Volume 114 | Issue 2 Article 8

January 2012

Medical Professional Liability Litigation in West Virginia: Part II

Thomas J. Hurney Jr.
Jackson Kelly PLLC

Jennifer M. Mankins
Jackson Kelly PLLC

MEDICAL PROFESSIONAL LIABILITY LITIGATION IN WEST VIRGINIA: PART II

Thomas J. Hurney, Jr.[*]
Jennifer M. Mankins[**]

[*] Member, Jackson Kelly PLLC, Charleston, West Virginia; J.D., University of Dayton School of Law, 1983. Thanks to summer clerks Alyssa Baute, University of Dayton; Alana Dagher, Washington & Lee University; Amber Moore, West Virginia University; and Chris Petersen, University of Utah, for help proofreading and cite checking.

[**] Associate, Jackson Kelly PLLC, Charleston, West Virginia; J.D., West Virginia University College of Law, 2005. Thanks to Lee Floyd, Associate, Jackson Kelly PLLC, Charleston, West Virginia, for her help with this Article.

I. INTRODUCTION

In West Virginia, actions against health care providers for injuries to patients are governed by the Medical Professional Liability Act ("MPLA").[1] This Article will discuss the MPLA and its amendments, the developing case law from the Supreme Court of Appeals of West Virginia and federal courts in West Virginia, and other legislation related to health care litigation.[2] This Article is intended for the West Virginia MPLA practitioner and focuses on what the law is and how the MPLA has been interpreted, as opposed to debating the relative merits of the MPLA or civil justice or medical negligence field. That task is left to the capable efforts of others.[3]

---

[1] 1986 W. Va. Acts 791–96, *codified at* W. VA. CODE ANN. § 55-7B-1, *et seq.* (LexisNexis 1994).

[2] A prior article examined this subject up to and including the amendments passed in 2001, so this Article, hopefully, will pick up where the last one left off. Thomas J. Hurney, Jr. & Rob J. Aliff, *Medical Professional Liability in West Virginia*, 105 W. VA. L. REV. 369 (2003). *See also*, Thomas J. Hurney, Jr., Hospital Liability in West Virginia, 95 W. VA. L. REV. 943 (1993). For a solid review of West Virginia law prior to the MPLA, read Mike Farrell's seminal article. Michael J. Farrell, *The Law of Medical Malpractice in West Virginia*, 82 W. VA. L. REV. 251 (1979). For a comprehensive review, see LAURIE GARRIGAN MCKOWEN, THE LAW OF MEDICAL MALPRACTICE IN WEST VIRGINIA (2010).

[3] *See generally*, Franklin D. Cleckley & Govind Hariharan, *A Free Market Analysis of the Effects of Medical Malpractice Damage Cap Statutes: Can We Afford to Live with Inefficient Doctors?*, 94 W. VA. L. REV. 11 (1991); Anthony J. DeFrank & Allan S. Hammock, *The Health Care Crisis and Medical Liability in West Virginia*, 7 W. VA. PUB. AFF. REP. 1 (Winter 1990); Elizabeth G. Thornburg, *Judicial Hellholes, Lawsuit Climates and Bad Social Science: Lessons from West Virginia*, 110 W. VA. L. REV. 1097 (2008). *See also* Tom Baker, THE MEDICAL MALPRACTICE MYTH (2005); Mark A. Behrens, *Medical Liability Reform: A Case Study of Mississippi*, 118:2 OBSTETRICS & GYNECOLOGY 335 (Aug. 2011) (analyzing statistics from states' major malpractice carriers, and concluding that Mississippi's tort reform laws were associated with a "steep drop in lawsuits," particularly against "OB-GYNs", as well as medical liability pre-

II. THE PASSAGE OF THE MPLA

"Medical professional liability" actions are broadly defined in the MPLA as "liability for damages resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient."[4] The West Virginia Legislature[5] enacted the MPLA in three stages, passing the original act in 1986, with an amendment in 2001[6] and a more extensive amendment in 2003.[7] For ease of reference, the 1986 MPLA will be referred to as "MPLA I," the 2001 amendments as "MPLA II," and the 2003 amendments as "MPLA III." This section will provide a summary of the MPLA and its amendments, and the next section will discuss MPLA III in more detail.

A. MPLA I

The first version of the MPLA was passed in 1986 as part of a package of reforms in response to a perceived crisis in the affordability and availability of medical malpractice insurance.[8]

---

mium reductions and refunds); Shirley Svorny, *Could Mandatory Caps on Medical Malpractice Damages Harm Consumers?*, CATO INST. POL'Y ANALYSIS, Oct. 20, 2011, *available at* http://www.cato.org/pub_display.php?pub_id=13780.

4 1986 W. Va. Acts 793, *codified at* W. VA. CODE ANN. § 55-7B-2(d) (LexisNexis 1994).

5 The West Virginia Legislature will be referred to as "Legislature."

6 2001 W. Va. Acts 3162–63, *codified at* W. VA. CODE Ann. § 55-7B-10 (LexisNexis Supp. 2002).

7 2003 W. Va. Acts 1484, *codified at* W. VA. CODE ANN. § 55-7B-10 (LexisNexis Supp. 2003).

8 *See* West Virginia Offices of the Insurance Commissioner, *Medical Malpractice Report on Insurers with 5% Market Share*, 1–2 (Nov. 2008), *available at* http://www.wvinsurance.gov/LinkClick.aspx?fileticket=0ftSY32RxmM%3d&tabid=207&mid=798 [hereinafter "2008 IC Report"]. The Supreme Court of Appeals of West Virginia in *Robinson v. Charleston Area Med. Ctr.*, discussed the need for such reform:

> [As set forth in the statement of findings,] . . . [t]he overriding concern of the legislature was to encourage and facilitate the provision of the best health care services to the citizens of this state. *W.Va.Code*, 55-7B-1 [1986]. The legislature found that in recent years the cost of professional liability insurance for health care providers has risen dramatically and that the nature and extent of coverage concomitantly has diminished, to the detriment of the injured and health care providers. *Id.* Therefore, to provide for a comprehensive, integrated resolution, the legislature determined that reforms in three areas must be enacted together: in (1) the common-law and statutory rights of the citizens to compensation for injury or death in medical professional liability cases; in (2) the regulation of rate making and other health care liability insurance industry practices; and in (3) the authority of medical licensing boards to regulate effectively and to discipline health care providers.

414 S.E.2d 877, 881 (W. Va. 1991).

The MPLA is a definition-based statute. Its applicability is set forth in a series of definitions.[9] "Medical professional liability" means any "liability for damages resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient."[10] West Virginia Code section 55-7B-2(c) defines "[h]ealth care providers" as the following:

> [A] person, partnership, corporation, facility or institution licensed by, or certified in, this state or another state, to provide health care or professional health care services, including, but not limited to, a physician, osteopathic physician, hospital, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, or psychologist, or an officer, employee or agent thereof acting in the course and scope of officer's, employee's or agent's employment.[11]

Furthermore, West Virginia Code section 55-7B-2(b) defines "[h]ealth care facilities" as "any clinic, hospital, nursing home or extended care facility in and licensed by the state of West Virginia and any state operated institution or clinic providing health care."[12]

MPLA I codified the longstanding requirement under West Virginia law that a plaintiff alleging medical negligence must prove the applicable standard of care and breach thereof causing death or injury, and generally must do so with qualified expert testimony.[13] MPLA I provided a $1,000,000 limit or "cap" on noneconomic damages,[14] limited joint and several liability,[15] and provided protection for settling defendants against claims from other defendants.[16] It also codified the following provisions: a two-year statute of limitations,[17] tolling doctrines (including the discovery rule and fraudulent concealment), a shortened

---

9 W. VA. CODE ANN. § 55-7B-2 (LexisNexis 1994).

10 § 55-7B-2(d).

11 § 55-7B-2(c).

12 § 55-7B-2(b).

13 W. VA. CODE ANN. § 55-7B-7 (LexisNexis 1994). *See also* Short v. Appalachian OH-9, Inc., 507 S.E.2d 124, 130 (W. Va. 1998) *overruled in part by* Phillips v. Larry's Drive-In Pharmacy, 647 S.E.2d 920, 929 (W. Va. 2007); Eady v. Lansford, 92 S.W.3d 57 (Ark. 2002); Lutz v. Foran, 427 S.E.2d 248 (Ga. 1993). *See generally* H.H. Henry, Annotation, *Necessity of expert evidence to support an action for malpractice against a physician or surgeon*, 81 A.L.R.2d 597 (1962).

14 § 55-7B-8. "Noneconomic loss" is defined in the MPLA as "losses including, but not limited to, pain, suffering, mental anguish and grief." § 55-7B-2(g).

15 W. VA. CODE ANN. § 55-7B-9(b) (LexisNexis 1994).

16 § 55-7B-9(c).

17 W. VA. CODE ANN. § 55-7B-4(a) (LexisNexis 1994)

statute of limitations for claims by minors,[18] and a ten-year statute of repose.[19] MPLA I also established minimal qualification requirements for expert witnesses,[20] directives regarding pretrial procedures designed to expedite cases,[21] and restrictions limiting the use of *ad damnun* clauses.[22] MPLA I applied to *injuries occurring after* June 6, 1986.[23]

B. MPLA II

In 2001, the Legislature responded to another crisis in the affordability and availability of medical malpractice insurance,[24] including the exit of St. Paul Companies, the leading medical professional liability insurer at the time, from the market,[25] and the failure of PHICO Insurance Company.[26] Governor Bob

---

18 § 55-7B-4(b).

19 § 55-7B-4(a).

20 W. VA. CODE ANN. § 55-7B-7 (LexisNexis 1994). A later version of this statute was held unconstitutional by the Supreme Court as an improper legislative intrusion into the Court's rule-making power. *See* Mayhorn v. Logan Med. Found., 454 S.E.2d 87 (W. Va. 1994).

21 W. VA. CODE ANN. § 55-7B-6 (LexisNexis 1994) (current version at W. VA. CODE ANN. § 55-7B-6b (LexisNexis 2008)).

22 W. VA. CODE ANN. § 55-7B-5 (LexisNexis 1994). This principle was recently extended to all civil actions in W. VA. CODE ANN. § 55-7-25 (LexisNexis 2008), which was passed on the heels of a complaint seeking $10,000,000 for an allergic reaction to cheese on a hamburger.

23 W.VA. CODE ANN. § 55-7B-10 (LexisNexis 1994).

24 *See* 2008 IC Report, *supra* note 8, at 1–2.

25 St. Paul announced the exit on December 12, 2001, although it was already heavily rumored. "Because of heavy losses, the St. Paul Companies will exit the medical malpractice insurance business, ending coverage for 750 hospitals, 42,000 physicians and 73,000 other health care workers nationwide, the company said yesterday." Milt Freudenheim, *St. Paul Cos. Exits Medical Malpractice Insurance*, N.Y. TIMES, Dec. 13, 2001, *available at* http://www.nytimes.com/2001/12/13/business/st-paul-cos-exits-medical-malpractice-insurance.html. St. Paul had a market share of 32.5% in 2001 and 13.8% in 2003. *See* West Virginia Insurance Commission, *Medical Malpractice Report on Insurers with 5% Market Share* 11 (Nov. 2002), *available at* http://www.wvinsurance.gov/LinkClick.aspx?fileticket=V29NPU-rru8%3d&tabid=207&mid=798 [hereinafter "2002 IC Report"]; *see also* Office of the West Virginia Insurance Commission, *Medical Malpractice Report on Insurers with 5% Market Share* 24 (Nov. 2004), *available at* http://www.wvinsurance.gov/LinkClick.aspx?fileticket=yMRG_n4Re-M%3d&tabid=207&mid=798 [hereinafter "2004 IC Report"]. The 2002 Insurance Commission Report indicated:

> As is well known by all, St[.] Paul is withdrawing from the medical malpractice market. It is expected that by March, 2003 St[.] Paul (and ACIC) will no longer be in the West Virginia malpractice market. St[.] Paul together with ACIC represented over 39% of the 2001 direct written premium in the state. Thus, over the course of the current year, nearly 40% of the market will need to find a new carrier. It is known that BRIM II has been picking up a sizeable share of this business.

2002 IC Report, *supra* note 25, at 13. St. Paul's withdrawal was not completed until March 2003. *See id.*, at 26.

Wise, in his 2002 State of the State address, referred retrospectively to the "collapse of the medical malpractice insurance system."[27] Though some insurance was still available to many physicians, particularly specialists, it was considered too expensive.[28] In response, the Legislature enacted House Bill 601[29] during a special legislative session to address specific findings regarding the need for stable and affordable insurance and the need for the state to assist in providing it.[30]

House Bill 601, therefore, amended Chapter 29 of the West Virginia Code to provide a temporary insurance option for physicians through the State's Board of Risk and Insurance Management ("BRIM"), by expanding existing insurance coverage, previously available only to state-employed physicians, as

---

[26] PHICO insured 160 West Virginia physicians. Its failure led to a negotiation among the Governor, Insurance Commissioner, and Medical Assurance to offer coverage to the company's doctors left without insurance. "Gov. Bob Wise announced this morning that Medical Assurance of West Virginia has agreed to renew at least 90 percent of its current policies plus cover 90 percent of those 160 state doctors now insured by troubled Pennsylvania insurer PHICO Insurance Co." Therese Smith Cox, *Doctors get malpractice insurance; [] State negotiates temporary action with medical insurer,* CHARLESTON DAILY MAIL, Sept. 5, 2001, *available at* http://www.highbeam.com/doc/1P2-18950753.html. In Pennsylvania, PHICO insured twenty-six percent of physicians in 1998, reduced to zero in 2001. *See* Randall R. Bovbjerg & Anna Barto, UNDERSTANDING PENNSYLVANIA'S MEDICAL MALPRACTICE CRISIS 8 (2003), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Medical_liability/vf_medical_malpractice_0603.pdf. Before PHICO, West Virginia physicians weathered other insurer insolvencies, including PIE Mutual Insurance Company, which was ordered into rehabilitation in December 1997 under the Ohio Insurers Rehabilitation and Liquidation Act. The rehabilitation phase ended March 23, 1998, when PIE was ordered into liquidation. *See* McManamon v. Ohio Dept. of Ins., 903 N.E.2d 714 (Ohio Ct. App. 2008). *See also* Verba v. Ghaphery, 552 S.E.2d 406, 413 (W. Va. 2001) (Starcher, J., dissenting) (discussing PIE Mutual). Another carrier, ICA, later purchased by PIE, was declared insolvent in Texas in 1997. *See* Devane v. Kennedy, 519 S.E.2d 622, 627 (W. Va. 1999). These insolvencies left many West Virginia physicians without the insurance coverage they purchased, and subject to much lower limits, $300,000, under the West Virginia Insurance Guaranty Act. *See* 1985 W. Va. Acts 1150, *codified at* W. VA. CODE ANN. § 33-26-8(1)(a) (LexisNexis 1988).

[27] This problem had repercussions, as hospitals and other health care facilities had difficulty attracting physicians to either stay in or come to West Virginia. Moreover, the lack of available, affordable insurance lessened protection for injured patients and physicians who caused injury. Bob Wise, W. Va. Governor, West Virginia State of the State Address (Jan. 10, 2002), *available at* http://www.stateline.org/live/details/speech?contentId=16098.

[28] *See* 2001 W. Va. Acts 3097, *codified at* W. VA. CODE ANN. § 11-13P-1 (LexisNexis 2003). "[T]he retention of physicians practicing in this state is in the public interest and promotes the general welfare of the people of this state. The Legislature further finds that the promotion of stable and affordable medical malpractice liability insurance premium rates will induce retention of physicians practicing in this state." *Id.*

[29] 2001 W. Va. Acts 3092.

[30] 2001 W. Va. Acts 3115–16, *codified at* W. VA. CODE ANN. § 29-12B-2 (LexisNexis Supp. 2002). "The Legislature finds and declares that there is a need for the state of West Virginia to assist in making professional liability insurance available for certain necessary health care providers in West Virginia to assure that quality medical care is available for the citizens of the state." *Id. See also infra*, note 32.

an option for private physicians unable to obtain coverage in the normal market.[31] Viewing a longer term solution, the bill also contained provisions to enable the initial financing and formation of a physicians' mutual insurance company. The provision of state insurance for private physicians was a stopgap measure intended to exist until the physicians' mutual insurance company could be formed.[32]

House Bill 601 also added amendments to the MPLA ("MPLA II"), which applied to *actions filed on or after* March 1, 2002.[33] MPLA II required that a person intending to file a medical professional liability action ("claimant") must generally provide a notice of claim and certificate of merit to each potential defendant health care provider at least thirty days prior to filing suit.[34] The health care provider could request mandatory, pre-suit mediation; if requested, the claimant was permitted to take the health care provider's deposition, either before or during mediation.[35] MPLA II also increased the number of jurors in medical professional liability trials from six to twelve (with nine required to prevail);[36] eliminated third party claims under the Unfair Trade Practices Act against medical professional liability carriers;[37] and provided directives requiring mandatory mediation,[38] exchange of medical records,[39] management and

---

31 House Bill 601 "established through the board of risk and insurance management optional insurance for health care providers consisting of a preferred professional liability insurance program and a high risk professional liability insurance program." 2001 W. Va. Acts 3121, *codified at* W. VA. CODE ANN. § 29-12B-6(a) (LexisNexis Supp. 2002). This insurance, known as "BRIM II," was a stopgap measure until the creation of a physicians' mutual insurance company: "The Legislature took temporary measures to alleviate the medical liability insurance problem by creating programs to provide coverage through the West Virginia Board of Risk and Insurance Management . . . until the legislative 'mechanism for the formation of a physicians' mutual insurance company' was actuated. W. VA. CODE § 33-20F-2(b) (2003) (Repl.Vol. 2006)." Zaleski v. W. Va. Physicians' Mut. Ins. Co., 647 S.E.2d 747, 750–51 (W. Va. 2007).

32 2001 W. Va. Acts 3115–16, *codified at* W. VA. CODE ANN. § 29-12B-2 (LexisNexis Supp. 2002).

33 2001 W. Va. Acts 3162–63, *codified at* W. VA. CODE ANN. § 55-7B-10 (LexisNexis Supp. 2002).

34 W. VA. CODE ANN. § 55-7B-6(b) (LexisNexis Supp. 2002).

35 §§ 55-7B-6(f), (g).

36 As discussed below, the twelve person jury was struck down as unconstitutional. *See* Syl pt. 3, Louk v. Cormier, 622 S.E.2d 788 (W. Va. 2005).

37 W. VA. CODE ANN. § 55-7B-5(b) (LexisNexis Supp. 2002). The right of the health care provider to file a first party action against a carrier is preserved, but it cannot be filed until after the underlying matter is resolved. *See* § 55-7B-5(c). MPLA II also included tax incentives for physicians and provisions enabling the financing and structure of a physician's mutual insurance company. *See* W. VA. CODE ANN. § 11-13P-1, *et seq.* (LexisNexis 2003).

38 W. VA. CODE ANN. § 55-7B-6b(b) (LexisNexis Supp. 2002).

39 W. VA. CODE ANN. § 55-7B-6a (LexisNexis Supp. 2002).

scheduling directives designed to expedite actions,[40] and voluntary summary jury trials.[41]

C. MPLA III

MPLA III was passed on March 8, 2003, as part of House Bill 2122. Like its predecessors, House Bill 2122 contained tort and regulatory reforms, including a mechanism for the State to exit from the private medical malpractice insurance business,[42] increased power for medical and osteopathic boards, and tort reform.

Central to MPLA III was the funding and enabling legislation allowing the formation of the West Virginia Mutual Insurance Company ("WVMIC"). This legislation responded to the "nationwide crisis in the field of medical liability insurance," causing "physicians in West Virginia [to] find it increasingly difficult, if not impossible, to obtain medical liability insurance either because coverage is unavailable or unaffordable."[43] MPLA III created "a mechanism for the formation of a physicians' mutual insurance company" that provided "(1) [a] means for physicians to obtain medical liability insurance that is available and affordable; and (2) [c]ompensation to persons who suffer injuries as a result of medical professional liability."[44] Funding was provided by a loan from the West Virginia Tobacco Settlement Medical Trust Fund for "use as the initial capital and surplus of the physicians' mutual insurance company."[45] The legislation also provided for the transfer of the "BRIM II" physicians to the WVMIC[46] and for the State's exit from the private medical malpractice market.[47] The West

---

40 § 55-7B-6b.

41 W. VA. CODE ANN. § 55-7B-6c (LexisNexis Supp. 2002).

42 In his State of the State address on January 9, 2003, Governor Bob Wise discussed the need for reform, including the need to level "the playing field so our doctors have the same protections as doctors in other states—but still retains fairness for patients who are truly injured by medical mistakes." Bob Wise, W. Va. Governor, West Virginia State of the State Address (Jan. 9, 2003), *available at* http://www.stateline.org/live/details/speech?contentId=16142.

43 Zaleski v. W. Va. Physicians' Mut. Ins. Co., 647 S.E.2d 747, 750 (W. Va. 2007) (quoting W. VA. CODE § 33-20F-2(a)(1), (6) (2003) (Repl. Vol. 2006).

44 W. VA. CODE ANN. §§ 33-20F-2(b)(1), (2) (LexisNexis 2003).

45 W. VA. CODE ANN. § 4-11A-2(c) (LexisNexis Supp. 2003). As a factual finding for this action, the Legislature found "certain dedicated revenues should be preserved in trust for the purpose of stabilizing the state's health related programs and delivery systems." § 4-11A-2(a). The Legislature provided for replenishment of the Tobacco Settlement Account from a portion of taxes received by the Insurance Commissioner from insurance policies for medical liability insurance. W. VA. CODE ANN. § 33-3-14(a) (LexisNexis 2003). The Legislature further levied an additional premium tax and provided for certain tax credits for reinsurance. *Id.* Further, the Legislature amended provisions related to rate making. W. VA. CODE ANN. § 33-20B-2 (LexisNexis 2003).

46 W. VA. CODE ANN. § 29-12-5(c)(2)(R) (LexisNexis Supp. 2003).

47 The legislation provided that after September 1, 2002, if BRIM assigned coverage or transferred insurance obligations, then BRIM "shall not thereafter offer or provide professional liability

Virginia Health Care Provider Professional Liability Insurance Availability Act, previously created in House Bill 601, was amended to enable physicians to purchase the necessary tail coverage to allow a move to the WVMIC.[48] Certain tax credits were created related to the purchase of insurance and tail coverage.[49]

House Bill 2122 also addressed the professional discipline of physicians, providing the West Virginia Boards of Medicine and Osteopathy ("Boards") with power to initiate disciplinary proceedings against physicians based on information received from medical peer review committees, physicians, podiatrists, hospital administrators, professional societies, and others.[50] Both Boards are required to initiate investigations upon notice "that three or more judgments, or any combination of judgments and settlements resulting in five or more unfavorable outcomes arising from medical professional liability have been rendered or made against the physician or podiatrist within a five-year period."[51] Formal disciplinary procedures against physicians by peer review groups, hospitals, managed care organizations, and others have to be reported to the requisite Board within sixty days.[52] Circuit court clerks are also required to report adverse medical professional liability judgments or criminal actions against physicians to the Boards.[53]

House Bill 2122 included MPLA III, which applies to *actions filed after* July 1, 2003.[54] MPLA III relies on legislative findings that the cost of liability insurance continued to rise dramatically. In turn, the rising cost of liability in-

---

insurance to any health care provider pursuant to the provisions of subsection (c) of this section or the provisions of article twelve-b [§§ 29-12B-1 et seq.] of this chapter unless the Legislature adopts a concurrent resolution authorizing the board to reestablish medical insurance programs." § 29-12-5(d). "The statutory scheme provided that all medical liability insurance obligations and risks associated with BRIM policies be transferred to the new company upon its formation." *Zaleski*, 647 S.E.2d at 751. *See* 2003 W. Va. Acts 1450–51, *codified at* W. VA. CODE ANN. § 33-20F-9(b)(1) (LexisNexis 2003).

48 W. VA. CODE ANN. § 29-12B-6(d) (LexisNexis Supp. 2003).

49 House Bill 2122 also "provided a tax credit for certain medical malpractice liability insurance premiums and medical malpractice liability tail insurance premiums paid." The Legislature found:

> [T]he retention of physicians practicing in this state is in the public interest and promotes the general welfare of the people of this state. The Legislature further finds that the promotion of stable and affordable medical malpractice liability insurance premium rates and medical malpractice liability tail insurance premium rates will induce retention of physicians practicing in this state.

W. VA. CODE ANN. § 11-13T-1 (LexisNexis 2003).

50 W. VA. CODE ANN. § 30-3-14(a) (LexisNexis Supp. 2003). House Bill 2122 also provided the Boards with the power to initiate suspension or revocation proceedings based on information received from any person. W. VA. CODE ANN. § 30-14-12(a) (LexisNexis Supp. 2003).

51 § 30-3-14(a); *see also* § 30-14-12a.

52 § 30-3-14(b).

53 *Id.*

54 W. VA. CODE ANN. § 55-7B-10(b) (LexisNexis Supp. 2003).

surance resulted in the loss and threatened loss of physicians, creating a competitive disadvantage for attracting and retaining qualified physicians and other health care providers in West Virginia.[55] Similar legislative findings were made regarding the cost of insurance for the State's long term health care facilities, such as nursing homes.[56]As a result, the Legislature enacted reforms in the tort system.

MPLA III contained a number of amendments, including a reduction on the limitation of noneconomic damages or "caps" from $1,000,000 to $250,000, an increase on the amount recoverable for more serious cases to $500,000,[57] and a $500,000 single limitation on all damages, both economic and noneconomic, in "trauma" cases.[58] Further amendments included expedited resolution of cases,[59] limitations on the use of "loss of chance" theory of causation,[60] elimination of joint and several liability,[61] collateral source adjustment,[62] modifications to expert qualifications,[63] restrictions on ostensible agency,[64] and limits on actions against health care providers by third parties/non-patients.[65] MPLA III also created a patient injury compensation fund "for the purpose of providing fair and reasonable compensation to claimants in medical malpractice actions for any portion of economic damages awarded that is uncollectible as a result of . . .

---

55 W. VA. CODE ANN. § 55-7B-1 (LexisNexis Supp. 2003).

56 *Id.* The Supreme Court relied upon the original legislative findings included in MPLA I in upholding challenges to the $1,000,000 limitation on noneconomic loss. *See* Syl. pt. 5, Robinson v. Charleston Area Med. Ctr., 414 S.E.2d 877 (W. Va. 1991). *See also* Verba v. Ghaphery, 552 S.E.2d 406 (W. Va. 2001).

57 W. VA. CODE ANN. § 55-7B-8(a)–(b) (LexisNexis Supp. 2003). These more serious cases are for claims involving the following: "(1) [w]rongful death; (2) permanent and substantial physical deformity, loss of use of a limb or loss of a bodily organ system; or (3) permanent physical or mental functional injury that permanently prevents the injured person from being able to independently care for himself or herself and perform life sustaining activities." § 55-7B-8(b).

58 W. VA. CODE ANN. § 55-7B-9(c) (LexisNexis Supp. 2003). "Trauma" cases are those in which the patient's injury or death arises from health care services or assistance that (1) are rendered in good faith, and (2) are necessitated by an "emergency condition" for which the patient enters a designated trauma center, and include health care services or assistance rendered in good faith by a licensed EMS agency or an employee of an licensed EMS agency. § 55-7B-9c(a). An "emergency condition" is defined as "any acute traumatic injury or acute medical condition which, according to standardized criteria for triage, involves a significant risk of death or the precipitation of significant complications or disabilities, impairment of bodily functions, or, with respect to a pregnant woman, a significant risk to the health of the unborn child." W. VA. CODE ANN. § 55-7B-2(d) (LexisNexis 2008).

