NURSING HOME NEGLIENCE AND THE MPLA

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I. INTRODUCTION

In recent years, some of our brethren in the plaintiff's bar have turned their attention to personal injuries claims against nursing homes under a variety of theories collectively branded "nursing home negligence."[1] A quick search of the internet shows that many plaintiff's attorneys now boast having practice areas or expertise in "nursing home negligence." The generic term "nursing home negligence" seems to encompass a variety of claims ranging from traditional medical malpractice to abuse and neglect.[2] These actions may involve issues such as medication errors; death or serious injury to a wandering resident; bed sores; dehydration or malnutrition; slip and falls or falling out of bed; and/or unusually heavy or continuous sedation of the patient.[3] In connection with these claims, plaintiffs may also assert claims of negligent hiring, negligent retention, and/or negligent supervision against the nursing home depending on the circumstances.

In the upcoming years, nursing homes will likely continue to serve as fodder for plaintiff's attorneys as more and more West Virginians reach old age and require long-term care outside the home. The following are statements from the website of a Morgantown plaintiff's firm that illustrate this point:

> As more and more people are living longer and fewer families have the skill and expertise required to provide adequate care to older family members, the number of individuals living in West Virginia nursing homes has significantly increased. Unfortunately, incidents of nursing home abuse and neglect have also increased.
> . . . .
> Nursing home negligence can be difficult for people without a medical background to detect. Underperforming nursing homes often go to great lengths to cover up incidents of nursing home abuse and neglect. By recognizing the common signs of nursing home abuse and neglect and contacting a West Virginia nursing home negligence attorney families are empowered to protect the welfare of aging family members. [4]

The good news for nursing homes is that the Medical Professional Liability Act, W. Va. Code § 55-7B-1 et seq. ("MPLA"), by definition applies to nursing homes and other assisted living facilities. West Virginia Code § 55-7B-2(f) defines "healthcare facility" to include "nursing home or assisted living facility, including personal care home, residential care community and residential board and care home."[5] Certain claims that fall under the designation

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[1] A quick review of websites from several plaintiff's firms in the state reveals that nursing home negligence is being marketed as a specific practice area. See, e.g., www.wvnursinghomeinjuries.com; www.wfbmlaw.com/PracticeAreas/Nursing-Home-Negligence.asp.

[2] See id.

[3] Id.

[4] www.wfbmlaw.com/PracticeAreas/Nursing-Home-Negligence.asp (last visited 3/28/2008)

[5] See Davis v. Mound View Health Care, Inc., 640 S.E.2d 91 (W. Va. 2006) (involving medical malpractice claims against a nursing home that were deemed subject to MPLA's notice requirements).

"nursing home negligence," particularly those involving traditional medical malpractice, are certainly governed by the MPLA.[6] However, as explained below, the MPLA does not apply to all claims against nursing homes.

Applicability of the MPLA to a given case is important to nursing homes and other health care providers for several reasons. First, with the passage of the 2003 medical malpractice reforms in the MPLA, non-economic damages in most lawsuits involving "medical professional liability" are now limited to $250,000 with upward adjustment for inflation.[7] Additionally, prior to the enactment of the 2003 amendments to the MPLA, the legislature in 2001 had added a pre-suit notice and a pre-suit screening requirement, which were intended to reduce the filing of meritless medical malpractices cases.[8] The key issue for nursing homes faced with a "nursing home negligence" action is therefore whether the specific claims the plaintiff has alleged fit within the MPLA rubric.

Because of the damage cap and the pre-suit notice burdens, plaintiffs have tried (and will continue trying) to avoid triggering the MPLA by creatively pleading their claims and arguing that specific claims are not "medical professional liability" or malpractice claims. Because plaintiffs have worked hard to avoid triggering the MPLA and have challenged its constitutionality, the applicability of the MPLA to specific claims has been a hot topic before the state's highest court in recent terms.[9] In these recent decisions, the Court has provided some guidance to practitioners, but has emphasized that "the determination of whether the . . . MPLA . . . applies to certain claims is a fact-driven question. Thus, the particular facts of a case will impact the applicability of MPLA." [10] "[T]he determination of whether a cause of action falls within the MPLA is based upon the factual circumstances giving rise to the cause of action, not the type of claim asserted."[11] Fortunately for nursing homes, the manner in which the claim is pled does not dictate the applicability of the MPLA. The Supreme Court recently explained: "The failure to plead a claim as governed by the MPLA does not preclude application of the MPLA. Where the alleged tortious acts or omissions are committed by a health care provider within the context of rendering of 'health care' as defined in W. Va. Code § 55-7B-2(e) (Supp. 2007), the MPLA applies regardless of how the claims have been pled." [12]

The purpose of this Article is to provide a general overview of the MPLA and how it applies in the context of nursing home negligence litigation. To accomplish this purpose, the Article first explains the MPLA procedure and the rights and benefits that nursing homes (another health care providers and facilities) have under the MPLA. Next, the Article reviews the West Virginia Supreme Court's recent decisions on the applicability of the MPLA (and some West Virginia federal district court cases) generally with regard to the types of claims that courts have found to be subject to the MPLA. Finally, the Article summarizes the claims that have

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6 See id.

7 See W. Va. Code § 55-7B-8.

8 See W. Va. Code § 55-7B-6.

9 "When it applies is an issue that has been actively litigated in West Virginia, with several recent cases addressing the topic." Thomas J. Hurney, Jr., Applicability of the Medical Professional Liability Act, Defense Trial Count of West Virginia Newsletter (Winter 2008).

