In The

Court of Appeals of Maryland

No. 50

September Term, 2019

AMERICAN RADIOLOGY SERVICES, LLC, *et al.*,

Petitioners,

v.

MARTIN REISS,

Respondent.

On Writ of Certiorari the Court of Special Appeals from a Decision in No. 1570, Sept. Term, 2017 on an Appeal from the Circuit Court for Baltimore City (The Honorable Pamela J. White, Circuit Judge)

BRIEF OF AMICI CURIAE AMERICAN MEDICAL ASSOCIATION AND MEDCHI, THE MARYLAND STATE MEDICAL SOCIETY

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Michael C. Stinson, *Medical Professional Liability – Trends in Claims and Legislative Responses*, 26 Health Law. 1 (Aug. 2014) 12

Team-Based Health Care Delivery: Lessons from the Field, Am. Hosp. Ass'n Physician Leadership Forum (2012), at http://www.ahaphysicianforum.org/resources/leadership-development/team-based-care/team-delivery-report.pdf 14

QUESTIONS PRESENTED

(1) Did the Court of Special Appeals err in requiring a medical malpractice defendant arguing non-party negligence to present standard of care expert testimony where the defendant is not asserting non-party negligence as an affirmative defense?

(2) Even assuming *arguendo* that it was error for the Circuit Court to submit the question of non-party negligence to the jury, did the Court of Special Appeals err in concluding that the error was prejudicial based solely on an initial incorrectly completed juror questionnaire that was promptly corrected?

INTEREST OF *AMICI CURIAE*

The ability of physicians to put forth traditional defenses to medical negligence claims is of utmost importance to the members of the American Medical Association (AMA) and The Maryland State Medical Society (MedChi), who are the *amici* filing this brief. The AMA is the largest professional association of physicians, residents, and medical students in the United States. Through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all United States physicians, residents and medical students are represented in the AMA's policymaking process. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every state, including Maryland, and in every medical specialty.

MedChi is a statewide, non-profit association of Maryland physicians. It is the largest physician organization in Maryland. MedChi, formally known as The Medical and Chirurgical Faculty of Maryland, was founded in 1799 by an act of the Maryland General

Assembly. Today, MedChi's mission is to serve as Maryland's foremost advocate and resource for physicians, their patients, and the public health.

The AMA and MedChi appear on their own behalves and as representatives of the AMA Litigation Center. The Litigation Center is a coalition among the AMA and the medical societies of every state. The AMA Litigation Center is the voice of America's medical profession in legal proceedings across the country. The mission of the Litigation Center is to represent the interests of the medical profession in the courts. It brings lawsuits, files *amicus* briefs, and otherwise provides support or becomes actively involved in litigation of general importance to physicians. Together, the *amici* represent hundreds of thousands of doctors in Maryland and across the nation.

All parties have consented to the filing of this brief.

STATEMENT OF THE CASE

This appeal arises out of a medical negligence claim alleging that Drs. Victor Bracey and Sung Kee Ahn, acting in their own capacities as radiologists and as employees of American Radiology Services, are liable for not detecting the growth of Mr. Reiss's cancerous lymph node sooner. The verdict sheet included questions about whether the radiologists committed negligent acts that caused Mr. Reiss's injury. If the jury were to answer in the affirmative, the jurors were also to be asked if negligent acts of non-party physicians, namely Mr. Reiss's oncologists, were also a substantial factor in causing Mr. Reiss's injury and what damages, if any, Mr. Reiss sustained.

The jury found that Drs. Bracey and Ahn did not breach the applicable standards of care in treating Mr. Reiss. The verdict sheet stated that if they reached this conclusion, the jurors were to stop and not answer any other questions. However, the jury answered

the remaining questions, finding that negligent acts of non-party physicians were a substantial cause of Mr. Reiss's injury and that Mr. Reiss sustained about $4.86 million in damages. The trial judge explained to the jurors that if they found Defendants not liable to Mr. Reiss, they were not to consider the remaining questions and sent the jury back to deliberate with a blank verdict sheet. The jury affirmed its finding that Defendants did not breach their standard of care to Mr. Reiss, and this time, left the other questions blank.