59 W. VA. CODE ANN. § 55-7B-6(d) (LexisNexis Supp. 2003).

60 W. VA. CODE ANN. § 55-7B-3(b) (LexisNexis Supp. 2003).

61 W. VA. CODE ANN. § 55-7B-9 (LexisNexis Supp. 2003).

62 § 55-7B-9(a).

63 W. VA. CODE ANN. § 55-7B-7 (LexisNexis Supp. 2003).

64 § 55-7B-9(g).

65 § 55-7B-9(b).

the operation of the joint and several liability principles and standards, set forth in [the MPLA]."[66]

The following Parts discuss these amendments in more detail, as MPLA III reflects current law applicable to cases filed after July 1, 2003.

1. Notice of Claim and Certificate of Merit[67]

West Virginia Code section 55-7B-6, as originally enacted, required a claimant to serve a notice of claim and certificate of merit by certified mail on each health care provider to be joined in the litigation at least thirty days before filing suit and within the applicable statute of limitations. MPLA III adds the requirement that the notice of claim include "a list of all health care providers and health care facilities to whom notices of claim are being sent."[68] This amendment fine-tuned section 55-7B-6, which previously allowed the claimant to send pre-suit notice to several health care providers without identifying the other providers being served, creating problems in the investigation and evaluation of cases.

Section 55-7B-6(e) also allows the health care providers, within thirty days of receipt of the claim, to state a "bona fide defense" to the claim made and identify its defense counsel.[69] This allows the health care provider to notify the claimant of law or facts that could make the claimant reevaluate whether the health care provider should be sued. For example, the health care provider may provide notice to the claimant that the health care provider was misnamed or never participated in the treatment, or provide medical records or other information rebutting the claim.

As discussed in Section III below, the West Virginia Supreme Court of Appeals issued a number of opinions addressing alleged failures to provide, or deficiencies in, notices of claim and certificates of merit. In general, these opinions discourage the dismissal of claims where the record suggests the plaintiff has made some effort to comply with section 55-7B-6.

---

66 W. VA. CODE ANN. § 29-12D-1(a) (LexisNexis 2004). *See also* W. VA. CODE ANN. § 29-12C-1 (LexisNexis Supp. 2003). In order to recover from the fund, the plaintiff must show he "exhausted all reasonable means to recover from all applicable liability insurance an award of economic damages arising under article seven-b [§§ 55-7B-1 et seq.]." W. VA. CODE ANN. § 29-12D-3(d) (LexisNexis 2004). The amount paid from the fund cannot exceed $1,000,000 or the maximum amount of money that could have been collected from all applicable insurance prior to the creation of the fund. *See id.*

67 *See* W. VA. CODE ANN. § 55-7B-6 (LexisNexis Supp. 2003).

68 § 55-7B-6(b).

69 § 55-7B-6(e).

2. Causation: Loss of Chance

As originally enacted, West Virginia Code section 55-7B-3 codified the necessary elements of proof of standard of care and causation in medical professional liability cases:

> (1) The health care provider failed to exercise that degree of care, skill and learning required or expected of a reasonable, prudent health care provider in the profession or class to which the health care provider belongs acting in the same or similar circumstances; and
>
> (2) Such failure was a proximate cause of the injury or death.[70]

As originally enacted, this provision did not define causation, instead leaving the concept to common law development.[71] MPLA III stepped partially into the breach, codifying and limiting the "loss of chance" doctrine.[72]

The common law "loss of chance" doctrine allows a patient to recover damages for a lost "chance" of recovery so long as the health care provider's negligent conduct was a "substantial factor" in the ultimate injury or death.[73] A typical "loss of chance" case is one in which the plaintiff alleges, for example, that earlier detection of cancer would have allowed a better chance of cure and/or recovery. Section 55-7B-3, as amended, provides the following limitation upon the theory:

> If the plaintiff proceeds on the "loss of chance" theory, *i.e.*, that the health care provider's failure to follow the accepted standard of care deprived the patient of a chance of recovery or increased the risk of harm to the patient which was a substantial factor in bringing about the ultimate injury to the patient, the plaintiff must also prove, to a reasonable degree of medical probability, that following the accepted standard of care would have resulted in a greater than twenty-five percent chance that

---

70 W. VA. CODE ANN. §§ 55-7B-3(a),(b) (LexisNexis 1994). *See also* Daniel v. CAMC, Inc., 544 S.E.2d 905 (W. Va. 2001).

71 *See* Stewart v. George, 607 S.E.2d 394, 398 (W. Va. 2004).

72 W. VA. CODE ANN. § 55-7B-3 (LexisNexis Supp. 2003).

73 Thornton v. CAMC, Inc., 305 S.E.2d 316, 324–25 (W. Va. 1983). *See also* Bellomy v. United States, 888 F. Supp. 760 (S.D. W. Va. 1995); Rine v. Irisari, 420 S.E.2d 541 (W. Va. 1992); Pennington v. Bluefield Orthopedics, P.C., 419 S.E.2d 8 (W. Va. 1992); Reager v. Andersen, 371 S.E.2d 619 (W. Va. 1988).

the patient would have had an improved recovery or would have survived.[74]

This statute requires the plaintiff to establish that he would have had a greater than twenty-five percent chance of improved recovery or survival, had the defendant followed the standard of care.[75] While this provision still maintains the "loss of chance" doctrine, the concept of a "substantial factor" has been tightened to require a statistical minimum standard of proof.

3. Expert Requirements and Qualifications

West Virginia Code section 55-7B-7, as originally enacted in 1986, provided enhanced requirements for the admission of expert testimony,[76] including the requirement that the proffered expert be "engaged or qualified in the same or substantially similar medical field as the defendant health care provider."[77]

In *Mayhorn v. Logan Med. Found.*,[78] the Supreme Court of Appeals of West Virginia held this provision was unconstitutional because it violated the separation of powers by invading the court's province to dictate the Rules of Evidence, "the paramount authority for determining whether or not an expert is qualified to give an opinion."[79]

MPLA III removed this provision and added the requirement that the expert witness must be "engaged or qualified in a medical field in which the practitioner has experience and/or training in diagnosing or treating injuries or conditions similar to those of the patient."[80]MPLA III also adds minimum quali-

---

74 W. VA. CODE ANN. § 55-7B-3(b) (LexisNexis Supp. 2003) (emphasis added).

75 The use of a percentage (twenty-five percent) chance suggests that the expert is required to establish the probability by use of statistics supported by the medical literature. This statute might be viewed as the flip side of *Yates v. Univ. of W. Va. Bd. of Trs.*, in which the Court suggested that the defendant must introduce literature supporting his or her method of treatment before a jury instruction on "multiple methods of treatment" can be given. 549 S.E.2d 681, 688–89 (W. Va. 2001).

76 The other requirements were that: (1) the opinion is actually held by the expert; (2) the opinion is offered to a reasonable degree of medical probability; (3) the expert has professional knowledge and expertise coupled with knowledge of the applicable standard of care to which the opinion is addressed; and (4) the expert has a current license to practice medicine in a state in the United States. W. VA. CODE ANN. § 55-7B-7 (LexisNexis 1994).

77 § 55-7B-7(e).

78 454 S.E.2d 87 (W. Va. 1994).

79 *Id.* at Syl. pt. 6 in part.

80 W. VA. CODE ANN. § 55-7B-7(a)(5) (LexisNexis Supp. 2003). MPLA III retained the original requirements: (1) the opinion is actually held by the expert; (2) the opinion is offered to a reasonable degree of medical probability; (3) the expert has professional knowledge and expertise coupled with knowledge of the applicable standard of care to which the opinion is addressed; and (4) the expert has a current license to practice medicine in a state in the United States (and added

fications designed to ensure that experts are engaged in active clinical practice or teaching, to create a rebuttable presumption that the expert is qualified.

Section 55-7B-7(b) of MPLA III recognizes the trial court's discretion in determining whether a witness qualifies as an expert, stating, "Nothing contained in this section may be construed to limit a trial court's discretion to determine the competency or lack of competency of a witness on a ground not specifically enumerated in this section."[81]

As discussed in Section III below, in light of the holding in *Mayhorn,* there is a substantial question concerning section 55-7B-7(a).

4. Noneconomic Damages Limitation

Amended section 55-7B-8 reduces the limit on liability for noneconomic loss from the original $1,000,000 cap to $250,000, in most cases.[82] Under section 55-7B-8(a), the maximum amount recoverable for compensatory damages for noneconomic loss "shall not exceed two hundred fifty thousand dollars per occurrence, regardless of the number of plaintiffs or the number of defendants or, in the case of wrongful death, regardless of the number of distributees, except as provided in subsection (b) of this section."[83]

Section 55-7B-8(b) provides a higher limitation of $500,000 for each occurrence where the damages are for wrongful death, permanent and substantial physical deformity, loss of use of a limb or loss of a bodily organ system, or permanent physical or mental functional injury that permanently prevents the injured person from being able to independently care for himself or herself and perform life sustaining activities.[84]

Section 55-7B-8(c) provides for the increase of caps, up to fifty percent of the amounts specified annually, based on the Consumer Price Index.[85] The limits on noneconomic loss apply only to defendants who have medical professional liability insurance in the amount of at least $1,000,000 per occurrence covering the medical injury that is the subject of the action.[86] Finally, section 55-7B-8(e) provides a loophole that allows for the reversion to the $1,000,000 cap, in the event the new limitations are found unconstitutional.[87] As discussed

---

the additional requirement that the license has not been revoked or suspended in the past year in any state). W. VA. CODE ANN. § 55-7B-7(a) (LexisNexis Supp. 2003).

81 § 55-7B-7(b).

82 W. VA. CODE ANN. § 55-7B-8 (LexisNexis Supp. 2003).

83 § 55-7B-8(a).

84 § 55-7B-8(b).

85 § 55-7B-8(c).

86 § 55-7B-8(d).

87 § 55-7B-8(e). The $1,000,000 cap was held constitutional on two occasions. *See* Verba v. Gaphery, 552 S.E.2d 406 (W. Va. 2001); *see also* Robinson v. Charleston Area Med. Ctr., 414 S.E.2d 877 (W. Va. 1991) (finding the cap applied per occurrence and not per plaintiff; noneconomic awards to injured child and parents therefore reduced to $1,000,000).

in Section III below, this provision was held constitutional in 2011 in *MacDonald v. City Hospital, Inc.*[88]

5. Elimination of Joint and Several Liability

West Virginia Code section 55-7B-9 of MPLA III eliminates joint and several liability.[89] This changes MPLA I, which applied joint and several liability only to those defendants found twenty-five percent or more at fault.[90] As amended, section 55-7B-9(a) requires the jury to answer special interrogatories showing the total amount of compensatory damages (separated into economic and noneconomic loss) and the percentage of fault attributable to each plaintiff and to each defendant.[91]

Section 55-7B-9(c) provides that upon a verdict for the plaintiff, the circuit court must enter judgment of several, but not joint, liability against each defendant consistent with the percentage of fault determined by the jury or court.[92]

Section 55-7B-9(b) addresses the fault of absent parties, requiring that the trier of fact "shall consider only the fault of the 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."[93] However, upon creation of the Patient Injury Compensation Fund,[94]

> [O]r of some other mechanism for compensating a plaintiff for any amount of economic damages awarded by the trier of fact which the plaintiff has been unable to collect, 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

---

88 MacDonald v. City Hosp., Inc., 715 S.E.2d 405 (W. Va. 2011).

89 W. VA. CODE ANN. § 55-7B-9 (LexisNexis Supp. 2003).

90 W. VA. CODE ANN. § 55-7B-9(b) (LexisNexis 1994).

91 W. VA. CODE ANN. § 55-7B-9(a) (LexisNexis Supp. 2003). *See* Gerver v. Benavides, 530 S.E.2d 701 (W. Va. 1999) (refusing to apply noneconomic damages cap to $2,000,000 verdict where jury instructions and verdict form mixed special and general damages).

92 § 55-7B-9(c).

93 § 55-7B-9(b). This language is consistent with current case law holding that the twenty-five percent rule applies only to those defendants in the case at the time of the verdict. *See* Rowe v. Sisters of the Pallottine Missionary Soc'y, 560 S.E.2d 491, 500 (W. Va. 2001).

94 The Patient Injury Compensation Fund was established in 2004 for the purpose of providing compensation to medical malpractice plaintiffs for any portion of economic damages the plaintiff is unable to collect as a result of MPLA III's elimination of joint and several liability. W. VA. CODE ANN. § 29-12D-1(a) (LexisNexis 2004); W. VA. CODE ANN. § 29-12C-1 (LexisNexis Supp. 2003).

> a claim with the plaintiff arising out of the same medical injury.[95]

The prior version of section 55-7B-9 provided protection to defendants who settled with the plaintiff in "good faith" from cross-claims by other defendants. This language is omitted in MPLA III, which eliminates contribution between defendants.[96] In other words, if each party is limited to the percentage of the verdict assessed by the jury, the situation remedied by contribution—that a party who pays more than its share can recoup from other negligent defendants—no longer exists.

A more complex question arises as to how this provision affects, if at all, the ability of a defendant to implead other negligent parties under Rule 14 of the West Virginia Rules of Civil Procedure. Because the Supreme Court of Appeals of West Virginia has repeatedly held that a party seeking contribution from other negligent parties must do so before judgment,[97] and before settlement,[98] it would seem that MPLA III should not limit a defendant's ability to add other parties to secure a full apportionment of fault. The argument exists, however, that the elimination of joint and several liability removes the basis for a contribution claim.

Section 55-7B-9(d) explains how the circuit court should determine the amount of judgment.[99] First, the circuit court must adjust the verdict for "collateral sources."[100] Next, the circuit court must reduce the verdict for any preverdict settlement, and then multiply the total amount of damages remaining, with interest, by the percentage of fault attributed to each defendant.[101] "The resulting amount of damages, together with any post-judgment interest accrued, shall be the maximum recoverable against the defendant."[102]

With the establishment of the Patient Injury Compensation Fund, the circuit court's calculation of the amount of the judgment changes. The circuit court must first multiply the total amount of damages, with interest, by the percentage of each defendant's fault, and that amount, together with any post-judgment interest accrued, is the maximum recoverable against the defendant.[103]

---

95 § 55-7B-9(b).

96 In *Sydenstricker v. Unipunch Prod., Inc.*, 288 S.E.2d 511 (W. Va. 1982), the Court held "[t]he doctrine of contribution has its roots in equitable principles. The right to contribution arises when persons having a common obligation, either in contract or tort, are sued on that obligation and one party is forced to pay more than his *pro tanto* share of the obligation." *Id.* at Syl. pt. 4.

97 *See* Howell v. Luckey, 518 S.E.2d 873, 877 (W. Va. 1999).

98 *See* Charleston Area Med. Ctr., Inc. v. Parke-Davis, 614 S.E.2d 15 (W. Va. 2005).

99 § 55-7B-9(d).

100 § 55-7B-9(a).

101 § 55-7B-9(d).

102 *Id.*

103 § 55-7B-9(e).

The circuit court must then, before entering final judgment, reduce the total jury verdict by any amounts received by a plaintiff in settlement of the action.[104] The provision further provides:

> When any defendant's percentage of the verdict exceeds the remaining amounts due plaintiff after the mandatory reductions, each defendant shall be liable only for the defendant's pro rata share of the remainder of the verdict as calculated by the court from the remaining defendants to the action. The plaintiff's total award may never exceed the jury's verdict less any statutory or court-ordered reductions.[105]

6. Limitation Upon Ostensible Agency

West Virginia section 55-7B-9(g) of MPLA III limits the application of ostensible or apparent agency theories. Under this statute, a health care provider cannot be held liable under these theories for a non-employee, provided that the non-employee has at least $1,000,000 in professional liability insurance coverage.[106] This provision responds to the common law expansion of the liability of hospitals for anesthesiologists and other independent physicians who contract to provide services,[107] for emergency room physicians regardless of who employs them,[108] and potentially for doctors for whom the hospitals advertise their services.[109] However, under section 55-7B-9(g), the elimination of joint and several liability is not meant to affect a health care provider from being held responsible for the fault of any person acting as its agent or servant.[110]

---

104 *Id.*

105 *Id.*

106 § 55-7B-9(g).

107 *See* Thomas v. Raleigh Gen. Hosp., 358 S.E.2d 222 (W. Va. 1987).

108 *See* Torrence v. Kusminsky, 408 S.E.2d 684 (W. Va. 1991).

109 *See* Glover v. Saint Mary's Hosp., 551 S.E.2d 31 (W. Va. 2001). *See also* Syl. Pt. 7, Burless v. W. Va. Univ. Hosp., 601 S.E.2d 85, Syl. pt. 7 (W. Va. 2004) (the court established the test for determining ostensible agency in a new syllabus point):

> For a hospital to be held liable for a physician's negligence under an apparent agency theory, a plaintiff must establish that: (1) the hospital either committed an act that would cause a reasonable person to believe that the physician in question was an agent of the hospital, or, by failing to take an action, created a circumstance that would allow a reasonable person to hold such a belief, and (2) the plaintiff relied on the apparent agency relationship.

110 § 55-7B-9(g).

7. Collateral Source

West Virginia Code Section 55-7B-9a(a) of MPLA III changes the application of the collateral source rule in MPLA actions.[111] This provision allows the defendant against whom a verdict is rendered to present, after the verdict and before entry of judgment, evidence of payments the plaintiff received for the same injury from collateral sources.[112]

Section 55-7B-9a(b) allows evidence of future payments from collateral sources if the circuit court determines the following:

> (1)There is a preexisting contractual or statutory obligation on the collateral source to pay the benefits; (2) the benefits, to a reasonable degree of certainty, will be paid to the plaintiff for expenses the trier of fact has determined the plaintiff will occur in the future; and (3) the amount of the future expenses is readily reducible to a sum certain.[113]

The plaintiff is also entitled to put on evidence of the value of payments or contributions he or she made to secure the right to the benefits paid by the collateral source.[114] The new provision requires the circuit court to make the following findings of fact:

> (1) [t]he total amount of damages for economic loss found by the trier of fact;
>
> (2) [t]he total amount of damages for each category of economic loss found by the trier of fact;
>
> (3) [t]he total amount of allowable collateral source payments received or to be received by the plaintiff for the medical injury which was the subject of the verdict in each category of economic loss; and
>
> (4) [t]he total amount of any premiums or contributions paid by the plaintiff in exchange for the collateral source payments in each category of economic loss found by the trier of fact.[115]

---

111 W. VA. CODE ANN. § 55-7B-9a (LexisNexis 2003).

112 § 55-7B-9a(a).

113 § 55-7B-9a(b).

114 § 55-7B-9a(c).

115 § 55-7B-9a(d).

Subsection (e) requires the circuit court to subtract the total premiums the plaintiff paid in each category of economic loss from the total collateral source benefits the plaintiff received to arrive at a "net amount of collateral source payments."[116]

Section 55-7B-9a(f) then requires the circuit court to "subtract the net amount of collateral source payments received or to be received by the plaintiff in each category of economic loss from the total amount of damages awarded the plaintiff by the trier of fact for that category of economic loss to arrive at the adjusted verdict."[117]

However, section 55-7B-9a(g)(1) provides that the circuit court shall *not* reduce the verdict for collateral source benefits that the plaintiff must pay back through subrogation, lien, or reimbursement.[118] Nor can the circuit court reduce the verdict for "[a]mounts in excess of benefits actually paid or to be paid on behalf of the plaintiff by a collateral source in a category of economic loss."[119] Proceeds of individual disability or income replacement insurance paid entirely by the plaintiff, the assets of the plaintiff or the members of the plaintiff's immediate family, or a settlement between the plaintiff and another tortfeasor also may not be used by the court to reduce economic loss.[120]

Once the amount of the adjusted verdict is determined, including proper reduction for collateral sources, the circuit court is directed to enter judgment in accordance with the provisions of section 55-7B-9.[121]

8. Third Party Claims Against Health Care Providers

Third party claims are filed against health care providers by non-patients alleging injury arising from medical care rendered by the provider to a patient, who in turn causes injury to the non-patient.[122] In *Osborne v. United States*,[123] the West Virginia Supreme Court of Appeals held a third party non-patient may bring a medical professional liability action against a physician where the patient as the result of the physician's negligence injured a third party.[124] The facts of *Osborne* demonstrate this principle. In *Osborne*, several members of a family were injured and killed in an automobile accident.[125] The

---

116 § 55-7B-9a(e).

117 § 55-7B-9a(f).

118 § 55-7B-9a(g)(1).

119 § 55-7B-9a(g)(2).

120 § 55-7B-9a(g)(3)–(5).

121 § 55-7B-9a(h). Further, for a discussion regarding the determination of the amount of judgment to be entered against defendants, see *supra* Section II.C.5.

122 W. VA. CODE ANN. § 55-7B-9b (LexisNexis Supp. 2003).

123 567 S.E.2d 677 (W. Va. 2002).

124 *Id.* at 685.

125 *Id.* at 679.

offending driver, who was uninsured and incarcerated at the time of trial, was partly intoxicated as a result of medication prescribed by the defendant physician.[126]

In 2003, the Legislature enacted section 55-7B-9b, which limits third party actions to circumstances where health care services are rendered in "willful and wanton or reckless disregard of a foreseeable risk of harm to third persons" [127]:

> An action may not be maintained against a health care provider pursuant to this article by or on behalf of a third-party nonpatient for rendering or failing to render health care services to a patient whose subsequent act is a proximate cause of injury or death to the third party unless the health care provider rendered or failed to render health care services in willful and wanton or reckless disregard of a foreseeable risk of harm to third persons. Nothing in this section shall be construed to prevent the personal representative of a deceased patient from maintaining a wrongful death action on behalf of such patient pursuant to article seven [§§ 55-7-1 et seq.] of this chapter or to prevent a derivative claim for loss of consortium arising from injury or death to the patient arising from the negligence of a health care provider within the meaning of this article.[128]

9. Trauma Damage Limitations

Perhaps the most sweeping change in MPLA III is the limitation on damages for trauma care, as set forth in section 55-7B-9c.[129] This provision targets treatment of emergency conditions for which a patient is admitted to a designated trauma center.[130] Where the treatment in question meets statutory definitions, the total amount of all civil damages recoverable is limited to $500,000, exclusive of interest computed from the date of judgment.[131] The trauma limitation applies:

> In any action brought under this article for injury to or death of a patient as a result of health care services or assistance rendered in good faith and necessitated by an emergency condition for which the patient enters a health care facility designated by

---

126 *Id.*

127 § 55-7B-9b.

128 *Id.*

129 W. VA. CODE ANN. § 55-7B-9c (LexisNexis Supp. 2003).

130 § 55-7B-9c(a).

131 *Id.*

> the office of emergency medical services as a trauma center, including health care services or assistance rendered in good faith by a licensed EMS agency or an employee of an [sic] licensed EMS agency . . . .[132]

The trauma limitation also applies "to any act or omission of a health care provider in rendering continued care or assistance in the event that surgery is required as a result of the emergency condition within a reasonable time after the patient's condition is stabilized."[133] However, the limitation does not apply to acts or omissions in rendering care or assistance that occur after the patient's condition is stabilized, and the patient is capable of receiving medical treatment as a non-emergency patient, or which is unrelated to the original emergency condition.[134]

Section 55-7B-9c(d) creates "a rebuttable presumption that the medical condition was the result of the original emergency condition and that the limitation on liability provided by [subsection a] applies with respect to that medical condition":

> (1) A physician provides follow-up care to a patient to whom the physician rendered care of assistance pursuant to subsection (a) of this section; and (2) a medical condition arises during the course of the follow-up care that is directly related to the original emergency condition for which care or assistance was rendered pursuant to said subsection . . . .[135]

Furthermore, under 55-7B-9c(e), if "follow-up care is provided within a reasonable time after the patient's admission to the designated trauma center," then "[t]here is a rebuttable presumption that a medical condition which arises in the course of follow-up care provided by the designated trauma center health care provider who rendered good faith care or assistance for the original emergency condition is directly related to the original emergency condition."[136]

The liability limitation does not apply when the treatment is rendered "[i]n willful and wanton or reckless disregard of a risk of harm to the patient[,] or [i]n clear violation of established written protocols for triage and emergency health care procedures."[137]

---

132 *Id.*

133 § 55-7B-9c(b).

134 § 55-7B-9c(c).

135 § 55-7B-9c(d).

136 § 55-7B-9c(e).

137 § 55-7B-9c(f)(1)–(2).

Section 55-7B-9c(g) directed the Office of Emergency Medical Services ("OEMS") to develop protocols for triage in emergency health care[138] that recognize and accept "standards for triage and emergency health care procedures for treatment of emergency conditions necessitating admission of the patient to a designated trauma center."[139]

Section 55-7B-9c(h) allows the OEMS to grant provisional trauma center status to a health care facility for a period of up to one year.[140] Facilities with provisional trauma center status are eligible for the limitation on liability.[141] However, "[i]f, at the end of the provisional period, the facility has not been approved by the office of emergency medical services as a designated trauma center, the facility will no longer be eligible for the limitation on liability."[142]

Section 55-7B-9c(i) allows a one-time extension of provisional trauma center status.[143] The requesting facility must submit a written request for extension with a detailed explanation and plan of action to fulfill the requirements for a designated trauma center.[144] The extension may last up to six months, after which, if the facility has not been approved as a designated trauma center, it is no longer entitled to the limitation on liability.[145]

Section 55-7B-9c(j) allows the OEMS to revoke the trauma designation for any facility which no longer meets the requirements.[146] Once the designation is revoked, the limitation on liability ceases to apply to the facility.[147] Section 55-7B-9c(k) also contains a legislative finding directing the promulgation of emergency rules "governing the criteria for designation of a facility as a trauma center or provisional trauma center and implementation of a statewide trauma/emergency care system."[148]

The Supreme Court has yet to interpret the applicability of the trauma care provisions of MPLA III. For now, the MPLA practitioner must look to the statute itself for guidance. However, like other provisions of the MPLA, it is only a matter of time before the trauma care provisions become a source of litigation.

---

138 § 55-7B-9c(g).

139 *Id.* In the event such written protocols were not developed, the limitation on liability did not apply "where health care or assistance is rendered under this section in violation of nationally recognized standards for triage and emergency health care procedures." § 55-7B-9c(f)(2).

140 § 55-7B-9c(h).

141 *Id.*

142 *Id.*

143 § 55-7B-9c(i).

144 *Id.*

145 *Id.*

146 § 55-7B-9c(j).

147 *Id.*

148 § 55-7B-9c(k).

III. THE MPLA IN THE COURTS

A. *Constitutional Issues*

Several MPLA provisions have faced constitutional challenges. Both the $1,000,000 noneconomic damages "cap" established in MPLA I and the lower caps in MPLA III have been upheld as constitutional.[149] The notice of claim and certificate of merit provision has been challenged on several occasions, but the Supreme Court of Appeals of West Virginia has declined to address the constitutional issues, choosing instead to interpret the statute in a way as to preserve its constitutionality.[150] However, the court struck down the expert qualification provision of MPLA I, [151] and the twelve-person jury created in MPLA II, as violative of its constitutional rulemaking authority. [152] The court has not yet addressed the constitutionality of the MPLA III expert qualifications.

