Click to return to Table of Contents

West Virginia Medical Professional Liability & Health Care Litigation Review 2014-16[1]

Thomas J. Hurney, Jr.
John M. Huff
Jackson Kelly PLLC
Charleston, West Virginia

Introduction

In 2015, the West Virginia Legislature clarified the law of medical professional liability when it amended the Medical Professional Liability Act, W.Va. Code 55-7B-1, *et seq.* ("MPLA"). The 2015 amendments accomplish several things. Recognizing trends in how health care is delivered, the amendments broaden the statutory definitions of "health care provider" and "health care" to encompass a wider range of health care professionals and health care related activities. The bill also extends its coverage to entities related to health care providers. Statutory prerequisites for expert testimony are also strengthened.

Senate Bill 6 was, at least in part, the Legislature's response to a series of decisions of the Supreme Court of Appeals of West Virginia which narrowly interpreted the MPLA, creating a class of claims against health care providers falling outside its parameters, most notably *Manor Care v. Douglas.*

Manor Care, perhaps the most significant of the Court's MPLA decisions in the last year, was a nursing home case where the Court affirmed but reduced a jury verdict for noneconomic damages and also reduced a large award for punitive damages. The Court also affirmed the jury's verdict which apportioned by percentage an award between "ordinary" and "medical" negligence, and applied the MPLA only to the portion for "medical" negligence.

[1] This paper continues a series of prior papers which track updates in the law of Medical Professional Liability which I have published for WVU CLE, Defense Trial Counsel of West Virginia and others. The "MPLA at a Glance" section is more or less the same in each paper, followed by cases and statutes passed in the year prior to the date of the paper. For West Virginia law prior to the enactment of the original MPLA in 1986, read Mike Farrell's seminal article, The Law of Medical Malpractice in West Virginia, 82 W.VA. L. REV. 251 (1979). For more about the MPLA, see Thomas J. Hurney, Jr. & Robby J. Aliff, Medical Professional Liability in West Virginia, 105 W.Va. L. REV. 369 (Winter 2003), and Thomas J. Hurney, Jr. and Jennifer Mankins, Medical Professional Liability in West Virginia, Part II, 114 W.Va. L. REV 573 (2012). See also, Thomas J. Hurney, Jr., Hospital Liability in West Virginia, 95 West Virginia Law Review 943 (1993).

In addition to *Manor Care*, the Court issued several opinions of interest to the practitioner. This article will review the 2015 MPLA amendments and recent decisions of the Supreme Court of Appeals of West Virginia.

MPLA at a Glance

The Medical Professional Liability Act (MPLA) was first passed in 1986 and amended in 2001 and 2003, governs all "medical professional liability actions" defined to include any actions in tort or contract against health care providers by patients arising from health care.[2] The 1986 MPLA (MPLA I), applied to injuries occurring after June 6, 1986,[3] defined the elements of an medical professional liability action, established a one million dollar cap on non-economic damages,[4] and limited joint and several liability.[5] MPLA I also restricted the statement of damages in *ad damnum* clauses,[6] require expert testimony and set forth qualifications of expert witness,[7] established a shortened statute of limitations for claims by minors[8] and a ten year statute of repose,[9] and various pretrial procedures.[10]

MPLA II (H.B. 601), passed in 2001, applies to *actions filed after* March 1, 2002,[11] and included service of Notice of Claim and Certificate of Merit as a mandatory prerequisite to filing suit;[12] mandatory mediation;[13] exchange of medical records;[14] various management and scheduling directives designed to expedite actions;[15] voluntary summary jury trials;[16] an increase in the number of jurors from six to twelve

---

2 W.Va. Code § 55-7B-2(d) (1986).

3 W.Va. Code § 55-7B-9 (1986). Under the original version of § 55-7B-9, only defendants present at verdict are considered by the jury in its apportionment. See, *Rowe v. Sisters of the Pallotine Missionary*, 211 W.Va. 16, 560 S.E.2d 491 (2001). See also, *Landis v. Hearthmark*, Slip Op. No. 13-0159 (W.Va. Oct. 17, 2013)(allowing third party action by child against parents despite parental immunity; jury allowed to consider parents' fault in allocation and for intervening cause).

4 W.Va. Code § 55-7B-8 (1986).

5 W.Va. Code § 55-7B- 9 (1986).

6 W.Va. Code § 55-7B-5 (1986).

7 W.Va. Code § 55-7B-7 (1986).

8 W.Va. Code § 55-7B- 4(b) (1986).

9 W.Va. Code § 55-7B-4(a) (1986).

10 W.Va. Code § 55-7B-6 (1986) (This section, as amended, is now §55-7B-6b).

11 W.Va. Code § 55-7B-10(a) (2001).

12 W.Va. Code § 55-7B-6 (2001).

13 W.Va. Code § 55-7B-6b(b) (2001).

14 W.Va. Code § 55-7B-6a (2001).

15 W.Va. Code § 55-7B-6b (2001).

16 W.Va. Code § 55-7B-6c (2001)

with nine required to prevail;[17] and elimination of third party claims under the Unfair Trade Practices Act.[18]

MPLA III (H.B. 2122) applies to *actions filed after* July 1, 2003,[19] and added provisions for expedited resolution of cases;[20] limitations on the use of "loss of chance";[21] elimination of joint and several liability;[22] collateral source adjustment;[23] expert qualifications;[24] restrictions on ostensible agency;[25] limits on actions against health care providers by third parties;[26] lowering of the non-economic caps to $250,000, and $500,000 for more serious cases;[27] and an overall $500,000 cap on all damages (both economic and non-economic) in "trauma" cases.[28] H.B. 2122 also created a patient compensation fund.[29]

The MPLA and its amendments have been subject to a variety of challenges. In general, the Court will construe the provisions of the MPLA narrowly as it is "in derogation" of the common law. In *Phillips v. Larry's Drive In Pharmacy,* 220 W. Va. 484, 647 S.E.2d 920 (2007), the Court held that MPLA does not apply to pharmacies as they are not included in the definition of "health care providers" in the MPLA, West Virginia Code §55-7B-2(c) [1986]. The single syllabus point in *Phillips* 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.

---

17 The twelve person jury was struck down as unconstitutional in *Louk v. Cormier*, 218 W.Va. 81, 622 S.E.2d 788 (2005). See also, *Richmond v. Levin*, 637 SE 2d 610 (W.Va. 2006)(*Louk v. Cormier* retroactive).

18 W.Va. Code § 55-7B-5(b). A health care provider can still file a first party action against a carrier but not until after the underlying matter is resolved. *Id.*, § 55-7B-5(c).

19 W.Va. Code § 55-7B-10(b) (2003).

20 W.Va. Code § 55-7B-6d (2003).

21 W.Va. Code § 55-7B-3(b) (2003).

22 W.Va. Code § 55-7B- 9 (2003).

23 W.Va. Code § 55-7B- 9a (2003).

24 W.Va. Code § 55-7B- 7 (2003).

25 W.Va. Code § 55-7B- 9a(g) (2003).

26 W.Va. Code § 55-7B-9b (2003).

27 W.Va. Code § 55-7B-9c (2003).

28 W.Va. Code § 55-7B-9c (2003).

29 W.Va. Code § 29-12C-1 (2003). Other statutes offer liability protection in specific circumstances to health care providers (and others), advancing a policy to encourage the provision and improvement of medical care. See, W. Va. Code § 30-3C-2(a)(1)(peer review protection); W.Va. Code § 30-3-10A(a)(Good Samaritans); W.Va. Code § 55-7-15, 19 (retired physicians with special volunteer medical license who provide care without pay for the indigent, absent gross negligence or willful misconduct); W. Va. Code § 55-7-23(a)(Innocent Prescribers Act); W.Va. Code § 30-5-12 (protection for pharmacists and pharmacies who dispense medications unchanged); West Virginia Code §55-7-11(b)(1)(Expressions of sympathy or apology by a healthcare provider).