10 Blankenship v. Ethicon, Inc. , 656 S.E.2d 451, 2007 W. Va. LEXIS 66, *18-19 (W. Va. 2007).

11 Id. at *3-4.

12 Id. at *19.

been deemed subject to the MPLA and considers other potential claims that might be asserted against nursing homes and speculates on how courts might treat those claims for purposes of the MPLA.

II. RIGHTS, PROCEDURES, AND PROTECTIONS UNDER THE MPLA

The two most important features—and probably the most controversial—of the current version of the MPLA are its damage caps and the pre-suit notice requirements. However, the MPLA provides nursing homes with a variety of other protections and rights that are not present in litigation outside of the MPLA. Since the passage of the 2003 amendments to the MPLA, however, plaintiffs have been successful in challenging certain aspects of the MPLA as being unconstitutional, and have thereby chipped away at scope of the MPLA. A minority of the Justices on the current Supreme Court have also expressed a willingness to find that the pre-suit notice and certificate of merit requirements discussed below are unconstitutional.[13] Finally, the Court has also softened the MPLA's impact on plaintiffs by instructing trial courts to grant plaintiffs who have failed to comply with the MPLA's pre-filing requirements additional time to comply with the MPLA instead of granting a dismissal.[14]

a. Pre-suit Note and Certificate of Merit Prior to the Filing of the Complaint—W. Va. Code § 55-7B-6

The MPLA contains mandatory prerequisites that must be met before a plaintiff can file a complaint seeking damages for "medical professional liability."[15] These prerequisites are found in W. Va. Code § 55-7B-6(a)-(d). Subsection (a) provides that "no person can file a medical professional liability action against any health care provider without complying with this section," thereby making clear that the requirements in § 55-7B-6 are mandatory.[16]

The first requirement in this section is the pre-suit notice requirement found in subsection (b). The plaintiff must, at least 30 days prior to filing the action, serve by certified mail a notice of claim upon each health care provider that the plaintiff will join in the litigation.[17] A critical part of this pre-suit notice is the "screening certificate of merit."[18] The MPLA requires that the

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[13] As he explained in his concurrence, in part, and dissent, in part, in Blankenship v. Ethicon, Inc., 656 S.E.2d 451, 2007 W. Va. LEXIS 66 (W. Va. 2007), Justice Starcher along with Justice Davis believe that the MPLA pre-suit notice and certificate of merit requirements are unconstitutional as violations of the separation of powers doctrine because these provisions encroach upon the West Virginia Supreme Court's constitutional rule-making powers. Id. at * 27.

[14] See Gray v. Mena, 625 S.E.2d 326 (W. Va. 2005); Blankenship v. Ethicon, Inc., 656 S.E.2d 451, 2007 W. Va. LEXIS 66 (W. Va. 2007).

[15] This term is defined in W. Va. Code § 55-7B-2(i).

[16] While failure to comply is grounds for dismissal, but courts have somewhat limited that affect of this requirement by permitting plaintiffs the opportunity to comply with MPLA after it has been deemed to apply. See supra note 14.

[17] The notice must include (1) a statement of the theories of liability upon which the cause of action may be based; (2) a list of the other health care providers and facilities that were given notice of the claim; and (3) a screening certificate of merit. See W. Va. Code § 55-7B-6(b).

[18] In Syl. Pt. 2 of Hichman v. Gillette, 618 S.E.2d 387 (W. Va. 2005), the Court explained that the purposes of § 55-7B-6 "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." Id.

screening certificate of merit be executed under oath by a health care provider qualified as an expert under the West Virginia Rules of Evidence, and it must include the following: (1) the expert's familiarity with the standard of care at 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 care resulted in injury or death. [19] A separate certificate must be provided for each health care provider against whom the claim is asserted.[20] With regard to the expert, subsection (b) requires that the person have no financial interest in the litigation. Nevertheless, the expert is permitted to serve as an expert witness in any judicial proceeding.[21]

The MPLA contains an exception to the screening certificate of merit requirement if a claimant or his or her counsel believes that no screening certificate of merit is necessary." However, for the exception to apply, the claim must be "based upon a well-established legal theory of liability which does not require expert testimony supporting a breach of the applicable standard of care."[22] In place of the certificate, the plaintiff must file a "statement specifically setting forth the basis of the alleged liability."[23]

Furthermore, if the statute of limitations is about to run, the plaintiff can delay the filing of a certificate until 60 days after the notice of claim is served. However, the plaintiff still has to file the notice of claim, but instead of the certificate, the plaintiff must state that he or she intends to provide the certificate within 60 days of the date the health care provider received notice.[24]

Once the health care provider receives notice, it may respond, in writing, to the plaintiff within 30 days of receipt or within 30 days of receiving the certificate of merit if plaintiff moves under subsection (d). In the response, the health care provider can state that it has a bona fide defense and identify its counsel.[25] The West Virginia Supreme Court has held that "[b]efore 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 . . ., the plaintiff must have been given written and specific notice of, and an opportunity to address and correct the alleged defects and insufficiencies."[26] Making a request for more definite statement in response to the notice and certificate "preserves a parties objections to the legal sufficiency of the notice and certificate" but only as to "all matter specifically set forth in the request; all objections to the notice or certificate's legal sufficiency not set forth in the request are waived."[27]

Another unique feature of the MPLA is that the healthcare provider is entitled to demand pre-litigation mediation after receipt of the notice, or the certificate if filed under subsection (d). The demand must be in writing. If pre-litigation mediation is demanded, then the mediation shall be completed within 45 days of the written demand and shall be conducted pursuant to Rule

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19 W. Va. Code § 55-7B-6(b).
20 Id.
21 Id.
22 W. Va. Code § 55-7B-6(c).
23 Id.
24 W. Va. Code § 55-7B-6(d).
25 W. Va. Code § 55-7B-6(e).
26 Syl. Pt. 3, Hinchman v. Gillette, 618 S.E.2d 387 (W. Va. 2005).
27 Id. at Syl. Pt. 5.

