Miller, Dr. Battaglino, and Wheeling Hospital were subsequently dismissed due to a settlement prior to trial. Ultimately, only the claims against Dr. Burech and West Virginia University Board of Governors were tried to the jury.

After the complaint was filed, discovery ensued and a jury trial on the matter began on February 26, 2007. Before jury selection began, the court considered Plaintiffs' Motion to Reconsider Peremptory Strikes.<sup>2</sup> In their motion, the plaintiffs argued that the defendants shared a common defense and, therefore, the court should allot two peremptory strikes for the plaintiffs and two peremptory strikes for all the defendants. *See Motion to Reconsider Preemptory Strikes*. The Circuit Court denied the plaintiffs' motion on the basis of six factors: sufficient adversity existed between the defendants; the defendants were represented by separate counsel; the plaintiffs' complaint averred separate theories of negligence against each defendant; the defendants filed separate answers; the defendants retained and proffered separate expert witnesses; and, the defendants were on different sides of a critical issue. *See Trial Transcript, Volume I, page 9, lines 5-13*. Thus, the Circuit Court found that the Defendants did not share a common defense that would warrant sharing peremptory strikes and, as a result, the Circuit Court properly denied the Plaintiffs' Motion to Reconsider Peremptory Strikes. In addition, it was noted that WVUH did not become a defendant until after Dr. Burech's deposition testimony in which he denied receiving any instructions or recommendations from Nurse Asher concerning the resuscitation efforts. *See Trial Transcript, Volume I, page 9, lines 17 through 21*. At trial, the plaintiffs received two (2) peremptory strikes and each defendant received two (2) peremptory strikes.

Prior to jury selection, members of the jury panel completed extensive jury questionnaires, signed under oath, which explored their attitudes about lawsuits in general and suits against healthcare providers in particular. They were also asked on the jury questionnaires about their attitudes concerning awarding damages against healthcare providers for injuries sustained by a patient due to negligence of a healthcare provider. In addition to the jury questionnaires, all of the potential jurors

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<sup>2</sup>In its original ruling, the trial court granted plaintiffs two (2) peremptory strikes and each defendant two (2) peremptory strikes.

were extensively voir dired by the court and counsel was given the opportunity to individually voir dire all of the potential jurors prior to jury selection.

During jury selection, Dr. Donald Walter, a dentist and potential juror, was questioned by counsel for both Plaintiffs and Defendants. Although Dr. Walter expressed some hesitation regarding his beliefs about medical malpractice lawsuits and pain and suffering damage awards, he stated that he could follow the law provided by the trial judge and apply it to the facts of the case.<sup>3</sup> Furthermore, Dr. Walker agreed that people should be able to file claims and recover damages when they have been wrongfully injured. *See Trial Transcript*, page 56, lines 24-25, and page 57, lines 1-2. Dr. Walker also indicated on his jury questionnaire that he felt patients injured by the negligence of a healthcare provider should be allowed to bring a lawsuit for damages sustained, that hospitals and healthcare workers should be held to the same legal standards as other individuals and businesses, that the healthcare industry does not always provide the best care possible and that doctors and nurses do not always act in their patients' best interests. He also agreed that doctors should be held responsible for their medical mistakes. *See, Jury Questionnaire of Donald E. Walker attached as Exhibit 1.* Plaintiffs moved at trial to strike Dr. Walter for cause. *See Trial Transcript, Volume I*, page 60, line 2. The Circuit Court denied the Plaintiffs' Motion to Strike Dr. Walter for Cause after determining that Dr. Walter's opinions did not rise to the level of bias and prejudice requiring him to be dismissed for cause and that Dr. Walker would be able to follow the law and apply it to the case. *See Trial Transcript, Volume I*, page 61, lines 19-25, and page 62, lines 1-9.

Plaintiffs also moved to strike another juror, Kevin Heilman, for cause. Juror

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<sup>3</sup>Mr. Offutt:

And the Court is not going to tell you that you have to set aside your own personal experiences, your own common sense, you simply have to follow the law as he gives it to you and apply it to the facts in the case. Do you think you would be able to do that?

Prospective Juror Walter: Yes.

*Trial Transcript, Volume I*, page 53, lines 18-24.

Heilman initially expressed some confusion in regard to the concept of intent in negligence cases. However, upon further questioning, Juror Heilman stated that he could follow the law as instructed by the judge.<sup>4</sup> Like Dr. Walker, prospective juror Heilman indicated on his jury questionnaire that he felt patients injured by the negligence of a healthcare provider should be allowed to bring a lawsuit for damages sustained, that hospitals and healthcare workers should be held to the same legal standards as other individuals and businesses, that the healthcare industry does not always provide the best care possible and that doctors and nurses do not always act in their patients' best interests. He also agreed that doctors should be held responsible for their medical mistakes and that he would have no difficulty awarding damages to a patient he thought had been injured due to the negligence of a physician or nurse. *See*, Jury Questionnaire of Kevin Heilman attached as Exhibit 2. Thus, the Circuit Court denied the Plaintiffs' Motion to Strike Juror Kevin Heilman for Cause.