The MPLA I provision setting qualifications for experts was struck down as an unconstitutional legislative intrusion into the Court's rule-making power[30] as was the twelve person jury established in MPLA II.[31] While the pre-suit requirement of Notice of Claim and Certificate of Merit has been challenged several times, the Court has declined to strike it down on constitutional grounds. The Court's opinions, however, demonstrate it is reluctant to affirm dismissal of complaints where plaintiffs fail to comply with W.Va. Code § 55-7B-6d.[32]

The original one million dollar limitation or "cap" on noneconomic loss was affirmed as constitutional on two occasions[33], and the reduced caps in the 2003 amendments were upheld in *MacDonald v. City Hospital*, 715 S.E.2d 405 (2011).

MPLA IV: Senate Bill 6

Background Leading to the 2015 MPLA Amendments: Senate Bill 6

A series of decisions by the Supreme Court of West Virginia narrowly interpreting the applicability of the MPLA exposed health care providers and related entities to an increased risk of liability not subject to the MPLA's provisions.

In an early case arising from a challenge to a notice of claim and certificate of merit, *Boggs v. Camden Clark Memorial Hospital,* 216 W.Va. 656, 609 S.E.2d 917, 2004 W.Va. Lexis 217 (2004), the Court held the MPLA applies only to medical negligence claims, stating it "*does not apply to other claims that may be contemporaneous to or related to the alleged act of medical professional liability* (italics added)."[34] The Court retreated a bit from

---

30 *Mayhorn v. Logan Medical Foundation*, 193 W.Va. 42, 454 S.E.3d 87 (1994).

31 *Louk v. Cormier*, 218 W.Va. 81, 622 S.E.2d 788 (2005).

32 *See, State ex rel. Miller v. Stone*, 216 W.Va. 379, 607 S.E.2d 485, 2004 W.Va. Lexis 174 (2004); *Boggs v. Camden Clark Memorial Hospital*, 216 W.Va. 656, 609 S.E.2d 917, 2004 W.Va. Lexis 217 (2004); *Hinchman v. Gillette*, 217 W.Va. 378, 618 S.E.2d 387, 2005 W.Va. Lexis 102 (2005); *Gray v. Mena*, 218 W.Va. 564, 625 S.E.2d 326 (2005)..

33 *Robinson v. Charleston Area Medical Center*; 186 W. Va. 720, 414 S.E.2d 877 (1991); *Verba v. Ghaphery*, 210 W. Va. 30, 552 S.E.2d 406 (2001).

34 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?

Boggs in *Gray v. Mena*, 218 W.Va. 564, 625 S.E.2d 326 (2005), stating "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….(footnotes omitted)."

After *Boggs*, the Court, in *Short v. Appalachian OH-9*, 203 W.Va. 246, 507 S.E.2d 124 (1998), held that emergency medical technicians were "health care providers" as defined in the MPLA, reasoning that "emergency medical services, regulated pursuant to the West Virginia Emergency Medical Services Act, *W.Va.Code,* 16-4C-1 [1996], *et seq.,* are also subject to the provisions of the West Virginia Medical Professional Liability Act,…" *Short*, however, was later reversed in *Phillips v. Larry's Drive In Pharmacy,* 220 W. Va. 484, 647 S.E. 2d 920 (2007), where the Court held the MPLA does not apply to pharmacies as they are not included in the definition of "health care providers" in the MPLA, West Virginia Code §55-7B-2(c) [1986]. The single syllabus point in *Phillips* 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.

Applicability of the MPLA was at issue in *Riggs v. WVUH,* 656 S.E.2d 91 (2007), where plaintiff argued the hospital's infection control program was not "health care" because its actions did not relate to an individual patient. While the majority opinion affirmed the applicability of the MPLA based on judicial estoppel, Justice Davis filed a strong concurring opinion that absent estoppel, the MPLA did not apply. However, in *Blankenship v. Ethicon*, 221 W. Va. 700, 656 S.E.2d 451 (2007), the Court held that the MPLA applied to claims against a hospital that it negligently used tainted surgical sutures.

Justice Davis' reasoning in her concurring opinion in *Riggs* found its way into the majority opinion in *Manor Care v. Douglas*, 763 S.E.2d 73 (2014). *Manor Care* arose from the death of a nursing home resident. Her estate claimed her death was the result of malnourishment and dehydration due to negligence and willful, wanton and reckless actions during her nineteen days in the defendants' nursing home. The defendants included the nursing home which was part of a chain and several entities in the national corporate structure.

Thus we find that the lower court erred in dismissing the appellant's causes of actions that were only contemporaneous or related to the alleged act of medical professional liability.

At trial, a Kanawha County jury awarded $1.5 million in damages for violations of the Nursing Home Act, $5 million for breach of fiduciary duty and $5 million in damages for negligence for a total non-economic loss verdict of $11.5 million. The Circuit Court allowed the jury to apportion by percentage between "ordinary" and "medical" negligence and then applied the non-economic limitation of the MPLA to the "medical negligence" portion of the verdict. The jury also awarded $80 million in punitive damages against all of the defendants.

Manor Care appealed after the Circuit Court denied its post-trial motions in total, except it applied the limitation in W.Va. Code 55-7B-8(b) to reduce 20% of the $5 million negligence award consistent with the jury's apportionment of 20% to "medical" negligence.

The Supreme Court reviewed the three compensatory damage awards individually. First, the Court held there is no cause of action in West Virginia for "breach of fiduciary duty" against a nursing home and therefore vacated the jury's $5 million award. Second, the Court analyzed the verdict for violation of the Nursing Home Act and finding the verdict form was too confusing to determine the basis for the award vacated it as well. Third, reviewing the $5 million award for negligence, the Court held that trial courts must rule as a matter of law whether there are claims that are covered and not covered by the MPLA. Finding the trial judge "impliedly" made such a ruling by allowing the jury to apportion between the two types of negligence, the Court affirmed the $5 million negligence award, the jury's allocation and the application of the MPLA caps to "medical" negligence only.

In *Manor Care*, the Court rejected the argument that the verdict form allowed the award of damages to non-plaintiffs, finding it harmless error that both beneficiaries were awarded damages by the jury. The Court also rejected a number of arguments raised by the defendants finding they had been waived below, including the circuit court's failure to provide separate verdict form lines for the award of punitive damages against each corporate entity.

Addressing punitive damages, the Court determined the total award was excessive in comparison to the reduced compensatory damage award. Using the same ratio between the original $11.5 million compensatory and $80 million punitive award, approximately 7:1, the Court concluded that a punitive damage award of approximately $32 million was appropriate. The Court ordered remittitur and gave the plaintiff the option of either accepting the new award or a new trial on punitive damages.

Senate Bill 6

Against this backdrop, the Legislature amended the MPLA during its regular session in 2015 in Senate Bill 6. The bill amended some of the definitions in the MPLA and added additional ones.

The definition of "health care" was substantially amended in Senate Bill 6. Existing West Virginia Code 55-7B-2(e) stated "health care… means 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."

Senate Bill 6 broadens the definition of "health care." The amendment changes the "any act or treatment" language to "any act, *service or* treatment," including those "pursuant to or in furtherance" of a plan of care or under the direction of a health care provider "for, to or on behalf" of a patient "during the patient's medical care, treatment or confinement." The amendment also provides "health care" includes but is not limited to "staffing, medical transport, custodial care or basic care, infection control, positioning, hydration, nutrition and similar patient services…." Finally, the amendment includes in the definition "[t]he process employed by health care providers and health care facilities for the appointment, employment, contracting, credentialing, privileging and supervision of health care providers." The amended definition, W.Va. Code 55-7B-2(e), now states:

> (e) "Health care" means:
>
> > (1) Any act, service or treatment provided under, pursuant to or in the furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis or treatment;
> >
> > (2) Any act, service or treatment performed or furnished, or which should have been performed or furnished, by any health care provider or person supervised by or acting under the direction of a health care provider or licensed professional for, to or on behalf of a patient during the patient's medical care, treatment or confinement, including, but not limited to, staffing, medical transport, custodial care or basic care, infection control, positioning, hydration, nutrition and similar patient services; and

> (3) The process employed by health care providers and health care facilities for the appointment, employment, contracting, credentialing, privileging and supervision of health care providers.

A consistent change was made to West Virginia Code §55-7B-2(i) which expands the definition of "medical professional liability" to include "any other claims that may be contemporaneous to or related to the alleged tort or breach of contract." That section now states:

> (i) "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. It also means any other claims that may be contemporaneous to or related to the alleged tort or breach of contract.