25 of the West Virginia Trial Court Rules. If mediation is conducted, the plaintiff can depose the healthcare provider before mediation or take testimony from the healthcare provider during the mediation. [28]

b. Filing the Complaint—W. Va. Code § 55-7B-5

Although the MPLA prohibits a plaintiff from stating a specific dollar amount in the complaint, the complaint can state the minimum jurisdictional amount is satisfied. However, the defendant has the right at anytime to request a written statement describing the nature and amount of damages being sought. The defendant must serve this request upon the plaintiff. The plaintiff has 30 days to respond. If no response within 30 days, the defendant may petition the court in which the action is pending to have the court order the plaintiff to respond to the statement. [29]

c. Procedure After Answer and Access to Medical Records—W. Va. 55-7B-6a

Within 30 days of the filing of the answer, or the last answer when multiple defendants are involved, the plaintiff and each defendant are to exchange copies of the plaintiff's medical records that are in their control. This only applies to those records that are "reasonably related" to the plaintiff's claim and are in the party's control. This exchange is to be done just as if a request for production of documents was made under Rule 34 of the West Virginia Rules of Civil Procedure. The MPLA also requires the plaintiff to provide releases for other medical records known but not in his or her control.

d. Elements of Proof for MPLA Claim—W. Va. Code § 55-7B-3.

West Virginia Code § 55-7B-3 sets forth the necessary elements of proof for a claim pursuant to the MPLA.[30] The plaintiff must demonstrate that the alleged injury or death resulted from the failure of a health care provider to follow the accepted standard of care by showing that: (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) that the failure to do so was a proximate cause of the injury or death. [31]

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[28] W. Va. Code § 55-7B-6(f) & (g).

[29] Pursuant to W. Va. Code § 55-7B-4, there is a two-year statute of limitations for claims under the MPLA from the date of the injury; however, the discovery rule applies to toll the statute of limitations and it is also tolled for fraud or collusion by the health care provider concealing or misrepresenting the facts about the injury. There is, however, a 10-year statute of repose.

[30] W. Va. Code § 55-7B-3.

[31] "If the plaintiff proceeds on the 'loss of chance' theory, . . . 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 the patient would have had an improved recovery or would have survived." W. Va. Code § 55-7B-3(b).

e. Expedited Resolution—W. Va. Code § 55-7B-6b

The MPLA requires the circuit court to set a mandatory status conference within 60 days after defendant makes appearance in case. The defendant must schedule the conference with the court and provide notice of the same to the plaintiff. The parties are required to identify contested facts and issues as well as provide other information to the court at this conference. The court is obligated to order mandatory mediation of the matter. The court is required to enter a scheduling order setting the case for trial within 24 months from the date of the defendant's appearance, or the date of the appearance of the last defendant if more than one. If prior to trial, the court determines that either party is presenting or relying on a frivolous claim or defense or being dilatory, the court may order as part of the final judgment the payment to the prevailing party for its litigation expenses, including attorney's fees.[32]

f. Summary Trial –W. Va. Code § 55-7B-6c

West Virginia Code § 55-7B-6b(d) allows the court to order a summary trial if all the parties are ready for trial and jointly request a summary trial. The provisions governing a summary trial are found in W. Va. Code § 55-7B-6c. The court determines the date for the summary trial and controls the length of counsel presentations and the length of jury deliberations so that the trial can be completed in no more than one day. The trial is to be conducted before a six-member jury. At the trial, all evidence is presented by the parties' attorneys. The attorneys are given leeway to summarize, quote from, and comment on pleadings, depositions, and other items from discovery along with exhibits and statements from witnesses. There are some specific limitations relating to counsel's reference to witness testimony. The court has the discretion to limit the presentations to one hour for each party. During the presentations, opposing counsel is entitled to object.[33]

Following the summary trial, the court will give the jury an abbreviated set of instructions. The court is to encourage the jury to reach a unanimous decision. If this turns out to be impossible, the court is to direct the jury to return a special verdict consisting of an anonymous statement as to each juror's finding on liability and damages. After the verdict, the parties and attorneys are permitted to discuss the case with the jury. The proceeding is not recorded and neither the statements and documents submitted in conjunction with the summary trial, nor the verdict are admissible in any evidentiary proceeding.[34]

Thirty days after the summary jury verdict, each party must file a notice with the court electing to accept the summary jury verdict or rejecting the verdict and proceeding to trial. If all parties accept the verdict, then the summary trial is deemed a trial on the merits and a final judgment is entered on the verdict. The MPLA contains an interesting disincentive for rejecting the summary trial similar to the offer of judgment in Rule 68 of the West Virginia Rules of Civil Procedure. If the summary trial is rejected, and the verdict rendered at trial is not more than 20% more favorable to a party who rejected the summary trial verdict, the rejecting party is liable for

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[32] W. Va. Code § 55-7B-6b.

[33] W. Va. Code § 55-7B-6c.