1. Twelve-Person Jury Invalidated

The twelve-person jury provision of MPLA II[153] was invalidated by the court in *Louk v. Cormier*.[154] Section 55-7B-6d of MPLA II increased the number of jurors in MPLA actions from six, as in other civil cases, to twelve,[155] and provided for a verdict with nine of twelve jurors.[156] In *Louk*, after the jury returned a non-unanimous verdict for the defense, the plaintiff petitioned for appeal.[157] The court held that establishing the number of jurors and the requirement of unanimity, is solely within its constitutional rule-making power.[158] Thus, section 55-7B-6d was struck down as unconstitutional because it conflicted with Rule 48 of the West Virginia Rules of Civil Procedure.[159]

In *Louk,* the defendant argued the plaintiff was barred from challenging the constitutionality of section 55-7B-6d on appeal because it was never chal-

---

149 The MPLA I cap was upheld in *Robinson v. Charleston Area Med. Ctr.*, 414 S.E.2d 877 (W. Va. 1991), and *Verba v. Ghaphery*, 552 S.E.2d 406 (W. Va. 2001). The MPLA III cap was upheld in *MacDonald v. City Hosp., Inc.*, 715 S.E.2d 405 (W. Va. 2011).

150 *See* Hinchman v. Gillette, 618 S.E.2d 387, 396–407 (W. Va. 2005) (Davis, J., concurring); *see also* Davis v. Mound View Health Care, Inc., 640 S.E.2d 91 (W. Va. 2006).

151 *See* Mayhorn v. Logan Med. Found., 454 S.E.3d 87 (W. Va. 1994); *see also supra* Section II.C.3. and *infra* Section III.A.2.

152 *See* Syl. pt. 3, Louk v. Cormier, 622 S.E.2d 788 (W. Va. 2005).

153 W. VA. CODE ANN. § 55-7B-6d (LexisNexis 2002 Supp.).

154 *See Louk*, 622 S.E.2d at 805.

155 § 55-7B-6d.

156 *Id.*

157 *See Louk,* 622 S.E.2d at 791.

158 *Id.*

159 *Id.* at 801.

lenged in the circuit court.[160] While acknowledging that generally issues cannot be raised for the first time on appeal, the court held "[a] constitutional issue that was not properly preserved at the trial court level may, in the discretion of this Court, be addressed on appeal when the constitutional issue is the controlling issue in the resolution of the case."[161]

The court then discussed its constitutional rule-making powers at length:

> The Rule-Making Clause of Article VIII, § 3 provides, in relevant part, that the Supreme "[C]ourt shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process practice and procedure, which shall have the force and effect of law." W. Va. Const. art. VIII, § 3. *See also* Syl. pt. 1, Bennett v. Warner, 179 W. Va. 742, 372 S.E.2d 920 (1988) ("Under article eight, section three of our Constitution, the Supreme Court of Appeals shall have the power to promulgate rules for all of the courts of the State related to process, practice, and procedure, which shall have the force and effect of law."). As a result of the authority granted to this Court by the Rule-Making Clause, 'a statute governing procedural matters in [civil or] criminal cases which conflicts with a rule promulgated by the Supreme Court would be a legislative invasion of the court's rule-making powers.'[162]

The court concluded the West Virginia Constitution does not permit the Legislature to invade its rule-making power.[163] Therefore, section 55-7B-6d was invalid because it conflicted with Rule 48 of the West Virginia Rules of Civil Procedure.[164] The court found the statute's requirement that the judge instruct the jury on a non-unanimous verdict conflicted with the requirement that a verdict less than unanimous is permissible only with the stipulation of the parties,[165] thereby stripping litigants of their right to a unanimous verdict under

---

160 *Id.* at 792.

161 *Id.* at Syl. pt. 2 (citing Whitlow v. Bd. of Educ. of Kanawha Cnty., 438 S.E.2d 15 (W. Va. 1993)).

162 *Id.* at 795 (citing State v. Arbaugh, 595 S.E.2d 289, 295 (W. Va. 2004) (Davis, J., dissenting)); *see also* People v. Hollis, 670 P.2d 441, 442 (Colo. App. 1983); State v. Wallace, 517 S.E.2d 20 (W. Va. 1999); State v. Derr, 451 S.E.2d 731 (W. Va. 1994).

163 *Louk*, 622 S.E.2d at 801. Justice Davis' opinion contains a detailed analysis of prior cases regarding separation of powers, including *Mayhorn v. Logan Med. Found.*, 454 S.E.2d 87 (W. Va. 1994), which is discussed in Section III.A.2. of this Article.

164 *Louk*, 622 S.E.2d at 801.

165 *Id.* at 800.

Rule 48.[166] Since the promulgation of Rule 48 was squarely within the court's constitutional sphere of power, the conflicting statute was one that the legislature had no power to enact and was therefore invalid.[167]

After striking down the non-unanimous verdict, the court analyzed the MPLA's non-severability clause,[168] in which the legislature declared that the twelve-member jury and the elimination of third party "bad faith" actions were tied to the remaining provisions of House Bill 601. Thus, the entire Act had to be declared unconstitutional if either provision was struck down.[169] The court held it would not "blindly" throw out the rest of the Act, finding the clause merely establishes a rebuttable presumption not binding on the courts.[170]

The court held that *Louk* applies retroactively and reversed a non-unanimous defense verdict in *Richmond v. Levin*.[171] The court made clear that both the increase in number of jurors to twelve and the non-unanimous verdict were legislative acts that violated separation of powers.[172] Justice Maynard dissented, stating that *Louk* was wrongly decided and further that plaintiffs waived the retroactivity argument by not raising it below.[173] Also dissenting was Justice Benjamin, who wrote separately to state that the plaintiff waived both the constitutional and retroactivity arguments.[174]

2. Expert Qualifications

There is an unanswered question concerning whether section 55-7B-7(a) as amended in MPLA III, which sets forth specific requirements for the admissibility of expert testimony, is constitutional. As discussed in Section II.C.3. above, in *Mayhorn v. Logan Medical Foundation*,[175] the Supreme Court of Ap-

---

166 *Id.*

167 *See id.* at 801.

168 W. VA. CODE ANN. § 55-7B-11 (LexisNexis Supp. 2002).

169 *See Louk*, 622 S.E.2d at 805.

170 *Id.* at 802. In finding a rebuttable presumption exists, the Court held:

> Consequently, we now hold that a non-severability provision contained in a legislative enactment is construed as merely a presumption that the Legislature intended the entire enactment to be invalid if one of the statutes in the legislation is found unconstitutional. When a non-severability provision is appended to a legislative enactment and this Court invalidates a statute contained in the enactment, we will apply severability principles of statutory construction to determine whether the non-severability provision will be given full force and effect.

Id. at 803.

171 637 S.E.2d 610 (W. Va. 2006).

172 *See id.* at 617. A petition for rehearing in *Richmond* was denied on September 7, 2006.

173 *Levin*, 637 S.E.2d at 618 (Maynard, J., dissenting).

174 *Id.* (Benjamin, J., dissenting).

175 454 S.E.2d 87 (W. Va. 1994).

peals of West Virginia struck down the predecessor statute enacted in MPLA I, which required that the proffered expert be "engaged or qualified in the same or substantially similar medical field as the defendant health care provider."[176] The *Mayhorn* court found that this provision unconstitutionally violated the state constitutional separation of powers by invading the court's province to dictate the rules of evidence, specifically holding:

> Rule 702 of the West Virginia Rules of Evidence is the paramount authority for determining whether or not an expert is qualified to give an opinion. Therefore, to the extent that *Gilman v. Choi*, 185 W.Va. 177, 406 S.E.2d 200 (1990) indicates that the legislature may by statute determine when an expert is qualified to state an opinion, it is overruled.[177]

Mayhorn expressly overruled *Gilman v. Choi*,[178] a 1990 decision upholding the expert qualification statute of MPLA I. In *Gilman*, the court found that because the statute was "concerned primarily with the competency of expert testimony in a medical malpractice action,"[179] it was valid under Rule 601 of the West Virginia Rules of Evidence[180] and, therefore, unnecessary to decide whether it "conflicts with Rule 702 of the West Virginia Rules of Evidence,[181] which is concerned primarily with the relevancy of expert testimony."[182]

---

176 *Id.* at 93–94 (quoting W. VA. CODE ANN. § 55-7B-7 (LexisNexis Supp. 1994)).

177 *Id.* at Syl. pt. 6.

178 406 S.E.2d 200 (W. Va. 1990).

179 *Id.* at 201. The court relied on a portion of the statute, which authorized the trial court to require "the testimony of one or more knowledgeable, competent expert witnesses," (quoting W. VA. CODE ANN. § 55-7B-7 (LexisNexis Supp. 1994)) to conclude that the Legislature's "paramount concern was with the *competency* of the proffered expert testimony." *Id.* at 202.

180 Rule 601 of the West Virginia Rules of Evidence provides, "Every person is competent to be a witness except as otherwise provided for by statute or these rules." W. VA. R. EVID. 601. The *Gilman* court interpreted Rule 601 to mean that the court "has elected to defer to the legislature when it enacts statutes on the competency of witnesses." *Id.* at 202.

181 Rule 702 of the West Virginia Rules of Evidence provides, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." W. VA. R. EVID. 702.

182 *Gilman*, 406 S.E.2d at 202. Although the *Gilman* court refused to decide whether section 55-7B-7 (1986) was more restrictive than Rule 702, it went on to note that the following common-law principles were applicable under both rules:

> First, a medical expert, otherwise qualified, is not barred from testifying merely because he or she is not engaged in practice as a specialist in the field about which his or her testimony is offered; on the other hand, it is clear that a medical expert may not testify about any medical subject without limitation . . . . Second, a plaintiff in a medical malpractice action must prove that the defendant specialist failed to meet the standard of care required of physicians in the same specialty practiced by the defendant; and to qualify a witness as an expert on that standard of care, the party offering the witness must establish that

The *Gilman* court further concluded that neither section 55-7B-7 (1986) nor Rule 702 required the proffered expert to be board certified in the same medical specialty as the particular defendant health care provider.[183]

As discussed in Section II.C.3., the 2003 amendment removed the requirement that the proffered expert be "engaged or qualified in the same or substantially similar medical field as the defendant health care provider" and added the requirement that the expert witness be "engaged or qualified in a medical field in which the practitioner has experience and/or training in diagnosing or treating injuries or conditions similar to those of the patient."[184] Section 55-7B-7(b) of MPLA III also added a provision that "[n]othing contained in this section may be construed to limit a trial court's discretion to determine the competency or lack of competency of a witness on a ground not specifically enumerated in this section."[185]

In *Daniel v. Charleston Area Medical Center, Inc.*[186] and *State ex rel. Weirton Medical Center v. Mazzone,*[187] the court, although acknowledging that the circuit court has the discretion pursuant to Rule 16(b) of the West Virginia Rules of Civil Procedure to enter a scheduling order in any action which controls the course of litigation, nevertheless found, with respect to the identification of expert witnesses in medical malpractice cases, that the mandatory status conference provisions of MPLA I "take precedence over a Rule 16 scheduling order."[188] The majority opinions in *Daniel*[189] and *Mazzone* never addressed whether the MPLA's mandatory status conference provisions violated the court's constitutional rule-making power. These opinions therefore suggest that

---

> the witness has more than a casual familiarity with the standard of care and treatment commonly practiced by physicians engaged in the defendant's specialty . . . . Third, a medical witness may acquire sufficient knowledge to qualify as an expert through practical experience, recent formal training and study or a combination of these factors.

Id. at 204 (citations omitted).

183 *Id.* at 203.

184 W. VA. CODE ANN. § 55-7B-7(a)(5) (LexisNexis Supp. 2003). MPLA III retained the original requirements of MPLA I that: (1) the opinion is actually held by the expert witness; (2) the opinion is offered to a reasonable degree of medical probability; (3) the expert has professional knowledge and expertise coupled with knowledge of the applicable standard of care to which the opinion is addressed; and (4) the expert has a current license to practice medicine in any state in the United States and added the additional requirement that the license has not been revoked or suspended in the past year in any state. *Id.* However, as discussed in Section II.C.3., MPLA III also added minimum qualifications designed to ensure that experts are engaged in active clinical practice or teaching.

185 § 55-7B-7(b).

186 544 S.E.2d 905 (W. Va. 2001).

187 587 S.E.2d 122 (W. Va. 2002).

188 *Id.* at 126–27.

189 Justice Davis touched on the issue of whether the provision violated separation of powers in her concurring opinion in *Daniel*. 544 S.E.2d at 909 n.2 (Davis, J., concurring).

statutes which don't conflict with the West Virginia Rules of Civil Procedure will be enforced.

Also of note is the court's opinion in *Walker v. Sharma,*[190] a 2007 decision. In *Walker*, the circuit court, in concluding that the plaintiff failed to meet his burden of proof, found that the plaintiff's expert could not testify regarding the national standard of care, or any deviation therefrom, given that the expert was unfamiliar with the specific surgical technique used by the defendant.[191] The court held the circuit court committed reversible error "in concluding that an experienced, board-certified urologist could not testify as to the standard of care applicable to this case."[192] In its analysis, the court quoted section 55-7B-7(a) (2003) and referred to it as setting "specific foundational requirements for the admission of [expert] testimony" in MPLA cases.[193] The court, although recognizing that "Rule 702 is the paramount authority" for determining expert qualification,[194] nonetheless still relied on section 55-7B-7(a) (2003) in determining whether the plaintiff's expert was qualified, stating:

> In this case, the trial court had little difficulty in ruling that Dr. Lewis was qualified to testify as an expert witness on the subject [urological procedures] pursuant to W.Va.Code § 55-7B-7 . . . .[195] The trial court determined that Dr. Lewis was qualified based on the fact that he was a board-certified urologist who spends more than sixty percent of his professional time in the active clinical area of urology.[196]

Walker also cited *Gilman* as the standard "for determining whether a physician is qualified to offer testimony on the standard of care," one which requires "a showing that the physician has 'more than a casual familiarity with the standard of care and treatment commonly practiced by physicians engaged in the defendant's specialty.'"[197]

It may be reasonable to argue, as in *Gilman*, that section 55-7B-7(a) (2003) governs the competency of expert witnesses and therefore is an appropriate legislative function that does not improperly invade the court's rule-making power. As suggested in *Daniel* and *Mazzone*, section 55-7B-7(a) (2003) can be argued as consistent with the West Virginia Rules of Evidence insofar as delineating specific requirements, therefore not violative of the court's rule-making

---

190 655 S.E.2d 775 (W. Va. 2007).

191 *See id.* at 778–79.

192 *Id.* at 777.

193 *Id.* at 778–79.

194 *Id.* at 781 (citing Syl. pt. 6, *Mayhorn*, 454 S.E.2d 87).

195 *Id.* at 779 (internal quotation marks omitted).

196 *Id.* at 781 (internal quotation marks omitted).

197 *Id.* at 779 n.2 (citing Gilman v. Choi, 406 S.E.2d 200, 204 (W. Va. 1990)).

power. On the other hand, *Mayhorn* has not been overruled, and, in *Louk v. Cormier*, the court struck down the twelve-person jury of MPLA II, finding that it violated the court's rule-making power under the *Mayhorn* analysis. However, in *Walker*, the court, although acknowledging Rule 702 as the paramount authority on expert qualification under *Mayhorn*, referred to and relied on section 55-7B-7(a) (2003) in determining whether a physician was qualified to offer expert testimony in an MPLA action. There is sure to be litigation to address this unresolved issue.

3. Noneconomic Damage Limitations Upheld

Since 1986, West Virginia has limited noneconomic loss in MPLA cases.[198] For cases where the injury occurs after 1986, there is a $1,000,000 limitation or "cap" on noneconomic loss.[199] MPLA III reduces the caps for cases filed after July 1, 2003.[200]

The $1,000,000 cap in MPLA I was upheld as constitutional in *Robinson v. Charleston Area Medical Center*[201] and *Verba v. Ghaphery*.[202] In *Robinson,* the Supreme Court of Appeals of West Virginia also held the cap applied to the aggregated claims of all plaintiffs, ruling the noneconomic award had to be reduced to $1,000,000 by first reducing the jury awards for the derivative claims of the injured infant's parents.[203]

In 2011, the MPLA III cap was upheld as constitutional in *MacDonald v. City Hospital.*[204] The court held that amended section 55-7B-8 did not render the statute unconstitutional, stating:

> West Virginia Code § 55-7B-8 (2003) (Repl. Vol. 2008), which provides a $250,000 limit or "cap" on the amount recoverable for a noneconomic loss in a medical professional liability action and extends the limitation to $500,000 in cases where the damages are for: (1) wrongful death; (2) permanent and substantial physical deformity, loss of use of a limb or loss of a bodily organ system; or (3) permanent physical or mental functional injury that permanently prevents the injured person from being

---

198 1986 W. Va. Acts 796.

199 *Id.*

200 2003 W. Va. Acts 1373–74.

201 414 S.E.2d 877 (W. Va. 1991).

202 552 S.E.2d 406 (W. Va. 2000).

203 *See* 414 S.E.2d at 889–90.

204 715 S.E.2d 405 (W. Va 2011). Disclosure: Authors Thomas J. Hurney, Jr., and Jennifer M. Mankins, Jackson Kelly, PLLC, and Christine S. Vaglienti, Associate Litigation Counsel for WVU Hospitals, represented City Hospital in the *MacDonald* appeal. A federal district court had previously ruled the cap constitutional. *See* Wilson v. United States, 375 F. Supp. 2d 467, 472 (E.D. Va. 2005).

> able to independently care for himself or herself and perform life sustaining activities (both subject to statutorily-mandated inflationary increases), is constitutional. It does not violate the state constitutional right to a jury trial, separation of powers, equal protection, special legislation or the "certain remedy" provisions . . . .[205]

In *MacDonald*, plaintiff and his wife sued his physician and the hospital, claiming he contracted rhabdomyolysis, a debilitating neurologic condition, caused by a combination of medications ordered by the physician while he was hospitalized.[206] The plaintiffs alleged the physician was negligent in prescribing and failing to monitor for side effects, and that the hospital pharmacy negligently failed to intervene by warning the physician about the potential risk for the disease posed by the medications.[207] After trial, a jury rendered a total verdict of $1,629,000, apportioning liability of seventy percent to the physician and thirty percent to the hospital.[208]

Post-trial, the circuit court reduced the noneconomic damages portion of the verdict to conform to the $500,000 limitation contained in section 55-7B-8(b).[209] The following table shows the original verdict and the reduction by the circuit court:

Damage Items	**Jury Award**	**Reduced by Court**
Economic Loss		
Past medical expenses	92,000	92,000
Past lost wages	37,000	37,000
Noneconomic Loss		
Past pain & suffering	250,000	
Future pain & suffering	750,000	500,000
Lost consortium to wife	500,000	0
Total Noneconomic	1,500,000	500,000
Total Verdict	1,629,000	629,000
Verdict as Apportioned		
City Hospital (30%)	488,700	188,700
Physician (70%)	1,140,300	440,300

---

205 Syl. pt. 6, *MacDonald*, 715 S.E.2d 405.

206 *Id.* at 411–12.

207 *Id.*

208 *Id.* at 412.

209 *Id.*

The plaintiffs filed post-trial motions, arguing section 55-7B-8 violated several provisions of the West Virginia Constitution.[210] The circuit court denied the motions, and the plaintiffs appealed.[211]

The plaintiffs challenged section 55-7B-8 on several grounds, arguing that it violated state constitutional provisions guaranteeing equal protection and prohibiting special legislation, guaranteeing trial by jury, establishing separation of powers, and guaranteeing open courts and certain remedy.[212] The plaintiffs urged the court to abandon precedent and apply strict scrutiny in examining the legislation[213] and argued at length that since there was no real "crisis" for the legislature to solve in 2003 when it enacted section 55-7B-8, the legislation was invalid.[214]

The court began its analysis restating its precedent of deference to the legislature:

> In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.[215]

The court found it significant that the caps at issue differed from the prior $1,000,000 cap because they automatically increased each year to account

---

210 *Id.*

211 *Id.* The Supreme Court of Appeals of West Virginia has five Justices. Before the plaintiffs' petition for appeal was granted, Justice Thomas McHugh voluntarily recused himself because of his position on the Board of Trustees of a hospital. He was replaced by Ohio County Circuit Court Judge Ronald Wilson, who was appointed by the Chief Justice. After the briefing was complete, the plaintiffs moved to recuse Justice Menis Ketchum, claiming that during his campaign for election to the court, he made statements that he would not overrule the cap. Justice Ketchum denied the motion, but reconsidered after his order immediately appeared on an internet blog site, stating he would not permit the Court to be publicly maligned. Justice Ketchum was replaced by Jackson County Circuit Judge Thomas Evans. The case was therefore heard by three Supreme Court of Appeals justices and two circuit court judges.

212 *Id.* at 413–14.

213 *Id.* at 416, n.15.

214 *See id.* at 416.

215 *Id.* at 412 (citing State *ex rel.* Appalachian Power Co. v. Grainer, 143 S.E.2d 351 (W. Va. 1965)).

for inflation.[216] Moreover, in order to gain the protection of the cap, a health care provider must have at least $1,000,000 in insurance coverage.[217]

The plaintiffs argued the caps violated the constitutional right to a jury trial for two reasons. Relying on *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*,[218] the plaintiffs argued that the caps generally violated the right to trial by jury.[219] They further argued that by setting limits which would change the verdict, the statute violated the State Constitution's "reexamination" clause, which states, "No fact tried by a jury shall be otherwise reexamined in any case than according to the rule of court or law."[220] Both arguments were rejected. The court found that Georgia's constitutional provision—which states the right to jury trial is "inviolate"—was substantially different than West Virginia's.[221] Instead, "the right of jury trials in cases at law is not impacted. Juries always find facts on a matrix of laws given to them by the legislature and by precedent, and it can hardly be argued that limitations imposed by law are a usurpation of the jury function."[222] As to the "reexamination" clause, the court, as in prior cases, held it did not apply to actions of the Legislature.[223]

The court also rejected plaintiffs' claim that the statute violated the constitutional separation of powers, stating, "[I]f the legislature can, without violating separation of powers principles, establish statutes of limitation, establish statutes of repose, create presumptions, create new causes of action and abolish old ones, then it also can limit noneconomic damages without violating the separations of powers doctrine."[224]

The court held section 55-7B-8 did not violate the West Virginia Constitution's equal protection and special legislation provisions either.[225] The plaintiffs' primary argument was there "was no factual basis for the Legislature to conclude that lowering the cap from $1,000,000 to $250,000, or $500,000 in certain cases, would accomplish the legislative goals of attracting and keeping physicians in West Virginia and reducing medical malpractice premiums."[226] After reviewing the factual findings contained in the legislation related to the problems of unavailability and affordability of liability insurance for health care providers, the court concluded:

---

216 *Id.* at 414.

217 *Id.*

218 691 S.E.2d 218 (Ga. 2010).

219 *MacDonald*, 715 S.E.2d at 415.

220 *Id.* at 414 n.10 (citing W. VA. CONST. art. III, § 13).

221 *Id.* at 415.

222 *Id.* (citing Robinson v. Charleston Area Med. Ctr., Inc., 414 S.E.2d 877, 888 (W. Va. 1991)).

223 *See id.*

224 *Id.* (citing Verba v. Ghaphery, 552 S.E.2d 406, 411 (W. Va. 2001)).

225 *Id.* at 420–21.

226 *Id.* at 416.

> The Legislature could have rationally believed that decreasing the cap on noneconomic damages would reduce rising medical malpractice premiums and, in turn, prevent physicians from leaving the state thereby increasing the quality of, and access to, health care for West Virginia residents. While one or more members of the majority may differ with the legislative reasoning, it is not our perogative to substitute our judgment for that of the Legislature, so long as the classification is rational and bears a reasonable relationship to a proper governmental purpose. Further, even though the cap now contained in W. Va. Code § 55-7B-8 is significantly less than the original $1,000,000 amount, we cannot say that it is on its face arbitrary or capricious. [227]

The court cited several other jurisdictions reaching similar conclusions. The court found no violation of the "certain remedy" guarantee in the West Virginia Constitution, stating:

> [T]he impact of the statute at issue is limited to a narrow class–those with noneconomic damages exceeding $250,000. Furthermore, the Legislature has not imposed an absolute bar to recovery of noneconomic damages. Instead, the Legislature has merely placed a limitation on the amount of recovery in order to effectuate the purpose of the Act as set forth in W. Va. Code § 55-7B-1. Because the legislative reasons for the amendments to the Act are valid, there is no violation of the certain remedy provision and, thus, no merit to the [plaintiffs'] argument.[228]

Ohio County Circuit Judge Ronald Wilson, appointed to sit when Justice Thomas McHugh recused himself, filed a dissenting opinion on July 21, 2011, asserting the majority opinion was "counterintuitive" and that "the justices capitulated to the West Virginia Legislature's political and unconstitutional mistreatment of medical malpractice victims, and by its decision, delivered the coup de grâce to the rights of thousands of West Virginians to be fully compensated for losses caused by the negligence of medical professionals."[229] Referring to the MPLA as a political decision by the Legislature,[230] Judge Wilson found the caps affected substantial rights of those injured by medical negligence, and

---

227 *Id.* at 418. The court cited *Estate of McCall v. United States*, 642 F.3d 944 (11th Cir. 2011); *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1053–55 (Alaska 2002); *Zdrojewski v. Murphy*, 657 N.W.2d 721, 739 (Mich. App. 2002); and *Judd v. Drezga*, 103 P.3d 135, 140 (Utah 2004). For the same reasons, the court rejected the "special legislation" argument.

228 *Id.* at 420.

229 *Id.* at 425 (Wilson, J., dissenting).

230 *Id.*

concluded they violated all of the constitutional provisions asserted by the plaintiffs.[231] A petition for rehearing was denied by the court on September 8, 2011.

B. Applicability of the MPLA

Whether the MPLA applies to a given case or claim has been an area of active and ongoing litigation. Plaintiffs' counsel, attempting to avoid the MPLA's restrictions, particularly the lower noneconomic damages "caps" of MPLA III, have actively litigated the MPLA's applicability on several fronts, many involving notice of claim and certificate of merit issues.

Applicability was first at issue in *Boggs v. Camden-Clark Memorial Hospital Corporation*,[232] where the single syllabus point states:

> The West Virginia Medical Professional Liability Act, . . . applies only to claims resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient. *It does not apply to other claims that may be contemporaneous to or related to the alleged act of medical professional liability.*[233]

Boggs was a procedurally complex case in which the issue before the Supreme Court of Appeals of West Virginia was whether the claims of the plaintiffs, who failed to properly comply with the notice of claim and certificate

---

231 *See id.* at 426–30.

232 609 S.E.2d 917 (W. Va. 2004). Disclosure: Author Thomas J. Hurney, Jr. represented amicus curiae Defense Trial Counsel of West Virginia in *Boggs*.

233 *Id.* at Syl. pt. 3 (emphasis added) (citation omitted). In the text of the opinion, the court commented:

> Fraud, spoliation of evidence, or negligent hiring are no more related to "medical professional liability" or "health care services" than battery, larceny, or libel. There is simply no way to apply the MPLA to such claims. The Legislature has granted special protection to medical professionals, while they are acting as such. This protection does not extend to intentional torts or acts outside the scope of "health care services." If for some reason a doctor or nurse intentionally assaulted a patient, stole their possessions, or defamed them, such actions would not require application of the MPLA any more than if the doctor or nurse committed such acts outside of the health care context. Moreover, application of the MPLA to non-medical malpractice claims would be a logistical impossibility. No reputable physician would sign a certificate of merit for a claim of fraud or larceny or battery; how could such a certificate be helpful or meaningful?
>
> Thus we find that the lower court erred in dismissing the appellant's causes of actions in that they were only contemporaneous or related to the alleged act of medical professional liability.