These changes expand (and are intended to expand) the definition of health care and medical professional liability to ensure the MPLA applies to services typically provided to patients in hospitals and nursing homes as part of the overall plan of care, but which arguably fit within "ordinary" negligence under *Manor Care v. Douglas*, 763 S.E.2d 73 (2014). In *Manor Care,* the plaintiffs' claims included understaffing,[35] and failure to provide adequate nutrition and hydration. Plaintiffs' lawyers argued these services were not "health care" but rather "ordinary negligence" both before the court and the jury. They argued "there was ample evidence presented at trial, and specific findings made by the trial court, as to how non-healthcare decisions, such as budgetary constraints, lack of staff, and poor management of the facility, affected all of the residents, including Ms. Douglas." The jury was then allowed to apportion by percentage between "medical" and "ordinary" negligence, with the MPLA applying

[35] The *Manor Care* opinion states:

> Evidence presented at trial demonstrated that Heartland Nursing Home had been chronically understaffed. There had been numerous complaints from residents and their families, as well as by Heartland Nursing Home employees. At least one employee who complained of understaffing was reprimanded for her complaint, and the complaint was apparently removed from Heartland Nursing Home records. Additionally, and notwithstanding attempts to conceal the understaffing, surveys by the West Virginia Department of Health and Human Services documented Heartland Nursing Home's understaffing and improper records pertaining to staff that occurred prior to Ms. Douglas' admission to that facility. Nevertheless, Heartland Nursing Home remained understaffed and, as a result, Ms. Douglas did not survive the adverse effects of her stay there.

only to the percentage of the award of noneconomic loss that was "medical" negligence.

By expanding the definition of "health care," more services provided as part of and important to the overall care and treatment of patients are included in the definition of medical professional liability. W.Va. Code §55-7B-2(i). These changes should counter the effect of *Manor Care* and eliminate or at least narrow expansive arguments about "ordinary" negligence.

Similarly, the amended definition extends the MPLA to claims against hospitals for negligence in granting credentials and privileges and in monitoring health care providers. Like the other amendments to this subsection, the amendment was driven by concerns that hospitals could be exposed to claims related to health care that avoided the protection of the MPLA.

Senate Bill 6 also extended the application of the MPLA to other corporate entities related to the health care provider or facility which treats the patients, including parent and sister corporations. This was an issue in *Manor Care* where plaintiffs argued their claims against "non-health care provider" corporations, such as a related management company, were not protected by the MPLA. The plaintiff argued these entities were not health care providers or facilities and were therefore not entitled to the protection of the MPLA. The Court did not directly address the issue, finding it had been waived by the defendant below.

The concept of related entity is found in amendments to two sections of the MPLA. Section 55-7B-2(f) includes "related entities" in the definition of health care facilities.

> (f) "Health care facility" means any clinic, hospital, nursing home or assisted living facility, including personal care home, residential care community and residential board and care home, or behavioral health care facility or comprehensive community mental health/mental retardation center, in and licensed by the State of West Virginia and any state-operated institution or clinic providing health care <u>and any related entity to the health care facility.</u>

A new section, 55-7B-2(n), adds a definition of related entity:

> <u>(n) "Related Entity" means any corporation, partnership, professional limited liability company, limited liability company, trust or affiliate</u>

which owns directly, indirectly, beneficially or constructively any part of a health care provider or health care facility.

These changes are important to nursing homes, which have individual buildings or facilities which are generally owned by parent entities, and have certain services provided by separate corporations, such as budgeting and management services. These changes can also be important to hospitals as they will ensure the MPLA applies to related entities in a hospital system, or which are designed to provide services to several hospitals, and more particularly to entities set up to employ physicians. The changes reflect the evolving way of providing health care services and provide the MPLA is applicable.

The definition of "representative" was expanded to include medical power of attorney and health care surrogate.

(o) "Representative" means the spouse, parent, guardian, trustee, attorney, medical power of attorney, health care surrogate, or other legal agent of another.

A new section, W.Va. Code §55-7B-7a, limits the admissibility of certain evidence. This section is intended to stop the introduction of state and federal investigative reports, disciplinary actions, accreditation reports or assessment of penalties unless they apply to the injured person or substantially similar conduct within one year of the incident involved. It prohibits the introduction of evidence about staffing levels if state staffing requirements are met. Finally, even if the evidence satisfies these provisions, it may only be admitted if there is a final order which is otherwise admissible under the West Virginia Rules of Evidence.

§55-7B-7a Admissibility of certain information

a) In any action brought, the following information may not be introduced in any proceeding unless it applies specifically to the injured person or it involves substantially similar conduct that occurred within one year of the particular incident involved:

    1. A state or federal survey report of a health care provider or health care facility;

    2. Disciplinary actions against a health care provider's license, registration or certification;

3. An accreditation report of a health care provider or health care facility; or

4. An assessment of a monetary penalty.

b.) In any action brought, a health care provider or health care facility's staffing levels may not be introduced in any proceeding if the health care provider or health care facility demonstrates compliance with the minimum staffing requirements under state law

c.) Information under this section may only be introduced in a proceeding if it has been affirmed by the entry of a final adjudicated and unappealable order of the department after formal appeal and is otherwise admissible under the WV Rules of Evidence.

S.B. 6 also amended §55-7B-7 to include a new requirement that the "(4) the expert witness's opinion is grounded on scientifically valid peer reviewed studies if available;…"[36]

The definition of collateral source was amended to exclude benefits payable under Medicare directly attributable to the medical injury in question. The amended §55-7B-2(b) states:

(b) "Collateral source" means a source of benefits or 4 advantages for economic loss that the claimant has received from:

(1) Any federal or state act, public program or insurance 7 which provides payments for medical expenses, disability benefits, including workers' compensation benefits, or other similar benefits. Benefits payable under the Social Security Act and Medicare are not considered payments from collateral sources except for Social Security disability benefits directly attributable to the medical injury in question.

[36] There will likely be a challenge to constitutionality of the evidentiary provisions in S.B. 6. Statutory provisions in the MPLA related to expert qualifications in the original MPLA were struck down as unconstitutional. *Mayhorn v. Logan Medical Foundation*, 193 W.Va. 42, 454 S.E.3d 87 (1994)(MPLA expert requirements violated separation of powers and was an unconstitutional legislative intrusion into the Court's rule-making power). A provision in the 2001 amendments expanding the number of jurors was struck down for the same reason. *Louk v. Cormier*, 218 W.Va. 81, 622 S.E.2d 788 (2005)(striking down twelve member jury). However, the Court has upheld and applied other provisions related to the requirements for expert testimony. Daniel v. CAMC; State ex rel. Weirton Medical Center.

West Virginia Code 55-7B-9(l) is a new provision allowing an inflationary increase of the limitation on damages related to trauma care:

> (l) On the first of January, two thousand sixteen, and in each year thereafter, the limitation for civil damages contained in subsection (a) of this section shall increase to account for inflation by an amount equal to the consumer price index published by the United States department of labor, up to fifty percent of the amounts specified in subsection (a) as a limitation of civil damages.

Section 55-7B-9c (a) was also amended to be consistent with 55-7B-8(a) and (b) "the total amount of civil damages recoverable shall not exceed five hundred thousand dollars, exclusive of interest computed from the date of judgment, regardless of the number of plaintiffs or the number of defendants or, in the case of wrongful death, regardless of the number of distributees." The bill also cleans up the language of the inflationary riser, stating "On January 1, 2004, and in each year thereafter, the limitation for compensatory damages contained in subsections (a) and (b) of this section shall increase to account for inflation by an amount equal to the Consumer Price Index published by the United States Department of Labor, not to exceed one hundred fifty percent of the amounts specified in said subsections."

Section 55-7B-9d, entitled "Adjustment of verdict for past medical expenses" is a new provision stating:

> A verdict for past medical expenses is limited to:
>
> (1) The total amount of past medical expenses paid by or on behalf of the plaintiff; and
>
> (2) The total amount of past medical expenses incurred but not paid by or on behalf of the plaintiff for which the plaintiff or another person on behalf of the plaintiff is obligated to pay.

