# COURT

Court Watch is a special WVSMA membership update on the actions and decisions of the West Virginia Supreme Court of Appeals regarding key issues impacting West Virginia physicians. The WVSMA, West Virginia's largest physician advocacy organization, is dedicated to a fair and equitable civil justice system and is fighting to preserve our hard-fought medical liability reforms. Monitor our website at www.wvsma.org for the latest updated information.

## Criminal Drug Abusers Are Allowed to Sue Their Doctors

By Susan Baek, JD

Patients addicted to painkillers may sue their physicians and pharmacies for damages associated with their addictions, even if the patients illegally acquired and abused the substances, according to a ruling issued by the WV Supreme Court of Appeals. The Court issued this ruling on May 13, 2015, in response to a certified question from the Circuit Court of Mingo County. Chief Justice Workman, joined by Justices Benjamin and Davis, delivered the majority opinion. Justices Ketchum and Loughry each wrote blistering dissents. To many people's surprise, Justice Brent Benjamin sided with the majority. He justified his stance in a concurrence that explains how his reasoning differs from that of the Chief Justice. The opinions are detailed below.

### Background and Facts

The case, *Tug Valley Pharmacy, et.al. v. All Plaintiffs Below*, which is ongoing, involves 29 plaintiffs in eight different actions filed in the Circuit Court of Mingo County against Tug Pharmacy, Strosnider Drug Store, B & K Pharmacies, the Mountain Medical Center, and four physicians working at the Mountain Medical Center: Drs. Victorino Teleron, William Ryckman, Katherine Hoover, and Diane Shafer. The plaintiffs allege that the defendants negligently prescribed and dispensed Lortab, Oxycontin, and Xanax, which caused or contributed to the plaintiffs' abuse of or addiction to the controlled substances.

Some of the defendants in the case (the medical providers) have admitted to and been punished for their wrongdoing. Some of the physicians lost their licenses and served time for federal offenses following an FBI raid at the Mountain Medical Center in 2010 for improper prescribing practices, and one of the pharmacies (Strosnider) and its pharmacist faced criminal and disciplinary actions. The Court noted that Dr. Hoover was believed to have written over 350,000 prescriptions for controlled substances between 2002 and 2010. (Over the nine-year period, that equals more than 100 prescriptions per day, 365 days per year!)

The plaintiffs were not "even remotely innocent victims," however, as Justice Loughry observed. They committed a long list of criminal violations, and most admitted to abusing substances prior to the car accidents or workplace injuries that led them to seek medical treatment. The ruling states that "most, if not all" of the plaintiffs admitted that they were already addicted to controlled substances before they sought treatment at Mountain Medical, and all of the plaintiffs admitted to "most, if not all" of the following illegal activities: "criminal possession of pain medications; criminal distribution, purchase, and receipt of pain medications ('off the street'); criminally acquiring and obtaining narcotics through misrepresentation, fraud, forgery, deception, and subterfuge (not advising doctors of addiction or receipt of narcotics from other doctors); criminally obtaining narcotics from multiple doctors concurrently (commonly known as 'doctor shopping'); and abusing and/or misusing pain medication by ingesting greater amounts than prescribed and snorting or injecting the medications to enhance their effects."

Since the plaintiffs admitted to illegally obtaining and abusing the substances that they accuse the defendants of negligently prescribing to them, the defendants' attorneys argued that the claims should be dismissed based on the "wrongful conduct rule." This rule, adopted by many other jurisdictions, precludes people from filing lawsuits if their own criminal actions are the proximate cause of the injuries for which they seek to recover damages. The Circuit Court refused to dismiss the claims, but posed questions to the WV Supreme Court of Appeals to certify its holding.

The question before the Court was, "May a person maintain an action if, in order to establish the cause of action, the person must rely, in whole or in part, on an illegal or immoral act or transaction to which the person is a party?"

### The Majority's Opinion

The majority answered the question in the affirmative. It explained that, although the wrongful conduct rule has been commonly used in other jurisdictions, the majority considered the rule too complex to be workable. The Court explained, "In addition to the difficulty in meaningfully articulating the degree of causal connection required between the wrongful conduct and the injuries, the nature of the 'wrongful conduct' required to implicate the rule has also been variably characterized." Further, the Court stated that the rule requires certain complicated exceptions,

such as when as the plaintiff has a subordinate or unequal relationship to the defendant.

In response to the argument that the wrongful conduct rule serves to bar criminals from using the legal system to profit for their wrongdoing, the Court distinguished profit from compensation for a loss. It went on to assert that barring criminals from pursuing lawsuits will not deter criminal behavior because "If the criminal penalties for such activity are insufficient, it is highly unlikely that such individuals will be deterred by the inability to bring a civil suit in the event they are injured and are further unlikely to appreciate any risk to themselves in participating in the criminal activity in the first instance."

As to the public policy argument against allowing criminals to use the justice system to recoup their losses, the Court stated that public opinion does not govern its decisions; it is bound only by the rule of law. Additionally, the Court reasoned that decisions of this type are best left to juries, which can apportion appropriate liability and damages based on West Virginia's comparative fault rule.