[34] Id.

the costs incurred by the other parties after the summary trial and is liable for their attorneys' fees incurred after the summary trial.[35]

g. Trial By 12 Member Jury—W. Va. Code § 55-7B-6d Deemed UNCONSTITUTIONAL

With the 2001 amendments to the MPLA, the Legislature provided that the jury in any case governed by the MPLA was to contain 12 members.[36] The statute also includes a provision that if a unanimous verdict could not be reached, the jury could return a majority verdict of nine of the 12 jurors, which the judge would accept and record. However, in Louk v. Cormier,[37] the West Virginia Supreme Court declared W. Va. Code § 55-7B-6d unconstitutional. Specifically, the Court held that this section in its entirety was unconstitutional because it was enacted in violation of the West Virginia constitution's separation of powers' clause, Article V, Section 1 and because it conflicts with Rule 47 of the West Virginia Rules of Civil Procedure.[38]

h. Limits on Liability for Noneconomic Damages—W. Va. Code § 55-7B-8

One of the most important reasons that plaintiffs want to avoid the MPLA is its limits on damages. Prior to 2003, the MPLA contained a $1 million cap on non-economic damages. During the 2003 Legislative session, the Legislature lowered the cap to $250,000, which is codified in W. Va. Code § 55-7B-8(a). This limitation applies regardless of the number of plaintiffs or the number of defendants or, in wrongful death cases, regardless of the number in the decedent's estate.[39]

However, there are three circumstances in which the cap is raised to $500,000.[40] The first is for wrongful death. The second is when the claim involves permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system. The third is when there is 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. The MPLA damage caps are adjusted for inflation yearly based on the consumer price index up to 50% of the cap amounts. Therefore, regardless of inflation, the caps will eventually max out at $375,000 and $750,000 respectively.[41]

The MPLA imposes a requirement on health care providers wishing to benefit from the damage caps. The MPLA specifically states that the damage caps are "not available to any defendant in an action . . . which does not have medical professional liability insurance in the

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35 Id.

36 See W. Va. Code § 55-7B-6d, *declared unconstitutional by*, Louk v. Cormier, 622 S.E.2d 788 (W. Va. 2005).

37 622 S.E.2d 788 (W. Va. 2005).

38 Id.

39 W. Va. Code § 55-7B-8.

40 See State ex rel. Med. Assur. of W. Va., Inc., 583 S.E.2d 80 (W. Va. 2003).

41 W. Va. Code § 55-7B-8.

amount of at least one million dollars per occurrence covering the medical injury which is the subject of the action."[42]

i. Several Liability—W. Va. Code § 55-7B-9

Another important feature of the 2003 amendments to MPLA was the change from joint and several liability to only several liability in W. Va. Code § 55-7B-9. Under the amended MPLA, when multiple defendants are involved, the jury must report its findings on a form, in which it will be instructed to answer special interrogatories, or the court—without a jury—is to make findings, as to: (1) total amount of compensatory damages; (2) the portion of the damages that represents damages for noneconomic loss; (3) the portion that represents damages for each category of economic loss; (4) the percentage of fault, if any, attributable to the plaintiff; and (5) the percentage of fault, if any, attributable to each defendant. Normally, the jury can only consider the fault of parties in the litigation at the time the verdict is rendered and may not consider the fault of parties who have settled with the plaintiff. The court can only enter judgment against the defendants for several liability in accordance with the percentage of fault attributed to that defendant. [43]

While W. Va. Code § 55-7B-9 does not purport to eliminate a defendant's vicarious liability for action of its employees or agents, the MPLA does state that the defendant may not be held vicariously liable for acts of nonemployees under the ostensible agency theory unless the alleged agent does not maintain liability insurance covering the subject medical injury in the aggregate amount of at least $1 million. [44]

j. Limitations on Third-Party Claims—W. Va. Code § 55-7B-9b

The final benefit that the MPLA provides to nursing homes and other health care providers is a limitation on liability to third parties. Specifically, W. Va. Code § 55-7B-9b states that "[a]n action may not be maintained against a heather care provider [under the MPLA] 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's acts were committed with willful, wanton and reckless disregard for foreseeable risk of harm to third party. This limitation does not, however, prevent a derivative action by any third party for loss of consortium or a wrongful death action by the personal representative of the decedent's estate.

III. APPLICABILITY OF THE MPLA

The discussion in the above section shows that the MPLA includes a variety of limitations and protections for nursing homes facing lawsuits involving claims of nursing home negligence. Specifically, the damage caps and the limitation to several liability are critical

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[42] Id.

[43] W. Va. Code § 55-7B-9.

[44] Another benefit to defendants under the MPLA is that W. Va. Code § 55-7B-9a allows defendants to present the court with evidence after the verdict that plaintiff has received payments for the same injury from collateral sources or will receive future payments from collateral sources.

features that protect the extent of the nursing home's liability once the litigation has begun. While the notice and prescreening requirements are important for prohibiting frivolous claims from being filed, it is the damage and liability limitations that protect health care providers from the ever-present fear of jack-pot justice. Moreover, the Court has weakened the pre-filing requirements by permitting plaintiffs the opportunity to comply with the MPLA after the fact.