Similar to the 2003 amendments, S.B. 6 applies "to all causes of action alleging medical professional liability which are filed on or after July 1, 2015." W.Va. Code §55-7B-10(b)(2015).

Medical Professional Liability Cases

SUPREME COURT OF APPEALS OF WEST VIRGINIA

State ex rel. Wheeling Hospital, Inc. v. Wilson, ___ S.E.2d ___, 2016 WL 595873 (W. Va.

2016).

In this case the Supreme Court took up the issue of the Peer Review Privilege codified at W. Va. Code § 30-3C-1 *et seq*. In clarifying the meaning of the language contained in West Virginia's Peer Review Statute, the Supreme Court recognized "an urgent need for more precise guidelines as to which documents are subject to disclosure." *Wheeling Hospital,* No. 15-0558 at 14.[37]

This matter arrived at the Supreme Court on a *Petition for a Writ of Prohibition* filed by the Defendant, because it had been ordered by the Circuit Court to produce several documents that it claimed were protected by the Peer Review Privilege. *Id.* at 3. The Plaintiff, however, argued that these documents were not necessarily created specifically to be used for peer review purposes and were documents that fell under the original source exception to the Peer Review Privilege. *Id.* at 4, 8. In its argument to the Supreme Court, the Defendant argued that if the documents ordered to be disclosed by the Circuit Court were, in fact, disclosed, "such disclosure [would] have a 'chilling effect' on the peer review process, itself." *Id.* at 7 (*citing Young v. Saldanha*, 431 S.E.2d 669, 673 (W. Va. 1993)).

With Justice Davis writing the opinion, the Supreme Court performed a lengthy discussion of West Virginia's Peer Review Statute and the case law interpreting the same while citing case law from other jurisdictions to aid in further interpreting the meaning of the statute. In so doing, the Supreme Court stated "that documents using data that is generated exclusively for o by a peer review organization for its sole use are protected by the peer review privilege." *Id.* at 15. Further, the Supreme Court stated that "documents that contain mental impressions, analyses, and/or work product of the review organization are exempt from disclosure." *Id.* Specifically, the Supreme Court found that "credentialing files are "clearly privileged." *Id.* (*citing* Syl. Pt. 8, *State ex rel. Charles Town Gen. Hosp. v. Sanders*, 556 S.E.2d 85 (W. Va. 2001)).

However, according to the Supreme Court the more difficult question arises when determining "[w]hich category contains documents that are considered by a peer review organization but that have not necessarily been created specifically for or by that entity" or whether "compilations of existing data that are used by a peer review organization" fall under Peer Review protection. *Id.* at 16. The Supreme Court stated that "[t]he answer…is simple: 'the origin of the document determines if it is privileged.'" *Id.* at 16-17 (*quoting State ex rel. Shroades v. Henry*, 421 S.E.2d 264, 269 (W. Va. 1992)).

[37] The page numbers cited within this summary reflect that page numbers in the opinion that can be accessed on the West Virginia Supreme Court's website since Westlaw has not yet posted a copy of this opinion with page numbers.

To determine the origin of the document, one must "look to the way in which a document was created and the purpose for which it was used, not…its content." *Id.* at 17 (*quoting Bd. of Registration in Med. v. Hallmark Health Corp.*, 910 N.E.2d 898, 907 (Mass. 2009)). "The proper inquiry as to whether a document qualifies for protection…is whether it was created by, for, or otherwise as a result of a medical peer review committee." *Id.* (*quoting Hallmark*, 910 N.E.2d at 907). Thus, according to the Supreme Court, "the test to apply to determine whether the peer review privilege shields a particular document from disclosure is whether the document was created exclusively by or solely for a review organization." *Id.*

With regard to original source documents, the Supreme Court found that "[d]ocuments that may be provided to a peer review committee, but were not originally prepared exclusively for the committee and are also accessible to staff of the facility in their capacities as employees or managers of the facility, separate and apart from any role on a review committee, are not in any way protected by the privilege. The privilege attaches only to the files maintained by and for the committee, not to all files in a facility." *Id.* at 19 (*quoting Large v. Heartland-Lansing of Bridgeport Ohio, LLC*, 995 N.E.2d 872, 884-85 (Ohio Ct. App. 2013)). Simply put, "documents that are otherwise discoverable do not become privileged merely because they have been dipped in the waters of a peer review committee file." *Id.* at 20 (*quoting Large*, 995 N.E.2d at 886). Importantly though, the Supreme Court held that "[w]here documents sought to be discovered are used in the peer review process but either the document, itself, or the information contained therein, is available from an original source extraneous to the peer review process, such material is discoverable from the original source, itself, but not from the review organization that has used it in its deliberations." *Id.* at Syl. Pt. 2.

Applying these principles to the facts of this case, the Supreme Court held "that the party seeking the protections of the peer review privilege bears the burden of establishing its applicability by more than a mere assertion of privilege." *Id.* at 22-23. The Supreme Court further found that many of the documents that the Circuit Court ordered to be produced were, in fact, privileged by the Peer Review Privilege. *Id.* at 23-24. However, the Supreme Court was unable to tell whether the remaining documents were entitled to Peer Review protection, because it lacked "the crucial information determinative of the applicability of the privilege." *Id.* at 24. As such, the Supreme Court held that a party seeking peer review protection of certain documents must produce a privilege log that "identifies each document…by name, date, and custodian" as well as providing information regarding "(1) the origin of each document, and whether it was created solely for or by a review committee, and (2) the use of each document, with disclosures as to whether or not the document was used

exclusively by such committee." *Id.* at 26. The privilege log should also contain "a recitation of the law supporting the claim of privilege." *Id.*

Therefore, the Supreme Court granted the *Writ of Prohibition* as to the documents specifically enumerated in its opinion and ordered the Defendant to produce a privilege log consistent with the Supreme Court's opinion such that the Circuit Court could perform a further *in camera* review of the documents for which a claim of privilege was made. Further, the Supreme Court's opinion included the following four new syllabus points:

1. To determine whether a particular document is protected by the peer review privilege codified at W. Va. Code § 30-3C-3 (1980) (Repl. Vol. 2015), a reviewing court must ascertain both the exact origin and the specific use of the document in question. Documents that have been created exclusively by or for a review organization, or that originate therein, and that are used solely by that entity in the peer review process are privileged. However, documents that either (1) are not created exclusively by or for a review organization, (2) originate outside the peer review process, or (3) are used outside the peer review process are not privileged.

2. Where documents sought to be discovered are used in the peer review process but either the document, itself, or the information contained therein, is available from an original source extraneous to the peer review process, such material is discoverable from the original source, itself, but not from the review organization that has used it in its deliberations.

3. The party seeking the protections of the peer review privilege bears the burden of establishing its applicability by more than a mere assertion of privilege.

4. A party wishing to establish the applicability of the peer review privilege, set forth at W. Va. Code § 30-3C-3 (1980) (Repl. Vol. 2015), should submit a privilege log which identifies each document for which the privilege is claimed by name, date, and custodian. The privilege log also should contain specific information regarding (1) the origin of each document, and whether it was created solely for or by a review committee, and (2) the use of each document, with disclosures as to whether or not the document was used exclusively by such committee. Finally, the privilege log should provide a description of each document and a recitation of the law supporting the claim of privilege.

Pendleton v. Wexford Health Sources, Inc., 2015 WL 8232155 (W. Va. December 7, 2015) (unpublished).

In this case, plaintiff, a prisoner at the Mount Olive Correctional Complex, had a cavity filled by the defendant dentist employed by the defendant healthcare provider. *Id.* at *1. The plaintiff complained that the dentist had drilled his tooth too deep when performing the filling and went through the prison's grievance system before filing suit. *Id.* The prison denied the plaintiff's grievance. *Id.*

Plaintiff filed his Complaint in this civil action contending that he did not require a Screening Certificate of Merit, pursuant to W. Va. Code § 55-7B-6(c), and, instead, he "submitted a statement in lieu of a screening certificate of merit asserting "that expert testimony would not be needed to establish respondents' liability for the eventual extraction of his tooth because the unit manager's response to his January 3, 2012, grievance constituted an admission that [the defendant dentist] placed the filling 'too deep' into" the tooth. *Id.*

Defendants filed a Motion to Dismiss for failure to comply with the MPLA's pre-suit notice requirements. *Id.* The circuit court agreed dismissing the plaintiff's Complaint, with prejudice, and finding that whether the defendant dentist drilled too deep would require the expert testimony of another dentist. *Id.* at *2. As such, the circuit court dismissed the plaintiff's Complaint, with prejudice.