The Court of Special Appeals overturned this verdict. It found that Defendants did not put forth sufficient facts upon which the jury could determine whether non-party physicians committed negligent acts in not diagnosing Mr. Reiss's cancer earlier. The court stated that to offer the defense of non-party negligence, Defendants had to meet the same evidentiary standards—namely breach of a standard of care, causation and expert testimony—for establishing liability against those non-party physicians. Without such evidence, the court stated, the question on the verdict sheet was prejudicial. Defendants filed a Petition for Writ of Certiorari, explaining that such evidence is not needed for physicians to put forth a defense to liability that includes the allowable assertion that non-party physicians caused Plaintiff's injuries. Also, the presence of the question did not prejudice Plaintiff; the jury was consistent in its determination that Defendants did not commit acts of medical negligence against Mr. Reiss. The Court granted the Petition.

<u>STATEMENT OF THE FACTS</u>

In 2011, Mr. Reiss was diagnosed with renal cell cancer and an enlarged aortocaval lymph node that was presumed cancerous. Dr. Julio Davalos, a urological

surgeon, removed his kidney, but chose not to biopsy or remove the lymph node. He concluded the node was too close to the inferior vena cava, a critical blood vessel, to be removed without risking significant complications. From 2011 to 2014, Dr. Russell DeLuca treated Mr. Reiss for the enlarged lymph node. He testified that he presumed the lymph node was cancerous, prescribed a chemotherapy drug that shrank the lymph node, thereby affirming it was cancerous, and ordered regular CT scans without intravenous (IV) contrast. A CT scan with IV contrast includes dye that enhances the clarity of the CT images, but could be toxic to Mr. Reiss's remaining kidney.

Drs. Bracey and Ahn were the radiologists with American Radiology Services that interpreted the CT scans from 2011 to 2014. In 2011, Dr. Bracey found no lymphadenopathy, but noted the scan was "suboptimally evaluated" because of the lack of IV contrast. Dr. Bracey interpreted three more CT scans and reported the same findings and challenges with the lack of IV contrast. Dr. Ahn interpreted one CT scan during this time and also found no lymphadenopathy. In 2015, Dr. Elizabeth Kim interpreted a CT scan, also without contrast, and alerted Dr. DeLuca of "soft tissue density" near the node that had increased in size since 2011 and was "inseparable from the inferior vena cava." A biopsy confirmed that the lymph node was cancerous. In 2015, his treating oncologist, Dr. Eugene Ahn, similarly determined that the lymph node was inoperable given its proximity to the inferior vena cava.

Mr. Reiss sued the radiologists, Drs. Bracey and Ahn, and the surgeon, Dr. Davalos, but dismissed the claim against Dr. Davalos before trial. He did not sue Dr. DeLuca or his current treating oncologist, Dr. Eugene Ahn. Testimony at trial focused on

the radiologists' interpretations of the CT scans, the decisions of each physician in treating Mr. Reiss, whether the lymph node should have been biopsied earlier, and whether the lymph node should have been or still could be removed. As indicated, the jury found the radiologists did not breach their standard of care to Mr. Reiss.

SUMMARY OF THE ARGUMENT

In today's medical environment, a patient will often see multiple physicians for the same condition or treatment; each physician has his or her own specialty or will treat a patient as part of team-based approaches to patient care. Particularly in cases such as the one at bar, where the allegation is over the failure to diagnose cancer, it can be difficult for a patient to determine who, if anyone, may be legally at fault. As a result, which physicians are in the litigation may be a poor indicator of whether those physicians actually committed medical negligence. The goal of Maryland's civil justice system in these cases is to subject the physicians at trial to liability only when they have wrongfully caused the plaintiff's injuries. Here, only two of the potential five physician defendants were at trial. For the trial to be fair, these physicians must be able to present the jury with a full-throated defense that includes other explanations for the alleged misdiagnosis.