Now that that MPLA's benefits and procedure have been explained, the Article next discusses the specific types of claims, injuries, or allegations which the West Virginia Supreme Court of Appeals (and the state federal district courts) have considered in relation to the MPLA. As seen above, whether the MPLA applies in a given case is a critical issue for both plaintiffs and defendants and depends on the particular facts of the case.

a. Generally

The applicability of the MPLA does not depend on whether the plaintiff has alleged a medical malpractice claim, but rather "[t]he determination of whether a cause of action falls within the MPLA is based upon the factual circumstances giving rise to the cause of action, not the type of claim asserted."[45] As the West Virginia Supreme Court recently explained, "[t]he failure to plead a claim as governed by the MPLA does not preclude application of the MPLA. . . . ."[46] While the question of whether the MPLA applies in a particular case is a factual one, the determination of whether a specific cause of action is governed by the MPLA is a legal question for the court, not the jury.[47]

The keys to unlocking whether the plaintiff's allegations open the door to the MPLA are found in the definitions in W. Va. Code § 55-7B-2. By its express terms, the MPLA can only apply to claims involving "medical professional liability."[48] "Medical professional liability" is defined as "any liability for damages resulting from the death or injury of a person for any tort or breach of contract based on heath care services rendered, or which should have been rendered, by a heath care provider or health care facility to a patient."[49] Based on this definition, "the MPLA can only apply to heath care services rendered, or that should have been rendered." [50] More specifically,

> "The [MPLA] 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."[51]

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45 Blankenship v. Ethicon, Inc., 656 S.E.2d 451, 2007 W. Va. LEXIS 66, *3-4 (W. Va. 2007).

46 Id. at *19.

47 See id. at *19 n.12.

48 See Boggs v. Camden-Clark Memorial Hosp. Corp., 609 S.E.2d 917, 923 (W. Va. 2004).

49 W. Va. Code § 55-7B-2(i); see Boggs, 609 S.E.2d at 923.

50 Boggs, 609 S.E.2d at 923.

51 Blankenship v. Ethicon, Inc., 656 S.E.2d 451 (W. Va. 2007) (quoting Syllabus point 3, Boggs v. Camden-Clark Memorial Hospital Corp., 609 S.E.2d 917 (W. Va. 2004)).

Although the MPLA does not define "health care services," it does define "health care." "Health care" is "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."[52] The MPLA defines "health care providers" to include any "health care facility . . . licensed by . . . this state or another state, to provide health care or professional heath care services . . . ."[53] Finally, a "health care facility" by definition includes a "nursing home or assisted living facility, including personal care home, residential care community and residential board and care home . . . ."[54]

From these definitions, claims against nursing homes for injuries or death resulting from health care services rendered to patients are clearly governed by the MPLA, but what constitutes health care services or health care is not always clear. Therefore, since 2004, the applicability of the MPLA has been a hot button issue before the West Virginia Supreme Court. Four important Supreme Court opinions in the last four years have specifically addressed the applicability of the MPLA and clarified its scope. Each of these decisions is discussed below in detail.

b. Recent WV Court Decisions Regarding Applicability of MPLA

1. Boggs v. Camden-Clark Memorial Hospital Corp

The West Virginia Supreme Court first opined on the applicability of the MPLA in Boggs v. Camden-Clark Memorial Hospital Corp.[55] In Boggs, the plantiff's decedent died after going into cardiac arrest after receiving spinal anesthetic as she was being prepped for surgery. The plaintiff filed a civil action against the anesthesiologist, his practice group, and the hospital. The complaint asserted claims for medical malpractice along with negligent hiring and retention, vicarious liability, fraud, destruction of records, outrage, and spoliation of evidence. The plaintiff alleged that the non-malpractice claims related to a cover up. The plaintiff did not comply with the MPLA's pre-filing requirements; therefore, the circuit court dismissed all claims based on the MPLA.

On appeal, the Court, citing the definition of "medical professional liability," emphasized that "[b]y the MPLA's own terms, it applied only to "medical professional liability actions. . . . Thus, the MPLA can only apply to health care services rendered, or that should have been rendered. "[56] In addressing the specific claims asserted, the Court observed that

> 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

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52 W. Va. Code § 55-7B-2(e).
53 W. Va. Code § 55-7B-2(g).
54 W. Va. Code § 55-7B-2(g).
55 609 S.E.2d 917 (W. Va. 2004).
56 Id. at 923.

> 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 acts outside of the heath care context.[57]

In Syllabus Point 3 of Boggs, the Court held that the MPLA "only applies 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."

From Boggs, it is clear that not all claims involving health care providers or health care facilities are governed by the MPLA. However, some observers construed the Boggs' holding as finding that intentional torts always fell outside the scope of the MPLA. [58] As discussed in relationship to the Court's decision in Gray v. Mena, the Court has since clarified this issue and has modified Boggs to the extent it so suggested.

2. Gray v. Mena

The next decision in the Court's quadripartite regarding the applicability of MPLA was Gray v. Mena.[59] In this decision, the Court made a special effort to distinguish Boggs based on factual differences between the two cases. The plaintiff in Gray asserted claims for assault and battery, sexual assault and/or abuse, outrage, intentional infliction of emotion distress, and/or negligent infliction of emotional or mental distress arising out of the plaintiff's allegations that the doctor-defendant had inappropriately touched her during an examination without her consent and that the procedure was not medically necessary.[60] The circuit court dismissed the complaint against the doctor, his practice group, and the hospital based on the plaintiff's failure to comply with the MPLA. The Court held that the MPLA applied to intentional torts as well, but reversed the dismissal to give the plaintiff the chance to comply with the MPLA's requirements. [61]

Noting that Boggs had the potential for being misconstrued, the Gray Court carefully explained that the Boggs' decision was modified to the extent it suggested that all intentional torts were outside the scope of the MPLA.[62] The MPLA clearly states that it applies to "any tort" and thus would include intentional torts in certain circumstances.[63] The Court explained that there was a key distinction between the allegations in Boggs and the allegations in Gray: whereas the claims in Boggs involving fraud, destruction of records, and spoliation "did not arise in the context of an actual physical examination," the actions at issue in Gray clearly did.[64]

Based on this distinction, the Court emphasized

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57 Id. at 923-24.
58 See Blankenship , 2007 W. Va. LEXIS 66, at *19.
59 625 S.E.2d 326 (W. Va. 2005).
60 Id. at 329.
61 Id. at 332-333.
62 See id. at Syl. Pt. 4.
63 See id. at 330.
64 Id. at 330 n. 7.