On appeal, the Supreme Court found that the plaintiff misrepresented the findings of the unit manager by stating that the unit manager had admitted that the defendant dentist had drilled too deep when the unit manager actually stated that the dentist had drilled "real deep." *Id.* at *3. Therefore, the Supreme Court found that this false statement in the plaintiff's "statement in lieu of a screening certificate of merit did not represent a good faith and reasonable effort to further the purposes of the MPLA." *Id.* Thus, the Supreme Court held that the circuit court's dismissal, with prejudice, was proper. *Id.*

Keith v. Lawrence, 2015 WL 7628691 (W. Va. November 20, 2015) (unpublished).

In this case, plaintiff's decedent presented to the hospital where he was initially treated for shortness of breath. *Id.* at *1. When the shortness of breath continued, plaintiff's decedent was treated by the defendants, among other physicians, who performed many tests and procedures, including a lung biopsy, in attempts to diagnose the condition from which he was suffering. *Id.* After plaintiff's decedent's lung was biopsied, he went into respiratory distress, underwent a tracheostomy, and was placed on a ventilator. *Id.* Plaintiff's decedent remained hospitalized until the time of his death, and the death certificate reported the cause of death as being respiratory failure due to a cerebrovascular accident. *Id.*

The defendants were served with notices of claim and screening certificates of merit, and counsel for each defendant informed plaintiff of the perceived deficiencies in the documents each defendant received including that plaintiff's expert was not qualified to render standard of care opinions. *Id.* Counsel for plaintiff met with counsel for defendants, and counsel for defendants again wrote to counsel for plaintiff requesting "that the alleged deficiencies in the screening certificates of merit be corrected." *Id.* at *2. Plaintiff filed her Complaint, and the defendants filed Motions to Dismiss. *Id.* The circuit court denied the motions. *Id.*

On appeal, the Supreme Court first considered whether the Order from which the defendants appealed was, in fact, appealable. *Id.* "[U]nder the limited facts and circumstances of this case," the Supreme Court found that the Order from which the defendants appealed was properly appealable under the collateral order doctrine since the Order "conclusively determined the disputed controversy of the sufficiency of the certificates of merit…resolved an important issue completely separate from the merits…and was effectively unreviewable on appeal from a final judgment." *Id.*

With regard to the MPLA issues challenged in the appeal, the defendants argued that the plaintiff's screening certificates of merit "did not address: (1) respondent's expert's familiarity with the standard of care; (2) respondent's expert's qualifications to offer an opinion on the care provided by petitioners; (3) how the standard of care was breached; and (4) how the alleged breach of the standard of care resulted in the death of respondent's husband. Conversely, [plaintiff] argue[d] that its certificates of merit satisfied the requirements of West Virginia Code § 55–7B–6(b), and the spirit and purpose of the MPLA." *Id.* at *3.

However the Supreme Court affirmed the trial court's ruling finding that plaintiff's screening certificates of merit "were particular as to respondent's expert's familiarity with the applicable standard of care; his qualifications; his opinion as to how the applicable standard of care was breached; and how the breach resulted in the death of respondent's decedent." *Id.* *4. Further, the Supreme Court found that counsel for plaintiff had attempted to assuage the concerns of counsel for the defendants before suit was filed, thus, furthering the statutory purposes of the MPLA. *Id.*

Justice Davis, however, dissented from the majority's opinion stating that "[a]s a result of the majority's decision to hear the merits of this appeal, I am concerned that this Court will be flooded with appeals by defendants from interlocutory orders denying motions to dismiss on certificate of merit grounds. Even though the majority's decision correctly addresses the requirements for a certificate of merit, the majority has, nevertheless, accepted an improper appeal from an interlocutory order."

Id. at *5.

State ex re. Miles v. W. Va. Bd. of Registered Professional Nurses, 777 S.E.2d 669 (W. Va. 2015).

Although this is not an MPLA case, it does warrant mentioning, because it drives home the point that state licensing boards must closely follow statutory procedures when bringing complaints against a licensee. *Id.* at 674-75. In this case, the licensee had been terminated from her position with a hospital for "allegedly violating the hospital's narcotic waste policies." *Id.* at 671. The licensee self-reported her termination, and the Board issued a Notice of Complaint. *Id.*

Four months after issuing the Notice of Complaint, the Board sent a status report to the hospital by regular mail stating that it was continuing to investigate the situation. *Id.* at 671-72. Approximately seven months later, the Board sent another status update to the hospital stating that the case was "being negotiated for settlement," and the Board also sent the petitioner a proposed consent decree. *Id.* at 672.

Fourteen months after the first status report was issued, the Board sent the hospital a letter indicating that it had exceeded the time allowed by law to resolve the Complaint and stating that the hospital, as the complainant, and the Board had to agree to extend the timeframe to resolve the Complaint. *Id.* The Board only requested that the hospital respond in writing if it disagreed. *Id.* Three months after this letter was sent the Board began preparing for hearing and informed the petitioner's counsel of the same, and the petitioner's counsel requested the Board's complete file. *Id.* The petitioner filed a motion to continue the hearing, which was granted, and filed for a writ of prohibition with the Supreme Court. *Id.*

The Supreme Court stated that the statute at issue, W. Va. Code § 30-1-5(c), stated that

> [e]very board referred to in this chapter has a duty to investigate and resolve complaints which it receives and *shall,* within six months of the complaint being filed, send a status report to the party filing the complaint by certified mail with a signed return receipt and *within one year of the status report's return receipt date issue a final ruling, unless the party filing the complaint and the board agree in writing to extend the time for the final ruling.*

Id. at 673. According to the Supreme Court, it had to decide whether W. Va. Code § 30-1-5(c) was mandatory and, if it was, whether the Board complied with the statute

in this case. *Id.*

The Supreme Court found that the statutory procedures of W. Va. Code § 30-1-5(c) were mandatory and that the Board, in this case, had "exceeded its jurisdiction by failing, *almost entirely*, to comply with the statute governing its procedural handling of complaints." *Id.* at 675. Further, the Supreme Court was "dismayed to note that in addition to divesting it of jurisdiction, the Board's actions in this case present the seldom-seen 'persistent disregard for either procedural or substantive law' likewise warranting a writ of prohibition." *Id.* (*quoting* Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 483 S.E.2d 12 (W. Va. 1996)). Thus, the Supreme Court granted the petitioner a writ of prohibition. *Id.* at 676.

Stephens v. Rakes, 775 S.E.2d 107 (W. Va. 2015).

In this case, plaintiff alleged that the defendant was aware that plaintiff's decedent was negligently given Seroquel along with the Haldol and did nothing to counteract it. *Id.* at 112-13. Prior to trial, the defendant filed a motion for summary judgment on proximate causation and punitive damages, which was denied by the circuit court. *Id.* at 114. However, the circuit court granted defendant's motion to preclude "any testimony that [defendant] ordered and administered Seroquel to the decedent and that the order and administration of Haldol alone was the cause of the decedent's death." *Id.* At the close of the plaintiff's case in chief and at the close of all evidence, defendant moved for judgment as a matter of law on the issues of proximate cause and punitive damages, which was denied. *Id.* at 114, 119. The jury awarded plaintiff $500,000 in non-economic damages and $500,000 in punitive damages, and the circuit court reduced this verdict to $810,000 per the off-set for pre-verdict settlements from the jury's non-economic damages award. *Id.* at 114. Following the verdict, the defendant filed a Renewed Motion for Judgment as a Matter of Law on the issues of proximate cause and punitive damages, which was denied, as well as filing a Motion for a New Trial. *Id.*

In reviewing the circuit court's decision on defendant's Motion for Summary Judgment, Motion for Judgment as a Matter of Law, and Renewed Motion for Judgment as a Matter of Law on the issue of proximate causation, the Supreme Court found that the denial of the motion should be affirmed. *Id.* at 118. Further, with regard to defendant's Motion for Summary Judgment, Motion for Judgment as a Matter of Law, and Renewed Motion for Judgment as a Matter of Law on the issue of punitive damages, the Court found "that there was sufficient testimony presented for a jury to be convinced that willful, wanton and reckless conduct occurred warranting punitive damages." *Id.* at 119.