The comparative fault rule operates on the principle that, if a plaintiff's own negligence has played a role in his injury, then the damages he can recover are reduced by the percentage attributable to his own fault. West Virginia's modified comparative fault rule is based on a 1979 case, *Bradley v. Appalachian Power Co.,* and it prohibits claims by plaintiffs who were at least 50% responsible for their injuries.

The Legislature updated West Virginia's comparative fault rule during the 2015 Session with the passage of HB 2002. As noted in a footnote to the majority opinion, the bill contained a version of the wrongful conduct rule, prohibiting a convicted felon from collecting damages from a negligent defendant if the damages arose when the plaintiff was committing, attempting to commit, or fleeing from a felony act. The majority explained that the rule was not applicable because it had not yet taken effect. (It took effect on May 25, 2015, shortly after the opinion was delivered, and it only applies to claims originating after that date.)

**Justice Ketchum's Dissent**

Justice Ketchum criticized the ruling because it "ignores common sense and will encourage other criminals to file similar lawsuits in an attempt to profit from their criminal behavior . . . [and make] a mockery of our judicial system." He voiced strong support for the wrongful conduct rule, explaining that, despite the majority's protestations, it is a straightforward rule, and courts in many other states have adopted it without apparent difficulty. He disagreed with the Court's opinion that principles of comparative fault should be applied when plaintiffs have broken the law, referencing public policy considerations for prohibiting criminals from using the court system to recover from injuries they caused by their own illegal behavior.

As an interesting side note, he commented that the savvy plaintiffs alleged that the medical providers' actions were merely negligent or reckless. If they had alleged intentional or criminal acts, the liability for such acts would not be covered by the providers' insurance policies. Obviously the plaintiffs stand a better chance of collecting from insurers, since the doctors have presumably lost their jobs and one is said to have left the country, but it also shifts the expense away from the culpable parties to their indemnifiers, who will then pass on the cost to their other clients.

**Justice Loughry's Dissent**

Justice Loughry called the majority opinion "misguided" and said that, by rejecting the wrongful conduct rule in favor of requiring juries to sort out the "sordid details . . to determine who is the least culpable—a drug addict or his dealer," the Court will be asking juries to undertake an "exercise in abject futility."

In discussing the wrongful conduct rule, he stated that nearly all jurisdictions that have taken up the issue have adopted the rule, and the only two that rejected it did so on statutory or constitutional grounds. He said that at least 13 other jurisdictions have adopted wrongful conduct rules, either through legislation or adjudication, including the Federal District Court for the Southern District of West Virginia. Significantly, Florida, Iowa, Michigan, Mississippi, and a Kentucky federal court have specifically applied the rule to bar claims by drug addicts.

Justice Loughry described the case that came before the federal court in West Virginia to illustrate the absurdity of failing to apply the wrongful conduct rule. The case involved a hired arsonist who went to the scene of the intended crime, where he was stopped by an off-duty police officer, who inflicted some injuries on him. The would-be arsonist claimed that he had had a change of heart and was intending to leave when he was accosted. He sued the property owner, who had hired him, for failing to maintain reasonably safe premises! The district court dismissed the case, citing the principles of the wrongful conduct rule:

a person who willingly participates in a criminal act cannot pursue a claim for damages that occurred as a consequence of the act. Justice Loughry commented that if the federal court had not adopted the wrongful conduct rule, a jury would have had the ridiculous duty to decide who was responsible for the arsonist's injuries: the arsonist or the person who hired him!

He concluded, "While the majority purports to be impervious to 'public opinion,' the unavoidable outrage that will most assuredly follow its decision is well-deserved. In a state where drug abuse is so prevalent and where its devastating effects are routinely seen in cases brought before this Court, it is simply unconscionable to me that the majority would permit admitted criminal drug abusers to manipulate our justice system to obtain monetary damages to further fund their abuse and addiction."

**Justice Benjamin's Concurring Opinion**

Justice Benjamin concurred with the majority opinion, but he wrote separately because he applied different reasoning to come to the same conclusion. He stated that the determinative fact in the case was that the WV Legislature took up the issue of the wrongful conduct rule during the 2015 session, and the Governor signed it into law the day after the case was argued before the Court. Whereas the majority held that the new rule did not yet apply to the ruling, Justice Benjamin said that it was because of the new rule, not in spite of it, that he concurred. He posited that the Court should defer to the wisdom of the other branches of state government, based on the principles of judicial conservatism.

The newly enacted wrongful conduct rule provides a prohibition on lawsuits by convicted felons. Justice Benjamin explained that the Legislature had debated this issue at length. The original bill excluded felons from claims; the House Judiciary Committee amended it to restrict only convicted felons, and the House passed the amended version. Then the Senate passed the original, broader version of the bill, and eventually the bill went to Conference Committee, which decided to enroll the more restrictive House version.

The question before the Court was not whether courts should exclude convicted felons; it was not even limited to felony acts. The Court had been asked to decide if it would exclude all claimants who had participated in illegal or immoral acts related to their injury. To answer in the affirmative would have been to practice judicial activism and to usurp the authority of the Legislative and Executive branches, which had just spoken to the issue. According to Justice Benjamin, it would have been a "power grab."