Additionally, Juror Terry Bennett was questioned by counsel for both the Plaintiffs and Defendants about her beliefs during voir dire. Although she was employed by Wheeling Hospital, Ms. Bennett stated that she understood that Wheeling Hospital was not a party in this case. She was also not informed that Wheeling Hospital has been a defendant in the case or that the hospital had settled with the plaintiffs. *See*, Trial Transcript, Volume I, page 96, lines 7-8. Ms. Bennett also stated that she would be able to set aside her biases and find against a hospital or doctor if she believed, after the presentation of the evidence, that the hospital or doctor was

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<sup>4</sup>Mr. Offutt:

Okay. If the Judge told you at the conclusion of the case you were to weigh the evidence and whichever evidence had the most convincing force to you, you were to find in favor of that side and it happened to be for the plaintiffs, would you have a problem finding for the plaintiff?

Prospective Juror Heilman: No.

Trial Transcript, Volume I, page 285, lines 11-17.

negligent.<sup>5</sup> Like Dr. Walker and Mr. Heilman, prospective juror Bennett indicated on her jury questionnaire that she felt doctors and other healthcare providers should be held to the same standards as other individuals and that she would not have any difficulty awarding damages to a patients she believed was injured by the negligence of a doctor or nurse. *See*, Jury Questionnaire of Terry Lee Bennett attached as Exhibit 3. Although given the opportunity to object, for some reason they have never adequately explained, able counsel for the plaintiffs did not move at trial to strike Juror Bennett for cause. *See* Trial Transcript, Volume I, page 103, lines 9-11.

In the Plaintiffs' original complaint, the Plaintiffs included claims against the obstetricians who delivered Shawn Murphy. The Plaintiffs retained James Balducci, M.D., an obstetrician, as an expert witness to render an opinion on the standard of care pertinent to the obstetricians in this case. Dr. Balducci opined that the obstetricians breached the standard of care in their delivery of Shawn Murphy and that Mr. Murphy had suffered a pre-birth injury.<sup>6</sup> Both Defendants moved to compel the disclosure of Dr. Balducci's new opinions that were formed after the Plaintiffs settled with the obstetric defendants. *See* Motion to Continue Trial and Motion to Compel Disclosure of Plaintiffs' Expert Opinions to be Offered Against Non-Settling Defendants. At the September 19, 2006 hearing, Plaintiffs chose not to disclose such new opinions held by Dr. Balducci and agreed that the existing report encompassed all the opinions Dr.

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<sup>5</sup>Mr. Offutt: You said after hearing all the evidence in the case if you found a hospital was negligent you could return a verdict against the hospital; right?

Prospective Juror Bennett: Yes.

Mr. Offutt: And you also said after hearing all the evidence in the case and you - - if you found the doctor was negligent, you could return a verdict against the doctor?

Prospective Juror Bennett: Correct.

Trial Transcript, Volume I, page 97, line 25 and page 98, lines 1-8.

<sup>6</sup>The Plaintiffs subsequently settled their claims against Laura Miller, D.O., John Battaglino, M.D., and Wheeling Hospital for approximately \$4,000,000.00. This settlement was approved by the Court as being in the best interests of the infant Plaintiff prior to the trial against Dr. Burech and the West Virginia Board of Governors.

Balducci would offer.

The Defendants subsequently took a discovery deposition of Dr. Balducci. However, the Defendants did not stipulate to any agreement with the Plaintiffs regarding the playing of Dr. Balducci's deposition testimony at trial.

During trial, the Plaintiffs offered the testimony of a pediatrician, Dr. Donald Null, to present evidence that a majority of Mr. Murphy's injuries occurred after his birth due to inadequate resuscitation efforts of Dr. Burech. Defendants then played Dr. Balducci's deposition testimony wherein he testified to a reasonable degree of medical probability that Shawn Murphy suffered a pre-birth injury. *See* Deposition Transcript of James Balducci, M.D., pages 17, lines 11-22; *see also* Trial Transcript, Volume V, page 137, lines 20-23. The Defendants offered this testimony in rebuttal to Dr. Null's testimony to demonstrate inconsistent causation theories by plaintiffs' experts and to support the defense contention that the injury to Shawn Murphy, Jr., had occurred prior to birth..

One of the Plaintiffs' expert witnesses, Dr. Al Condeluci, a life care planning expert, testified concerning his proposed life care plan for Mr. Murphy. On cross-examination, Dr. Condeluci confirmed that many federal governmental programs were and are available to Shawn Murphy, Jr. *See* Trial Transcript, Volume IV, pages 66-76. The special education and related services Shawn Murphy, Jr., receives and is entitled to receive until age twenty-one (21) are federally mandated rights that he has as a handicapped child. The programs and services are not provided as a result of any contractual arrangements made by Shawn Murphy, Jr.'s family and the providers. Nonetheless, counsel for the Defendants did not elicit testimony from Dr. Condeluci regarding whether the infant Plaintiff or his parents had already received these payments or that any benefits he had received were paid for by insurance or other collateral sources.