Moreover, in denying defendant's Motion for a New Trial, the Court found that counsel for plaintiff "gave a credible, non-discriminatory reason for striking" the only African American juror on the panel, the Court found no error in the circuit court's rejection of defendant's allegation that counsel for plaintiff violated the circuit court's motion *in limine* order, and the Court found no error in the circuit court's rejection of the defendant's allegation that counsel for plaintiff used inflammatory statements. *Id.* at 121-23. Lastly, the Court found that the circuit court did not err in refusing to give defendant's "Do Not Resuscitate" ("DNR") jury instruction. *Id.* at 126-27. As such, the Court affirmed the circuit court's decisions. *Id.* at 128.

State ex rel. HCR Manor Care, LLC v. Stucky, 776 S.E.2d 271 (W. Va. 2015).

In this matter, the Court took up the issue of peer review and attorney-client privilege. Plaintiff filed this action for the injuries and death sustained by its decedent while a resident at defendant's facility. *Id.* at 274. The defendant "employed nurse consultants to do periodic evaluations of [its] facilities," which were called "Center Visit Summaries." *Id.* Plaintiff's counsel discovered the existence of these "Center Visit Summaries" in another unrelated case and requested them in discovery in the instant case. *Id.* at 275. At the time its discovery responses were made, defendant was unaware of the existence of the "Center Visit Summaries" and stated that if they did exist they were protected by the Peer Review Privilege, which is codified at W. Va. Code § 30-3C-1 *et seq*. *Id.* However, defendant did not state in its discovery responses "that it had a designated peer review organization in place which would have reviewed the purported Summaries." *Id.* Plaintiff took the position that the requested documents fell outside of the Peer Review Privilege. *Id.*

Following a motion to compel, the circuit court ordered defendant to produce the documents, to redact the names of all residents except the decedent, and to produce a privilege log for documents it claimed were peer review protected. *Id.* After this order was entered, plaintiff filed a motion to compel compliance, and a hearing was had. *Id.* Defendant asserted that the "Center Visit Summaries" were only given to persons in quality assurance and peer review and suggested that the next step would be for defendant to have an extension of time to demonstrate that it had a peer review committee. *Id.* at 275-76. Plaintiff countered that the defendant had been arguing peer review for a year but was still unable to prove it was entitled to the privilege it claimed. *Id.* at 276. Subsequently, the circuit court entered an order compelling production of the "Center Visit Summaries" and finding that the defendant "failed to put forth any evidence that a quality assurance committee existed or that the documents at issue were submitted to any such quality assurance committee." *Id.* Further, the circuit court found the "Center Visit Summaries" to be "from an original source." *Id.*

The circuit court also ordered defendant to produce requested "Briefing Packets" that consisted of reports and meeting minutes provided to the board of directors of each of defendant's entities regarding the decedent's residency. *Id.* Defendant sought to protect these by asserting the attorney-client privilege, because they have been prepared by the defendant's general counsel. *Id.* at 276-77. Plaintiff filed a motion to compel these documents, and defendant argued that they should be submitted to the circuit court for *in camera* review. *Id.* at 277. However, the circuit court ordered the "Briefing Packets" produced and redacted with regard to information that was provided by counsel. *Id.* Defendant filed a Petition for Writ of Prohibition concerning both the "Center Visit Summaries" and the "Briefing Packets." *Id.*

The Supreme Court found that under existing precedent, whether a document is protected by the Peer Review Privilege "is essentially a factual question and the party asserting the privilege has the burden of demonstrating that the privilege applies." *Id.* at 279 (*quoting* Syl. Pt. 2, *State ex rel. Shroades v. Henry*, 421 S.E.2d 264 (W. Va. 1992)). Further, the Court stated that "*Shroades* emphasized that, where the asserted privileged documents are identified in terms of a 'committee,' the circuit court should examine the health care provider's by-laws to determine whether the committee or organization is a 'review organization' as defined in *W.Va.Code,* 30–3C–1." *Id.* (*citing Shroades*, 421 S.E.2d at 269–70).

Moreover, the Court found that if the circuit court had conducted an *in camera* review,

> the circuit court would have been required to do the work of meeting [defendant]'s burden of establishing that it has a peer review organization as defined in *W.Va.Code,* 30–3C–1 [2004]. Stated differently, without first establishing the existence of the review organization, [defendant] cannot seek to encumber the circuit court with examining documents, not to determine which parts are privileged, but to determine whether the peer review privilege applies in the first place.

Id. at 280. The circuit court further found that the "Center Visit Summaries" originated from an original source, and due to defendant's "failure to establish a peer review organization through by-laws or additional information, the information sought by [plaintiff] necessarily emanated from a non-privileged source and would be subject to production." Therefore, the Court found that the circuit court did not exceed its jurisdiction in requiring the production of the "Center Visit Summaries." *Id.* at 282.

With regard to the "Briefing Packets," the Court found that defendant's position of requesting an *in camera* review by the circuit court was persuasive and, thus, granted a Writ of Prohibition on that issue while denying the Writ as to the "Center Visit Summaries." *Id.* at 283. Justice Davis concurred with the majority's decision with regard to the "Briefing Packets" but dissented with regard to its decision regarding the "Center Visit Summaries" stating that "[t]he requirement of an *in camera* review of documents allegedly protected by a statutory health care privilege is consistent with the law around the country." *Id.* at 285.

Rainey v. W. Va. Dep't of Health & Human Resources/Office of Healthcare Facility Licensure & Certification, 2015 WL 2364571 (W. Va. May 15, 2015) (unpublished).

In this Memorandum Decision, the Supreme Court decided an appeal brought by a nurse's aide ("petitioner") whose name was placed on the Nurse Aide Abuse Registry by the West Virginia Department of Health and Human Resources/Office of Healthcare Facility Licensure and Certification ("OHFLAC"). The petitioner's name was placed on the Nurse Aide Abuse Registry following a complaint made by a fellow nurse's aide, who witnessed the petitioner standing over the bed of a patient with significant health problems, including dementia and mental retardation, while the bed was "shaking or bouncing." *Id.* at *1. Further, while witnessing the petitioner in this position, the nurse's aide heard the petitioner tell the patient to "shut up." *Id.* However, the nurse's aide was unable to tell whether the petitioner's hands were on the patient or on the bed. *Id.* Upon investigation, OHFLAC "found sufficient evidence to place petitioner's name on the Nurse Aide Abuse Registry."

Petitioner was unsuccessful in both her hearing with the West Virginia Department of Health and Human Resources and in her appeal of that ruling to the circuit court level. On appeal to the Supreme Court, the Court upheld the decisions of both the hearing examiner and the circuit court finding that from the evidence presented, it could not say that the hearing examiner was clearly wrong "in finding that petitioner physically abused" the patient. *Id.* at *3. The Court further found that despite the hearing examiner's finding of physical abuse, the recommendation was for the petitioner's name to be placed on the Nurse Aide Abuse Registry for "verbal and psychological/emotional abuse only." *Id.*

Moreover, the Court found that "the circuit court clearly set out the action amounting to 'abuse' in the order" being appealed finding that "abuse" was committed "when [petitioner] was observed shaking [the patient's] bed and…either yelling at, or telling, [the patient] to shut up." *Id.* Also, the Court found that it could not say that the hearing examiner's determination regarding the credibility of the

petitioner's accuser was "clearly wrong" under a deferential standard. *Id.* at 4. Additionally, the Court found that OHFLAC met "its burden of proof in light of the applicable definitions of abuse" found in the West Virginia Code. *Id.* Lastly, the Court found petitioner's argument that the "preponderance of the evidence standard" was too low in this case to be without merit. *Id.* Therefore, the Court found no error, and petitioner's name was properly placed on the Nurse Aide Abuse Registry. *Id.*

State ex re. Tallman v. Tucker, 769 S.E.2d 502 (W. Va. 2015).