Id. at 923–24.

of merit statute, were governed by MPLA III, particularly its lower noneconomic damages limitation, or MPLA II.[234]

In *Boggs*, the plaintiffs filed an amended complaint prior to the effective date of MPLA III,[235] but did not serve a notice of claim and certificate of merit at least thirty days before the filing. The circuit court granted the defendant's motion to dismiss.[236] Reversing, the Supreme Court of Appeals concluded that under Rule 15 of the West Virginia Rules of Civil Procedure, the circuit court should have allowed the plaintiffs to "amend" their untimely filing, meaning the case would be governed under MPLA II, particularly the $1,000,000 limitation on noneconomic loss.[237]

As to applicability, one issue in *Boggs* related to whether allegations of spoliation of evidence contained in the complaint were governed by the MPLA.[238] The *Boggs* opinion suggested that claims such as battery, fraud, and spoliation of evidence were not subject to the MPLA.[239] This language was modified in *Gray v. Mena*:[240]

> In reviewing the rationale utilized in *Boggs*, we note an inconsistency and seek to remedy that inconsistency in the present opinion. In *Boggs* . . . this Court stated that the Act's protection does not extend to intentional torts; yet the Act itself states that it applies to "any tort," thus encompassing intentional torts. *See* West Virginia Code § 55-7B-2(i). . . . Having examined this matter in the context of the present case, we clarify *Boggs* by recognizing that the West Virginia Legislature's definition of medical professional liability, found in West Virginia Code § 55-7B-2(i), includes liability for damages resulting from the death or injury of a person for *any* tort based upon health care services rendered or which should have been rendered. To the extent that *Boggs* suggested otherwise, it is modified.[241]

Applicability was addressed in *Blankenship v. Ethicon, Inc.*,[242] a putative class action by patients claiming infections arising from inadequately steri-

---

234 *See id.* at 920–21.

235 *Id.* at 920.

236 *Id.* at 921.

237 *See id.* at 923.

238 *Id.*

239 *Id.*

240 625 S.E.2d 326 (W. Va. 2005).

241 *Id.* at 330–31 (footnotes omitted).

242 656 S.E.2d 451 (W. Va. 2007). *Blankenship* was originally removed to federal court by the pharmaceutical manufacturer Ethicon after the hospitals filed motions to dismiss for noncompliance with section 55-7-6(b). *Id.* at 454 n.7. The manufacturer asserted the hospitals were fraudulently joined in the action. *Id.* The federal district court remanded the case, finding joinder

lized sutures manufactured by Ethicon. The plaintiffs did not serve pre-suit notice of claims and certificates of merit on the defendant hospitals.[243] They argued the MPLA did not apply because they were making product liability claims against the hospitals, which were merely distributors of the sutures. Thus, the hospitals' actions were not "health care" subject to the protection of the MPLA.[244] The circuit court dismissed the action for plaintiffs' failure to file notices of claim and certificates of merit.

The Supreme Court of Appeals of West Virginia held that the MPLA applied, stating the following: "[t]he implantation of sutures is a classic example of health care. Sutures, by their very nature, are implanted during the course of and in furtherance of medical treatment, *i.e.*, surgery or wound repair."[245] The *Blankenship* court issued two new syllabus points:

> 4. The failure to plead a claim as governed by the Medical Professional Liability Act, W. Va. Code § 55-7B-1, *et seq.*, does not preclude application of the Act. Where the alleged tortious acts or omissions are committed by a health care provider within the context of the rendering of "health care" as defined by W. Va. Code § 55-7B-2(e) (2006) (Supp. 2007), the Act applies regardless of how the claims have been pled.
>
> 5. Pursuant to W. Va. Code § 55-7B-2(e) (2006) (Supp. 2007), "health care" is defined as "any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to or on behalf of a patient during the patient's medical care, treatment or confinement."[246]

---

was not fraudulent because it was "possible" the plaintiffs' claims were viable outside the MPLA under West Virginia law. *Id.* A case similar to *Blankenship* was *Redden v. Purdue Pharm., L.P.*, No. 5:03-2222, 2003 U.S. Dist. LEXIS 27172 (S.D. W. Va. Dec. 24, 2003), decided by the late Judge Charles Haden. In *Redden,* the court found plaintiffs were required to comply with the pre-filing requirements of Section 55-7B-6(a). *Id.* at *13. The plaintiffs acknowledged noncompliance, but argued the claim against the physician and the clinic was "not a Medical Professional Liability action, but instead a civil conspiracy." *Id.* The court rejected this argument because the definition of "medical professional liability" includes any liability for damages for "any tort or breach of contract based on health care services rendered." *Id.* The court also found that a civil conspiracy, or "combination to commit a tort," is not an independent claim, but is created "by the wrongful acts done by the defendants to the plaintiff." *Id.* at *14 (citing *Kessel v. Leavitt*, 511 S.E.2d 720, 753–54 (W. Va. 1998)). Disclosure: Author Thomas J. Hurney, Jr. was counsel for Thomas Memorial Hospital in *Blankenship.*

243 *Blankenship*, 656 S.E.2d at 453.

244 *Id.*

245 *Id.* at 458.

246 *Id.* at Syl. pt. 4–5.

However, as in *Gray v. Mena*[247] and *Davis v. Mound View Health Care, Inc.*,[248] the court reversed the dismissal and remanded the action, with directions that plaintiffs be given reasonable time to comply with section 55-7B-6.[249]

Applicability was squarely at issue in *Phillips v. Larry's Drive-In Pharmacy*, [250] which addressed a certified question from the circuit court as to whether the MPLA applied to actions against pharmacies. The Supreme Court of Appeals of West Virginia held, "A pharmacy is not a 'health care provider' as defined by the Legislature in W.Va. Code, 55-7B-2(c) [1986]."[251] The court looked to the plain meaning of the MPLA and its definitions and concluded that "because certain medical professionals are specifically included under the MPLA, but pharmacies are not included, [this] means that the Legislature intended to exclude pharmacies."[252]

Phillips also contained a significant new syllabus point, which states: "Where there is any doubt about the meaning or intent of a statute in derogation of the common law, the statute is to be interpreted in the manner that makes the least rather than the most change in the common law."[253] The court questioned its prior opinion in *Short v. Appalachian OH-9, Inc.*,[254] which held the MPLA applied to the actions of emergency medical technicians even though they were not specifically listed in its definition:

> Further, the holding in *Short v. Appalachian OH-9, Inc.*, is of dubious value because there is no mention of the rule of construction that statutes in derogation of the common law are to be given a narrow, not expansive and liberal, interpretation. And finally, while *Short v. Appalachian OH-9* gave *W.Va. Code*, 55-7B-2(c) an expansive interpretation, the Legislature supported that interpretation when it amended the statute in 2003 to specifically place emergency medical services authorities and agencies under the umbrella of the MPLA.[255]

---

247 625 S.E.2d 326 (W. Va. 2005)

248 640 S.E.2d 91 (W. Va. 2006). Disclosure: Author Thomas J. Hurney, Jr. appeared as counsel for amicus, West Virginia Mutual Insurance Company.

249 *See Gray*, 625 S.E.2d at 322; *Davis*, 640 S.E.2d at 96.

250 647 S.E.2d 920 (W. Va. 2007).

251 *Id.* at 929.

252 *Id.*

253 *Id.* at Syl. pt. 5.

254 507 S.E.2d 124 (W. Va. 1998).

255 *Phillips,* 647 S.E.2d at 929. An interesting point in *Phillips* was the court's rejection of the plaintiff's use of affidavit evidence from former legislators in support of their interpretation of the statute. *Id.* at 925–26. In his separate opinion, Justice Maynard concurred but stated he would

Applicability was raised yet again in *Riggs v. West Virginia University Hospitals, Inc.*,[256] this time to challenge the reduction of a $10,000,000 noneconomic damage award. In *Riggs*, the plaintiff developed a severe knee infection after surgery, which she alleged was caused by the hospital's negligence in administering its infection control program.[257] She settled with the defendant surgeon and proceeded to trial against the hospital, obtaining a $10,000,000 verdict in noneconomic damages for pain and suffering.[258] On post-trial motion, the circuit court applied the noneconomic cap in section 55-7B-8 (1986) and reduced the award to $1,000,000.[259]

On appeal, plaintiff argued the MPLA did not apply to the claim against the hospital because it was related not to direct patient care, but to general negligence, i.e., the duty to take reasonable measures to prevent infections.[260] Plaintiff argued the hospital, through a pre-trial stipulation related to the settlements of two defendant physicians, waived any argument that the actions of its infection control committee were "health care;" therefore, the verdict was not subject to the MPLA cap.[261] In opposition, the hospital and several amici, argued that infection control was indeed "health care" subject to the MPLA.[262] The hospital argued the plaintiffs were estopped from changing their position post-verdict about whether the claim was one of "medical negligence."[263]

The Supreme Court of Appeals of West Virginia affirmed the reduction of the verdict to $1,000,000: "Finding that Appellants may not change the theory of their case after the return of jury's verdict so as to avoid application of the MPLA's noneconomic damages cap, we affirm the trial court's application of W. Va. Code § 55-7B-8 to the jury verdict rendered herein."[264]

The court reviewed the plaintiff's complaint, pre-trial memorandum and discovery responses, including expert disclosures, in detail and found all centered upon claims the hospital failed to meet the applicable standard of care "in monitoring the infectious disease control procedures within the hospital and perhaps in some other ways that they were guilty of medical negligence."[265] "Medical negligence" also permeated the jury instructions and plaintiff's coun-

---

have allowed consideration of the affidavits from the legislators involved in the passage of the bill. *Id.* at 929 (Maynard, J., concurring) (citation omitted).

256 656 S.E.2d 91 (W. Va. 2007). Disclosure: Author Thomas J. Hurney, Jr. appeared as counsel for amicus, West Virginia Mutual Insurance Company.

257 *Id.* at 93.

258 *Id.* at 97.

259 *Id.* at 103.

260 *See id.* at 104.

261 *Id.* at 92.

262 *See id.* at 103. Disclosure: Author Thomas J. Hurney, Jr. was counsel to amicus.

263 *See id.* at 96.

264 *Id.* at 93.

265 *Id.* at 95.

sel's closing argument.[266] The court found it was only after the circuit court entered an order reducing the verdict that plaintiff began to assert the MPLA did not apply.[267] The court thus rejected the plaintiff's argument under the doctrine of judicial estoppel, stating:

> Judicial estoppel bars a party from re-litigating an issue when: (1) the party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, or with a position taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the inconsistent positions received some benefit from his/her original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process.[268]

Applying these elements, the court found plaintiff's post-verdict change of position was barred.[269] As to the first factor, the court found, "Appellants pled, prosecuted, tried and argued their claims as falling within the MPLA, including continual references to WVUH as a health care provider, breaches of the applicable standard of care to a reasonable degree of medical probability and characterizations of the action as a medical professional liability action."[270] The court concluded, "Appellants did not assume the position that their claims were not governed by the MPLA until *after* a verdict in excess of the MPLA's non-economic damages cap was rendered and their verdict was reduced by order of the trial court."[271]

The court found the second and third factors were "easily satisfied," the second because the positions changed in the same litigation,[272] and the third because:

> By characterizing their claims as medical negligence claims, the Appellants were able to attempt to invoke strong emotional responses and a sense of authority from the jury in their closing arguments. In their rebuttal closing arguments, Appellants strongly encouraged the jury to "send a message that you must pro-

---

266 *Id.* at 95–97.

267 *Id.* at 92–93.

268 *Id.* at 100 (quoting W. Va. Dep't of Transp., Div. of Highways v. Robertson, 618 S.E.2d 506 (W. Va. 2005)).

269 *Id.*

270 *Id.*

271 *Id.*

272 *Id.*

> vide medical services in this town responsibly . . . changes will occur . . . health care will be improved . . . you decide what a reasonably prudent health care provider should do . . . you say what the community standard . . . will be." Additionally, if the adverse position is accepted, Appellants will receive an additional $9,000,000 in noneconomic damages.[273]

As to the final factor, "[b]y not characterizing their claims as premises liability claims until after the jury verdict was rendered, Appellants precluded WVUH from developing a theory of defense on this theory."[274] Thus, the court refused to "sanction a change in liability theories post-verdict to avoid application of clear statutory provisions. The doctrine of judicial estoppel applies to preclude Appellants' arguments that the MPLA does not apply to the jury verdict rendered herein."[275]

Two Justices, Albright and Starcher, dissented. Justice Albright asserted that the circuit court should have relied on West Virginia Rule of Civil Procedure 15(b) to allow plaintiffs to amend their pleadings based on the evidence at trial.[276] Justice Starcher criticized the majority for being legally and factually "wrong," and would have upheld the jury's verdict.[277]

Justice Davis penned a lengthy concurring opinion supporting the holding that plaintiffs were judicially estopped from arguing the MPLA did not apply to their claims of negligent infection control by WVUH.[278] However, Justice Davis emphasized that the court did not reach the substantive issue of whether the MPLA actually applied and expressed her view that the MPLA does *not* apply to infections caused by the negligence of hospitals.[279] Justice Davis equated these claims with "premises" liability and not "medical professional liability"[280] and indicated that she would have so held absent the estoppel argument.[281] Justice Davis also discussed in detail why Rule 15 did not apply to allow the post-trial amendment of plaintiffs' pleadings and why it would have been "judicial activism" to apply it *sua sponte*.[282]

---

273 *Id.* at 100–01.

274 *Id.* at 101.

275 *Id.*

276 *See id.* (Albright, J., dissenting).

277 *Id.* at 109.

278 *Id.* at 109–10 (Davis, J., concurring).

279 *Id.* at 110.

280 *Id.* at 111.

281 *See id.* at 121.

282 *Id.* at 113.

C. *Notice of Claim and Certificate of Merit*

Section 55-7B-6 of the MPLA requires a claimant to serve a notice of claim and certificate of merit on any health care provider at least thirty days before filing suit.[283] In West Virginia, as in virtually all states, expert testimony is generally required to prove breach of the standard of care and causation.[284] The notice of claim[285] and certificate of merit[286] must be timely served within the applicable statute of limitations. Section 55-7B-6 provides that the health care provider may respond to the notice of claim and certificate of merit with a bona fide defense and may request mandatory, pre-suit mediation.[287] Upon request for mandatory mediation, the claimant is entitled to take the health care provider's deposition, either before or during mediation.

The Supreme Court of Appeals of West Virginia has issued a series of opinions interpreting section 55-7B-6 which discourage the dismissal of claims where the record suggests the plaintiff has made some effort to comply with the statute, thereby suggesting that the claim is not "frivolous."[288] Section 55-7B-6 has easily been the most frequently litigated issue under MPLA III.[289]

---

283 W. VA. CODE ANN. § 55-7B-6 (LexisNexis 2006).

284 *Id. See* Eady v. Lansford, 92 S.W.3d 57 (Ark. 2002); Lutz v. Foran, 427 S.E.2d 248 (Ga. 1993); and Short v. Appalachian OH-9, Inc., 507 S.E.2d 124 (W. Va. 1998). *See generally* H.H. Henry, Annotation, *Necessity of Expert Evidence to Support an Action for Malpractice Against a Physician or Surgeon,* 81 A.L.R.2d 597 (1962).

285 W. VA. CODE ANN. § 55-7B-6 (LexisNexis 2008) ("The notice of claim shall include a statement of the theory or theories of liability upon which a cause of action may be based . . . together with a screening certificate of merit.").

286 Section 55-7B-6(b) defines the requirements of the certificate of merit, stating:

> The screening certificate of merit shall be executed under oath by a health care provider qualified as an expert under the West Virginia rules of evidence and shall state with particularity: (1) the expert's familiarity with the applicable standard of care in issue; (2) the expert's qualifications; (3) the expert's opinion as to how the applicable standard of care was breached; and (4) the expert's opinion as to how the breach of the applicable standard of care resulted in injury or death.

Id.

287 *Id.* Other states also provide for mediation after service of the required pre-suit documents. For example, South Carolina requires service of notice of intent and expert affidavit prior to suit. S.C. CODE ANN. § 15-79-125(A) (2011). Upon service, the parties are allowed to obtain medical records and may also, with the court's permission, take depositions, in preparation of participating in mandatory mediation, which must occur within 120 days of service of the notice of intent. § 15-79-125(B)–(C). If the matter is not resolved at mediation, the plaintiff is then allowed to file suit. § 15-79-125(E).

288 *See* Gray v. Mena, 625 S.E.2d 326 (W. Va. 2005); Hinchman v. Gillette, 618 S.E.2d 387 (W. Va. 2005); Boggs v. Camden-Clark Mem'l Hosp. Corp., 609 S.E.2d 917 (W. Va. 2004); State ex rel. Miller v. Stone, 607 S.E.2d 485 (W. Va. 2004).

289 *See, e.g.*, Roy v. D'Amato, 629 S.E.2d 751 (W. Va. 2006); *Gray*, 625 S.E.2d 326; *Hinchman*, 618 S.E.2d 387; *Boggs*, 609 S.E.2d 917; *Miller*, 607 S.E.2d 485.

State ex rel. Miller v. Stone[290] was the first case to reach the court on this issue. The Court affirmed dismissal because the plaintiff did not comply with section 55-7B-6. Discussing section 55-7B-6, the court found its language is not ambiguous:

> After careful consideration of the provisions of the statute at issue, we conclude that the Legislature's clear intent in enacting W. Va. Code § 55-7B-6 was to mandate that a plaintiff in a medical malpractice claim file his or her certificate of merit at least 30 days prior to filing his or her medical malpractice action so as to allow health care providers the opportunity to demand pre-litigation mediation.[291]

State ex rel. Miller was short-lived in the sense that the next several opinions from the court interpreted section 55-7B-6 to avoid dismissal of complaints where plaintiffs failed to strictly comply with its provisions. While the court has clearly discouraged dismissal in these opinions, it has, at the same time, avoided addressing constitutional challenges to the statute as well.[292]

In *Boggs v. Camden-Clark Memorial Hospital Corporation*,[293] the circuit court dismissed the plaintiffs' complaint[294] as violative of section 55-7B-6 because the plaintiffs sent unsigned certificates of merit to the defendants and did not wait thirty days to file suit.[295] On appeal, the plaintiffs challenged the circuit court's failure to allow amendment of the complaint to cure the procedural defect involving the certificate of merit.[296] In the alternative, the plaintiffs asserted that section 55-7B-6 was unconstitutional. The Supreme Court of Appeals of West Virginia declined to address the issue of constitutionality,[297] but held the circuit court should have allowed the complaint to be "amended" under Rule 15 of the West Virginia Rules of Civil Procedure.[298]

---

290 607 S.E.2d 485 (W.Va. 2004).

291 *Id.* at 489.

292 In *Hinchman*, Justice Davis expressed her strong opinion that section 55-7B-6 is unconstitutional. 618 S.E.2d at 402.

293 609 S.E.2d 917 (W. Va. 2004).

294 *Id.* at 920. The plaintiffs filed three suits.

295 *See id.* at 921.

296 *Id.*

297 *Id.* at 921 n. 5.

298 *Id.* at 923. The irony of *Boggs* is that the plaintiffs were rushing the filing of the complaint to avoid the application of the lower noneconomic damage caps of MPLA III, and therefore did not wait thirty days. The court virtually ignored the fact that the plaintiffs had already filed a complaint which was controlled by the MPLA I caps, but had failed to timely serve it on the defendants, resulting in its dismissal under W. VA. R. CIV. P. 4(k). Moreover, the dismissal of the plaintiff's complaint did not throw them out of court, but rather subjected them to the provisions of MPLA III. Indeed, upon dismissal of their second complaint, the *Boggs* plaintiffs filed a third complaint, and were, in fact, in discovery at the time the Court issued its opinion. In *Hannigan v.*

The court took a similar stance in *Gray v. Mena*,[299] an action arising from a suit over an alleged assault during a medical exam. The plaintiff alleged the assault was intentional and took the position, relying on *Boggs*, that since her claims were not governed by the MPLA,[300] a notice of claim and certificate of merit were not required.[301] The circuit court found the action arose from health care and dismissed the complaint because the plaintiff did not comply with section 55-7B-6.[302]

The court reversed and remanded the action, instructing the circuit court to allow the plaintiff time to file a notice of claim and certificate of merit, and further ruling that the statute of limitations had been tolled:[303]

> We find that the Appellant and her counsel, in good faith, made a legitimate judgment that this case should be framed as an assault and battery civil action, rather than a medical malpractice action. The Appellant therefore filed her civil action without adherence to West Virginia Code § 55-7B-6. In this situation, the defendants should be permitted to request compliance with the statutory requirements. The lower court should thereafter examine the issues raised by the defendants and require the Appellant to comply with the statute. The statute of limitations for bringing an action under West Virginia Code § 55-7B-6 should be tolled during this court assessment, and the Appellant should be provided with an additional thirty days after the court decision to comply with the provisions of the statute.[304]

Perhaps the most significant interpretation of section 55-7B-6 came in *Hinchman v. Gillette*.[305] In *Hinchman*, the Supreme Court of Appeals of West Virginia reversed the dismissal of a complaint where the circuit court found the

---

United States, No. 2:02-1286, (S.D. W. Va. Jan. 7, 2005), Judge John T. Copenhaver explained *Boggs*, suggesting, "[T]he amendment authorized by the Supreme Court would reflect interim compliance with [the pre-filing requirements] and be deemed to relate back to the filing of the dismissed complaint as if those requirements had been initially met, thereby allowing the action to proceed under the old cap." *Id.* at 22–23. *Boggs* ultimately proceeded to trial against the hospital (the defendant physicians settled), and the plaintiffs obtained a substantial verdict including punitive damages. *See* Verdict Form, *Bernard Boggs, As Administrator of the Estate of Hilda Boggs*, Civil Action No. 03-C-296 (Cir. Ct. Wood Cnty. W. Va. Mar. 10, 2006).

299 625 S.E.2d 326 (W. Va. 2005).

300 *Id.* at 332.

301 *Id.*

302 *Id.* at 329.

303 *Id.* at 332.

304 *Id.*

305 618 S.E.2d 387 (W. Va. 2005).

certificates of merit did not comply with section 55-7B-6.[306] Impliedly distinguishing *State ex rel. Miller*, where there was no compliance by the plaintiff with the statute, the Supreme Court of Appeals created the requirement that a health care provider who challenges a notice of claim or certificate of merit must demand, in writing, a more definite statement, and give the plaintiff a reasonable time to respond to this request.[307] A defendant's failure to do so waives any later challenge to the sufficiency of the documents *via* a motion to dismiss.[308] The *Hinchman* court issued five new syllabus points:

> 2. Under W.Va. Code, 55-7B-6 [2003] the purposes of requiring a pre-suit notice of claim and screening certificate of merit are (1) to prevent the making and filing of frivolous medical malpractice claims and lawsuits; and (2) to promote the pre-suit resolution of non-frivolous medical malpractice claims. The requirement of a pre-suit notice of claim and screening certificate of merit is not intended to restrict or deny citizens' access to the courts.
>
> 3. Before a defendant in a lawsuit against a health care provider can challenge the legal sufficiency of a plaintiff's pre-suit notice of claim or screening certificate of merit under W.Va. Code, 55-7B-6 [2003], the plaintiff must have been given written and specific notice of, and an opportunity to address and correct, the alleged defects and insufficiencies.
>
> 4. Under W.Va. Code, 55-7B-6 [2003], when a health care provider receives a pre-suit notice of claim and screening certificate of merit that the health care provider believes to be legally defective or insufficient, the healthcare provider may reply within thirty days of the receipt of the notice and certificate with a written request to the claimant for a more definite statement of the notice of claim and screening certificate of merit. The request for a more definite statement must identify with particularity each alleged insufficiency or defect in the notice and certificate and all specific details requested by the defendant. A claimant must be given a reasonable period of time, not to exceed thirty days, to reply to a health care provider's request for a more definite statement, and all applicable periods of limitation shall be extended to include such periods of time.

---

306 *Id.*

307 *Id.* at 395.

308 *See id.*

> 5. Under W.Va. Code, 55-7B-6 [2003], the making of a request for a more definite statement in response to a notice of claim and screening certificate of merit preserves a party's objections to the legal sufficiency of the notice and certificate as to all matters specifically set forth in the request; all objections to the notice or certificate's legal sufficiency not specifically set forth in the request are waived.
>
> 6. In determining whether a notice of claim and certificate are legally sufficient, a reviewing court should apply W.Va. Code, 55-7B-6 [2003] in light of the statutory purposes of preventing the making and filing of frivolous medical malpractice claims and lawsuits; and promoting the pre-suit resolution of non-frivolous medical malpractice claims. Therefore, a principal consideration before a court reviewing a claim of insufficiency in a notice or certificate should be whether a party challenging or defending the sufficiency of a notice and certificate has demonstrated a good faith and reasonable effort to further the statutory purposes.[309]

The *Hinchman* waiver applies to defendants who receive notices of claim and certificates of merit and later assert they are insufficient.[310] Not responding, or making a blanket denial, may be considered insufficient and a waiver of the right to challenge a violation of section 55-7B-6 via a motion to dismiss the complaint.[311] In a lengthy concurrence, Justice Davis expressed her view that section 55-7B-6 was unconstitutional.[312]

In *Roy v. D'Amato*,[313] the plaintiff alleged the defendant physician negligently treated her finger injury and filed suit without serving a notice of claim and certificate of merit.[314] On the day suit was filed, the plaintiffs sent a letter to the defendant, stating that the suit had been filed and that they would obtain a certificate of merit within sixty days.[315] The plaintiff later served the complaint,

---

309 *Id.* at Syl. pt. 2–6.

310 *See id.* at 395.

311 *See id.* A review of the briefs in *Hinchman* shows the plaintiffs raised various constitutional issues, including the argument that the pre-filing requirements violate the State constitution's separation of powers. Brief for Appellant, Hinchman v. Gillette, 618 S.E.2d 387 (W. Va. 2005) (No. 31760), 2004 WL 3262447. The *Hinchman* plaintiffs focused on the Court's constitutional power to enact Rules of Civil Procedure and argued that Section 55-7B-6 was a legislative infringement of those powers, similar to arguments made in *Mayhorn* and *Louk*. *See supra* Section III. The Court declined to address the constitutional claims, although Justice Davis would have addressed the issue. *Hinchman*, 618 S.E.2d at 396 (Davis, J., concurring).

312 *Id.*

313 629 S.E.2d 751 (W. Va. 2006).

314 *See id.* at 754.

315 *Id.*

along with a certificate of merit.[316] The circuit court granted the defendant's motion to dismiss, finding that the plaintiff filed suit before the expiration of thirty days after the provision of the notice of claim.[317] The plaintiff filed a second complaint, and the defendant moved to dismiss, asserting the statute of limitations had run.[318] The circuit court denied the motion, but gave defendant leave to move to dismiss based on the plaintiffs' failure to comply with the notice of claim requirement.[319] This motion was granted, based on the circuit court's finding that the letter enclosing the complaint did not qualify as a notice of claim.[320] The plaintiff's motion for reconsideration was denied by the circuit court.[321]

On appeal, the Supreme Court of Appeals of West Virginia avoided plaintiff's constitutional challenge and held the dismissal was erroneous.[322] Relying on *Hinchman,* the court stated:

> [W]e find that Dr. D'Amato waived any right to object to the notice of claim after the second complaint was filed. The Roys were not on notice, pre-suit, of any alleged defects in the notice of claim and consequently, never had any opportunity to address any insufficiencies with a more definite statement. Dr. D'Amato never took advantage of the opportunity to request mediation to further clarify and possibly resolve the Roys' claims even after the first complaint was dismissed without prejudice. Furthermore, there is nothing in the record to suggest that the claims asserted by the Roys were frivolous.[323]

In *Davis v. Mound View Health Care, Inc.,*[324] the plaintiff filed a complaint on the last day of the statute of limitations without complying with section 55-7B-6, then hired new counsel, who filed an amended complaint (near the end of the 120-day service period)[325] with a letter advising of their intent to serve a certificate of merit within sixty days.[326] Ultimately, the circuit court dismissed the action due to plaintiff's noncompliance with section 55-7B-6.[327] On appeal,

---

316 *Id.*

317 *Id.*

318 *Id.* at 755.