Plaintiffs' counsel objected to this line of questioning, arguing these were collateral source benefits. However, the Circuit Court permitted the questioning on the

grounds that these benefits did not derive from collateral sources. *See* Trial Transcript, Volume IV, page 76, line 25, and page 77, line 1.

Prior to trial, the Circuit Court limited the plaintiffs' and defendants' experts' opinions to those expressed in their disclosures. Dr. Robert Cicco, a neonatology expert for the Defendant, West Virginia Board of Governors, had, in his report, limited his opinions to the standard of care. However, on cross-examination, Plaintiffs' counsel asked Dr. Cicco whether it was a breach of the standard of care for Dr. Burech to order a second blood gas to be repeated in 1-2 hours. This opinion had not been disclosed in Dr. Cicco's report nor had it been explored by the Defendants on direct examination. In response, Dr. Burech's counsel asked Dr. Cicco whether this breach made any difference in Shawn's outcome. Although Plaintiffs' counsel objected, the court permitted this line of questioning because the Plaintiffs had opened the door to such testimony by asking Dr. Cicco on cross examination whether Dr. Burech breached the standard of care by not ordering a blood gas more quickly. The court also permitted this questioning because a majority of Dr. Cicco's deposition had focused on his causation opinions and the jury was entitled to hear this opinion. *See* Trial Transcript, Volume VI, page 272, lines 3 through 25, through page 277, lines 1 through 17.

On March 6, 2007, the jury returned a verdict finding that the Defendants did not deviate from the standard of care in their care and treatment of Shawn M. Murphy, Jr. *See* Verdict Form. On March 16, 2007, the Plaintiffs filed their Motion for New Trial/Post-Trial Relief. *See* Plaintiffs' Motion for New Trial/Post-Trial Relief. A hearing on the Plaintiffs' Motion for New Trial/Post-Trial Relief was held on May 7, 2007. Thereafter, the court denied the Plaintiffs' motion in a May 11, 2007 Order. *See* Memorandum of Opinion and Order. The Plaintiffs subsequently filed their Petition for Appeal on October 30, 2007. This Court granted the Petition for Appeal on April 2, 2008. On May 2, 2008, Appellants' Brief was filed. In response, Appellee, Dennis L. Burech, M.D., hereby files his Brief.

### III. ARGUMENT

#### A. **The Circuit Court Properly Denied the Plaintiffs' Motions to Strike Potential Juror Walker and Juror Heilman for Cause and Plaintiffs Waived Their Objection to Juror Bennett**

If during voir dire “a prospective juror makes a clear statement . . . reflecting or indicating the possibility 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.” Syl. Pt. 5 of O'Dell v. Miller, 211 W. Va. 285, 565 S.E.2d 407 (2002)(emphasis added). However, “[j]urors who on voir dire of the panel indicate possible prejudice should be excused, or should be questioned individually either by the court or by counsel to precisely determine whether they entertain bias or prejudice for or against either party, requiring their excuse.” Id. at Syl. Pt. 2 (citing Syl. Pt. 3 of State v. Pratt, 161 W. Va. 530, 244 S.E.2d 227 (1978)). When determining the actual bias of jurors, trial judges may rely on their own self-evaluation of “allegedly biased jurors.” Syl. Pt. 12 of State v. Salmons, 203 W. Va. 561, 509 S.E.842 (1998). Additionally, trial judges are “in the best position to determine the sincerity of a juror’s pledge to abide by the court’s instructions.” Id.

This Court “defer[s] to [the] trial judge’s rulings regarding the qualifications of jurors because the trial judge is able to personally observe the juror’s demeanor, assess his/her credibility, and inquire further to determine the juror’s bias and/or prejudice.” Black v. CSX Transp., Inc., 220 W. Va. 623, 627, 648 S.E.2d 610, 614 (2007). Therefore, the trial judge’s “assessment is entitled to great deference.” Syl. Pt. 12 of State v. Salmons, 203 W. Va. 561, 509 S.E.842 (1998). In fact, “[a]n 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.” Syl. Pt. 1 of State v. Mills, 221 W. Va. 283, 654 S.E.2d 605, 606 (2007) (citing Syl. Pt. 6 of State v. Miller, 197 W. Va. 588, 476 S.E.2d 535 (1996)). Furthermore, “[w]hen a litigant deems himself or herself aggrieved by . . . an erroneous ruling by a trial court, he or she

ordinarily must object then and there or forfeit any right to complain at a later time.” Hanlon v. Logan County Bd. of Educ., 201 W. Va. 305, 315, 496 S.E.2d 162, 170 (1996).