In *Copsey v. Park*, the Court recognized this basic premise, stating that physicians can introduce evidence of a non-party's medical negligence in defending the allegations, calling such evidence "relevant and necessary in providing [Defendant] a fair trial." 453 Md. 141, 174, 160 A.3d 623, 642 (2017). How much evidence of a non-party's negligence is needed should correspond with what the jury is asked to do with that evidence. In *Copsey*, the defendants sought a legal determination that the subsequent non-

party physicians were a superseding cause of the injuries, irrespective of whether the defendants themselves breached their standard of care to the patient. *See* 453 Md. at 153, 160 A.3d at 630. Accordingly, they put forth evidence associated with establishing the burden of proof in medical negligence cases against the non-parties, namely expert testimony of the non-party physicians' breach of a standard of care and causation. Here, Defendants are asserting only evidence elicited at trial as part of a factual defense to Plaintiff's allegations. Imposing standards of evidence needed for establishing liability or asserting a superseding cause, as the Court of Special Appeals has done here, creates an improper burden on Defendants by undermining their ability to assert their full factual defenses.

A physician must be able to point to evidence at trial of potential alternative causes to an injury for the purpose of showing that a plaintiff has no right to recover and has not proven the case against him or her without engaging in the burden and expense of mini-trials with respect to each potential alternative cause. Further, Defendants were entitled to a jury instruction on this question because it was consistent with their theory of their defense. The mere existence of the question on the verdict sheet did not prejudice the jury's view of the entire case. Indeed, the jury affirmed the finding that Defendants did not breach their standard of care to Mr. Reiss, even if it meant no award in this case. *Amici* respectfully urge the Court to reverse the Court of Special Appeals ruling and allow physicians to assert a proper defense to allegations of medical negligence.

ARGUMENT

I. THERE ARE IMPORTANT REASONS PATIENTS MAY NOT SUE CERTAIN PHYSICIANS, BUT THAT SHOULD NOT PREJUDICE THE TRIAL AGAINST THE PHYSICIANS IN THE LITIGATION

In medical negligence cases, as in other types of litigation, all of the parties that could be deemed a legal cause of a plaintiff's injuries are often not at trial together. There are many reasons a trial may focus only on a small subset of potentially responsible parties. For example, many defendants settle before trial to avoid the expense and uncertainties of litigation. In *Martinez ex rel. Fielding v. Johns Hopkins Hosp.*, a case involving comparable issues to those here, the likely at-fault person was not named in the lawsuit because she did not have insurance and was considered judgment proof. *See* 212 Md. App. 634, 667, 70 A.3d 397, 416 (2013). Other times, the plaintiff may not believe a physician was at fault, regardless of how the facts would be assessed by an impartial jury; secure a certificate of merit against a potentially responsible physician; or want to inject antagonism into an ongoing patient-physician relationship. In all of these cases, "the reasons for not joining an individual as a defendant have no bearing on the legal issue of the admissibility of evidence of a non-party's negligence." *Id.*

In the case at bar, Mr. Reiss appeared to focus his allegations of medical negligence on the radiologists who were somewhat remote from his regular care. He did not name his oncologists, Drs. DeLuca or Eugene Ahn, in this lawsuit. Suing the oncologists would clearly have required Mr. Reiss to testify against his own doctors who he may have valued and wanted to maintain an ongoing relationship. Litigation can often be detrimental to a patient-physician relationship, which "is based on trust." Opinion

1.1.1, Code of Medical Ethics, Am. Med. Ass'n.[1] "[P]atients need to be able to trust that physicians will place patient welfare above other interests, provide competent care, provide the information patients need to make well-considered decisions about care, respect patient privacy and confidentiality, and take steps to ensure continuity of care." Opinion 1.2.12, Code of Medical Ethics, Am. Med. Ass'n. The desire to protect the patient-physician relationship, which can be vital to a patient's care, from any such unwanted discord is the reason the Court and General Assembly have adopted laws and rules that protect this important relationship from the antagonism of litigation. *See*, *e.g.*, *Hill v. Fitzgerald*, 304 Md. 689, 501 A.2d 27 (1985) (establishing the continuous course of treatment doctrine to toll a statute of limitations); MD Code, Cts & Jud. Proc. § 9-109 (2013) (establishing patient-therapist privilege).