319 *Id.*

320 *Id.*

321 *Id.*

322 *Id.* at 758.

323 *Id.* at 757–58.

324 640 S.E.2d 91 (W. Va. 2006).

325 *See* W. VA. R. CIV. P. 4(k).

326 *Davis*, 640 S.E.2d at 93–94.

327 *Id.* at 94.

the Supreme Court of Appeals of West Virginia held dismissal was correct given the "plain language" of section 55-7B-6.[328] However, because the dismissal order was silent as to whether it was "with" or "without" prejudice, the court presumed it was without prejudice.[329] Applying section 55-2-18 of the West Virginia Code, the court found that the plaintiff had a year from the date of its opinion to comply with section 55-7B-6 and re-file the action.[330]

In *Elmore v. Triad Hospitals, Inc.*,[331] the court, reversing dismissal of the complaint, held that mailing of the notice of claim and certificate of merit, albeit to the wrong address, complied with section 55-7B-6.[332] *Elmore* was filed on June 30, 2003, immediately prior to the applicability date for MPLA III, which enacted the lower noneconomic caps.[333] The complaint was filed thirty-one days after plaintiff mailed the notice of claim and certificate of merit to the defendant physician at Greenbrier Valley Medical Center ("GVMC"), where he had privileges, and not to the doctor's home or office.[334] A GVMC employee signed the certified return receipt and put the envelope in the doctor's mailbox at GVMC.[335] Since the doctor did not actually receive the papers until several days later, he did not have thirty days to respond as provided for by section 55-7B-6.[336] The circuit court dismissed the complaint because it was filed before the expiration of thirty days after service, as the pre-filing documents were not properly served upon the physician.[337]

The Supreme Court of Appeals of West Virginia reversed the dismissal in a per curiam opinion,[338] finding plaintiff "complied with the plain meaning of the MPLA when he mailed the notification package by certified mail, return receipt requested, to [the defendant physician's] place of work."[339] Focusing on the policy of section 55-7B-6 to discourage frivolous claims stated in *Hinchman*,[340] the court commented that "a principal consideration before a court reviewing a claim of insufficiency in a notice or certificate should be whether a party challenging or defending the sufficiency of a notice and certificate has

---

328 *Id.* at 95.

329 *Id.*

330 *Id.*

331 640 S.E.2d 217 (W. Va. 2006).

332 *See id.* at 224.

333 *Id.* at 219–20. In fact, *a la Boggs*, 609 S.E.2d 917 (W. Va. 2004), the plaintiff filed another suit after July 1, 2003, and before the statute of limitations expired, as a backup in case the first suit was dismissed. *Elmore*, 640 S.E.2d at 220 n.6.

334 *Elmore*, 640 S.E.2d at 219.

335 *Id.*

336 *Id.*

337 *Id.* at 220.

338 *Id.* at 219.

339 *Id.* at 223.

340 *See* 618 S.E.2d at Syl. pt. 6 (regarding frivolous claims).

demonstrated a good faith and reasonable effort to further the statutory purposes,"[341] and found that "[t]here is nothing in the record to suggest—and Appellee does not allege—that Appellant's claim is frivolous or that his actions impeded pre-suit resolution of the claim."[342]

As to service, the court stated the following:

> It is undisputed that Appellant deposited in the mail the notice of claim by return-receipt certified mail, thirty-one days before filing a medical malpractice suit in the circuit court. Absent further legislative prescription by definition of the term 'serve,' including direction about where a health care provider must be served or similar technicalities regarding perfection of service, Appellant complied with the plain meaning of the MPLA when he mailed the notification package by certified mail, return receipt requested, to Appellee's place of work. Furthermore, we find no reason to penalize Appellant with dismissal of his suit when the record fails to show that Appellant was not acting in good faith or otherwise was neglecting to put forth a reasonable effort to further the statutory purposes.[343]

Justice Benjamin filed a separate opinion, stating the majority erred in allowing a person with no express or implied authority to accept service, finding no support for the proposition that a hospital can accept service for a member of its medical staff.[344] He noted the following:

> Simply put, the mere mailing of a notice of claim to a hospital where a physician provides medical services cannot suffice to establish service of the notice of claim upon the physician unless the notice is received by a person designated by the physician as having the authority to accept such service on the physician's behalf.[345]

In *Blankenship v. Ethicon, Inc.*,[346] the court again reversed the dismissal of a complaint. The plaintiffs, arguing the defendant hospitals were "distributors" of defective surgical sutures, did not serve a notice of claim and certificate of merit prior to filing suit.[347] Following *Hinchman* and its progeny, the court

---

341 *Id.*

342 *Id.* at 224.

343 *Id.* at 223.

344 *Id.* at 225 (Benjamin, J., concurring in part, dissenting in part).

345 *Id.*

346 656 S.E.2d 451 (W. Va. 2007).

347 *Id.* at 453.

remanded the case to allow plaintiffs an opportunity to comply with section 55-7B-6.[348]

The pre-filing requirements of section 55-7B-6 have also been considered in several opinions from West Virginia federal district courts. Two Federal Tort Claims Act ("FTCA") cases show a divergence in whether the pre-filing requirements are substantive or procedural. In *Stanley v. United States*,[349] Judge Keeley, in the Northern District, ruled that the pre-filing requirements were substantive, and the plaintiff's failure to serve a notice of claim and certificate of merit required the dismissal of the action.[350] To the contrary, Judge Copenhaver, in the Southern District, ruled that the pre-filing requirements were procedural and therefore did not require the dismissal of a complaint where the plaintiff did not comply with section 55-7B-6.[351] Whether the pre-filing requirements are substantive or procedural remains a split issue between north and south at this point, although Judge Keeley's opinion in *Stanley* pre-dates *Boggs*.[352]

Judge Broadwater of the Northern District of West Virginia addressed the pre-filing requirements in *Williams v. Fresenius Medical Care*.[353] In *Williams*, the plaintiffs notified the defendants of their intent to file suit, but did not serve a certificate of merit.[354] When the defendants moved to dismiss, the plaintiffs argued that section 55-7B-6(d) allows a sixty-day "safe harbor" from the date of receipt of a notice of claim for the plaintiff to submit a certificate of merit.[355] In response to the defendants' motion to dismiss, the plaintiff included such a notice and thus asserted an additional sixty days within which to provide a certificate of merit.[356]

Similar to *State ex rel. Miller,* Judge Broadwater ruled the plaintiff did not comply with section 55-7B-6 because a certificate of merit was not provided at least thirty days before suit was filed.[357] The court rejected the plaintiff's "safe harbor" argument, concluding the "plaintiff should have provided defendants with a statement of intent to file a certificate of merit within sixty days of

---

348 *Id.* at 454.

349 321 F. Supp. 2d 805, 808 (N.D. W. Va. 2004).

350 *Id.*

351 Hannigan v. United States, Slip. 2:02-1286 (S.D. W. Va. Jan. 7, 2005).

352 Of interest in *Hannigan* is the court's chastisement of the government for waiting until late in the case to raise the plaintiff's failure to comply with section 55-7B-6. By doing so, the plaintiffs were not advised of the government's position in time to cure the problem by filing a new suit under the "old" cap. *Hannigan* suggests that challenges based on the pre-filing requirements should be raised early in the litigation.

353 No. 3:03CV27, 2004 U.S. Dist. LEXIS 29757 at *10–11 (N.D. W. Va. Feb. 26, 2004).

354 *Id.* at *2–4.

355 *Id.* at *6.

356 *Id.*

357 *Id.* at *7.

the date that he advised the defendants he was going to file a claim."[358] The sixty-day "safe harbor" provision:

> [A]pplies to situations where claimants have insufficient time to obtain the screening certificate of merit prior to the expiration of the statute of limitations. Obviously, section 55-7B-6(d) does not help plaintiff here because there was ample time to file the screening certificate of merit prior to the expiration of the statute of limitations.[359]

The court held that because the plaintiff did not comply with the pre-filing requirements, the applicable statute of limitations was not tolled, and the complaint was therefore dismissed with prejudice.[360]

These cases demonstrate that dismissal for failure to comply with section 55-7B-6 is disfavored as a remedy. Combined with the creation of the pre-litigation deficiency notice procedure in *Hinchman,* the message in all of these cases appears to reflect the concern of the majority of the Supreme Court of Appeals of West Virginia over dismissing actions concerning timing or what is viewed as procedural technicalities. While *Gray* suggests *Boggs* is not as broad as some plaintiffs are arguing, it continues to appear that the court will favor dismissal, as in *Miller,*[361] only when there is no compliance and no excuse for lack of compliance. Instead, *Hinchman* reads section 55-7B-6 as primarily directed at encouraging pre-suit resolution of differences, as opposed to the strong requirement of expert testimony intended by the Legislature.[362] In this regard, the court places primacy on the optional mediation provided by section 55-7B-6, elevating it to a requirement which must be requested by the defendant in order to have a valid objection to the sufficiency of these pre-suit documents, even with the prospect of aiding or educating the plaintiff.[363] This may be best demonstrated by the comment in *Roy* that nothing in the record suggested the plaintiffs' claims were frivolous.[364]

To date, the court has avoided the constitutional challenges to section 55-7B-6, choosing instead to interpret the statute in such a manner as to preserve it. Justice Davis's separate opinion in *Hinchman,*[365] restated in *Davis*[366]

---

358 *Id.* at *8.

359 *Id.* at *8–9.

360 *Id.* at *10–11.

361 *See* 607 S.E.2d 485, 490 (W. Va. 2004).

362 Syl. pt. 2, 618 S.E.2d 387, 388 (W. Va. 2005).

363 *See* 607 S.E.2d 485, 490 (W. Va. 2004).

364 629 S.E.2d 751, 758 (W. Va. 2006).

365 *Hinchman,* 618 S.E.2d at 396–407.

366 640 S.E.2d 91, 96 (W. Va. 2006).

and *Elmore*,[367] strongly demonstrates her view that section 55-7B-6 violates the separation of powers, rulemaking, and certain remedy clauses of the West Virginia Constitution.[368] Justice Benjamin opined that section 55-7B-6 is constitutional in *Elmore*.[369] Dissenting in *Miller*,[370] Justice Starcher wrote that "[i]t is well established that this Court has the primary constitutional authority to administer and control the procedural aspects of litigation. *See W.Va. Const.* Art. VIII, § 3 . . . . The new amendments appear to have crossed this constitutional boundary."[371]

D. Ostensible Agency

MPLA III limits the assertion of ostensible agency unless the health care provider who is claimed to be the agent does not have $1,000,000 in insurance coverage.[372] While the provisions of section 55-7B-9(g) have not been interpreted by the Supreme Court of Appeals of West Virginia, the court has dealt with ostensible agency.[373]

In *Burless v. West Virginia Univ. Hosp., Inc.*,[374] the court dealt with the ostensible agency of hospitals for physicians outside the emergency room setting. The court held:

> For a hospital to be held liable for a physician's negligence under an apparent agency theory, a plaintiff must establish that: (1) the hospital either committed an act that would cause a reasonable person to believe that the physician in question *was* an agent of the hospital, or, by failing to take an action, created a circumstance that would allow a reasonable person to hold such a belief, and (2) the plaintiff relied on the apparent agency relationship.[375]

---

367 640 S.E.2d 217, 224–25 (W. Va. 2006).

368 In *Blankenship v. Ethicon*, Justice Davis penned the majority opinion with an introductory footnote restating her opinion on constitutionality. 656 S.E.2d 451, 454 n.2 (W. Va. 2007).

369 *See Elmore*, 640 S.E.2d at 225–26.

370 607 S.E.2d 485, 491 (Starcher, J., dissenting).

371 *Id.* (citations omitted).

372 W. VA. CODE ANN. § 55-7B-9(g) (LexisNexis Supp. 2003).

373 Another issue likely to be litigated is, "What does $1,000,000 in insurance mean?" The statute is likely intended to reflect the requirement of most hospitals that physicians with staff privileges maintain $1,000,000 in coverage, meaning that a physician with an active policy with $1,000,000 limits qualifies. What the statute is not specific about is, for example, what happens if the physician has other claims which have or may cause the available limits to be less than $1,000,000. Even if the physician's insurance does not qualify, the statute does not create an agency relationship. Rather, the plaintiff must prove agency under existing law.

374 601 S.E.2d 85, 88 (W. Va. 2004).

375 *Id.* at Syl. pt. 7 (emphasis added).

Burless is significant because it requires the patient to prove reliance on some action or inaction by the hospital which created an implied agency relationship.[376] *Burless* expressly incorporates the elements of reasonable belief and reliance not seen in the court's prior opinions on ostensible agency.[377]

Section 55-7B-9(g) was at issue in *Cartwright v. McComas*,[378] where the circuit court granted summary judgment to the defendant hospital, finding the plaintiff's ostensible agency claims were barred under the 2003 amendment to section 55-7B-9, which applies to cases filed after July 1, 2003.[379] The plaintiffs appealed the ruling on constitutional and statutory grounds.[380] In a confusing opinion, the Supreme Court of Appeals of West Virginia ignored these arguments and, on its own, applied the "plain error" doctrine to hold the claims against the hospital related back to the original filing of the complaint, which preceded the July 1, 2003 effective date of the statute.[381] Finding the action timely filed before the effective date of MPLA III, the court reversed and remanded the action.[382]

E. Applicability of Noneconomic Damages Cap

In *Gerver v. Benavides*, [383] the Supreme Court of Appeals of West Virginia held that to preserve the applicability of the noneconomic damages cap, the defendant must submit a verdict form or ask for special interrogatories that clearly separate economic and noneconomic damages.[384] Any confusion may result in the cap not being applied.

A similar issue occurred in *Karpacs-Brown v. Murthy*, [385] where the court reversed a circuit court ruling declining to apply the limitation on noneconomic loss to a multi-million dollar damage award ($4,000,000 plus pre- and post-judgment interest) in an MPLA action.[386] The circuit court, citing *Gerver,* determined that because there was some testimony that the plaintiff had lost household services, even though not quantified, the verdict could not be reduced

---

376 *Id.*

377 *Id. See* Torrence v. Kusminsky, 408 S.E.2d 684, 690–93 (W. Va. 1991); Thomas v. Raleigh Gen. Hosp., 358 S.E.2d 222, 225 (W. Va. 1987). In those cases, the requirement of reliance was presumed, and *Burless* thus appears to resurrect reliance as an element of proving ostensible agency. *See also* Glover v. St. Mary's Hosp., 551 S.E.2d 31, 35 (W. Va. 2001) (issue of fact as to whether the hospital's advertising rendered it liable for the acts of the defendant surgeon).

378 672 S.E.2d 297, 298 (W.Va. 2008).

379 W. VA. CODE ANN. § 55-7B-9 (LexisNexis Supp. 2006).

380 *Cartwright*, 672 S.E.2d at 298.

381 *Id.* at 303.

382 *Id.*

383 530 S.E.2d 701, 708 (W. Va. 1999).

384 *Id.* at 708.

385 686 S.E.2d 746, 750–51 (W. Va. 2009).

386 *Id.* at 757.

because there was no separate line for the jury to award economic loss.[387] The court reversed on this issue, finding:

> [U]nlike in *Gerver,* there was no evidence presented of economic damages suffered as a result of Dr. Murthy's negligence. Second, the appellee did not propose any jury instructions on economic damages. In fact, the subject of economic damages was not mentioned at all in the discussion by the parties and the court on jury instructions. Further, the appellee's counsel did not argue for a finding of economic damages during his closing argument. Finally, the verdict form does not clearly provide for a finding of economic damages. Rather, the form simply provides for an amount of damages upon a finding of "Past and future sorrow, mental anguish and solace, loss of companionship, comfort and guidance, and loss of services, protection, care and assistance suffered by [each one of Mrs. Karpacs' children]."[388]

Moreover, the court noted:

> [I]n light of the absence of evidence of economic damages, the fact that such damages were not clearly addressed in the jury instructions, and the fact that economic damages were not argued to the jury, it cannot be concluded that Dr. Murthy was fairly put on notice that the phrase "loss of services, protection, care and assistance" permitted the jury to find that there were economic damages.[389]

Discussing *Miller v. Monongahela Power Co.*,[390] the court noted the general rule that the burden is on the defendant to ask for separate lines on the verdict form, but stated that in light of the absence of evidence of economic loss, it was "reasonable" that the defendant did not request separation.[391] "As a result, Dr. Murthy should not be penalized in light of the reasonableness of her action in this regard."[392] Moreover, because there was no evidence of economic loss, the court also reversed the circuit court's award of pre- and post-judgment interest on the entire verdict.[393]

---

387 *Id.* at 752–53.

388 *Id.* at 753.

389 *Id.*

390 *See* 403 S.E.2d 406, Syl. pt. 7 (W. Va. 1991), *overruled on other grounds by* Mallet v. Pickens, 522 S.E.2d 436, 448 (W. Va. 1999).

391 *Karpacs-Brown*, 686 S.E.2d at 753–54.

392 *Id.* at 754.

393 *Id.* at 755–56.

Justice Workman filed a separate opinion, indicating that she would have affirmed the circuit court ruling allowing a verdict in excess of $4,000,000 to stand. Justice Workman argued that there was sufficient evidence of economic loss and that the defendant had failed to request a separate verdict line.[394]

Riggs v. West Virginia University Hospitals, Inc. affirmed the application of $1,000,000 "cap" of MPLA I to reduce an award from $10,000,000 to $1,000,000.[395] Although *Riggs* may be viewed primarily as an estoppel or "applicability" case, it is also notable for the affirmation of the application of the cap to reduce the verdict.

Another issue is whether the MPLA I cap applies as an overall limit on noneconomic loss regardless of the number of defendants ("per case") or as a limit applicable to each health care provider ("per defendant"). Judge Goodwin, in the U.S. District Court for the Southern District of West Virginia, adopted the latter view in *Daniel v. Beaver*, concluding the language in MPLA I dictated the application "per defendant" because the Legislature could have, but did not make clear, that the cap was an overall limitation.[396] Judge Goodwin rejected cases from other states, most notably *Etheridge v. Medical Center Hospital*,[397] in which the Virginia Supreme Court, interpreting similar language, found that Virginia's cap applied per case.[398]

This issue has not reached the Supreme Court of Appeals of West Virginia. The MPLA III amendments expressly resolve the issue, so it remains to be seen whether there will be litigation over the "old" cap.[399]

F. Causation

The issue of causation remains very fact and case specific, making it difficult to draw general conclusions. For example, the Supreme Court of Appeals of West Virginia reversed summary judgment for defendants in *Stewart v. George*,[400] finding that plaintiff's expert's testimony was sufficient enough to allow the plaintiff to reach the jury on causation.[401]

In *Stewart*, the plaintiffs claimed the defendants failed to diagnose and treat the plaintiff's hyperglycemia, causing him to be more susceptible to the infection he developed after open heart surgery.[402] The circuit court granted

394 *Id.* at 758–59 (Workman, J., dissenting).

395 656 S.E.2d 91, 101 (W. Va. 2007).

396 300 F. Supp. 2d 436, 442 (S.D. W. Va. 2004).

397 376 S.E.2d 525 (Va. 1989).

398 *Beaver*, 300 F. Supp. 2d at 442.

399 Author Thomas J. Hurney has filed motions seeking clarification of the "per case" or "per defendant" issue, which have been deferred pending the need to decide the issue in the event of a verdict.

400 607 S.E.2d 394 (W. Va. 2004).

401 *Id.* at 398.

402 *Id.* at 396.

summary judgment, ruling that there was no evidence that negligence by the defendant health care providers proximately caused injury to the plaintiff.[403]

The Supreme Court of Appeals analyzed the expert's testimony and found that even though the expert could not identify a cause for infection, the defendant's negligence was "a" cause and therefore sufficient under West Virginia law, commenting that "[t]he uncertainties implicit in this medical record are prime territories for jury determination."[404] The court stated:

> Upon thorough review of Dr. O'Grady's deposition testimony in the case sub judice, evaluated in a light most favorable to the Appellants, we find that there is sufficient evidence to potentially create a dispute in the minds of reasonable jurors regarding whether the Appellees' deviations from the applicable standards caused injury to the Appellants.[405]

Stewart, therefore, was remanded back to the circuit court.[406]

The Supreme Court of Appeals also scrutinized the testimony of the plaintiff's expert on causation in *Sexton v. Grieco*[407] to reverse judgment as a matter of law granted to the defendant.[408] The court in *Sexton* found that expert testimony need only establish a reasonable inference of causation.[409]

Sexton was a shoulder dystocia case in which the plaintiff claimed the defendant obstetrician was negligent in failing to perform a cesarian section and in using too much force to deliver the baby.[410] The baby was born with a severe nerve injury to the left shoulder.[411]

At the conclusion of the plaintiff's case-in-chief, the circuit court granted judgment as a matter of law, finding the plaintiff's expert failed to establish causation because he did not explicitly testify that the defendant's negligence was the proximate cause of the injury to the baby.[412] The Supreme Court of Appeals reversed after a detailed review of the expert's testimony, in light of

---

403 *Id.*

404 *Id.* at 399.

405 *Id.* at 398.

406 *Id.* at 399.

407 613 S.E.2d 81 (W. Va. 2005).

408 *Id.* at 87.

409 *Id.* at 84.

410 *Id.* at 83. Shoulder dystocia occurs during a vaginal delivery when the baby's shoulder impacts the mother's pelvis, stopping the baby's movement down the birth canal. It presents an emergency because the physician must get the baby out quickly to avoid an anoxic event. *See generally* Elizabeth Baxley & Robert Gobbo, *Shoulder Dystocia*, 69 AM. FAM. PHYSICIAN 1707 (2004). Shoulder dystocia has been described as "one of the most anxiety-provoking emergencies encountered by physicians practicing maternity care." *Id.*

411 *Sexton*, 613 S.E.2d at 83.

412 *Id.*

plaintiff's concession that no direct question on causation was asked. The court stated the following:

> Medical testimony to be . . . sufficient to warrant a finding by the jury of the proximate cause of an injury is not required to be based upon a reasonable certainty that the injury resulted from the negligence of the defendant. All that is required to render such testimony . . . sufficient to carry it to the jury is that it should be of such character as would warrant a reasonable inference by the jury that the injury in question was caused by the negligent act or conduct of the defendant.[413]

The court rejected the defendant's assertion that the MPLA, which requires proof that the defendant's breach of the standard of care be "*a proximate cause of the injury or death*," modified the common law to require a plain and unambiguous statement of causation.[414] "[W]e find nothing in the language of W. Va. Code § 55-7B-3, or anywhere else in the [MPLA], which shows a legislative intent to *prohibit* the proximate cause inference allowed by *Pygman*."[415] Instead, the court found the MPLA simply codified the common law of causation, and therefore relied on the "reasonable inference" of causation approved in *Pygman*.[416]

Thus, the court analyzed the trial transcript, which contained the expert's testimony of why he believed the defendant breached the standard of care, by "pulling too hard," among other things, and found enough mention of potential injury to establish an "inference" of causation.[417]

---

413 *Id.* at 84 (citing Syl. pt. 1, Pygman v. Helton, 134 S.E.2d 717, 718 (W. Va. 1964)).

414 *Id.*

415 *Id.* at 86–87. The authors think the Supreme Court of Appeals is probably right that MPLA I merely codified existing law of causation. Hurney & Aliff, *supra* note 2, at 424.

416 *Id.* at 87.

417 *Id.* at 84. In a footnote, the court cautioned counsel:

> Justice Cleckley noted in *State ex rel. Cooper v. Caperton*, 196 W .Va. 208, 216, 470 S.E.2d 162, 170 (1996), that "[t]he rule in West Virginia is that parties must speak clearly in the circuit court, on pain that, if they forget their lines, they will likely be bound forever to hold their peace." Although we are reaffirming the holding in *Pygman* that proximate cause may be established through inferences, we believe that the better practice would be to ask an expert a direct question as to whether or not an injury was the proximate cause of medical negligence. This approach would alleviate the protraction of litigation as occurred in the instant case. In fact, during oral argument counsel for the Sextons admitted that trial counsel forgot his lines in not asking Dr. O'Leary a direct question on the issue of proximate cause. Fortunately for the Sextons, Dr. O'Leary provided sufficient testimony to trigger the inference allowed by *Pygman*.

Id. at 87 n.4.

To the contrary, in *Farley v. Shook*, a per curiam opinion, the court found plaintiffs' expert was unable to establish a causal link between the negligence of the emergency room physician and hospital and the patient's injury.[418] Because the plaintiffs failed in sustaining their burden of proving causation, the court found that the grant of summary judgment was "correct."[419] The court reviewed the requirement of expert testimony in MPLA actions under section 55-7B-7 (1986), finding that the case required expert testimony because it involved "complex matters of diagnosis and treatment that are not within the understanding of lay jurors by resort to common knowledge and experience."[420] The court found it significant that the parties entered into an agreed order reflecting the need for expert testimony.[421]

G. *Statute of Limitations*

Dunn v. Rockwell established an omnibus test for determining the discovery rule and application of other tolling doctrines.[422] In an opinion authored by Justice Ketchum, *Dunn* overruled *Cart v. Marcum*,[423] finding *Gaither v. City Hospital, Inc.*[424] and *Cart* were in conflict, particularly as to *Cart*'s third syllabus point, which held:

> Mere ignorance of the existence of a cause of action or of the identity of the wrongdoer does not prevent the running of the statute of limitations; the "discovery rule" applies only when there is a strong showing by the plaintiff that some action by the defendant prevented the plaintiff from knowing of the wrong at the time of the injury.[425]

The *Dunn* court resolved this conflict by holding that the "the 'discovery rule' is generally applicable to all torts, unless there is a clear statutory prohibition to its application."[426]

In *Dunn,* the Supreme Court of Appeals announced a five-part test, which "should be applied to determine whether a cause of action is time-barred:"[427]

---

418 629 S.E.2d 739, 745 (W. Va. 2006).

419 *Id.*

420 *Id.* at 744–45.

421 *Id.* at 747.

422 689 S.E.2d 255 (W. Va. 2009).

423 423 S.E.2d 644 (W. Va. 1992), *overruled by Dunn*, 689 S.E.2d at Syl. pt. 1.

424 487 S.E.2d 901 (W. Va. 1997).

425 *Cart*, 423 S.E.2d at 645.

426 *Dunn*, 689 S.E.2d at Syl. pt. 2.

427 *Id.* at 265.

> First, the court should identify the applicable statute of limitation for each cause of action. Second, the court (or, if material questions of fact exist, the jury) should identify when the requisite elements of the cause of action occurred. Third, the discovery rule should be applied to determine when the statute of limitation began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action, as set forth in Syllabus Point 4 [of *Gaither v. City Hosp., Inc*]. Fourth, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action. Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled. And fifth, the court or the jury should determine if the statute of limitation period was arrested by some other tolling doctrine. Only the first step is purely a question of law; the resolution of steps two through five will generally involve questions of material fact that will need to be resolved by the trier of fact.[428]

Dunn also addressed actions against an employer/principal and held the statute of limitations begins to run based on the tort committed by the employee/agent:

> [T]he doctrine of *respondeat superior* imposes liability on an employer for the [tortious] acts of its employees within the scope of employment, not because the employer is at fault, but merely as a matter of public policy. . . . Because the employer may only be held liable to the extent that the employee can be held liable, and only for acts committed by the employee in the course of his or her employment, the statute of limitation applicable is determined by the [tortious] act of the employee.[429]

The *Dunn* court also analyzed the plaintiffs' assertion of a civil conspiracy, issuing new syllabus points:

> A civil conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose or to accomplish some purpose, not in itself unlawful, by unlawful

---

428 *Id.* at 265 (citation omitted).