In O'Dell, the prospective juror at issue was a former patient of the defendant physician and a current client of the appellees' law firm. O'Dell, 211 W. Va. at 290, 565 S.E.2d at 412. This Court reversed the trial court's refusal to strike the juror for cause finding bias on the basis of the prospective juror's attorney-client relationship with the appellees' law firm and doctor-patient relationship with the defendant physician. Id. at 291, 413.

As noted above, the prospective jurors completed jury questionnaires prior to jury selection which explored their prior experience and attitudes about healthcare and litigation. In addition, both the Plaintiffs and Defendants were given the opportunity to individually voir dire the prospective jurors selected for the panel. During voir dire, the Plaintiffs' raised challenges for cause with two potential jurors, Donald Walker and Kevin Heilman. In their Brief, the Appellants allege that they were prejudiced by the failure of the Circuit Court to strike Jurors Terry Bennett, Donald Walker, and Kevin Heilman for cause because Appellants' received an adverse verdict at trial.

Plaintiffs contend that potential juror Donald Walker should have been excused for cause. The Plaintiffs' allege that Dr. Walker was biased because he, as a member of the medical profession, a dentist, showed disdain for medical malpractice cases and pain and suffering awards. However, Dr. Walker made no clear statement in his answers to the written questionnaire or during voir dire of disqualifying bias. When Dr. Walker's responses to voir dire questioning showed a possibility of prejudice, he was questioned individually by the Circuit Court and counsel for all parties whereupon he demonstrated his ability to decide the case fairly and in accordance with the law. The plaintiffs used one of their peremptory challenges to remove Dr. Walker from the jury.

The plaintiffs also contend that the trial court erred by failing to excuse Juror Kevin Heilman for cause. The Plaintiffs' allege that Juror Heilman was biased because

he initially displayed confusion with the intent required for negligence in medical malpractice cases. However, upon clarification of the law of medical negligence and upon individual questioning by the Circuit Court and counsel for all parties, Juror Heilman clearly stated that he could follow the instructions given by the Court.

Finally, the Plaintiffs now allege that Juror Terry Bennett should have been excluded for cause by the Circuit Court although they made no such motion at trial. Juror Bennett was employed by Wheeling Hospital where a portion of Mr. Murphy's treatment occurred. However, she was not aware that Wheeling Hospital was once a defendant in the case or that the hospital had settled with the plaintiffs prior to trial. Upon individual questioning by the Court and counsel for all parties, Juror Bennett stated that she would be able to find against a hospital or physician and in favor of a patient if she believed, after the presentation of the evidence, that the hospital or physician was negligent. *See* Trial Transcript, Volume I, page 97, line 25 and page 98, lines 1-8. Most importantly, counsel for the Plaintiffs did not move to strike Juror Bennett for cause at the trial level. Therefore, the Plaintiffs waived their objection to juror Bennett and cannot now raise it on appeal for the first time pursuant to Hanlon and its progeny.

Unlike the juror in O'Dell, the two jurors challenged by the Plaintiffs at trial in this case had no relationship with any of the parties or their counsel. Most importantly, none of the challenged jurors made clear statements of bias or prejudice during voir dire as required to exclude them for cause. Although the jurors may have made initial statements in their answers to the questions on the jury questionnaire or during voir dire indicating possible prejudice, the Circuit Court adequately probed all such statements and determined that none of the jurors held actual bias toward any party and that these jurors were sincere in their pledge to abide by the court's instructions. The fact that the jury's verdict was adverse to the Plaintiffs is certainly not a reflection of any bias or prejudice on the part of the jurors, but is merely a result of the weight of the evidence presented at trial. Moreover, counsel for the Plaintiffs' waived any

objection to the Circuit Court's placement of Juror Bennett on the jury panel pursuant to Hanlon and its progeny. Therefore, the Circuit Court's denial of the Plaintiffs' Motions to Strike potential juror Walker and Juror Heilman for cause did not prejudice the Plaintiffs and this Court should give due deference to the Circuit Court's assessment of these jurors.

**B. The Circuit Court Correctly Assigned Peremptory Challenges Because the Defendants Were Charged With Separate Acts of Negligence, The Defendants' Acts Occurred at Different Points of Time, the Defendants were Represented by Separate Counsel, and Negligence, if Found, Would Have Been Subject to Apportionment**

Pursuant to Rule 47(b) of the West Virginia Rules of Civil Procedure, parties are normally granted two peremptory challenges each. However, "several defendants or several plaintiffs may be considered as a single party for the purpose of exercising challenges, [and the Circuit Court] may allow additional peremptory challenges and permit them to be exercised separately or jointly." W. VA. R. CIV. P. 47(b) (emphasis added). In Price v. Charleston Area Med. Ctr., 217 W. Va. 663, 619 S.E.2d 716 (2005), this Court discussed the allocation of peremptory challenges. The Court held that where the interests of defendants are "antagonistic or hostile, the trial court, in its discretion, may allow the . . . defendants separate peremptory challenges, upon motion, and upon a showing that separate peremptory challenges are necessary for a fair trial." Id. at Syl. Pt. 2. In addition to considering the fact that the defendants are represented by separate counsel and have filed separate answers, a trial court should consider a number of other factors when two or more defendants are involved, including:

(1) whether the defendants are charged with separate acts of negligence or wrong doing, (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 Syl. Pt. 3.