In this case, the Court granted a Writ to prohibit the enforcement of the circuit court's order excluding the opinions contained in the defendant's Supplemental Expert Witness Disclosure. *See generally id.* The circuit court entered a Scheduling Order establishing expert disclosure deadlines. *Id.* at 504. Plaintiff filed its Expert Witness Disclosure a little over a month late. *Id.* Upon receipt of plaintiff's Expert Witness Disclosure, defendant sent plaintiff a letter, which set forth that the parties had agreed to an extension of six weeks for the defendant to file its Expert Witness Disclosure. *Id.* Approximately four weeks after defendant's letter confirming its extension of time to file its Expert Witness Disclosure, defendant forwarded another letter to plaintiff informing it of deficiencies in plaintiff's Expert Witness Disclosure and stating that defendant would not disclose its expert witnesses until plaintiff provided a full disclosure of its expert's opinions. *Id.*

After approximately three months with no answer, defendant sent plaintiff another letter stating that it had not received plaintiff's supplemental expert information and threatening a Motion to Compel. *Id.* at 504-05. Defendant served plaintiff with its Expert Witness Disclosure shortly after sending this letter, and defendant filed a motion to strike and preclude the testimony of plaintiff's expert or to compel a complete expert disclosure. *Id.* at 505. During the pendency of this motion, the circuit court entered a new Scheduling Order extending the discovery deadline. *Id.* Subsequently, a hearing was held on defendant's motion, and the court denied the motion but included language that the parties had agreed that plaintiff would supplement its Expert Witness Disclosure with its Screening Certificate of Merit. *Id.* Defendant then deposed plaintiff's expert, and after defendant's experts reviewed the transcript, they revised their opinions prompting defendant to file a Supplemental Expert Witness Disclosure, which plaintiff moved to strike and exclude, and the circuit court granted plaintiff's motion. *Id.*

On hearing defendant's Petition for a Writ of Prohibition, the Supreme Court found that the defendant had "'seasonably' supplemented his expert witness disclosure." *Id.* at 506. Further, the Court found that while the circuit court's order "implicitly pardon[ed plaintiff] for…filing her initial expert witness disclosure" thirty-

three days late, it found "fault with [defendant] for supplementing his expert witness disclosure fifteen days after the discovery cut-off date." *Id.* Moreover, the Court found that "the late and inadequate disclosure by [plaintiff] was the cause of [defendant's] inability to fully disclose the opinions of his experts within the initial and subsequent discovery cut-off dates." *Id.* at 507. Additionally, the Court agreed that plaintiff's initial Expert Witness Disclosure fell "completely below the minimal disclosure requirements of Rule 26(b)(4)" of the *West Virginia Rules of Civil Procedure*. *Id.* Therefore, the Court granted defendant's Petition for a Writ of Prohibition. In so doing, the Court issued two new syllabus points:

1. Under Rule 26(e)(1) of the West Virginia Rules of Civil Procedure, a party responding to a discovery request is under a continuing duty to make a seasonable supplementation to its original answers to any question asking for the identity of an expert witness expected to be called at trial, the subject matter on which the expert will testify, and the substance of his or her testimony.

2. Factors that may assist a court in deciding whether to permit late supplemental expert witness disclosure include: (1) the explanation for making the supplemental disclosure at the time it was made; (2) the importance of the supplemental information to the proposed testimony of the expert, and the expert's importance to the litigation; (3) potential prejudice to an opposing party; and (4) the availability of a continuance to mitigate any prejudice.

Justice Workman, joined by Justice Loughry, issued a concurring opinion stating "I wholeheartedly agree that seasonable supplementation of discovery is required by our Rules and fundamental fairness. However, adherence to these requirements does not necessitate that an expert disclosure constitute a veritable script from which the expert may not stray in testifying and elucidating his opinions." *Id.* at 508.

Tabata v. Charleston Area Medical Center, Inc., 759 S.E.2d 512 (W. Va. 2014).

In this case, the Court decided that the plaintiffs in a breach of privacy case had standing to bring suit and met the prerequisites for class certification. *Id.* at 465, 467. The plaintiffs in this case received a letter from CAMC informing them that "their personal and medical information contained on a database operated by CAMC accidentally was placed on the Internet." *Id.* at 462. To compensate these persons,

CAMC offered "a full year of credit monitoring at CAMC's cost." *Id.* Plaintiffs filed suit claiming "breach of duty of confidentiality; invasion of privacy – intrusion upon the seclusion of the petitioners; invasion of privacy – unreasonable publicity into the petitioners' private lives; and negligence. *Id.* at 463. During discovery, it was revealed that neither plaintiffs nor CAMC, were "aware of any unauthorized and malicious users attempting to access or actually accessing their information." *Id.* Further, they were not aware of "any actual or attempted identify theft," and the plaintiffs did not suffer "any property injuries or sustain[] any actual economic losses," nor were they aware of "any other potential class members, [who had] sustained such injuries." *Id.*

The circuit court determined that the plaintiffs did not have standing to bring suit and that the plaintiffs did not meet the prerequisites for class certification. *Id.* The Supreme Court used a three part test to determine the standing issue: (1) was there an "injury-in-fact"; (2)was there "a causal connection between the injury and the conduct forming the basis of the lawsuit; and (3) was it "likely that the injury [could] be redressed through a favorable decision of the court." *Id.* (*quoting* Syl. Pt. 5, *Findley v. State Farm Mut. Auto. Ins. Co.*, 576 S.E.2d 807 (W. Va. 2002)). The Court found that the plaintiffs had a "legal interest in having their medical information kept confidential," which interest was "concrete, particularized, and actual," and, thus, the plaintiff's had standing to bring their claims. *Id.* at 464. Further, the Court found that the plaintiff's claims met "the requirements of class certification of commonality, typicality, and the predominance of common issues of law or fact." *Id.* at 467. Therefore, the Court reversed the decision of the circuit court; however, it made "no determination regarding the merits" of the case. *Id.*

In dissent, Justice Ketchum stated that "[t]his case is a typical example of a frivolous class-action lawsuit. The named plaintiffs' lawyer admitted during oral argument that discovery did not reveal that any of his client's medical records or personal information was accessed or viewed by any unauthorized person." *Id.* Further, Justice Ketchum stated that "[t]he majority opinion concedes that discovery reveals the named plaintiffs have suffered no injury." *Id.* As such, for Justice Ketchum, there was "[n]o harm, no foul[, and t]he plaintiffs lack[ed] standing to sue or represent a class of unnamed plaintiffs." *Id.*

Kenney v. Liston, 760 S.E.2d 434 (W. Va. 2014).

In this case, the Court held that "[t]he collateral source rule protects payments made to or benefits conferred upon an injured party from sources other than the tortfeasor by denying the tortfeasor any corresponding offset or credit against the injured party's damages. Even though these collateral sources mitigate the injured party's loss, they do not reduce the tortfeasor's liability." *Id.* at Syl. Pt. 2. This case

originated from an accident in which the plaintiff was rear ended by the defendant, whose blood alcohol level at the time of the accident was greater than "four times the legal limit." *Id.* at 437. Plaintiff incurred over $70,000 in medical bills. *Id. at* 438.

Defendant filed a pre-trial motion to exclude the amount of medical bills written off or adjusted. *Id.* The defendant argued that the plaintiff was not entitled to the full amount of the medical bills, because they "were neither paid nor actually incurred by the plaintiff or the plaintiff's health insurance carrier[, and, as such,] plaintiff should not be allowed to introduce evidence of those written-off amounts at trial." *Id.* The Court denied the motion, and at trial, the jury awarded the plaintiff a verdict of $325,272.92 including $74,061 in medical bills. Subsequently, the Court held a punitive damages trial where the jury awarded the plaintiff $300,000 in punitive damages.

In affirming the circuit court, the Supreme Court found that a "party at fault should not be able to minimize his damages by offsetting payments received by the injured party through his own independent arrangements." *Id.* at 441 (*citing Ratlief v. Yokum*, 280 S.E.2d 584, 590 (W. Va. 1981)). Further, the Court held that "the amount of the medical expense that was discounted or written off [could] be considered both a benefit of the plaintiff's bargain with his health insurance carrier, and a gratuitous benefit arising from the plaintiff's bargain with the medical provider," thus, the collateral source rule protected amounts discounted or written off by a medical provider. *Id.* at 444. Moreover, the Court held that

> the collateral source rule permits an injured person to recover *all* of his or her reasonable medical costs that were necessarily required by the injury. Where a person's health care provider agrees to reduce, discount or write off a portion of the person's medical bill, the collateral source rule permits the person to recover the entire reasonable value of the medical services necessarily required by the injury. The tortfeasor is not entitled to receive the benefit of the reduced, discounted or written-off amount.