> The particular facts will impact the applicability of the statute. For instance, where the allegedly offensive action was committed within the context of the rendering of ["health care"], the statute applies. Where, however, the action in question was outside the realm of the provision of ["health care"], the statute does not apply. [65]

The Court recognized that a good faith argument could be made by the plaintiff that the assault and battery (an intentional tort) at issue did not involve health care services rendered or should have been rendered; however, the Court likewise recognized that a good faith argument could be made that it did. Based on this, the Court recognized that the resolution of that issue was always fact-dependent; therefore, the Court cautioned plaintiffs to adhere to the MPLA's requirements in close calls.[66] The court reversed and remanded the matter to give the plaintiff an opportunity to comply with the MPLA's pre-filing requirements.

The key point from Gray is that the only intentional torts that are "outside the rubric of the MPLA [are] those intentional torts that do not pertain to the rendering of 'health care services.'"[67] Based on Gray, the intentional tort of assault and battery (and for that matter, any other intentional tort relating to "heath care services") is subject to the MPLA under some circumstances.

3. Blankenship v. Ethicon, Inc.

In October of 2007, the Court once again had the opportunity to address the applicability of the MPLA in Blankenship v. Ethicon, Inc.[68] In Blankenship, the class action plaintiffs alleged that they suffered injuries and infections after being contacted by improperly sterilized sutures. The plaintiffs asserted causes of action for product liability, breach of warranties, violations of the West Virginia Consumer Credit and Protection Act, fraud, and intentional infliction of emotional distress. The defendants moved to dismiss the case arguing, inter alia, that the MPLA is the sole remedy against health care providers and that the MPLA did not allow the claims alleged by plaintiffs.[69] The plaintiffs argued that the MPLA was not an exclusive remedy and that they were not asserting medical malpractice claims and therefore did not have to comply with the MPLA.[70] The circuit court held that the MPLA applied and dismissed all claims.

On appeal, the Court framed the issue as follows: does the MPLA provide the exclusive remedy for the plaintiff's claims in this instance?[71] Although the claims were not pled under the MPLA, the Court looked at whether "those claims should have been brought under the MPLA."[72] After reviewing Boggs and Gray, the Court held that "failure to plead a claim as governed by

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65 Id. at 332.

66 See id. at 332 (stating that plaintiffs should "err on side of caution by complying with the requirements of the Act if any doubt exists").

67 Gray, 625 S.E.2d at 334 (Davis, J., concurring).

68 656 S.E.2d 451, 2007 W. Va. LEXIS 66 (W. Va. 2007).

69 Id.

70 Id.

71 Id. at *12.

72 Id.

[MPLA] does not preclude application of the Act. Where the alleged tortious acts or omissions are committed by a health care provider with in the context of rendering '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."[73] Under the MPLA, the Court emphasized that "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." [74]

With regard to the specific causes of action the plaintiffs asserted, the Blankenship Court found that "all of the [plaintiffs'] claims against the defendant hospitals arise from the same factual event, the 'implantation' of contaminated sutures . . . . The implantation of sutures is a classic example of heath care. Sutures, by their very nature, are implanted during the course of and in furtherance of medical treatment, i.e., surgery or wound repair."[75] The Court expressly affirmed the circuit court's statement that "[t]he fact that they label them as 'products' claims does not change the fundamental basis of this tort action."[76] The lesson from Blankenship is that when the claims at issue arise from or are related to or are in furtherance of the heath care services, the plaintiff's exclusive remedy is the MPLA regardless of how the claims are pled and regardless of how the claims are characterized.

4. Riggs v. W. Va. Univ. Hospitals

The Court's most recent case regarding the applicability of the MPLA is Riggs v. West Virginia University Hospitals.[77] The plaintiff in Riggs developed a bacterial infection while a patient at the hospital. The patient and her husband filed an action against the hospital and were ultimately awarded damages in the amounts, which were reduced to $1,000,000 by the circuit court based on the pre-2003 version of the MPLA. On appeal, the plaintiffs argued that the damage cap should not have applied because the claims did not arise from health care rendered, but from the failure to control an outbreak of bacteria in the hospital. The West Virginia Supreme Court held that the plaintiffs were judicially estopped from arguing that the MPLA did not apply because they had pled, prosecuted and tried the claims as MPLA claims in the circuit court and did not raise the issue until after the verdict exceed the MPLA's caps.[78]

The majority opinion only dealt with the issue of judicial estoppel. It did not address whether the hospital's infection control practices were covered by the MPLA. However, Justice Davis filed a concurring opinion to specifically address whether the claim could have been asserted outside the MPLA.[79] Justice Davis reasoned that the plaintiff sought medical treatment for her knee. The allegations related not to negligence in performing the surgery on her knee but rather the hospital's failure to maintain a safe environment for patients. "The duty breached by WVUH was not that of failing to properly treat [plaintiff's] knee, WVUH breached a general

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73 Id. at *19 (emphasis added).
74 Id.
75 Id. at *20.
76 Id. at *21 (citing circuit court's order).
77 656 S.E.2d 91, 2007 W. Va. LEXIS 107 (W. Va. 2007).
78 656 S.E.2d 91, 2007 W. Va. LEXIS 107.
79 Id. at 109 (Davis, J., concurring).

duty it owed to all patients and nonpatients to maintain a safe environment.[80] Therefore, in Justice Davis' opinion, this matter could have been pled as a premises liability action rather than a malpractice action under the MPLA. [81]

5. Other Cases of Interest

A. Phillips v. Larry's Drive-In Pharmacy, Inc.

In Phillips, the Court addressed the issue of what constitutes a "health care provider" under the MPLA.[82] The plaintiff asserted a claim against a doctor and a pharmacy because she allegedly received a prescription that did not contain a specified limit for the number of doses that she could take during a defined period, which she alleged was negligently prescribed by the doctor and negligently filled by the pharmacy. The issue before the Court was solely whether a pharmacist was a "health care provider" under the MPLA. The Court concluded that pharmacists are not health care providers under the MPLA.