At the pre-trial hearing on February 13, 2005, the Defendants moved the Circuit

Court for separate peremptory challenges because of a conflict in defense theories. Although the Plaintiffs argued that the Defendants shared a common defense and should share peremptory challenges, the Circuit Court granted two challenges for the Plaintiffs and two challenges for each Defendant. At the beginning of trial, the Circuit Court considered the Plaintiffs' Motion for Reconsideration of Peremptory Strikes and denied it based on the factors outlined in Price.

The Circuit Court correctly concluded that the interests of the Defendants were antagonistic and hostile pursuant to the Price factors for purposes of separate peremptory strikes. The Plaintiffs clearly alleged separate claims of negligence against Dr. Burech and the West Virginia Board of Governors ("WVBOG"), these alleged acts of negligence occurred at different points of time, the Defendants were represented by separate counsel and the verdict form submitted to the jury required it to apportion liability, if found, between Dr. Burech and WVBOG.

Most importantly, Dr. Burech and WVBOG did not share a common defense theory. Specifically, a factual dispute arose between the two defendants regarding the telephone call between Nurse Asher and Dr. Burech that occurred on November 26, 2002, the night Mr. Murphy was born. The Plaintiffs claimed that Nurse Asher was obligated to advise Dr. Burech of treatment options during that telephone call. Nurse Asher testified that she did, in fact, advise Dr. Burech to treat Mr. Murphy with bicarbonate, volume, and generous oxygen as she would have done had she been with Mr. Murphy. However, Dr. Burech disputed this testimony and testified that Nurse Asher never advised him to administer bicarbonate, volume, and generous oxygen. In fact, Dr. Burech had raised the issue of a conflict with his recollection of his conversations with Nurse Asher and her recollection with WVU Hospital officials long before a lawsuit was filed or a claim for damages was asserted by the plaintiffs. Throughout discovery and during trial, the testimony of both Nurse Asher and Dr. Burech never wavered and remained in conflict on this seminal issue.

Moreover, the Plaintiffs' added WVBOG as a party to this lawsuit only after Dr.

Burech's deposition testimony. The Plaintiffs', in their response to the WVBOG's Motion for Summary Judgment, admitted the existence of this dispute between the Defendants. Specifically, the Plaintiffs stated, "[t]he jury must resolve the **dispute** as to whether or not Nurse Asher gave the proper instructions; the proper medical command." See Plaintiffs' Reply to Motion for Summary Judgment of Defendant West Virginia University Board of Governors.

Additionally, the testimony of the Defendants' expert witnesses was consistent with the factual dispute between the Defendants. Even though Dr. Boyle agreed that Nurse Asher herself appropriately treated Mr. Murphy with bicarbonate, Dr. Boyle never testified that Nurse Asher instructed Dr. Burech to give bicarbonate. See Trial Transcript, Volume VI, pages 90-92. Thus, Dr. Boyle's testimony did not resolve the factual dispute between Dr. Burech and Nurse Asher. Furthermore, the WVBOG's expert witness, Dr. Cicco, testified that Dr. Burech breached the standard of care by not ordering a blood gas on Mr. Murphy earlier. See Trial Transcript, Volume VI, page 267, lines 3-15. Therefore, Dr. Cicco's testimony was inconsistent with Dr. Burech's defense. Accordingly, the defense theories were not consistent. They were antagonistic and hostile. The Price case does not direct a trial court to consider the positions of the defendants' respective experts in determining the number of peremptory challenges to permit. In sum, the antagonism between Dr. Burech and WVBOG arose out of a factual dispute between the Defendants. Thus, the Defendants' hostile positions concerning this critical fact warranted the Circuit Court's grant of separate peremptory challenges and the Plaintiffs were not prejudiced by the court's decision.

**C. The Circuit Court Properly Permitted The Defendants to Introduce Testimony of Plaintiffs' Expert Witness, James Balducci, M.D., Because Dr. Balducci Presented No Testimony to the Jury Regarding the Fault of Parties Not in the Litigation at the Time of the Verdict, But Solely Addressed the Timing of the Plaintiff's, Shawn Murphy, Jr.'s, Injury**

The Plaintiffs' expert witness, James Balducci, M.D., an obstetrician, testified in his discovery deposition that the obstetrician, Laura Miller, D.O. was negligent and had breached the applicable standard of care in her treatment of Mr. Murphy. Before

trial, the Plaintiffs reached a settlement with the obstetricians, Laura Miller, D.O., John Battaglino, M.D., and Wheeling Hospital for approximately \$4,000,000.00. Subsequent to that settlement, the Defendants learned that Plaintiffs intended to still call Dr. Balducci as a trial witness and that Dr. Balducci intended to give trial testimony that was contrary to the opinions he expressed during discovery. In essence, the Defendants believed that Dr. Balducci would testify as an expert obstetrician that a significant portion of the infant Plaintiff's injuries occurred after he was born and not during labor and delivery.