When some of the potentially responsible parties are not in the case at trial, whether by choice or other reason, the resulting litigation must not be skewed against the remaining defendants. Each defendant deserves a fair trial. The goal of the courts is to make sure a jury's liability decisions are right, not merely to ensure that a plaintiff is paid for his or her alleged harms. Some states, including New Jersey, have developed a fair process for how defendants in medical negligence cases can assert that a party, absent from the case for whatever reason, was a cause of the plaintiff's injury. *See Jones v. Morey Piers, Inc.*, 165 A.3d 769 (N.J. 2017).[2] In that state, a defendant can assert a third

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[1] https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/code-of-medical-ethics-chapter-1.pdf.

[2] Although New Jersey is a comparative negligence state, the Court of Special Appeals stated in *Martinez* that "cases cited from other jurisdictions are persuasive, despite the

party's negligence and have the third-party physician on the verdict sheet. *See id.* As here, a determination by the jury that a non-party substantially contributed to the plaintiff's injuries does not create liability on the non-party; it establishes a factual defense for the physicians sued. In *Martinez*, the Court of Special Appeals favorably cited New Jersey law that evidence of non-party negligence is admissible because, as here, it can be "relevant to the defendant's complete denial of liability." 212 Md. App. at 668-69, 70 A.3d at 417.

The Court of Special Appeals further explained in *Martinez* that without such evidence, the jury would be "given a materially incomplete picture of the facts." 212 Md. App. at 666, 70 A.3d at 161. It is widely recognized that "failure to consider the negligence of all [potential] tortfeasors, whether parties or not, prejudices the joined defendants." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 475–76 (5th ed. 1984). For this reason, the Court has long allowed parties to defend themselves by pointing out acts or omissions of non-parties relevant to the allegations against the defendant. *See ACandS, Inc. v. Asner*, 344 Md. 155, 686 A.2d 250 (1996).

Here, in order to ensure Defendants are provided a fair trial, the Court must allow them to point out facts admitted and elicited at trial suggesting alternative causes for Plaintiff's alleged misdiagnosis. Defendants did not ask the jury to make a standard of care determination for any non-party because they were not seeking a legal conclusion on non-party liability—through contribution or as a superseding cause. They were merely

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fact that they originated in comparative negligence jurisdictions." 212 Md. App. at 671, 70 A.3d at416-17.

pointing to the non-parties as potential alternative causes of Plaintiff's injury in an effort to provide the jury with a proper understanding of the circumstances surrounding the patient's medical care as part of defending against Plaintiff's allegations against them.

II. WHEN THERE ARE POTENTIAL NON-PARTY CAUSES OF THE PLAINTIFF'S ALLEGED HARM, PHYSICIANS SHOULD BE ABLE TO INFORM THE JURY OF THOSE POTENTIAL CAUSES WITHOUT MEETING THE STANDARDS FOR PROVING A MEDICAL NEGLIGENCE CASE AGAINST EACH NON-PARTY

When a physician is solely defending against allegations of medical negligence, and not seeking a determination on superseding cause, he or she is entitled to present evidence on any potential alternative causation theory that would be sufficient for "a reasonable jury [to] conclude that he was not negligent." *Copsey*, 453 Md. At 148, 160 A.3d at 627. Here, though, the Court of Special Appeals improperly required Defendants to meet a higher evidentiary standard. It held that "they must call an expert, who must express his or her opinions to a reasonable degree of probability" that the non-party physicians breached their standard of care in misdiagnosing Mr. Reiss's cancer. This is the same level of evidence needed to subject the non-party physicians to liability in a separate action for contribution or to seek a determination in the current action that the non-party physicians were a superseding cause of Mr. Reiss's injury. Defendants were not seeking any such determination; they were asserting only that they were not liable.