The Court did not address whether dispensing of medicine is rendering of health care services for purposes of MPLA. However, the Court's opinion is important to the future analysis of the MPLA's applicability and for construction of its definitions. In reaching its decision, the Phillips Court expressly held that the MPLA was a derogation of common law and "[w]here 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."[83]

B. Federal District Court Decisions of Note

In addition to the West Virginia Supreme Court's decisions on the MPLA, two decisions from the state's federal districts courts are noteworthy. The first of these is Redden v. Purdue Pharma.[84] In Redden, the plaintiff sued the pharmaceutical company, two doctors and two clinics based on the fact that he had developed an addiction after taking OxyCotin prescription medicine for an occupational injury. Plaintiff asserted claims against the doctors and the clinics for medical malpractice and civil conspiracy and violations of the consumer credit and protection act. Several of the defendants moved to dismiss the case because the plaintiff had failed to comply with the MPLA. Plaintiff argued that he did not have to comply with the MPLA because the cause of action was civil conspiracy, not medical professional liability. The district court held that, based on the definition of "health care" under the MPLA, "the acting of informing patients . . . about the safety and efficacy of OxyCotin, triggered the MPLA." [85] Because the misrepresentations about the medicine were the basis for the civil conspiracy, the court held that the civil conspiracy fell within the MPLA.

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80 Id. at 111 (Davis, J., concurring).
81 Id.
82 647 S.E.2d 920, 2007 W. Va. LEXIS 58 (W. Va. 2007).
83 Id. at Syl. Pt. 5.
84 2003 U.S. Dist. LEXIS 27172 (S.D. W. Va. Dec. 24, 2003).
85 Id.

The second case of interest is Grass v. Eastern Associated Coal Corp. ,[86] in which a pro se plaintiff filed a complaint against his former employer and a doctor based on his termination from the company. The district court, in reviewing the recommendation from the magistrate court, dismissed the claims against the doctor on the grounds that the plaintiff had failed to comply with the MPLA. In addressing the claim, the court surmised that the plaintiff was essentially alleging that the doctor had a duty to inform the plaintiff that he was released to return to work, which the doctor failed to perform. The court characterized the claim as one for breach of the fiduciary duty that a treating physician owes to a worker's compensation claimant. The court held "[n]evertheless, such a claim probably falls under MPLA inasmuch as the Act states that it encompasses 'any tort.'" [87]

c. A Summary and Analysis of Other Claims Relating to Nursing Home Negligence

Based on these above decisions, the following claims have been held to be subject to the MPLA:

- medical professional liability or malpractice (Davis v. Mound View Health Care, Inc., 640 S.E.2d 91 (W. Va. 2006); Boggs, Gray, Blankenship)
- allegations involving assault and battery, sexual assault, and sexual abuse based on actions during physical examination of the patient, and any corresponding claim for outrage and/or infliction of emotional distress associated with the act (Gray)
- implantation of sutures and any claim arising therefrom, including products liability claims (negligence and strict liability), breach of warranties (express and implied), consumer credit and protection act violations, outrage, and intentional infliction of emotional distress (Blankenship),
- Fraud, but only where the fraud alleged was part of the medical treatment rendered or which should have been rendered[88]
- Civil conspiracy, where the conspiracy centered around informing the patient about prescription drugs (Redden); and
- Breach of fiduciary duty by physician treating a worker's compensation claimant (Grass).

Based on the above decisions, the following claims have been deemed to be outside the scope of the MPLA:

- Any tortious conduct or breach of contract that is outside of or unrelated to providing medical care (Boggs, Gray, Blankenship)
- intentional torts that do not occur in the context of providing health care services, such as fraud, spoliation of evidence, negligent hiring, larceny, libel (Gray)
- Intentional assault (Boggs)
- Theft of the patient's possessions (Boggs)
- Defamation of patient (Boggs); and

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86 2006 U.S. Dist. LEXIS 23125 (S.D. W. Va. Mar. 23, 2006).

87 Id. at *11.

88 Blankenship, at *21 n. 14.

- Premises liability (maintaining a safe environment, e.g., infection control) (Justice Davis in Riggs)

Although the MPLA cases discussed above provide some guidance on what claims may or may not be subject to MPLA, there are a plethora of other claims that plaintiff's counsel advertise as being within the practice area of "nursing home negligence." For example, a quick search on the internet reveals the following issues being advertised as relating to "nursing home negligence" or "nursing home abuse and neglect": medication errors, broken bones and injuries due to falls and/or elopement,[89] infection and bedsores, heavy sedation, and negligent supervision or failure to supervise.[90] Whether these issues fall under the MPLA will depend on the particular facts of the case. Using the decisions discussed above as a guide, the following speculates on how these issues may be addressed in relationship to the MPLA.