Justice Benjamin admitted that he had been very tempted to deny this particular group of plaintiffs their day in court, but he had to consider that the ruling would apply not just to this case, but to others in the future that might have more compelling plaintiffs. He also expressed serious doubts that this particular group will prevail in their lawsuits, for numerous reasons.

**The Effect of the Ruling**

The immediate effect of the ruling is that 29 Mingo County plaintiffs will proceed with their lawsuits. As Justice Benjamin noted, the lawsuits might be dismissed on other grounds. If not, juries will decide whether the plaintiffs should be allowed to collect damages, and, if so, how much.

For the medical community, the ruling is particularly troubling. Physicians have an obligation to treat their patients' pain, but as the WVSMA's Executive Director Brian Foy told WOWK TV, physicians' "fear of retribution . . . could create additional barriers for patients seeking treatment for legitimate chronic pain."

The ruling seems absurd because it allows criminals to use the legal system to try to collect damages for alleged negligence related to the crimes they committed. It opens the courtroom doors to more senseless lawsuits against physicians, which ultimately impedes patient care. Although this case involves doctors who acted improperly, the holding is not limited to bad actors: it allows any drug abusers to bring suit against any physicians who treated their pain at some point, forcing even legitimate prescribers to waste time and money defending themselves.

Several legislators, including WVSMA members Sen. Stollings, Sen. Takubo, and Del. Rohrbach, have voiced an interest in creating a legislative fix. To do so, the Legislature will have to enact a more restrictive law than the one it passed last session, and this particular case will likely provide the impetus to do so. According to Dr. Rohrbach, House Judiciary Chair John Shott has already instructed his staff to start drafting a fix.

The WV State Medical Association dedicates much of its resources to working on legislative issues to ensure that physicians are not hindered in their legitimate practice of medicine and to ensure access to appropriate healthcare for West Virginians.

*The Court's holding, as well as the concurring and dissenting opinions, can be viewed online on the WV Judiciary website at http://www.courtswv.gov/supreme-court/docs/spring2015.* ■

## New Mother Gets 15-Year Sentence for Using Drugs During Pregnancy

The WV State Medical Association recently signed an amicus curiae brief written by the National Advocates for Pregnant Women and forwarded to us by the WV Perinatal Partnership.

The brief refers to the case of Stephanie Louk, who was convicted of "Child Neglect Resulting in Death" and sentenced to a 15-year prison term.

Mrs. Louk was 37 weeks pregnant back in the summer of 2013 when she was rushed to Summersville Hospital in acute pulmonary distress apparently resulting from methamphetamine overdose. She was resuscitated and intubated, and underwent an emergency c-section. The baby was born unresponsive, and when it did not improve after 11 days, life support was removed.

Following the tragedy, Mrs. Louk took significant steps toward turning her life around. Despite her efforts and a plea for clemency from her treating physician, the Nicholas County Circuit Court applied a novel interpretation of West Virginia's child abuse statute (W. Va. Code § 61-8D-4a), and meted out an unusually harsh sentence to show intolerance for substance abuse during pregnancy. Mrs. Louk appealed to the WV Supreme Court of Appeals, which has agreed to hear the case.

The amicus brief explains that the circuit court's misguided attempt to improve prenatal health will actually have the opposite effect. "The threat of prosecution thwarts maternal and fetal health by deterring health-promoting behaviors, defies the sensible operation of law by encouraging abortions and creating a law that knows no bounds, and flouts modern understandings of the nature and treatment of addiction."

If Mrs. Louk's conviction is upheld, it will have grave consequences for women. It will compound the suffering of women who suffer a pregnancy loss by allowing the state to bring charges against them if they are believed to have committed any potentially dangerous act or omission during their pregnancy. Further, it will discourage women from seeking medical treatment if they have engaged in any such acts.

The WVSMA was joined on the brief by a long and impressive list of amici. The list was comprised of 24 state and national organizations (to name just a few: the WV Perinatal Partnership, the WV Society of Addiction Medicine, the American Congress of Obstetricians and Gynecologists, the American Society of Addiction Medicine, the Association of Reproductive Health Professionals, the C.A.R.E. Alliance NW, and the National Council on Alcohol Abuse and Drug Dependence), as well as 30 experts from around the country. These individuals include physicians, medical professors, law professors, and program directors (among them, WVSMA president Adam Breinig, D.O.; WVSMA Legislative Committee chair Sherri Young, D.O.; and WVSMA's Brad Hall, M.D., the President of the WV Society of Addiction Medicine).

Depending on the outcome of this case, it might be necessary for the WV Legislature to enact an amendment to the state's child neglect statute to clarify that it should not be used against pregnant women. The WVSMA would strongly support such an amendment, in accordance with its long-standing policy of advocating treatment opportunities, rather than punitive measures, for individuals suffering substance abuse disorders.■

**Court Watch is funded through physicians' membership investment in the WVSMA and prepared by Susan Baek, JD, Director, Healthcare Policy and Legislative Affairs, WVSMA.**