The Defendants then moved to compel the disclosure of Dr. Balducci's new opinions apparently formed after the settlement. *See Motion to Continue Trial and Motion to Compel Disclosure of Plaintiffs' Expert Opinions to be Offered Against Non-Settling Defendants.* However, at the hearing on this motion, the Plaintiffs refused to supplement Dr. Balducci's expert disclosure. The Plaintiffs were specifically given the choice of disclosing any new opinions against the non-settling Defendants, Dr. Burech and the WVBOG, or stipulating that Dr. Balducci would only offer the opinions contained in his report. The Plaintiffs refused to disclose any new opinions and stated that Dr. Balducci would testify only to the opinions contained in his report.

Before trial, the discovery deposition of Dr. Balducci was held by the Defendants. Counsel for the Plaintiffs asked no questions of Dr. Balducci during this deposition. Although the Plaintiffs allege that the Defendants agreed to a stipulation regarding the playing of Dr. Balducci's deposition testimony at trial, the alleged stipulation was not reduced to writing and signed by counsel. Furthermore, counsel for the Defendants denied that they reached any such agreement with the Plaintiffs' counsel.

At trial, the Plaintiffs offered the testimony of their expert witness, Donald Null, M.D., a pediatrician, to present evidence that most of the infant Plaintiff's injuries occurred after his birth due to the resuscitation efforts of Dr. Burech. As a result, the Defendants were entitled to defend the Plaintiffs' proffer on the basis that Mr. Murphy's injuries occurred before birth and did not result from the resuscitation efforts

of Dr. Burech. In support of this defense, the Defendants played the videotaped deposition testimony of Dr. Balducci wherein he stated his opinion to a reasonable degree of medical probability that Mr. Murphy's injuries occurred prior to his birth.<sup>7</sup>

The Defendants presented no evidence of the negligence of any obstetrician defendant whom settled prior to trial, even though this would have been permissible in accordance with Sydenstricker v. Mohan, 217 W. Va. 552, 618 S.E.2d 561 (2005) (adopting the long recognized proposition that although evidence of a settling defendant's negligence may be inadmissible under one theory, it is proper to permit presentation of such evidence if it is admissible under another theory) and West Virginia Code § 55-7B-9.<sup>8</sup> Conversely, the trial testimony presented by Dr. Balducci only expressed his opinions regarding the timing of Mr. Murphy's injuries. He was not asked and did not express any standard of care opinions. Thus, no evidence was admitted in violation of West Virginia Code §55-7B-9. The Defendants did not proffer Dr. Balducci's testimony to suggest to the jury that it should consider the fault of parties no longer a part of the litigation. Instead, the Defendants offered this testimony in defense of Dr. Burech's actions to present a causation defense through an expert retained to testify on behalf of the plaintiffs.

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- <sup>7</sup>Q. And then I also understand that based on your review of the records and your expertise that if the baby had been delivered at or about 5:20 p.m., the baby would have been healthy and would not have had any difficulties that it suffers from today?
- A. Yes ma'am.

Deposition Transcript of James Balducci, M.D., page 17, lines 17-22.

<sup>8</sup>W. VA. CODE 55-7B-9(b) provides:

in assessing percentages of fault, the trier of fact shall consider only the fault of parties in the litigation at the time the verdict is rendered and shall not consider the fault of any other person who has settled a claim with the plaintiff arising out of the same medical injury. *Provided, That upon the creation of the patient injury compensation fund* provided for in [W. Va. Code §29-12C-1] . . . the trier of fact shall, in assessing percentages of fault, consider the fault of all alleged parties, including the fault of any person who has settled a claim with the plaintiff arising out of the same medical injury (emphasis added).

The patient injury compensation fund was established in June, 2004. Thus, the fault of settling parties no longer in the litigation may now be considered by the jury in assessing percentages of fault. However, the jury in this case was not asked to apportion the fault of any non-parties. In fact, they were not even informed of the multi-million dollar settlement prior to trial with the obstetricians and Wheeling Hospital.

The Plaintiffs allege that Dr. Balducci's testimony was cumulative because other expert witnesses acknowledged a pre-birth injury. However, these other experts, specifically the Defendants' experts, are neonatologists and unqualified to render opinions in the realm of obstetrical care, specifically regarding the fetal heart tracings demonstrating Mr. Murphy's pre-birth distress. As such, the testimony of Dr. Balducci, an obstetrician qualified as an expert in this area, was essential to Dr. Burech's ability to present his defense at trial.