429 *Id.* at 274.

> means. The cause of action is not created by the conspiracy but by the wrongful acts done by the defendants to the injury of the plaintiff.[430]

> A civil conspiracy is not a *per se*, stand-alone cause of action; it is instead a legal doctrine under which liability for a tort may be imposed on people who did not actually commit a tort themselves but who shared a common plan for its commission with the actual perpetrator(s).[431]

As to the statute of limitations applicable to a civil conspiracy, the court held that it "is determined by the nature of the underlying conduct on which the claim for conspiracy is based."[432]

Perrine v. E.I. du Pont de Nemours & Co. analyzed the *Dunn* rule in the context of a class action for property damage and medical monitoring.[433] The Supreme Court of Appeals found that the circuit court incorrectly granted summary judgment to the plaintiffs on the issue of whether the case was timely filed within the statute of limitations.[434] The court "conditionally affirmed" the jury's verdict and remanded the case, with directions to the circuit court to conduct a jury trial on the sole issue of when the plaintiffs possessed the requisite knowledge to trigger the running of the statute of limitations.[435]

> If the jury determines that the Plaintiffs did not have the requisite knowledge more than two years prior to filing their cause of action, then the judgment in favor of the Plaintiffs, as modified herein, stands. If, however, the jury determines that the Plaintiffs had the requisite knowledge more than two years prior to filing their cause of action, then the trial court must set aside the verdict and render judgment in favor of DuPont.[436]

In *Mack-Evans v. Hilltop Healthcare Center, Inc.*,[437] the court applied the *Dunn* test and found the plaintiff's wrongful death claim was barred by the statute of limitations.[438] In *Mack-Evans*, a personal representative of a patient's estate brought a wrongful death action and personal injury claims against a hos-

---

430 *Id.* at Syl. pt. 8.

431 *Id.* at Syl. pt. 9.

432 *Id.* at Syl. pt. 10.

433 694 S.E.2d 815, 906–07 (W. Va. 2010).

434 *Id.* at 852.

435 *Id.* at 853.

436 *Id.*

437 700 S.E.2d 317 (W. Va. 2010).

438 *Id.* at 327.

pital responsible for the patient's care.[439] The patient had surgery on January 29, 2004, and was immediately visited afterwards by her daughter. After talking with hospital personnel, the patient's daughter contacted a lawyer within days "because she believed someone at the Hospital did something wrong in treating her mother."[440] The patient died on August 9, 2004, and the statute of limitations ran on August 9, 2006.[441] The daughter, as representative of the estate, mailed a notice of claim to the hospital on August 16, 2006; a certificate of merit on October 12, 2006; and filed a complaint on November 17, 2006.[442] The hospital moved for summary judgment, arguing the claims were time barred by the two-year statute of limitations.[443] The daughter argued she "could not have known that [the Hospital's] negligence caused or contributed to her mother's death until she was appointed Administrator of her mother's estate on August 20, 2004 [,] and had access to her mother's medical records."[444] The circuit court granted summary judgment because it found: (1) the statute of limitations began to run on the date of the patient's death, August 9, 2004, and expired on August 9, 2006; (2) the personal representative did not mail the notice of claim until August 16, 2006; and (3) the discovery rule did not toll the statute of limitations.[445]

On appeal, the Supreme Court of Appeals of West Virginia affirmed the circuit court's order, finding the complaint was time barred.[446] Critical to the court's reasoning was the plaintiff's concession that at the time of her mother's death, she believed the hospital had done something wrong and "had reasonable cause to believe that conduct by the Hospital may have caused [the patient]'s death."[447]

Regarding the personal injury claim, plaintiff contended that the statute of limitations did not begin to run on the date of the patient's death, but instead

---

439 *Id.* at 320.

440 *Id.*

441 *Id.*

442 *Id.*

443 *Id.*

444 *Id.* at 322.

445 *Id.* at 321–22.

446 *Id.* at 324.

447 *Id. Mack-Evans* quoted *Legg v. Rashid,* 663 S.E.2d 623, 629–30 (W. Va. 2008), as follows:

> [W]e explained that 'once a [plaintiff] is aware, or should reasonably have become aware, that medical treatment by a particular party has caused [harm], th[e] statute begins.' We further recognized that 'in some circumstances causal relationships are so well established that we cannot excuse a plaintiff who pleads ignorance.' Also, . . . we explained that 'the statute of limitations will begin to run once the extraordinary result is known to the plaintiff even though he may not be aware of the precise act of malpractice.' (quoting *Gaither v. City Hosp., Inc.,* 199 W. Va. 206, 487 S.E.2d 901 (W. Va. 1997)).

Mack-Evans, 700 S.E.2d at 324.

began to run when plaintiff was appointed administrator of the patient's estate.[448] The court rejected this argument, finding that the running of the statute was governed by West Virginia Code section 55-7-8a(c), which provides:

> If the injured party dies before having begun any such action and it is not at the time of his death barred by the applicable statute of limitations . . . , such action may be begun by the personal representative of the injured party against the wrongdoer . . . . Any such action shall be instituted within the same period of time that would have been applicable had the injured party not died.[449]

Although this statute does not toll the statute of limitations for the purpose of appointing a representative of a decedent's estate, the court found that it is impacted by the mental disability tolling provisions under West Virginia Code section 55-2-15, and issued the new syllabus point:

> The statute of limitations for a personal injury claim brought under the authority of W. Va.Code § 55–7–8a(c) (1959) (Repl.Vol.2008) is tolled during the period of a mental disability as defined by W. Va.Code § 55–2–15 (1923) (Repl.Vol.2008). In the event the injured person dies before the mental disability ends, the statute of limitations begins to run on the date of the injured person's death.[450]

The court found that the statute of limitations did not begin to run on the personal injury claim on the date of the patient's alleged injury because section 55-2-15 tolled the statute of limitations while the patient was under a mental disability.[451] The court further noted, "[t]hat mental disability ended when Ms. Mack died on August 9, 2004. Therefore, the statute of limitations began to run on the date of her death."[452] This meant that the two-year statute of limitations had expired on the personal injury claim before the plaintiff mailed the notice of claim.[453] The court therefore upheld summary judgment to the hospital on the personal injury claim.[454]

---

448 *Id.* at 325.

449 *Id.* at 325–26.

450 *Id.* at Syl. pt. 5.

451 *Id.* at 327.

452 *Id.*

453 *Id.*

454 *Id.*

Some "pre-*Dunn*" cases are worth reading, as they rely upon *Gaither*.[455] For example, the Supreme Court of Appeals applied the MPLA's discovery rule[456] in *Jones v. Aburahma*.[457] In *Jones*, the plaintiff had heart surgery on July 24, 1998, and developed a pseudoaneurysm, which subsequently burst and required emergency surgery.[458] While hospitalized after the successful repair of the pseudoaneurysm, plaintiff suffered a stroke.[459] The plaintiff filed suit on November 17, 2000.[460]

Jones summarized the discovery rule, stating that it applies in two circumstances. Under *Gaither*,[461] the rule applies where "the plaintiff knows of existence of an injury, but does not know the injury is a result of any party's conduct other than his own."[462] The second occurs when the individual "does or should reasonably know of the existence of an injury *and* its cause."[463] In this circumstance, the individual must "make a strong showing of fraudulent concealment, inability to comprehend the injury, or other extreme hardship" to claim the protection of the discovery rule.[464]

The Supreme Court of Appeals found the plaintiff knew or reasonably should have known of the negligence before October 1, 1998.[465] As neither of plaintiff's experts testified there was malpractice after that date, the court found the treatments plaintiff received "were not additional acts of malpractice, but treatment for the alleged medical malpractice that had already occurred."[466] Thus, "the statute of limitations began to run at the date of injury—not from the last date of treatment."[467]

The plaintiff argued that the defendant's failure to provide medical records for six months required an extension of the statute of limitations under the discovery rule.[468] The court noted that "[i]n some circumstances, the failure to timely provide medical records could rise to the level of fraudulent concealment."[469] However, the court found that the plaintiff knew she had been injured,

---

455 Gaither v. City Hosp., Inc., 487 S.E.2d 901 (W. Va. 1997).

456 W. VA. CODE ANN. § 55-7B-4(a) (LexisNexis 1994).

457 600 S.E.2d 234 (W. Va. 2004).

458 *Id.* at 234–35.

459 *Id.* at 235.

460 *Id.*

461 487 S.E.2d 901 (W. Va. 1997).

462 *Jones*, 600 S.E.2d at 236 (quoting *Gaither*, 487 S.E.2d at 908).

463 *Id.*

464 *Id.*

465 *Id.*

466 *Id.* at 237.

467 *Id.*

468 *Id.*

469 *Id.*

suspected the defendants were negligent, and received her medical records with plenty of time left in the statutory period.[470]

Merrill v. West Virginia Department of Health & Human Resources deals with the proper application of the discovery rule.[471] *Merrill* arose from a suit against the Department of Health and Human Resources ("DHHR") by children sexually abused by their father, which occurred between 1978 and 1987.[472] Suit was filed in 2002, when the two plaintiffs were thirty-three and thirty-seven years old.[473] The complaint alleged that DHHR fraudulently concealed its knowledge of the abuse.[474]

The court applied West Virginia Code section 55-2-15 to find the statute of limitations ran two years after each plaintiff turned eighteen years old.[475] Applying the three *Gaither* factors, the court found the plaintiffs knew of their injury (the sexual abuse) since becoming adults.[476] The plaintiffs also knew the identity of the wrongdoer, the DHHR, based on testimony about meetings and the plaintiffs' knowledge that they "were let down."[477] The court distinguished knowledge of legal duties of a wrongdoer from the identity of the wrongdoer.[478]

The court also examined *Cart v. Marcum* in a separate analysis, consistent with the *Gaither/Cart* dichotomy, and found no evidence that DHHR prevented the plaintiffs from knowing of their claim.[479] Records were not requested until 2000 and were timely turned over,[480] suggesting that silence by a defendant is not enough.[481]

Goodwin v. Bayer Corporation, a per curiam opinion, affirmed summary judgment for the defendants in an exposure case.[482] *Goodwin* focused on testimony that established the plaintiff was told by his doctor of breathing problems from paint, and filed for disability more than two years before filing suit:

> In the end, consideration of the discovery rule based upon the unrebuttable record herein leads the Court to agree with the circuit court that the underlying action was filed well over two years after Goodwin first knew that he suffered a breathing

---

470 *Id.*

471 632 S.E.2d 307, 309–10 (W. Va. 2006).

472 *Id.* at 310.

473 *Id.* at 310–11.

474 *Id.* at 311.

475 *Id.* at 317.

476 *Id.* at 313.

477 *Id.* at 314.

478 *Id.* at 313.

479 *Id.* at 318.

480 *Id.*

481 *Id.*

482 624 S.E.2d 562, 570 (W. Va. 2005).

> problem caused by his use of isocyanate-containing paints. While it is unclear to us why there was such a significant delay in the filing of the underlying action, it is clear that the discovery rule was never intended to excuse such a delay, nor will this Court allow the discovery rule to be modified, manipulated or expanded to now be used to remedy such a delay. Accordingly, we agree that Goodwin's complaint was filed beyond the applicable statute of limitations.[483]

In *Willey v. Bracken*,[484] the court addressed the effect of West Virginia's "borrowing statute," West Virginia Code section 55-2A-2, which states, "[t]he period of limitation applicable to a claim accruing outside of this State shall be either that prescribed by the law of the place where the claim accrued or by the law of this State, whichever bars the claim."[485] The statute had been applied in the past to bar cases that were barred by the statute of limitations in another state.[486]

In *Willey*, the plaintiff alleged malpractice by the defendant surgeon during a surgery performed in Ohio, which resulted in the need for a corrective surgery performed by another physician in West Virginia.[487] The court treated the second surgery, even though not negligently performed, or done by the defendant, as an additional injury the defendant caused.[488] Thus, the court held the complaint was not barred by the statute of limitations based on the "unique" facts before it, issuing a new syllabus point:

---

483 *Id.* at 568–69.

484 Slip Op. No. 35519, 2010 WL 4025599 (W. Va. Oct. 14, 2010).

485 W. VA. CODE ANN. § 55-2A-2 (LexisNexis 2008).

486 For example, in *Hayes v. Roberts & Schaefer Co.*, 452 S.E.2d 459 (W. Va. 1994), the court upheld dismissal of plaintiff's complaint as barred by Kentucky's one year statute of limitation, stating:

> In summary, we hold that *W.Va.Code*, 55-2A-2 [1959] provides that "[t]he period of limitation applicable to a claim accruing outside of [West Virginia] shall be either that prescribed by the law of the place where the claim accrued or by the law of [West Virginia], whichever bars the claim." Therefore, under *W.Va.Code*, 55-2A-2 [1959], when a person files a personal injury claim in West Virginia more than one year after the injury occurred in Kentucky, Kentucky's one-year statute of limitations for personal injuries, rather than West Virginia's two-year statute of limitations for personal injuries, is applicable because the Kentucky period of limitations would bar the claim.

Id. at 462. The court stated, "The spirit of *W.Va.Code*, 55-2A-2 [1959] clearly favors the extinguishment of the claim." *Id.*; *see also* McKinney v. Fairchild, 487 S.E.2d 913 (W. Va. 1997) (citing *Hayes*, 452 S.E.2d at 462) (discussing effect of West Virginia Code section 55-2A-2, "which 'clearly favors the extinguishment of the claim,'" but finding West Virginia Code section 55-2-18 [1985], extended the statute of limitations after dismissal of prior action).

487 Willey, 2010 WL 4025599 at *1–2.

488 *Id.* at *11.

> When a cause of action is filed in a West Virginia court seeking damages for a surgical procedure that was negligently performed in a foreign jurisdiction, along *with damages for a subsequent surgical procedure performed in West Virginia as a direct result of the negligence in the foreign jurisdiction*, public policy demands that the applicable West Virginia statute of limitations applies to the negligence committed in the foreign jurisdiction. Under these unique circumstances, the West Virginia borrowing statute, W. Va. Code § 55-2A-2 (1959) (Repl. Vol. 2008), has no application.[489]

The court's opinion relied heavily on the Certain Remedy Clause of the West Virginia Constitution, which states, "[t]he courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay."[490] The court found that the plaintiff's complaint, which was barred by Ohio's one-year statute of limitation, could be brought in West Virginia because the plaintiff had surgery in West Virginia to repair the injury from the alleged negligence. Taken to its extreme, *Willey* invalidates West Virginia Code section 55-2A-2 in cases where the malpractice occurs in another state, but treatment for injuries "as a direct result" of the malpractice occurs in West Virginia, thereby allowing plaintiffs to invoke the longer statute of limitations (assuming there is jurisdiction over the health care provider). Since *Willey* is limited to its "unique" facts, its effect on other cases is unknown.

H. Expert Witnesses

In most circumstances, MPLA plaintiffs are required to prove a breach of the standard of care and causation through expert testimony.[491] The Supreme Court of Appeals of West Virginia continues to require a minimal demonstration of qualification, with respect to education and training, and some familiarity

---

489 *Id.* at Syl. pt. 3 (emphasis added).

490 *Id.* at *14 (citing W. VA. CONST. art. III, § 17).

491 W. VA. CODE ANN. § 55-7B-7 (LexisNexis Supp. 2003). For a discussion concerning whether the statute is constitutional, see Section III.A.ii. Expert testimony is required in other cases, such as products liability, where necessary to prove product defect. In *Gibson v. Little Gen. Stores, Inc.*, 655 S.E.2d 106 (W. Va. 2007), the plaintiff sued for damages sustained when she was "soaked" with gas from an allegedly "malfunctioning" pump at a convenience store. *Id.* at 107–08. Summary judgment, granted when the plaintiff did not support the product defect allegations with expert testimony or any explanation as to why or how the pump malfunctioned, was affirmed by the Supreme Court of Appeals. *Id.* at 110. The court found the plaintiff's "claim that the gasoline pump malfunctioned [was] based solely upon her own unsubstantiated opinion and conclusory speculation." *Id.*

with the issue in question.[492] The basis for the opinion is largely left as a matter for cross examination.

In *Walker v. Sharma*,[493] the circuit court excluded plaintiff's expert, finding he was unfamiliar with the surgical technique employed by the defendant because it was not used where he practiced, and therefore, could not testify as to the standard of care.[494]

Walker involved claims against a urologist who perforated the plaintiff's urethra during a cystoscopy that was performed using Bard instruments.[495] At trial, the plaintiff's expert testified the defendant was negligent in the manner in which he "used the Bard instrument set in attempting to dilate the constricted area of [the plaintiff's] urethra."[496] The circuit court granted the defendant's motion for judgment as a matter of law because the plaintiff's expert "was not familiar with the methods employed for the dilation of urethral strictures at the hospitals in Huntington, West Virginia or at Duke University or at other hospitals where he does not practice."[497] Thus, the circuit court concluded plaintiff's expert could not "establish what constituted the national standard of care and that a deviation from the national standard of care occurred."[498]

The Supreme Court of Appeals reversed, finding the circuit court improperly applied the "locality rule" by requiring the expert to be familiar with practices in Huntington, West Virginia, as opposed to applying a national standard of care.[499] "What this case demonstrates is how this Court's decision to abandon the locality rule in medical malpractice cases in favor of a standard of care more national in approach is often misemployed to prevent qualified physicians from offering testimony in cases brought under the [MPLA]."[500] The court's discussion is instructive:

> By eliminating the locality rule, courts such as ours clearly sought to remove the requirement that an expert was not qualified to testify in a medical malpractice case unless he was intimately familiar with local procedures and techniques. In reason-

---

492 *See* Walker v. Sharma, 655 S.E.2d 775, 779 n.2 (W. Va. 2007) (citing Gilman v. Choi, 406 S.E.2d 200, 204 (W. Va. 1990)) (requiring a showing that the physician has 'more than a casual familiarity' with the standard of care and treatment commonly practiced by physicians engaged in the defendant's specialty). *See also* Fortney v. Al-Hajj, 425 S.E.2d 264 (W. Va. 1992) (experience in treating type of injuries can satisfy "same or similar field" requirement).

493 655 S.E.2d 775 (W. Va. 2007) (also discussed in Section III.A.ii.).

494 *Id.* at 780.

495 *Id.* at 777. The physician performed the cystoscopy to dilate, or open up, the plaintiff's constricted urethra. *Id.*

496 *Id.* at 778

497 *Id.* at 779.

498 *Id.*

499 *Id.* at 780.

500 *Id.* (footnote omitted).

> ing that Dr. Lewis' extrajurisdictional [sic] practice prevented him from being able to testify as to the standard of care that applied in this case, the trial court hinged its decision on the same rationale which underlies the now-rejected locality rule. The trial court wrongly read into a national standard of care (which is nothing more than the rejection of the locality rule) a requirement that an expert has to be familiar with each and every procedure and piece of equipment used by local physicians to testify as to the standard of care. Simply put, the adoption of a standard of care that is national in approach does not prevent an otherwise qualified expert from testifying as to the applicable standard of care based solely on the fact that the expert employs a medically accepted but different method of performing the same type of procedure at issue in a medical malpractice suit. We certainly appreciate that a given plaintiff might prefer to have as his expert a physician who is intimately familiar with the exact method or instrument set at issue in a given medical malpractice case. That, however, is nothing more than an issue of how much weight is to be accorded to the expert's testimony; it does not go to the admissibility of that expert's testimony in the first place. See *Gentry v. Mangum*, 195 W.Va. 512, 527, 466 S.E.2d 171, 186 (1995) (recognizing that "[d]isputes as to the strength of an expert's credentials, *mere differences in the methodology*, or lack of textual authority for the opinion go to weight and not to the admissibility of their testimony") (emphasis supplied).[501]

The court found plaintiff's expert was appropriately qualified and in fact offered testimony of the standard of care and the defendant's breach thereof.[502] "Where the trial court went astray in making its ruling was to equate [the expert's] purported lack of familiarity with a particularized instrument system with lack of knowledge as to the standard of care that applied to the use of that set of instruments."[503] Thus, the fact the expert did not use the particular procedure employed by the defendant did not disqualify him—any unfamiliarity could be explored through cross examination. *Walker* contained two new syllabus points:

> Following a trial court's decision that a physician is qualified to offer expert testimony in a given field, issues that arise as to the physician's personal use of a specific technique or procedure to which he or she seeks to offer expert testimony go only to the

---

501 *Id.* at 781.

502 *Id.* at 782.

503 *Id.*

> weight to be attached to that testimony and not to its admissibility.[504]

> Where there are several approved methods of performing a particular medical procedure, the fact that a physician who is qualified to offer an expert opinion based on field of practice and expertise utilizes a different method than the doctor whose actions are at issue does not prevent the physician from offering testimony on the applicable standard of care in a medical malpractice case.[505]

Implicit in *Walker* is the suggestion that the issue of an expert's personal practice is a matter for cross examination. In *Condra v. Atlanta Orthopaedic Group, P.C.*, the Supreme Court of Georgia, citing *Walker* and other cases, reversed the trial court's ruling, which prohibited cross examination of plaintiff's expert regarding his personal practices.[506] The court concluded:

> Lacking the benefit of knowledge that defendants' own experts routinely practiced differently from the standard of care to which they had testified, the jury was compelled to make a determination as to the standard of care based on incomplete and potentially misleading information. Under these circumstances, we cannot find the erroneous exclusion of personal practices testimony to have been harmless.[507]

---

504 *Id.* at Syl. pt. 3.

505 *Id.* at Syl. pt. 4.

506 681 S.E.2d 152, 155 (Ga. 2009).

507 *Id.* at 156 (citation omitted). *Condra* reversed *Johnson v. Riverdale Anesthesia Assocs.*, 563 S.E.2d 431 (Ga. 2002), relying in part on *Walker* and cases from other jurisdictions:

> Also important in our decision to shift course on this issue is the growing body of case law from other jurisdictions supportive of the admissibility of expert personal practices testimony, at least for some purposes. See, e.g., *Swink v. Weintraub*, 672 S.E.2d 53(III) (N.C. Ct.App. 2009) (affirming admission of personal practices testimony); *Bergman, supra*, 313 Ill.Dec. 862, 873 N.E.2d at 507(II)(B)(2)(d) (affirming admission of personal practices testimony for impeachment purposes); *Smethers, supra*, 108 P.3d at 956 (reversing exclusion of personal practices testimony); *Gallina v. Watson*, 354 Ill.App.3d 515, 290 Ill.Dec. 275, 821 N.E.2d 326(II)(A) (2004) (reversing exclusion of personal practices testimony); *Wallbank v. Rothenberg*, 74 P.3d 413(I) (Colo. Ct.App. 2003) (affirming admission of personal practices testimony). See also *Hartel v. Pruett*, 998 So.2d 979(I)(E) (Miss. 2008) (no abuse of discretion in permitting expert personal practices testimony); *Walker v. Sharma*, 221 W.Va. 559, 655 S.E.2d 775, 782-783 (W. Va.2 007) (where physician qualified as expert, personal practices as to procedures on which expert opinion offered relevant for purposes of assessing credibility). Though not all jurisdictions have followed this trend, see, e.g., *Vititoe v. Lester E. Cox Med. Centers*, 27 S.W.3d

Fout-Iser v. Hahn, is another case, like *Walker,* in which the Supreme Court of Appeals of West Virginia carefully parsed the testimony of plaintiff's expert and reversed summary judgment granted to defendant.[508] In *Fout-Iser,* a pregnant woman came to the emergency room of a rural hospital that did not provide obstetrical services.[509] The emergency room physician ordered an ultrasound, and an inexperienced radiology technologist took some images and sent them via teleradiology to the radiologist on call.[510] Because the films were inadequate, the radiologist, who had died by the time the complaint was filed, instructed the technologist to try and obtain better studies.[511] In deposition, the technologist testified the radiologist was angry and cursing (as prominently featured in the court's opinion).[512] When the technologist did not call back within thirty minutes, the radiologist called and was told the patient was being transferred.[513] When the patient reached the next hospital, which was an hour away, the baby had already died.[514] Prior to trial, the hospital and emergency room physician settled with the plaintiffs, and the circuit court granted summary judgment to the radiologist, which plaintiffs appealed.[515]

The Supreme Court of Appeals agreed with plaintiffs' argument that the combined testimony of their experts was enough to create an issue of fact for the jury, and ignored the fact that no expert testified that a breach of the standard of care by the radiologist was a cause of the plaintiffs' injuries.[516] Justice Davis's dissent reflects her careful examination of the experts' testimony, as well as her

---

812(III) (Mo. Ct.App. 2000) (affirming exclusion of personal practices testimony); *Carbonnell v. Bluhm*, 114 Mich.App. 216, 318 N.W.2d 659(III) (1982) (same), admissibility of personal practices testimony appears now to be the prevailing view.

Id. at 155. *Condra* also relied on the Georgia statute, Official Code of Georgia Annotated section 24-9-67.1(c)(2)(A), similar to West Virginia Code section 55-7B-7, which set forth requirements for expert testimony, finding that personal experience was relevant and part of the threshold inquiry into qualification. *Condra*, 681 S.E.2d at 154. *Walker*, while allowing this inquiry, was broader, in that the expert was not required to demonstrate personal experience or knowledge of a particular technique before being allowed to testify as to a breach of the standard of care. 655 S.E.2d 775, Syl. pt. 3 (W. Va. 2007). Once allowed, the lack of experience is fodder for cross examination.

508 649 S.E.2d 246, 252 (W. Va. 2007).

509 *Id.* at 248. Disclosure: Author Thomas J. Hurney, Jr., represented the radiologist on appeal.

510 *Id.*

511 *Id.*

512 *Id.*

513 *Id.* at 249.

514 *Id.*

515 *Id.*

516 *Id.* at 251.

concern that the majority relied on testimony by experts who expressly stated they were not offering expert testimony against the radiologist.[517]

Walker and *Fout-Iser* demonstrate the court will continue to closely examine expert testimony in MPLA actions and will apply *Gilman's* "more than passing familiarity" standard to qualifications, leaving most issues for cross examination.[518] This is largely consistent with the court's general approach to expert testimony, which was illustrated in *State ex rel. Jones v. Recht.*[519] *Jones* addresses generally the exclusion of expert testimony under Rule 702 of the West Virginia Rules of Evidence,[520] applying the "*Daubert*" analysis required by *Wilt v. Buracker.*[521] In *Jones,* the court reversed the complete exclusion of an expert who testified as to lack of injury due to low impact as well as neurological injury.[522] The court found the circuit court should have examined the testimony; excluded that which was "personal opinion", i.e., opinions on low impact; but admitted that which was within the witness's expertise, i.e., opinions on neurological injury, even though the separation between the two was difficult.[523]

Similarly, in *Perrine v. E.I. du Pont de Nemours & Co.,* a class action toxic tort, where the jury awarded approximately $380,000,000 for property damage and required medical monitoring, the Supreme Court of Appeals affirmed the circuit court's admission of plaintiffs' experts.[524] One plaintiff's expert, Dr. Brown, proffered as "an expert in contaminant assessment, remediation, related fields such as fate and transport, risk assessment and the [sic] fingerprinting contamination" was found qualified by the circuit court and allowed

---

[517] *Id.* at 252–58. (Davis, J., dissenting). Justice Davis also focused on plaintiffs' failure to appropriately respond to the motion for summary judgment with transcripts and other evidence, finding the record did not contain the materials they relied upon. *Id.*

[518] For cases finding that the proffered expert was not qualified to offer expert testimony, see Farley v. Shook, 629 S.E.2d 739 (W. Va. 2006) (emergency medicine physician did not have knowledge or skill and therefore was not qualified to testify to the standard of care applicable to podiatrists); Green v. Charleston Area Med. Ctr., Inc., 600 S.E.2d 340, 345–46 (W. Va. 2004) (trial court did not commit reversible err in prohibiting plaintiff's expert, a nurse administrator, from testifying about hospital's duty to warn of hazards of blood factor concentrate in light of her qualifications on the subject, which were debatable at best); Kiser v. Caudill, 599 S.E.2d 826 (W. Va. 2004) (plaintiff's expert was not qualified to testify on the applicable standard of care, as he indicated that he had no knowledge of the standard of care outside of his hospital and was not an expert on the medical condition at issue, had never written on the subject or performed any scientific studies, and could not cite any medical textbooks or literature to support his opinions).