Subjecting physicians to the heightened burden of proof for establishing liability in a medical negligence action when merely asserting a factual defense violates Defendants' right to a full and fair trial. As in many other states, Maryland's laws for establishing medical liability are intentionally rigorous in an effort to "screen malpractice

claims, ferret out meritless ones, and, in theory, thereby lower the cost of malpractice insurance and the overall cost of health care." *Alder v. Hyman*, 334 Md. 568, 575, 640 A.2d 1100, 1103 (1994).[3] To avert a health care crisis from such unfounded claims, Maryland's General Assembly enacted the Health Care Malpractice Claims Act in 1976 to establish the "exclusive procedures for filing a civil action [for medical malpractice] . . . against a health care provider." *Retina Group of Washington, P.C. v. Crosetto*, 237 Md. App. 150, 165, 183 A.3d 873, 882 (2018). For example, the plaintiff must "file a certificate of a qualified expert . . . attesting to departure from standards of care, and that the departure from standards of care is the proximate cause of the alleged injury." MD Code, Cts & Jud. Proc. § 3-2A-04(b)(1)(i). The certificate and accompanying report must "identify with specificity," the defendants against whom the claims are brought and "explain how or why the physician failed . . . to meet the standard of care and include some details supporting the certificate of qualified expert." *Walzer v. Osborne*, 395 Md. 563, 583, 911 A.2d 427, 438 (2006). About half of the states have similarly enacted affidavit or certificate of merit requirements. *See* Am. Med. Ass'n,

[3] In the mid-1970s, insurance rates for medical malpractice coverage spiked in Maryland. The state's largest insurer, facing a $10 million deficit and continuing to lose money, planned to stop offering insurance coverage to Maryland physicians. *See St. Paul Fire & Marine Ins. Co. v. Ins. Comm'r*, 275 Md. 130, 133-39, 339 A.2d 291, 293-95 (1975). No other insurer offered to provide coverage to the 3,600 Maryland physicians it insured. *See* 275 Md. at 138-41, 339 A.2d at 295-97.

State Laws Chart II: Liability Reforms (2017);[4] Nat'l Conf. of State Legislatures, Medical Liability/Malpractice Merit Affidavits and Expert Witnesses (2014).[5]

This regime, based on early expert evidence, allows physicians to avoid the initial, expensive stages of litigation in cases that are "eventually dropped, withdrawn or dismissed." Michael C. Stinson, *Medical Professional Liability – Trends in Claims and Legislative Responses*, 26 Health Law. 1, 12 (Aug. 2014). Experience has shown that lawsuits are poor indicators of whether malpractice has occurred. *See* Barry F. Schwartz & Geraldine M. Donohue, *Practicing Medicine in Difficult Times: Protecting Physicians from Malpractice Litigation* 47, 49 (Jones & Bartlett Publishers, 2009). Nationally, more than two thirds of medical negligence claims (68.2%) are dropped, dismissed, or withdrawn without any payment. *See* José R. Guardado, *Medical Professional Liability Insurance Indemnity Payments, Expenses, and Claim Disposition, 2006-2015*, at 3 (Am. Med. Ass'n 2018).[6] In fact, a Harvard Public Health Study showed that only 27 percent of adverse events are caused by negligence. *See* Troyen A. Brennan et al., *Incidence of Adverse Events and Negligence in Hospitalized Patients*, 324 New Eng. J. Med. 370, 371 (1991).[7] This regime has effectively stabilized Maryland's medical insurance market.[8]

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[4] https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/premium/arc/state-laws-chart-2_0.pdf.