Furthermore, the Plaintiffs cannot argue that they were unfairly prejudiced by the adverse testimony of their own expert witness. The fact that an expert retained by a party may give testimony adverse to the retaining party does not render the testimony inadmissible under Rule 403 of the West Virginia Rules of Evidence. During Dr. Burech's testimony at trial, counsel for the Plaintiffs used the discovery deposition testimony of the Defendants' expert witness, Gerald Hickson, M.D., who was not called as a witness at trial, to point out to the jury that Dr. Hickson opined in his discovery deposition that a blood gas should have been repeated more quickly. Although Dr. Hickson was not called as a trial witness because his opinions were cumulative to those given by other defense experts and therefore, would likely have been excluded by the trial court, the Plaintiffs emphasized the fact that this opinion was held by Dr. Burech's own expert witness in order to impeach the testimony given by another defense expert. Thus, just as the Defendants could not keep out such testimony under Rule 403, neither were the Plaintiffs entitled to exclude Dr. Balducci's expert causation testimony.

Counsel should not be able to obtain a favorable settlement with some defendants in a case and then totally alter or abandon their causation and fault theories and present totally different and inconsistent theories at trial against the remaining defendants. Consequently, the trial court properly permitted Dr. Balducci's testimony at trial and the Plaintiffs suffered no prejudice as a result.

**D. The Circuit Court Properly Permitted Dr. Cicco to Testify to His Causation Opinions Because Counsel for the Plaintiffs Opened the Door to Such Testimony by Cross Examining Dr. Cicco Beyond the Scope of His Direct Testimony and Expert Witness Disclosure**

Before trial, the Circuit Court limited each expert witness to those opinions disclosed in their individual expert witness reports. Robert Cicco, M.D., the WVBOG's neonatology expert witness, had limited his opinions to the standard of care in his report. Dr. Cicco's opinions had been fully explored at his discovery deposition, at which Plaintiffs' counsel was present. On cross examination at trial, Plaintiffs' counsel asked Dr. Cicco whether Dr. Burech breached the applicable standard of care by not ordering a second blood gas more quickly. *See Trial Transcript, Volume VI, page 267, lines 3-15.* This opinion had not been disclosed in Dr. Cicco's pre-trial expert witness report. Furthermore, this line of questioning had not been explored by defense counsel on direct examination. Thus, counsel for the Plaintiffs not only exceeded the scope of Dr. Cicco's report by asking this question, but also exceeded the scope of direct examination.

In response, defense counsel for Dr. Burech asked Dr. Cicco during re-direct examination whether this breach made a difference in Mr. Murphy's outcome. Counsel for the Plaintiffs objected that this question was designed to elicit causation opinions that were beyond the scope of the court's pre-trial limitations. However, the Court permitted counsel for Dr. Burech to elicit this testimony on the basis that counsel for the Plaintiffs opened the door to such testimony by asking whether Dr. Burech breached the standard of care by not ordering the blood gas more quickly and because a majority of Dr. Cicco's deposition had focused on causation, thereby resulting in no surprise to the Plaintiffs at trial. *See Trial Transcript Volume VI, pages 272 - 277.*

Plaintiffs' counsel elicited testimony beyond the scope of his direct examination and expert witness disclosure. Specifically, Plaintiffs' counsel asked Dr. Cicco whether it was a breach of the standard of care for Dr. Burech to order a blood gas to be repeated in 1-2 hours. Plaintiffs' counsel was fully aware that Dr. Cicco held opinions

regarding causation because Plaintiffs' counsel devoted most of Dr. Cicco's deposition to exploring his opinions about Dr. Burech's care and its impact on Mr. Murphy's outcome. See Deposition Transcript of Dr. Robert Cicco. Thus, at trial, when Plaintiffs' counsel elicited the standard of care opinion from Dr. Cicco against Dr. Burech, Plaintiffs' counsel was fully aware that Dr. Cicco believed that, while it was a breach, it caused no harm to Mr. Murphy because his injuries occurred pre-birth. Thus, the Plaintiffs were not surprised or unprepared for Dr. Cicco's opinion.

Counsel for Dr. Burech elicited this causation testimony merely to balance the standard of care testimony elicited by Plaintiffs' counsel on cross examination. Principles of fundamental fairness required that the jury receive a full explanation of Dr. Cicco's opinions after Plaintiffs' counsel inquired beyond the scope of direct examination and their own expert witness disclosure. Otherwise, the jury would be left with an incomplete impression of Dr. Cicco's opinions. Therefore, the Circuit Court properly permitted this testimony and the Plaintiffs were not unfairly prejudiced by this ruling at trial.

**E. The Circuit Court Properly Permitted the Defendants to Present Testimony of Federally Mandated Aid to Disabled Children and Adults Because Such Aid Does Not Constitute Collateral Source Payments Under West Virginia Law**

This Court has stated, “[t]he collateral source rule 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.” Ratlief v. Yokum, 167 W. Va. 779, 787, 280 S.E.2d 584, 590 (1981). “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.