[519] 655 S.E.2d 126 (W. Va. 2007).

[520] *Id.* at 310.

[521] 443 S.E.2d 196, 203 (W. Va. 1993), *cert. denied,* 511 U.S. 1129 (1994).

[522] *Jones*, 655 S.E.2d at 132.

[523] *Id.*

[524] 694 S.E.2d 815 (W. Va. 2010).

to testify "within his areas of expertise and within the limits as expressed by him."[525]

The defendant argued that Dr. Brown was not qualified and should not have been allowed to testify outside his area of expertise about the effects of exposure.[526] The court found that even though Dr. Brown was not a physician or toxicologist, his knowledge, skill, experience, training, and education qualified him as an expert, and his testimony was within his demonstrated expertise.[527] Weaknesses could be explored in cross examination. In a stringent dissent, Justice Ketchum challenged Dr. Brown's qualifications to offer the broad testimony allowed by the circuit court.[528]

The court's reluctance to exclude expert testimony was also illustrated in *San Francisco v. Wendy's International, Inc.*[529] In *San Francisco*, the court reversed the exclusion of plaintiffs' experts in a case of food poisoning,[530] finding that the experts were qualified to offer expert testimony under *Gentry v. Mangum*[531] and that their testimony was reliable under the *Daubert/Wilt* analysis. More importantly, the court issued two new syllabus points:

> Because the summary judgment process does not conform well to the discipline and analysis that *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1993) impose, the *Daubert/Wilt* regime should be employed only with great care and circumspection at the summary judgment stage. Courts must be cautious--except when defects are obvious on the face of a proffered expert opinion--not to exclude debatable scientific evidence without affording the proponent of the evidence adequate opportunity to defend its admissibility. Given the plain language of the *West Virginia Rules of Evidence*, the side trying to defend the admission of expert evidence must be given an adequate chance to do so.[532]
>
> A medical opinion based upon a properly performed differential diagnosis is sufficiently valid to satisfy the reliability prong of the Rule 702 inquiry under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469

525 *Id.* at 866.

526 *Id.*

527 *Id.* at 871.

528 *Id.* at 916–17 (Ketchum, J., dissenting).

529 656 S.E.2d 485 (W. Va. 2007).

530 *Id.* at 502.

531 466 S.E.2d 171 (W. Va. 1995).

532 *Wendy's*, 656 S.E.2d at Syl. pt. 4.

> (1993) and *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1993). A differential diagnosis is a tested methodology, has been subjected to peer review/publication, does not frequently lead to incorrect results, and is generally accepted in the medical community. Opinions based on differential diagnosis must be analyzed on a case-by-case basis, ensuring that the medical expert's application of the technique is reliable and proper in each case.[533]

Both of these principles embody the court's preference for the admissibility, rather than the exclusion, of expert testimony, as reflected by Justice Davis, who noted in her concurring opinion:

> All too often this Court is called upon to decide a case in which the trial court has been reluctant to permit an expert witness to testify despite the fact that the witness's credentials qualify him/her as an expert and the matters about which the expert is called to testify are both relevant and reliable to the case at hand. Rather than freezing like a proverbial deer in the headlights, however, trial courts should be mindful that scientific evidence presented through expert witnesses is presumptively admissible.[534]

I. Expert Witnesses: "Sham" Affidavits, Deadlines, & Disqualification

Three cases address the "sham" affidavit doctrine, which deals with changing testimony of experts after deposition to avoid summary judgment or exclusion of the experts.

Kiser v. Caudill (*Kiser II*)[535] was a remand after a reversal of the circuit court's grant of judgment as a matter of law for the defendant based on inadequate expert testimony in *Kiser I*.[536] On remand, the defendants deposed the

---

533 *Id.* at Syl. pt. 5.

534 *Id.* at 502 (Davis, J., concurring).

535 599 S.E.2d 826 (W. Va. 2004).

536 The first time, *Kiser v. Caudill*, 557 S.E.2d 245 (W. Va. 2001) (*Kiser I*), resulted in a per curiam opinion reversing judgment as a matter of law for the physician defendant. The circuit court dismissed the case because one of the plaintiff's experts was unqualified, and the other was disclosed late. *Id.* at 247. Plaintiff's expert, a neurologist, conceded in deposition and trial he did not hold himself out to be an expert in neurosurgery, did not know the standard of care for the treatment at issue, and did not plan to testify about the standard of care required of a neurosurgeon. *Id.* at 250. At trial, during cross-examination, he acknowledged that he was not qualified or trained in the field of neurosurgery and was not familiar with the manner in which neurosurgical procedures are performed. *Id.* "Given [the expert's] own admissions about his limited knowledge of neurosurgery, we do not find that the circuit court erred by limiting his testimony at trial to the field of neurology." *Id.* Clearly, the *Kiser I* opinion has good language affirming the discretion of the circuit court as to the unqualified expert.

plaintiffs' late disclosed expert and then moved to strike the expert's testimony and for summary judgment.[537] In response, the plaintiffs submitted an affidavit from the expert, which created an issue of fact, but which contradicted his deposition testimony.[538] The Supreme Court of Appeals of West Virginia affirmed the striking of the "sham" affidavit:

> [T]o defeat summary judgment, an "affidavit that directly contradicts prior deposition testimony is generally insufficient to create a genuine issue of fact for trial, unless the contradiction is adequately explained. To determine whether the witness's explanation for the contradictory affidavit is adequate, the circuit court should examine: (1) Whether the deposition afforded the opportunity for direct and cross-examination of the witness; (2) whether the witness had access to pertinent evidence or information prior to or at the time of his or her deposition, or whether the affidavit was based upon newly discovered evidence not known or available at the time of the deposition; and (3) whether the earlier deposition testimony reflects confusion, lack of recollection or other legitimate lack of clarity that the affidavit justifiably attempts to explain."[539]

With the exclusion of the "sham" affidavit, the court affirmed summary judgment because plaintiff's expert was admittedly not qualified.[540] He conceded he was not an expert on the medical condition at issue, had never written on the subject, nor performed any scientific studies, and could not cite any medical textbooks or literature to support his opinions.[541]

The second case in the "sham" affidavit trilogy, *State ex rel. Krivchenia v. Karl,* dealt with post-deposition changes to an expert's opinions, wherein the Supreme Court of Appeals vacated the circuit court's ruling prohibiting the defense expert from testifying.[542] After the expert testified in deposition that "standard of care" was a term used by lawyers and that he did not intend to opine on the standard of care, the plaintiffs' motion to exclude was granted by the circuit court.[543] The defendant filed a motion to reconsider and submitted an affidavit from the expert, in which he stated that after his deposition, he was advised of the meaning of the legal term "standard of care" and believed that the

---

537 *Kiser II*, 599 S.E.2d at 829.

538 *Id.*

539 *Id.* (quoting Yahnke v. Carson, 613 N.W.2d 102, 109 (Wis. 2000)).

540 *Kiser* II, 599 S.E.2d at 834.

541 *Id.*

542 600 S.E.2d 315, 321 (W. Va. 2004).

543 *Id.* at 319.

defendant physician did not breach the standard of care.[544] The Supreme Court of Appeals held it was an abuse of discretion for the circuit court to deny the defendant's motion for reconsideration.[545] Justice McGraw dissented.[546]

The third case in the "sham" affidavit trilogy is *Calhoun v. Traylor,*[547] which followed *Kiser I,*[548] and adopted the *Rohrbaugh v. Wyeth Laboratories, Inc.*[549] approach to "sham" affidavits. *Calhoun* affirmed summary judgment where the plaintiffs submitted an affidavit from their expert in opposition to defendants' motion for summary judgment which "directly contradict[ed]" his deposition testimony.[550]

Closely related to the "sham" affidavit doctrine is the enforcement of deadlines to identify experts and provide information about their opinions. The Supreme Court of Appeals addressed these issues in *Farley v. Shook.*[551] The plaintiffs sued two podiatrists, an emergency room physician, and a hospital for medical professional liability arising from a post-surgical infection which ended in an amputation.[552] The circuit court held a mandatory status conference, then entered an agreed order requiring the plaintiffs to prove liability and causation with expert testimony, and also entered a scheduling order setting deadlines for the disclosure of expert witnesses by all parties.[553]

The plaintiffs disclosed a single expert—an emergency medicine physician.[554] The defendants, after an agreed extension, identified experts, and then deposed plaintiffs' expert.[555] Although plaintiffs' expert testified that the defendant emergency room physician and hospital nurses were negligent, he "was unable to link [the negligence] to the ultimate outcome," and further testified he would defer to an infectious disease specialist on issues of causation.[556] "[B]ecause his area of expertise is emergency medicine, he did not testify as to any deviation of the standard of care as it would apply to podiatrists . . . ."[557]

The circuit court granted the hospital and emergency room physician's joint motion for summary judgment, to which plaintiffs did not respond with

---

544 *Id.* at 320.

545 *Id.*

546 *Id.* at 321 (McGraw, J., dissenting).

547 624 S.E.2d 501 (W. Va. 2005).

548 Kiser v. Caudill, 557 S.E.2d 245 (W. Va. 2001).

549 916 F.2d 970 (4th Cir. 1990).

550 *Calhoun*, 624 S.E.2d at 504–05.

551 629 S.E.2d 739 (W. Va. 2006).

552 *Id.* at 742–43.

553 *Id.* at 743.

554 *Id.*

555 *Id.*

556 *Id.* at 745.

557 *Id.* at 743.

pleadings or affidavits, based on the lack of causation testimony.[558] The podiatrists then filed a summary judgment motion based on the lack of expert testimony as to liability.[559] The plaintiffs sought reconsideration of the order dismissing the hospital and emergency room physician.[560] The circuit court denied the motion to reconsider and also granted the podiatrists' motion for summary judgment.[561]

The plaintiffs challenged both grants of summary judgment on appeal. The Supreme Court of Appeals affirmed the order dismissing the hospital and emergency room physician for lack of adequate causation.[562] However, the court reversed summary judgment for the podiatrists, finding the circuit court should have given the plaintiffs additional time to name experts.[563] Although the court agreed that the plaintiffs' only identified expert did not establish liability against the podiatrists, "the particular facts of this case require scrutiny beyond [the plaintiffs' expert's] competence to testify about podiatry practices."[564] Specifically, the court examined the circuit court's order denying the plaintiffs' motion to extend the time to identify expert witnesses and found significant the fact that plaintiffs' counsel had granted the defendants' request for an extension of their expert disclosure deadline on two separate occasions "without hesitation" and therefore expected the same courtesy from defense counsel when plaintiffs' counsel requested an extension.[565] However, defendant's counsel opposed plaintiffs' counsel's request for additional time to disclose experts.[566] The court found unfairness in such lack of reciprocal courtesy.[567]

The court further focused on the plaintiffs' inability to depose the defendant podiatrists until after the expert deadline had already passed, suggesting it was unfair to hold plaintiffs to the agreed deadline under the circumstances and implying that the expert deadlines were not so set in stone.[568] Reversing sum-

---

558 *Id.*

559 *Id.*

560 *Id.*

561 *Id.*

562 *Id.* at 748.

563 *Id.*

564 *Id.* at 746.

565 *Id.* at 747.

566 *Id.*

567 *Id.*

568 *Id.* Commenting on the agreements between counsel, in a footnote, the court noted:

> We take this opportunity to point out that this case emphasizes the importance of complying with the West Virginia Rules of Civil Procedure when parties request alterations to scheduling orders, and further prescribes the necessity of reducing parties' agreements to writing. In this case, the defendant doctors and St. Mary's had requested extensions of their expert disclosure deadlines, which were memorialized in stipulations signed by all counsel. These written stipulations were filed with the circuit court on January 13, 2003, and again on

mary judgment, the court stated these impediments meant that the plaintiffs "were not afforded adequate time to identify experts in light of the impediments with which they were faced. Therefore, it follows that the summary judgment awarded to Dr. Shook and Dr. Miller, on the basis that no expert existed to testify against them, must be reversed."[569] While the court will enforce scheduling orders, *Farley's* reversal of the podiatrists' dismissal suggests it will not do so in the face of arguments that one party gained unfair advantage.[570]

In addition to expert deadlines, the Supreme Court of Appeals has also addressed when an expert must be disqualified. In *State ex rel. Billups v. Clawges*,[571] the court held that the circuit court did not abuse its discretion in denying plaintiffs' motion to disqualify an expert from testifying for the defendants. The expert had previously been consulted by the plaintiffs pre-suit.[572] After reviewing the medical records, the expert advised the plaintiffs that his review did not support the issuance of a certificate of merit, so the plaintiffs then obtained a certificate of merit from another physician and filed suit.[573] The defendants then independently located and retained the expert to review the medical records.[574] After receiving the records, the expert advised the defendants that he had previously reviewed the records for the plaintiffs and had given them a negative review.[575] The defendants terminated their consultation with the expert at that point and advised plaintiffs of their contact with the expert and their desire to retain him as an expert. Plaintiffs objected, claiming that the expert was their "non-testifying expert" to whom they had provided a confidential medical

---

> March 14, 2003. When counsel for the Farleys realized the need for an extension, a similar practice should have been employed instead of relying on a professional courtesy that never materialized. The particular facts of this case, including the obstacles the defendant doctors and St. Mary's placed before the Farleys, and the inequity in not allowing the Farleys an opportunity to develop an expert witness against Dr. Shook and Dr. Miller, allow this Court to remedy the injustice on the Farleys. Finally, to the extent that parties do agree to alter a scheduling order, even if the agreement is in writing, the parties must also be aware that such agreement ultimately requires approval by the circuit court.

Id. at 747 n. 3.

569 *Id.*

570 For cases where the court enforced expert deadlines, see Jenkins v. CSX Transp., Inc., 649 S.E.2d 294 (W. Va. 2007) (per curiam) (upholding trial court's decision to prohibit plaintiff's medical expert from offering an opinion on causation due to plaintiff's failure to disclose the opinion prior to trial); Graham v. Wallace, 588 S.E.2d 167 (W. Va. 2003) (party's failure to fully disclose the substance of expert witness's expected testimony prior to trial constituted unfair surprise in violation of discovery rules and therefore required a new trial).

571 620 S.E.2d 162 (W. Va. 2005).

572 *Id.* at 165–66.

573 *Id.* at 165.

574 *Id.*

575 *Id.*

summary and had disclosed their theory of the case.[576] Plaintiffs then sought a writ of prohibition after the circuit court denied their motion to prohibit the defendants from retaining the expert.[577]

The court denied plaintiffs' writ, finding that the circuit court did not abuse its discretion in refusing to disqualify the expert.[578] In reaching its decision, the Supreme Court of Appeals adopted the following test for expert witness disqualification in such context:

> In cases where disqualification of an expert witness is sought, the party moving for disqualification bears the burden of proving that at the time the moving party consulted with the expert: (1) it was objectively reasonable for the moving party to have concluded that a confidential relationship existed with the expert; and (2) confidential or privileged information was disclosed to the expert by the moving party. Disqualification is warranted only when the evidence satisfactorily demonstrates the presence of both of these conditions.[579]

Applying the law to the facts at hand, the court found "it was objectively reasonable for Petitioners to conclude that a confidential relationship had existed with the doctor during the consultation period."[580] Regarding the second prong of the test, the court determined, based on its *in-camera* review of sealed documents in the record, that no confidential information was disclosed to the expert by plaintiffs, given that the information contained in them was either contained in the medical records, pre-suit filings, and pleadings, or would be discoverable under the Rules of Civil Procedure.[581]

J. Evidence, Procedure, Trial and Other Issues

1. Jury Selection Issues

In *Murphy v. Miller*, the Supreme Court of Appeals of West Virginia reversed a defense verdict in an MPLA case arising out of a birth injury, finding that statements by a physician juror demonstrated disqualifying bias that should have resulted in a strike for cause.[582] The court reviewed its jurisprudence on jury bias, and then examined closely the statements of the challenged juror:

---

576 *Id.* at 166.

577 *Id.*

578 *Id.* at 169.

579 *Id.* at Syl. pt. 3.

580 *Id.* at 168.

581 *Id.*

582 671 S.E.2d 714, 722 (W. Va. 2008).

> [A] prospective juror, Dr. Walter, clearly demonstrated his prejudice and/or bias during voir dire. The voir dire of Dr. Walter was conducted in two phases. First, Dr. Walter answered a series of questions presented to all potential jurors in the form of a written juror questionnaire. Second, based upon Dr. Walter's answers in that questionnaire, he was further questioned in chambers. The answers provided by Dr. Walter on the initial written juror questionnaire revealed that Dr. Walter, in his capacity as a dentist, had been the defendant in what he identified as a "frivolous lawsuit settled out of court. . . ." In response to a written question eliciting his opinion on "providing compensation for pain and suffering, mental anguish, or other emotional damage as the result of the negligence of doctors or other health care professionals," Dr. Walter wrote that "[c]ompensation needs to be provided in some cases but with limits." Dr. Walter also explained in the written juror questionnaire that this state "has some of the highest health care insurance rates because of medical malpractice lawsuits and their verdicts." Further, Dr. Walter stated in the written questionnaire that "frivolous lawsuits cost everyone except the attorneys involved."[583]
>
> During the subsequent verbal evaluation of Dr. Walter in chambers, he answered a question regarding pain and suffering damages, stating that "[i]t would be hard to justify an amount for pain and suffering. I don't know that there's any way you can compensate people for that." Dr. Walter was asked whether he could follow the trial court's instructions concerning damages, setting "aside whatever notions you might have personally about damages. . . ." He replied, "I would try." When questioned further about his ability to disregard "your personal views about what you may think the law is or ought to be . . .," Dr. Walter responded, "I can say I would try to follow the instructions of the Court, yes, whatever."[584]
>
> With regard to his own personal experience as a defendant in a medical malpractice action, Dr. Walter admitted, "obviously, I'm going to be a little bit prejudiced." He also expressed specific hesitation in awarding damages for anything less than a deliberate act, explaining that he would be able to bring a lawsuit seeking to recover damages for a relative of his "[i]f it was a deliberate act, if it was something like that, I guess, deliberate —

---

583 *Id.* at 716.

584 *Id.* at 721–22.

> if it was an accident, if it wasn't. I don't know, it would be a tough call, to be honest." Dr. Walter continued: "We're all human. We all make mistakes. We should be accountable for it, but I don't know." When asked whether he believed medical professionals ought to be less accountable, he responded, "I wouldn't say less accountable, but I think we need to take into consideration what's going on."[585]

Discussing two other challenged jurors, the court found that the plaintiff waived any challenge because she failed to move to strike one of them for cause.[586] Examining the testimony of the other, the court found no abuse of discretion in refusing to strike for cause.[587]

The court considered similar arguments in *Macek v. Jones.*[588] In *Macek*, the court applied *O'Dell v. Miller*[589] and found that because the jurors challenged by the plaintiff did not make disqualifying statements of bias, the circuit court did not abuse its discretion in allowing them to serve:

> Upon this Court's independent examination of the transcript of the voir dire proceedings in this case, we are unable to conclude that either Juror George or Juror Stolburg made a clear statement of disqualifying bias toward Dr. Jones or Weirton Medical Center sufficient to disqualify him from serving on the jury. While we believe that the trial court was correct to conclude that the jurors' initial comments compelled further inquiry by the trial court, we find that such additional questioning revealed that each of these potential jurors was free from disqualifying bias or prejudice. The trial court competently considered the totality of the circumstances and conducted a comprehensive inquiry before determining that the jurors were competent to serve.[590]

Despite reversing on this basis, the court addressed plaintiff's claims that the defendants were improperly given separate "strikes" and found sufficient adversity between the defendants to justify them.[591] Scrutinizing the claims against the physician and nurse, the court stated:

---

585 *Id.*

586 *Id.* at 722.

587 *Id.* at 723.

588 671 S.E.2d 707 (W. Va. 2008).

589 565 S.E.2d 407 (W. Va. 2002).

590 *Macek*, 671 S.E.2d at 713–14.

591 Murphy v. Miller, 671 S.E.2d 714 (W. Va. 2008).

> Examining the factors enumerated in *Price* [*v. Charleston Area Medical Center* 629 S.E.2d 176 (W. Va. 2005)], this Court observes that the record reveals that the respective interests of Dr. Burech and Nurse Asher are indeed antagonistic. Separate claims of negligence were alleged against Dr. Burech and Nurse Asher, the acts occurred at different points in time, they were represented by separate counsel, and the verdict form submitted to the jury required it to apportion liability, if found, between Dr. Burech and the West Virginia University Board of Governors based upon Nurse Asher's actions. The two did not share a common defense theory, and a specific factual dispute arose regarding the conversation that occurred during the telephone call on the night Shawn was born. The Appellants claimed that Nurse Asher was obligated to advise Dr. Burech regarding treatments, Nurse Asher contended that she did provide such recommendation; and Dr. Burech disputed that testimony. The provision of bicarbonate, volume, and generous oxygen was one of the very essential issues at trial.[592]

State v. Newcomb,[593] which applied the *O'Dell* rule in a criminal case, clarifies that clear statements of bias require disqualification; however, responses to general questions are not enough and require further inquiry:

> When a prospective juror makes a clear statement of bias during *voir dire*, the prospective juror is automatically disqualified and must be removed from the jury panel for cause. However, when a juror makes an inconclusive or vague statement that only indicates the possibility of bias or prejudice, the prospective juror must be questioned further by the trial court and/or counsel to determine if actual bias or prejudice exists. Likewise, an initial response by a prospective juror to a broad or general question during *voir dire* will not, in and of itself, be sufficient to determine whether a bias or prejudice exists. In such a situation, further inquiry by the trial court is required. Nonetheless, the trial court should exercise caution that such further *voir dire* questions to a prospective juror should be couched in neutral language intended to elicit the prospective juror's true feelings, beliefs, and thoughts — and not in language that suggests a specific response, or otherwise seeks to rehabilitate the juror. Thereafter, the totality of the circumstances must be considered, and

592 *Id.* at 724.

593 679 S.E.2d 675 (W. Va. 2009).

> where there is a probability of bias the prospective juror must be removed from the panel by the trial court for cause.[594]

In *Mikesinovich v. Reynolds Memorial Hospital*, the Supreme Court of Appeals of West Virginia reversed and remanded a defense verdict because "the spouse of one of the jurors was a long-time employee of one of the parties to the case."[595] The Supreme Court of Appeals found the circuit court abused its discretion in not striking the juror, whose wife worked at the defendant hospital for twenty-three years, for cause on motion of the plaintiff.[596] The Supreme Court of Appeals found:

> [T]he relationship of Juror W with the hospital was fairly close. Leaving aside the normal associational ties of a person with their spouse's employer, Juror W's earning power, household income, and family welfare was directly and specifically dependent in part on one of the parties to the lawsuit. Moreover, the juror's spouse worked at the specific physical location where the alleged acts of negligence occurred, and in the same job classification as the individual hospital employee who is alleged to have been negligent. As the cases cited *supra* indicate, such a prospective juror has regularly been held by a wide variety of courts under settled principles of law to be disqualified from service – precisely because of a close relationship to one of the parties.[597]

Thomas v. Makani is an interesting case on juror disqualification, as it appears to sway from the rule that former patients of a physician must be struck.[598] *Thomas* suggests that if voir dire does not expose bias, they are not automatically struck, and restates the rule that you must object to the refusal to strike a juror for cause.[599]

2. Multiple Defendants and Jury Selection

In *Price v. Charleston Area Medical Center, Inc.*, the circuit court gave separate sets of peremptory challenges to the three defendants, while giving only three challenges to the plaintiff.[600] On appeal, the Supreme Court of Ap-

---

594 *Id.* at 691–92.

595 640 S.E.2d 560, 560 (W. Va. 2006).

596 *Id.*

597 *Id.* at 563–64.

598 624 S.E.2d 582 (W. Va. 2005).

599 *Id.* at 585–86.

600 619 S.E.2d 176, 181 (W. Va. 2005).

peals of West Virginia reversed the defense verdict, holding that defendants are entitled to separate peremptory challenges only if they are "antagonistic" or "hostile."[601] The court issued three pertinent syllabus points:

> In the determination by the trial court of the number of peremptory challenges to be allowed two or more plaintiffs or two or more defendants pursuant to Rule 47(b) of the *West Virginia Rules of Civil Procedure*, plaintiffs or defendants with like interests are ordinarily to be considered as a single party for the purpose of allocating the challenges. Where, however, the interests of the plaintiffs or the interests of the defendants are antagonistic or hostile, the trial court, in its discretion, may allow the plaintiffs or the defendants separate peremptory challenges, upon motion, and upon a showing that separate peremptory challenges are necessary for a fair trial.[602]
>
> In determining whether the interests of two or more plaintiffs or two or more defendants are antagonistic or hostile for purposes of allowing separate peremptory challenges under Rule 47(b) of the *West Virginia Rules of Civil Procedure*, the allegations in the complaint, the representation of the plaintiffs or defendants by separate counsel and the filing of separate answers are not enough. Rather, the trial court should also consider the stated positions and assertions of counsel and whether the record indicates that the respective interests are antagonistic or hostile. In the case of two or more defendants, the trial court should consider a number of additional factors including, but not limited to: (1) whether the defendants are charged with separate acts of negligence or wrongdoing, (2) whether the alleged negligence or wrongdoing occurred at different points of time, (3) whether negligence, if found against the defendants, is subject to apportionment, (4) whether the defendants share a common theory of defense and (5) whether cross claims have been filed. To warrant separate peremptory challenges, the plaintiffs or defendants, as the case may be, as proponents, bear the burden of showing that their interests are antagonistic or hostile and that separate peremptory challenges are necessary for a fair trial.[603]
>
> In ruling upon the request of two or more plaintiffs or two or more defendants for separate peremptory challenges under Rule

---

601 *Id.* at 185.

602 *Id.* at Syl. pt. 2.

603 *Id.* at Syl. pt. 3.