Medication Errors/Sedation Issues: The medication errors were somewhat addressed in the Southern District's opinion in Redden, in which the court found that misrepresentations about prescriptions to patients in furtherance of a civil conspiracy trigger the MPLA. In holding that informing patients about the drugs constituted health care, the court's decision hinged on the MPLA's definition of "health care."[91] Health care includes "any act . . . performed . . .by a heath care provider for, to or on behalf of a patient during the patient's medical care, treatment or confinement."[92] The dispensing and administration of medicine to nursing home patients would be an act, and this act would be performed on the patient's behalf during his or her treatment. Under-medication and over-medication issues would likewise appear to meet this definition. Thus, it is likely that claims based on allegations of medication errors would be governed by the MPLA.

Moreover, dispensing and administration of medicine in the nursing home is distinguishable from the filling of a prescription by the pharmacist as discussed in Phillips. The Phillips Court, in distinguishing the case at hand from Short v. Appalachian OH-9, explained that there is a hands-on, close relationship between a doctor and a patient that does not exist between a customer and a pharmacy. The patient's interaction with the pharmacy is mostly limited to "purchasing a product."[93] Based on this distinction and the discussion in Phillips, the dispensing and administration of medicine to a nursing home patient would be health care under the MPLA.

Injuries Based on Slips and Falls/Falling Out of Bed/Elopement: Whether claims in this category are covered by MPLA is a more difficult question to answer. The best answer is probably that it depends on the circumstances. For example, if the patient is walking down the hall to his or her room and falls to the ground after slipping on a banana peel dropped by the food service staff, any claim based on this event would likely fall outside the MPLA. The banana peel being negligently left in the hallway would not be related to health care services rendered or that

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89 Elopement occurs when the patient leaves the nursing home premises without notice or supervision.

90 See, e.g., www.wvnursinghomeinjuries.com; www.wfbmlaw.com/PracticeAreas/Nursing-Home-Negligence.asp.

91 2003 U.S. Dist. LEXIS 27172 (S.D. W. Va. Dec. 24, 2003).

92 W. Va. Code § 55-7B-2(e).

93 Phillips, 647 S.E.2d at 928-29.

should have been rendered to the patient. This would likely be more of a premises liability issue like Justice Davis discussed in her concurrence in Riggs.[94]

However, under different circumstances, the patient falling to the floor or falling out of bed may constitute health care services rendered, or that should have been rendered. For example, if the patient falls out of bed at night because the nursing home failed to properly restrain the patient during the night, this could arguably constitute the failure to render health care that should have been rendered. Under the MPLA, health care includes any act which should have been performed or furnished, by any health care provider on behalf of a patient during the patient's medical care, treatment, or confinement.[95] Placing proper restraints on the patient's movement would certainly appear to meet this definition. This same analysis would likewise apply with regard to patients who wander off from the nursing home campus.

Infection Control/Bedsores: Justice Davis addressed whether claims based on infection control issues were subject to MPLA in her concurrence in Riggs. In her opinion, infection control does not.

However, claims based on bedsores (or more accurately, claims for failing to properly turn and move the patient) will likely fall under the MPLA for the same reason discussed above with regard to properly restraining the movement of a patient. Bedridden patients get bedsores when they are not turned and moved frequently enough. The MPLA's definition of health care in W. Va. Code § 55-7B-2(e) includes acts which should have been performed to or on behalf of the patient during treatment or confinement. While frequently moving the may not be a specific medical treatment, it is a necessary medical care during the bedridden patient's "confinement" at the nursing home. If the claim is based on the fact that the patient was not being turned frequently enough, this claim should be governed by the MPLA.

Negligent Supervision. In dicta, the Court stated in Boggs that negligent hiring would not fall under the MPLA. The Court's reasoning was that such an action was not related to health care services.[96] Negligent hiring relates to an act that occurred without relation to a specific patient. The claim of negligent supervision may be distinguishable from negligent hiring from the perspective that the supervision at issue will likely relate to certain acts or omissions in the medical care for a specific patient. To the extent that the claim relates to specific acts of medical care that were specifically performed on the patient, the MPLA should apply. The same is true where the allegations at issue involve omissions of the proper care. However, where the underlying issue does not relate to medical care, then the negligent supervision claim will not be governed by the MPLA. For example, where an employee of the nursing home sexually assaulted a patient and the nursing home is sued as a result, any claim relating to negligent supervision of this employee will likely fall outside the MPLA because the employee's act is unrelated to the patient's medical care. However, if like in Gray v. Mena, the

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[94] In Riggs, Justice Davis cited tests that other courts had formulated to use in determining whether acts constituted medical care under statutes similar to the MPLA as opposed to simply being common law negligence. See 656 S.E.2d at 111-112.

[95] W. Va. Code § 55-7B-2(e).

[96] Boggs, 609 S.E.2d at 923-24.

alleged assault occurred during a medical procedure, then the negligent supervision claim will be subject to the MPLA.

IV. CONCLUSION

Claims against nursing homes relating to nursing home negligence are a favorite of plaintiff's attorneys. What exactly constitutes nursing home negligence depends on the circumstances and includes a variety of claims and legal theories. However, many of the claims falling under the guise of nursing home negligence will likely trigger the MPLA and thus provide nursing homes with a limitation on liability and damages as well as trigger a myriad of other procedural rights that are not otherwise available in civil litigation. In recent terms, the West Virginia Supreme Court has had the opportunity to expound upon the claims that are subject to the MPLA and has provided much-needed guidance on the MPLA's applicability generally and in particular instances. Unfortunately for health cas providers, however, in addition to opining on the scope of the MPLA, the Court has eroded some of the MPLA's protections and diluted the pre-litigation notice and certificate of merit requirements. However, the damage caps and the limitation to only several liability are still important features under the MPLA for nursing homes and other health care providers when faced with nursing home negligence claims.