Public Law 94-142 mandates the government to provide all handicapped children with a “free appropriate public education which emphasizes special education and related services designated to meet their unique needs, to assure that the rights

of handicapped children and their parents or guardians are protected . . . “ Individuals with Disabilities Education Act, Pub. L. No. 94-142, 20 U.S.C. §1400 (1975). This law defines special education as “specifically designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospital and institutions.” See Pub. L. No. 94-142. Additionally, the law defines related services as:

. . . transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education and includes the early identification and assessment of handicapping conditions in children.

*See Id.*

At trial, the Plaintiffs’ life care planning expert, Al Condeluci, Ph.D., testified in regard to a life care plan he had authored for Mr. Murphy. On cross examination, counsel for Dr. Burech questioned Dr. Condeluci regarding federal benefit programs that were and are available to Mr. Murphy that Dr. Condeluci had left out of his life care plan. These benefits include such benefits outlined and provided by the Education for Handicapped Children Act and Vocational Rehabilitation. Counsel for the Plaintiffs objected stating that these federal benefit programs constituted collateral sources. However, the Circuit Court disagreed and permitted defense counsel’s questioning.

The federal benefits that Mr. Murphy is entitled to receive until age twenty-one (21) are federally mandated rights that belong to Mr. Murphy as a handicapped child. They are not benefits that derive from any contractual arrangements made by Mr. Murphy or his family with the public school system. Accordingly, these benefits do not constitute collateral sources which should be excluded pursuant to the collateral source rule. Similarly, the federally mandated rights that Mr. Murphy will have as a disabled adult to participate in educational and therapeutic programs do not result from any

contractual arrangements made by Mr. Murphy or his family. Therefore, the Circuit Court properly permitted Dr. Burech's counsel to introduce evidence that Mr. Murphy's needs are and will be met, at least in part, by the school system and governmental programs for disabled adults.

Furthermore, the jury did not reach the issue of damages during the jury's deliberations. As a result, any alleged error in permitting this testimony was harmless and this Court should not reverse the Circuit Court's ruling on this issue. As this Court has previously stated, "[the] Court will not . . . on appeal reverse the judgment or decree of a trial court for error which is merely harmless." Burcham v. City of Mullens, 139 W. Va. 399, 416, 83 S.E.2d 505, 515 (1954).

#### IV. CONCLUSION

There is no evidence of any error by the Circuit Court in the trial of this matter that would require reversal by this Court. The assignment of separate peremptory challenges was warranted because the interests of the Defendants were antagonistic and hostile based on the fact that they were charged with separate acts of negligence, their acts occurred at different points of time, they were represented by separate counsel, and negligence, if found, would have been subject to apportionment. Furthermore, the Circuit Court properly denied the Plaintiffs' Motion to Strike Jurors Donald Walker and Kevin Heilman for cause because neither of the jurors made any clear statements of bias and any possible biases were fully explored by the Circuit Court which determined that the jurors had no actual bias toward any party. Moreover, the Plaintiffs waived any objection to Juror Terry Bennett by failing to raise such objection at the Circuit Court level. In addition, the Circuit Court properly permitted the testimony of Dr. James Balducci at trial because such testimony solely addressed the timing of Mr. Murphy's injury and did not address the negligence of parties not in the litigation at the time of the verdict. Furthermore, the causation opinions of Dr. Cicco were properly admitted because the Plaintiffs elicited testimony

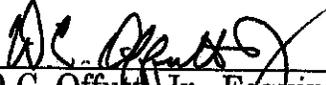
of Dr. Cicco beyond the scope of direct examination and the expert disclosure, thereby warranting a full explanation to the jury regarding Dr. Cicco's causation opinion.

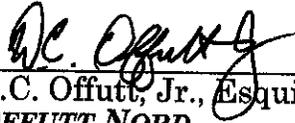
Finally, the Circuit Court properly admitted evidence of federally mandated aid to which Mr. Murphy is entitled as such aid does not derive from collateral sources under West Virginia law and is not subject to this exclusionary rule. Since the jury never reached the issue of damages in their deliberations, the question of governmental benefits available to the infant plaintiff was not a factor in the jury's verdict.

**WHEREFORE**, for the foregoing reasons, this Court should affirm the Circuit Court's rulings at the trial below.

**DENNIS L. BURECH, M.D.**

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
APPEAL NO. 07-174

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

Appellants,

v.

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

Appellees.

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CERTIFICATE OF SERVICE

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I, D. C. Offutt, Jr., Esquire, counsel for Dennis L. Burech, M.D., hereby certify that I have served the a copy of the foregoing, "**Brief of Appellee, Dennis L. Burech, M.D.**," upon counsel of record by depositing an envelope containing the same in the United States Mail, postage prepaid, this 5th day of June, 2008:

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