> 47(b) of the *West Virginia Rules of Civil Procedure*, the trial court shall set forth, on the record, its reasons for so ruling in a manner sufficient to permit meaningful appellate review.[604]

Kominar v. Health Management Associates of West Virginia, Inc., which also reversed a defense verdict, touches upon issues related to the trial of cases involving multiple defendants, including jury strikes, multiple experts, cross-examination, and lost medical records.[605]

Kominar arose from the treatment of a patient, who was involved in a catastrophic automobile accident, taken immediately to the emergency room, and pronounced dead fifty minutes later. The pronouncement was made eleven minutes after he arrived at the hospital emergency room.[606] The plaintiffs claimed that an endotracheal tube was misplaced by the paramedics and that the emergency room physician failed to timely discover it.[607] After a defense verdict at trial, the court reversed, primarily due to the circuit court's decision to allow the defendants to have separate peremptory challenges.[608]

Addressing the peremptory challenge issue, the Supreme Court of Appeals enforced *Price*.[609] Agreeing that the circuit court addressed the issue, the court did not defer to its conclusion, but rather found a lack of adversity among the defendants.[610] "It is an abuse of discretion for a trial court to allow separate peremptory challenges absent such showing because of the risk of affording co-parties a clear tactical advantage of collectively exercising their challenges against their opponent rather than each other."[611]

Rather than requiring a demonstration of prejudice by the plaintiff, the court issued a blanket rule requiring reversal where too many peremptory challenges are given to defendants, issuing a new syllabus point: "Once an error in the allocation of peremptory challenges is found on appeal because the record below prior to the swearing of the jury does not show a serious dispute constituting hostile or antagonistic positions among co-parties, reversal and a new trial will be granted the adversely affected litigant."[612] The court also addressed the issue of spoliation of certain records:

> The records in question are the original and hospital copy of the ambulance accident report or "run sheet," the printout of the

---

604 *Id.* at Syl. pt. 4.

605 648 S.E.2d 48 (W. Va. 2007).

606 *Id.* at 53.

607 *Id.*

608 *Id.* at 59.

609 619 S.E.2d 176 (W. Va. 2005).

610 *Kominar*, 648 S.E.2d at 57.

611 *Id.*

612 *Id.* at Syl. pt. 6.

> EKG taken by MCAS paramedics, and the printout of the EKG run at WMH. The evidence produced at trial reflects that the original run sheet was initially lost and when it eventually surfaced it had been facially altered; the hospital copy of the run sheet was never located. The evidence also revealed that the EKG monitor strip run by MCAS was never found. The testimony of three paramedics included speculations that the EKG strips were stapled to the undiscovered hospital copy of the run sheet which was left in the emergency room, or the strips were not salvageable because they were bloodied and trampled during the course of the rescue efforts. The EKG strip of the test performed at WMH was not lost, but only representative portions of the strip were retained in the hospital's medical records.[613]

The court applied the factors set forth in *Tracy v. Cottrell*, which require examination of:

> (1) the party's degree of control, ownership, possession or authority over the destroyed evidence; (2) the amount of prejudice suffered by the opposing party as a result of the missing or destroyed evidence and whether such prejudice was substantial; (3) the reasonableness of anticipating that the evidence would be needed for litigation; and (4) if the party controlled, owned, possessed or had authority over the evidence, the party's degree of fault in causing the destruction of the evidence.[614]

The court found there was insufficient evidence to require an adverse instruction against the hospital, stating that "the paramedics [sic] testimony did not establish that the hospital copy of the run sheet was actually delivered to anyone in the emergency room or that the ambulance run EKG strips were ever attached to that copy of the run sheet, the first prong of the *Tracy* test was not proven."[615] To the contrary, the record suggested an instruction was warranted as to the records lost by the EMTs.[616]

The plaintiff also challenged the circuit court's refusal to allow cross examination about the hospital's discovery responses, which initially did not disclose the run sheet that was later produced.[617] On this issue, the court found:

---

613 *Id.* at 59.

614 *Id.* at 59–60 (quoting Tracy v. Cottrell, 524 S.E.2d at Syl. pt. 2).

615 *Id.* at 60.

616 *Id.*

617 *Id.*

> We find no error in the trial court's conclusions about this matter. The record indicates that the triage sheet was ultimately produced before trial and its initial omission did not prejudice Appellant. As to the list of individuals providing treatment, the hospital explained that it compiled the list from the names of people on duty at the time of the accident holding positions it believed relevant to the injuries sustained. The list was not compiled from the medical records of the decedent and some of the names supplied had not provided treatment. We agree with the trial court that this evidence was not critical to any matter Appellant had to establish in her malpractice claim and it did not bolster her spoliation argument.[618]

The court also addressed plaintiff's claim that in opening statements, one of the defendants violated an *in limine* ruling prohibiting discussion of the investigation of the automobile accident, as well as the admission of the testimony of the investigating officer that he was not surprised the patient did not survive.[619] The court found counsel's argument did not violate the pretrial ruling, but admission of the officer's testimony did, and the court cautioned the circuit court to "careful[ly] and steadfast[ly] adhere" to the rulings on retrial.[620]

The court affirmed the exclusion of the testimony of an embalmer that the patient did not "leak" embalming fluid from any major arteries, finding the witness had not been disclosed as an expert prior to trial.[621] On this point, Justice Starcher urged, in his separate opinion, that the embalmer was qualified, and on retrial, should be allowed to testify.[622]

The court also addressed the issue of experts and cross examination of experts in cases with multiple defendants. As to plaintiff's argument that the defendants were improperly allowed multiple experts, the court, after a review of West Virginia cases, stated:

> Given the broad discretion afforded trial courts regarding evidentiary matters, we cannot say that the trial court abused its discretion in allowing each defendant to have separate experts. We do note that the hospital's expert specializing in emergency medicine essentially served to bolster the testimony of Dr. Zamora's own expert regarding whether the doctor performed in accord with the standard of care. In essence, there were three experts called to offer testimony supporting Dr. Zamora's

618 *Id.* at 60–61.

619 *Id.* at 61.

620 *Id.* at 62.

621 *Id.*

622 *Id.* at 66 (Starcher, J., concurring).

> treatment of Mr. Kominar. While it is suitable for a trial court to reconsider the number of experts a party may call when there are changes in circumstances during the course of trial such as the directed verdict granted for the hospital in this case, we do not find that refusing to do so necessarily results in an imbalance of fairness to all parties.[623]

On remand, the Supreme Court of Appeals directed the circuit court to examine the adversity between a party and a particular expert before allowing cross examination.[624] Of concern to the court was allowing defendants to cross examine each other's experts to show they are not critical of their client, when their direct examination only supported the party retaining the expert:[625]

> It would be virtually impossible to try complex multiparty litigation if every party had the unbridled right to cross-examine witnesses called by every other party on issues not related, or only tangentially related, to the witness' testimony in chief. We, therefore, hold that trial courts should carefully examine whether an adversarial relationship exists between co-parties at the time a motion to limit cross examination is raised in order to avoid the danger of prejudice, confusion, or delay.[626]

Kominar is important in any case tried with multiple defendants. It makes clear that if separate jury challenges are allowed, the defendants proceed at the risk of losing any verdict. It provides a powerful tool to plaintiffs to limit the cross examination of defense experts. Both issues require defendants seeking separate challenges or cross examination to make a careful record.

3. The "Empty Chair"

In *Green v. Charleston Area Medical Center, Inc.*,[627] the Supreme Court of Appeals of West Virginia reversed a defense verdict in a MPLA case based on arguments blaming an absent party made by defense counsel during opening statements and closing arguments.[628]

Green involved the claims of a hemophiliac who developed HIV/AIDS and subsequently died after being administered blood products in the emergency

---

623 *Id.* at 64.

624 *Id.* at 65.

625 *Id.* at 64–65.

626 *Id.* at 65.

627 600 S.E.2d 340 (W. Va. 2004).

628 *Id.* at 346.

room after a mining accident. [629] His estate instituted a wrongful death action against the manufacturer of the blood product, the emergency room physician, and the hospital.[630] The manufacturer settled, and the case proceeded to trial against the doctor and hospital.[631] After a defense verdict, the plaintiff appealed on multiple grounds.[632] The plaintiff first argued that the physician's attorney made improper and prejudicial remarks to the jury.[633] The physician's counsel, according to the Supreme Court of Appeals, actively argued that fault in the case was that of manufacturer and the laboratory division, who had settled and were not present at trial.[634] At the conclusion of opening statements, plaintiff's counsel objected and moved for mistrial.[635] The motion was denied, and similar remarks were made by defense counsel during closing argument without objection.[636]

Citing *Groves v. Compton*[637] and *Doe v. Wal-Mart Stores, Inc.*,[638] the court held that defense counsel's arguments were improper.[639] "[A]n argument attributing blame to an absent party, where the evidence of that party's liability has not been fully developed, allows a jury to speculate inappropriately regarding the absent party's role in the case."[640] The court also found that there was no factual support for certain assertions made during argument.[641] Because defense counsel attributed sole blame to the absent defendant, the court found the remarks prejudicial and reversed and remanded for a new trial.[642]

4. Evidence of Disability Award

Brooks v. Galen of West Virginia, Inc., affirmed the circuit court's ruling, which took judicial notice of and admitted the plaintiff's social security award as evidence of the cause of the plaintiff's disability (which contradicted the plaintiff's attempt to claim her injury and inability to work resulted from malpractice).[643] The Supreme Court of Appeals of West Virginia found:

---

629 *Id.* at 342.

630 *Id.* at 342–43.

631 *Id.* at 343

632 *Id.*

633 *Id.*

634 *Id.* at 344.

635 *Id.*

636 *Id.*

637 280 S.E.2d 708 (W. Va. 1981).

638 558 S.E.2d 663 (W. Va. 2001).

639 *Green*, 600 S.E.2d at 344.

640 *Id.*

641 *Id.* at 345.

642 *Id.*

643 649 S.E.2d 272, 283 (W. Va. 2007).

> The fact that a workers' compensation claimant has been awarded social security disability benefits is persuasive evidence that the claimant is permanently and totally disabled for workers' compensation purposes, and where social security disability is founded on work-related medical conditions that are substantially similar to those being asserted in connection with a workers' compensation claim for permanent total disability, the social security disability award should be given considerable weight. [644]

The court further noted that the plaintiff failed to object to the introduction of the social security evidence, thereby waiving it on appeal; moreover, the court held the "plain error" doctrine did not apply.[645] The court also affirmed the exclusion of plaintiff's expert testimony against the emergency room physician, finding it was never disclosed pre-trial or in two depositions of the expert.[646]

A similar issue was addressed in *Murphy v. Miller*.[647] The plaintiff challenged the circuit court overruling an objection to the introduction of evidence of "educational or other public benefits or services available to [the infant]" during cross examination of his life care expert.[648] Examining the testimony, the court stated:

> Upon thorough review of this matter, this Court declines to find reversible error on this issue. In *Ratlief v. Yokum*, 167 W. Va. 779, 280 S.E.2d 584 (1981), this Court observed that the admission of collateral source evidence is harmless where "the jury did not reach the damage issue but disposed of the case against the plaintiff on the liability issue." *Id.* at 788, 280 S.E.2d at 590. That is precisely the situation in the present case since the jury found for the Appellees on the issue of liability and never reached the issue of damages. We consequently find that any admission of testimony regarding future benefits to which Shawn would have been entitled was harmless.[649]

---

644 *Id.* at Syl. pt. 9 (quoting Syl. Pt. 4, Lambert v. Workers' Comp. Div., 566 S.E.2d 573 (W. Va. 2002)).

645 *Id.* at 278–79.

646 *Id.* at 282–83. On close examination, it is difficult to square *Brooks v. Galen* with the later opinion in *Estate of Fout-Iser ex rel. Fout-Iser v. Hahn*, 649 S.E.2d 246 (W. Va. 2007).

647 671 S.E.2d 714 (W. Va. 2008).

648 *Id.* at 726.

649 *Id.* at 727 (citing Ratlief v. Yokum, 280 S.E.2d 584, 590 (W. Va. 1981).

5. Death Certificates

In *Goldizen v. Grant County Nursing Home*,[650] the Supreme Court of Appeals of West Virginia reversed the circuit court's grant of summary judgment to a defendant nursing home in a wrongful death action after the physician who signed the decedent's death certificate later changed his mind as to the cause of death. During his deposition, the physician, who was disclosed by plaintiffs as their sole expert on causation, testified that the cause of death he certified on the death certificate (acute aspiration) was in error.[651] The nursing home was granted summary judgment on the grounds that the plaintiffs were unable to establish causation.[652]

The Supreme Court of Appeals reversed, finding that a genuine issue of material fact existed as to causation.[653] Central to the court's decision was section 16-5-28(d), which provides that "[a] certified copy of a vital record issued in accordance . . . shall be *prima facie* evidence of the facts stated in the record."[654] In light of this statute, the court held that "a certified cause of death listed on a death certificate is accorded *prima facie* weight as to the facts stated therein."[655] Because there was no equivocation as to the facts stated in the death certificate, the court found that it was "entitled to be accorded the probative value of *prima facie* evidence."[656] Regarding the physician later renouncing during his deposition the accuracy of the death certificate, the court noted:

> What Dr. Bensenhaver attempts to do through his deposition testimony is to constructively amend Ms. Goldizen's death certificate which--if permitted--would undermine the integrity and accuracy of our vital statistics records. The Legislature recognized the importance of properly amending or correcting a vital statistics record:
>
> > In order to protect the integrity and accuracy of vital records, a certificate or report registered under this article *may be amended only* in accordance with the provisions of this article or legislative rule.
>
> W.Va. Code, 16-5-25(a) [2006]. (Emphasis added).

---

650 693 S.E.2d 346, 350 (W. Va. 2010).

651 *Id.* at 348.

652 *Id.* at 347.

653 *Id.* at 350.

654 *Id.* at 349 (quoting W. VA. CODE ANN. § 16-5-28(d) (LexisNexis 2006)).

655 *Id.* at 350.

656 *Id.* at 350.

> There is no indication in the record before us that Ms. Goldizen's death certificate has been amended as required by W.Va. Code, 16-5-25(a) [2006]. Accordingly, the Plaintiffs have *prima facie* evidence that Ms. Goldizen died as a result of "acute aspiration."[657]

Regarding the physician's inconsistent statements on causation, the court determined that "such inconsistencies go to the weight to be afforded his testimony. It is for a jury to decide what weight to give that testimony."[658]

6. Learned Intermediary

In *State ex rel. Johnson & Johnson Corp. v. Karl*, the Supreme Court of Appeals of West Virginia considered a writ of prohibition seeking to compel the circuit court to apply the "learned intermediary" doctrine.[659] The case arose from a death of plaintiff's decedent alleged to have been caused by taking Propulsid®.[660] The plaintiffs sued the prescribing physician and the manufacturer of the drug.[661] After a period of discovery, the defendant manufacturer filed a motion for summary judgment, asserting "that, under the learned intermediary doctrine, it had fulfilled its duty to warn by providing warnings regarding Propulsid® to [the prescribing physician]."[662] After the motion was denied due to conflicting issues of fact, the manufacturer filed a pretrial motion in limine to prohibit plaintiff from arguing it "had a duty to provide any warnings regarding Propulsid® to [the decedent] personally."[663] Upon denial of the motion, the manufacturer filed a petition for a writ of prohibition.[664]

In a lengthy opinion penned by Justice Davis, the Supreme Court of Appeals traced the origins of the learned intermediary doctrine and concluded "under West Virginia products liability law, manufacturers of prescription drugs are subject to the same duty to warn consumers about the risks of their products as other manufacturers. [The Court] decline[d] to adopt the learned intermediary exception to this general rule."[665]

The court was influenced by the changing nature of direct marketing of pharmaceuticals to consumers via the media and concluded essentially that drug and device manufacturers should be treated no differently than manufacturers of

---

657 *Id.* at 350 (quoting W. VA. CODE ANN. § 16-5-25(a) (LexisNexis 2006)).

658 *Id.* at 350.

659 647 S.E.2d 899 (W. Va. 2007).

660 *Id.* at 901.

661 *Id.*

662 *Id.*

663 *Id.*

664 *Id.*

665 *Id.* at Syl. pt. 3.

other goods.[666] Justice Maynard concurred, concerned that under the learned intermediary doctrine, physicians were saddled with liability while manufacturers avoided it.[667] Justice Albright dissented, arguing the case should not have been considered on a writ of prohibition because the record was incomplete, and the court should have taken a more moderate approach, rather than wholesale rejection of the doctrine.[668]

7. Waiver of Objection to Verdict

In *State ex rel. Valley Radiology, Inc. v. Gaughan*, the Supreme Court of Appeals of West Virginia denied a writ of prohibition to stop a new trial on damages after a plaintiffs' verdict in a MPLA case on liability, where the jury did not award noneconomic loss or lost wages.[669] The court rejected the argument that plaintiffs waived objection to the verdict by objecting to the circuit court's offer to send back the issue of damages, issuing a new syllabus point: "The general rule of waiver established by this Court in [*Combs v. Hahn*], which requires that any objections to the verdict form based on defect or irregularity be made prior to the jury's dismissal, is not applicable to post-trial motions seeking relief based on the inadequacy of the damages awarded."[670]

8. Nursing Home Arbitration Agreements

In *Brown v. Genesis Healthcare Corporation*, the Supreme Court of Appeals of West Virginia issued its opinion in a trio of cases concerning the enforceability of arbitration clauses in nursing home agreements.[671] After a lengthy analysis, the court held that the arbitration clauses were unconscionable and therefore unenforceable as a matter of law.[672] Central to the court's ruling was the fact that these arbitration agreements were entered into by the resident or resident's representative at the time of the resident's admission to the nursing home, or, in other words, prior to the alleged negligence and injury.[673] The court agreed with the defendants that the Federal Arbitration Act ("FAA")[674] preempted section 5(c) of West Virginia's Nursing Home Act,[675] which effec-

666 *Id.* at 914.

667 *Id.* at 917 (Maynard, J., concurring).

668 *Id.* at 914 (Albright, J., dissenting).

669 640 S.E.2d 136, 140–42 (W. Va. 2006).

670 *Id.* at Syl. pt. 4.

671 Brown v. Genesis Healthcare Corp., 2011 WL 2611327 (W. Va. June 29, 2011).

672 *Id.* at *49–73.

673 *Id.* at Syl. pt. 21.

674 9 U.S.C. §§ 1 to 16 (2006).

675 W. VA. CODE ANN. §§ 16-5C-1 to -20 (LexisNexis 1997).

tively prohibits arbitration clauses. However, "after considering the history and purposes of the FAA," the court determined that:

> Congress did not intend for the FAA to apply to arbitration clauses in pre-injury contracts, where a personal injury or wrongful death occurred after the signing of the contract. In the context of pre-injury nursing home admission agreements, we do not believe that such arbitration clauses are enforceable to compel arbitration of a dispute concerning negligence that results in a personal injury or wrongful death.[676]

9. Private Right of Action Under West Virginia Code § 49-6A-2

One interesting opinion upheld summary judgment, on multiple grounds, for several different defendants against claims that they negligently permitted child abuse to occur. In *Barbina v. Curry*,[677] the Supreme Court of Appeals of West Virginia held (1) there is no private right of action under the child abuse reporting statute, Section 49-6A-2, affirming *Arbaugh v. Board of Education;*[678] (2) summary judgment was proper as to the Sheriff, to whom the abuse was allegedly reported, because there was no evidence of abuse occurring after the date of the report;[679] (3) summary judgment was proper as to the Department of Health and Human Resources ("DHHR"),[680] as there was no evidence of prior knowledge of abuse.[681] Records from a mental health center of a prior report were held insufficient to establish a jury issue on this point.[682]

IV. OTHER LEGISLATION AFFECTING HEALTH CARE PROVIDERS

In addition to the MPLA, the Legislature has enacted other statutes providing some degree of protection to health care providers against civil liability in specific enumerated circumstances.

A. Good Samaritans

The Legislature has enacted statutes protecting health care providers in narrow areas, focusing on those providing emergency or volunteer services. These "Good Samaritan" type statutes include limiting liability for licensed

---

676 *Brown*, 2011 WL 2611327, at *2.

677 650 S.E.2d 140 (W. Va. 2007).

678 591 S.E.2d 235 (W. Va. 2003), *aff'd by Barbina*, 650 S.E.2d at 146.

679 *Barbina*, 650 S.E.2d at 147.

680 *Id.* at 149.

681 *Id.* at 148.

682 *Id.*

physicians who render emergency care at the scene of an accident[683] and as volunteers and in good faith at athletic events.[684] Retired or retiring physicians providing care for free to indigent or needy patients in clinics are immune from liability, except in cases of gross negligence or willful misconduct.[685]

B. "Innocent" Prescribers

In 2005, the Legislature enacted a statute that protects health care providers who prescribe medications.[686] The "Innocent Prescriber Act" protects health care providers who prescribe medications or medical devices for uses as approved by the Food and Drug Administration.[687] The Act, codified at section 55-7-23(a) of the West Virginia Code, provides:

> No health care provider . . . is liable to a patient or third party for injuries sustained as a result of the ingestion of a prescription drug or use of a medical device that was prescribed or used by the health care provider in accordance with instructions approved by the U.S. Food and Drug Administration regarding the dosage and administration of the drug, the indications for which the drug should be taken or device should be used, and the contraindications against taking the drug or using the device: Provided, That [sic] the provisions of this section shall not apply if: (1) the health care provider had actual knowledge that the drug or device was inherently unsafe for the purpose for which it was prescribed or used or (2) a manufacturer of such drug or device publicly announces changes in the dosage or administration of such drug or changes in contraindications against taking the

---

683 *See* W. VA. CODE ANN. § 55-7-15 (LexisNexis 2006).

684 *See* W. VA. CODE ANN. § 55-7-19 (LexisNexis 2006).

685 *See* W. VA. CODE ANN. § 30-3-10a(b) (LexisNexis 2007). The Legislature has also provided protection to other "Good Samitaran" type activities, including good faith donation of food to nonprofit organizations, W. VA. CODE ANN. § 55-7D-1 (LexisNexis 2008); ski patrols rendering emergency care, W. VA. CODE ANN. § 55-7-16 (LexisNexis 2008); directors of nonprofit or volunteer agencies, W. VA. CODE ANN. § 55-7C-3 (LexisNexis 2008); immunity for trained hazardous substance emergency response personnel who respond to the discharge of hazardous substances and offer advice or assistance without remuneration, W. VA. CODE ANN. § 55-7-17 (LexisNexis 2008); and limited liability for personal injury or wrongful death cases for nonprofit organizations arranging passage on "excursion trains" to scenic, historic or educational sites, W. VA. CODE ANN. § 55-7-20 (LexisNexis 2008).

686 2005 W. Va. Acts 7, codified at W. VA. CODE § 55-7-23 (LexisNexis 2006).

687 *Id.* This Act was reportedly a compromise bill negotiated by the West Virginia State Medical Association and the West Virginia Trial Lawyers. *See* WEST VIRGINIA MEDICAL INSURANCE AGENCY, LLC, AND WEST VIRGINIA STATE MEDICAL ASSOCIATION, 2005 LEGISLATIVE WRAP-UP (2005), *available at* http://www.wvsma.com/shared/content_objects/helen/pdfs/2005%20legislative%20wrap%20up.pdf.

> drug or using the device and the health care provider fails to follow such publicly announced changes and such failure proximately caused or contributed to the plaintiff's injuries or damages.[688]

Section 55-7-23(b) further specifies the section is "not intended to create a new cause of action."[689] This provision[690] is silent as to whether it applies to suits filed after the effective date versus injuries sustained after the effective date; however, it likely applies to the latter.[691]

This provision was driven, at least in part, by physicians who were sued in the various mass tort actions arising from diet drugs (Baycol, Rezulin and others),[692] and by the concern over physician liability to third parties when a patient under the influence of a prescription medication causes injury.[693] This statute is similar to section 30-5-12 of the West Virginia Code, which protects pharmacists and pharmacies who dispense medications that are unchanged. [694]

C. Physician Apology

Another bill passed in 2005 offers protection to physicians who apologize to their patients.[695] Section 55-7-11a(b)(1) of the West Virginia Code provides that expressions of sympathy or apology by a health care provider to a patient shall not be admissible as an admission of liability or as an admission against interest in any civil action under the MPLA or in any arbitration, mediation, or other alternative dispute resolution proceeding.[696]

The intent of this statute is to encourage candid communication between physicians and patients after an untoward event.[697] This statute goes beyond existing rules of evidence, which prohibit evidence of compromise or offers to

---

688 W. VA. CODE ANN. § 55-7-23(a) (LexisNexis 2008).

689 § 55-7-23(b).

690 *Id.*

691 *Id.*

692 *See* Baisden v. Bayer Corp., 275 F.Supp.2d 759 (S.D. W. Va. 2003) (physician fraudulently joined in action against pharmaceutical company; motion to remand denied).

693 *See* Osborne v. United States, 567 S.E.2d 677 (W. Va. 2002) (physician can be liable to non-patients for negligent prescription of narcotics to patient who caused injury in automobile accident). An interesting issue arises where the physician prescribes in a manner different than the labeling or uses the drug or device "off label," both of which are accepted practices.

694 W. VA. CODE ANN. § 30-5-12 (LexisNexis 2006).

695 2005 W. Va. Acts 4, codified at W. VA. CODE ANN. § 55-7-11a(b)(1) (LexisNexis 2006).

696 *Id.*

697 *See* Jonathan R. Cohen, *Advising Clients To Apologize*, 72 S. CAL. L. REV. 1009, 1068 (1999).

compromise[698] and payment of medical or other expenses,[699] neither of which is admissible to prove liability.[700]

V. CONCLUSION

It is difficult to identify a common theme or trend in Supreme Court of Appeals of West Virginia cases dealing with the MPLA, except to say the court appears, at the least, uncomfortable with reforms that have the effect of blocking citizens' access to the courts. This is reflected in the wide discretion given to circuit court judges to deny motions to dismiss complaints absent almost a complete failure by plaintiffs to comply with the notice of claim and certificate of merit requirements of the MPLA. It is reflected, perhaps more strongly, in the court's rejection of the MPLA's twelve-juror provision as violative of its rule-making power. In both instances, however, the court has declined to take the larger step of declaring the entire MPLA invalid in a wholesale fashion despite the opportunity presented in *Louk* to apply the non-severability clause as written.[701]

There are many issues arising from the MPLA and its amendments yet to be litigated. Constitutional challenges are certainly coming as to some or all of the amendments, and issues remain regarding the pre-filing requirements. Perhaps the most significant is the *Boggs* issue of what claims are not covered under the MPLA.[702] At least one circuit court judge has ruled that credentialing and privileging activities by hospitals are *not* covered by the MPLA.[703] Given the lower caps of MPLA III, and the elimination of ostensible agency and joint and several liability, it is likely the plaintiff's bar will aggressively pursue "non-MPLA" claims.

Outside the emergency room context, ostensible agency is tightened up, and MPLA III eliminates it. However, there is sure to be litigation over whether a particular doctor's insurance satisfies the statutory requirement, both for the imposition of ostensible agency and for application of the noneconomic damage caps. Experts continue to be handled on a case-by-case basis,[704] and more peer

---

698 W. VA. R. EVID. 408.

699 W. VA. R. EVID. 409.

700 One interesting issue is whether this statute will stand challenge in light of the Court's decisions in *Louk v. Cormier*, 622 S.E.2d 788 (W. Va. 2005) and *Mayhorn v. Logan Med. Found.*, 454 S.E.2d 87 (W. Va. 1994), in which the Court reversed legislation as infringing upon its constitutional rule-making power.

701 *Louk*, 622 S.E.2d 788.

702 Boggs v. Camden-Clark Mem'l Hosp., 609 S.E.2d 917 (W. Va. 2004).

703 *See* Carter v. Teays Valley Health, No. 03-C-216 (Cir. Ct. Putnam Cnty. Mar. 11, 2005).

704 As to the qualification issue, *Kiser II* is probably the best read at this point as establishing the line at which (or below which) the court will find an expert's qualifications do not suffice to allow testimony in a MPLA case.

review/privilege litigation is surely coming. The next several years will be interesting, to say the least, for MPLA litigators.