[5] http://www.ncsl.org/research/financial-services-and-commerce/medical-liability-malpractice-merit-affidavits-and-expert-witnesses.aspx.

[6] https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/public/government/advocacy/policy-research-perspective-liability-insurance-claim.pdf?preview=true&site_id=654.

[7] The average expense of defending a physician against a medical liability claim that is dropped, dismissed, or withdrawn exceeds $30,000. *See* Guardado, *supra*, at 7. In

Further, as the Court of Special Appeals properly explained, expert evidence is generally required at trial to prove the elements of a medical negligence claim, namely (1) the applicable standard of care, (2) a breach of the standard of care, and (3) harm resulting from the breach. *See*, *e.g.*, *Armacost v. Davis*, 462 Md. 504, 526, 200 A.3d 859, 872 (2019). Experts must establish each of these elements "within a reasonable degree of probability." *Karl v. Davis*, 100 Md. App. 42, 51, 639 A.2d 214, 218 (1994). "If an expert witness cannot, will not or does not render his [or her] opinion to a reasonable degree of probability within the field of his [or her] expertise, the opinion may be excluded from evidence." *Hines v. State*, 58 Md. App. 637, 670, 473 A.2d 1335, 1351 (1984). Where the Court of Special Appeals erred was misapplying that law to this case. Here, the issue is not whether certain expert testimony should be admissible, but whether Defendants can argue non-party negligence based on the facts properly admitted and elicited at trial.

Requiring such medical expert testimony is wholly inappropriate for a physician offering such a factual defense to liability when only some of the physicians who treated the patient are at trial and he or she believes those other physicians may have been a substantial cause of the plaintiff's injuries. Defending against the allegations by raising

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the aggregate, these costs account for 38.4 percent of total legal expenditures in medical liability cases—a cost that jeopardizes affordable and available care. *See id.*

[8] When insurance rates again climbed, the General Assembly added safeguards to the solid foundation of the arbitration and certificate of qualified expert process. *See* H.B. 2 (Md. 2005) (establishing a separate cap on noneconomic damages in medical liability cases and temporarily freezing amount of limit and making apologies inadmissible as an admission of liability, among other reforms); S.B. 558 (Md. 1986) (establishing limit on noneconomic damage awards applicable to all personal injury cases, requiring juries to itemize damage awards, and allowing periodic payment of future economic damages).

alternative causes of the injury alleged would involve mini-trials with specialized expert testimony against each of the other physicians. The AMA and other medical professional organizations have codes of ethics stating that physicians must testify "only in areas in which they have appropriate training and recent, substantive experience and knowledge" so their testimony will reflect "current scientific thought and standards of care that have gained acceptance among peers in the relevant field." Medical Testimony, Code of Medical Ethics Opinion 9.7.1(h)-(j)(3), Am. Med. Ass'n.[9]

Here, Defendants would have to put forth expert evidence in oncology and urological surgery, simply to defend themselves against Plaintiff's allegations. In other situations, particularly in hospitals where team-based approaches to patient care are used, that number and depth of expertise could be much higher.[10] This burden of proof is unnecessary and inappropriate when the evidence is being offered only as a traditional defense to liability. In the case at bar, Defendants have no burden of persuasion; they are neither seeking to establish liability on those non-party physicians nor asserting the non-party physicians are superseding causes of Plaintiff's misdiagnosis.

III. ASKING A JURY ITS VIEWS ON ALTERNATIVE CAUSES OF A PATIENT'S HARM DOES NOT PREJUDICE ITS ABILITY TO FAIRLY DETERMINE THE LIABILITY OF THE DEFENDANTS

Finally, the verdict sheet seeking the jury's view on the other potential causes of Mr. Reiss's misdiagnosis did not prejudice the jury. The alternative causes were fully

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[9] https://www.ama-assn.org/delivering-care/medical-testimony.

[10] In hospitals, there have been significant efforts "to improve collaboration and team-based care." Team-Based Health Care Delivery: Lessons from the Field, Am. Hosp. Ass'n Physician Leadership Forum (2012), at 8.

consistent with Defendants' theory of non-party negligence and Mr. Reiss's burden to demonstrate Defendants unlawfully caused his misdiagnosis. They also were grounded in the facts admitted and elicited at trial. It is well-established that defendants are "entitled to an instruction on the defense or theory of the defense." *Fry v. Carter*, 375 Md. 341, 357, 825 A.2d 1042, 1050 (2003). Here, the trial court properly found that "[t]he verdict sheet provide[d] to the jury was instructive and focused on the critical issues of the case."

To be clear, asking a jury its sense of a key issue in the case is not prejudicial, as the Court of Special Appeals claimed. If the question had not been on the verdict sheet, the jury would have still heard the same evidence and arguments at trial and still been able to consider that evidence and draw conclusions about the potential alternative causes of liability. Compare this situation to that in *Copsey*, where the jurors were denied information and left to speculate as to the reasons the absent parties settled before trial. The lack of information there would seemingly be of greater concern to the veracity of the jury's decision-making about the alternative causes than merely asking the jury a question on its view of such causes based on evidence properly admitted or elicited at trial. The Court did not find the lack of such evidence in *Copsey* to be prejudicial. Here, the jury was clear—twice—that Defendants did not breach any standard of care to Mr. Reiss, regardless of whether any other physicians are liable for the alleged misdiagnosis. Further, the Circuit Court found that the jurors fully understood that their defense verdict meant that Mr. Reiss would not be collecting any award as a result of this lawsuit.

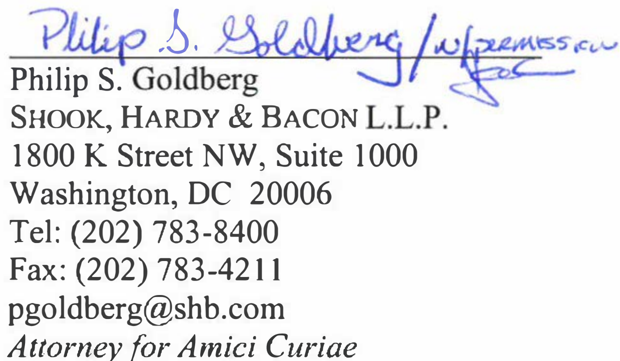
Plaintiff's argument that the jury must have been confused by being asked for their opinion on non-party negligence because they found Defendants not liable appears

premised on reading the initial verdict sheet backwards. Plaintiffs start with the $4.86 million in damages at the end of that verdict sheet and presume the jury was insisting that someone be liable for that amount. Given that the jury has no ability to subject the non-party doctors to liability, they argue, the jury must have meant the liability to be assigned to Defendants. As indicated, the jury could not have been clearer that Defendants did not breach their standard of care to Mr. Reiss. Vacating that decision and ordering a new trial would undermine this jury's decision and improperly subject Defendants to a new trial.

CONCLUSION

For these reasons, this Court should reverse the ruling of the Court of Special Appeals and uphold the jury's verdict in favor of Defendants.

Respectfully submitted,



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Dated: December 26, 2019

CERTIFICATE OF WORD COUNT AND COMPLIANCE WITH RULE 8-504

1. This brief contains 4440 words, excluding the parts of the brief exempted from the word count by Rule 8-503.

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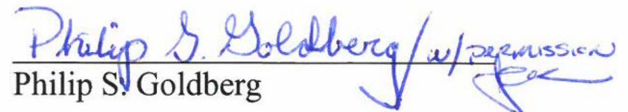

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I, John C. Kruesi, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

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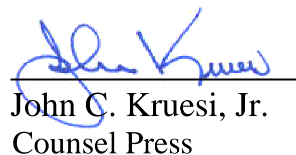

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