Id. at 446. Therefore, the Court affirmed the circuit court's decision. The two key syllabus points are:

> 6. A person who has been injured by the tortious conduct of a culpable tortfeasor is entitled to recover from the tortfeasor the reasonable value of medical and nursing services necessarily required by the injury. This recovery is for the reasonable value of the services and

not for the expenditures actually made or obligations incurred.

7. Where an injured person's health care provider agrees to reduce, discount or write off a portion of the person's medical bill, the collateral source rule permits the person to recover the entire reasonable value of the medical services necessarily required by the injury. The tortfeasor is not entitled to receive the benefit of the reduced, discounted or written-off amount.

In dissent, Justice Loughry stated that "[t]he majority's conclusion that medical bills that include a 'write-off' or discount–an amount no one pays–constitutes the 'reasonable value' of the medical services rendered defies both logic and common sense." *Id.* at 449.

Graham v. Asbury, 765 S.E.2d 175 (W. Va. 2014).

In this case, Court determined that "the determination of whether a spouse, children (including adopted children and stepchildren), brothers, sisters, and parents are 'surviving' is made by determining whether they were alive at the time of the wrongful death decedent's demise." *Id.* at 181. The underlying suit in this matter was a wrongful death/medical malpractice case against a hospital. *Id.* at 177. When the Petition to Approve Settlement was filed with the circuit court, it listed two siblings and six adult children of the decedent as potential wrongful death beneficiaries. *Id.* However, the Petition did not list the decedent's deceased adult child, who was alive at the time of the decedent's death, and the deceased adult child's estate was not provided notice of the hearing to approve the settlement. *Id.* During the settlement hearing, there was no mention of the deceased adult child or her potential claim, and the circuit court entered an order approving the settlement and distributing equal shares of the same to the six surviving adult children.

Subsequently, the deceased adult child's estate ("Estate") filed a *Motion to set Aside Settlement as Invalid or in the Alternative Motion Seeking Court Ordered Distribution of Wrongful Death Proceeds Pursuant to West Virginia Code § 55-7-6*. The Estate argued that it was entitled to a share of the settlement, because the deceased adult child was living at the time of her mother's death. *Id.* at 177-78. The circuit court agreed and ordered that the settlement be divided into seven equal shares. *Id.* at 178. On appeal to the Supreme Court, the six surviving siblings argued that "a 'surviving' child of the wrongful death decedent 'must survive to the distribution date to receive a share of the proceeds.'" *Id.* at 179. The Court found that there was "no support for the [six surviving siblings'] suggested construction of W. Va. Code § 55-7-6(b)." *Id.* at 180.

As such, the Court held that "the determination of whether a spouse, children (including adopted children and stepchildren), brothers, sisters, and parents are 'surviving' is made by determining whether they were alive at the time of the wrongful death decedent's demise." *Id.* at 181.

Barrett v. Retton, 2014 WL 6676540 (W. Va. November 21, 2014) (unpublished).

This Memorandum Decision involved a car accident in which the defendant's appealed an award of $1,013,156 of which $320,500 was for future medical expenses. *Id.* at *1. On appeal, the defendant asserted "five assignments of error: first, that the circuit court erred by allowing respondents to introduce evidence of payments made by State Farm to petitioners' expert witnesses; second, that the circuit court erred by allowing respondents to introduce evidence of future special damages that had not been timely disclosed; third, that the circuit court erred in prohibiting petitioners' expert witness, Dr. Sandra Metzler, from rendering an opinion on causation; fourth, that the circuit court erred in refusing to give a "missing witness" instruction; and, fifth, that the circuit court erred in denying petitioners' request for remittitur." *Id.*

First, the Court found that "any information about the relationships between each expert witness and State Farm Auto or its affiliates was offered for the purpose of showing witness bias, a purpose expressly authorized by Rule 411…[and the] evidence was relevant to determinations about the credibility of those witnesses, and the court conducted the appropriate balancing test." *Id.* at *3. Second, the Court found that defendant's "were not unfairly surprised [by the untimely disclosure of plaintiff's future medical damages], and the circuit court did not abuse its discretion in allowing evidence of" the same. *Id.*

Third, the Court agreed "with the circuit court that the testimony petitioners sought to elicit from Dr. Metzler—that petitioner could not have suffered permanent injuries as a result of the subject automobile collision—was unnecessarily cumulative in light of the testimony of petitioners' other expert witness, orthopedic surgeon Dr. Kent Thrush. We find no abuse of discretion in the exclusion of this evidence." *Id.* Fourth, the Court found that "there [was] no evidence that [the] witnesses were 'missing[,]' because they were equally available to both parties for deposition or trial testimony." *Id.* at *4. Finally, fifth, the Court found that the circuit court did not err in denying defendant's request for remittitur." *Id.* Therefore, the Court affirmed the verdict of the circuit court.

In dissent, Justice Loughry expressed his displeasure with the majority for refusing "to place this case on the argument docket and [for] the resultant cursory affirmance of this case in a memorandum decision." *Id.* at *5. Given the size of the

verdict and the amicus curiae briefs from both the Defense Trial Counsel of West Virginia and the West Virginia Association for Justice, Justice Loughry believed that the case deserved more than a Memorandum Decision, and he cautioned "practitioners and the lower courts to be mindful of the manner in which this case was affirmed." *Id.*

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA

McComas v. Miller, 2014 WL 5823138 (S.D.W. Va. November 7, 2014) (unpublished).

In this case, plaintiff sued a podiatrist for medical malpractice and wrongful death arising from the podiatrist's treatment of a non-healing wound on the bottom of the patient's foot over a period of a year. *Id.* at *1. The patient saw the podiatrist regularly during this time period, and the podiatrist performed a skin graft and a toe resection surgery to try and aid the healing process. *Id.* The podiatrist did not biopsy the wound but referred the patient to a dermatologist who did biopsy the wound diagnosing the patient with malignant melanoma. *Id.* The patient died of "metastatic disease related to malignant melanoma." *Id.*

The podiatrist's counsel filed a Motion for Summary Judgment and a Motion to Exclude the plaintiff's expert witness alleging that plaintiff's expert witness, an oncologist, was not qualified to render standard of care opinions critical of a podiatrist. *Id.* at *5. In denying the podiatrist's motions, Judge Chambers found that the plaintiff's expert was focused "on general standards of care purportedly required of all practitioners with respect to the diagnosis of cancer." *Id.*

Further, Judge Chambers found that according to plaintiff's expert, "the standard of care for any physician, including a podiatrist, called for biopsy of the ulceration so that cancer could be incorporated into the treating physician's differential diagnosis." *Id.* According to Judge Chambers, "to the extent that there is a general standard of care regarding the diagnosis of cancer, [plaintiff's expert, an oncologist,] is able to offer expert testimony on the applicable standard of care." *Id.*

Moreover, of particular importance, the podiatrist, in his deposition, testified "that a podiatrist would look at the same criteria and physical characteristics as a medical doctor to diagnose a melanoma." *Id.* Therefore, Judge Chambers denied the podiatrist's Motion for Summary Judgment and Motion to Exclude the plaintiff's expert witness. *Id.* at *6.

Watts v. St. Mary's Med. Ctr., Inc., 2012 WL 5373441 (S.D.W. Va. October 30, 2012)

(unpublished).

In this case, Judge Chambers decided that the trauma cap set forth in W. Va. Code § 55-7B-9c did not apply in this case, and, if it did, it was unconstitutional. *Id.* at *1. In this case, a patient was admitted to St. Mary's Medical Center and was categorized as a non-urgent patient after presenting to the Emergency Department complaining of hitting his head on the bottom of a swimming pool, not losing consciousness, and doing several other things at church before coming to the hospital. *Id.* at *3. St. Mary's argued that the patient's condition was misclassified by the nurse, and the patient's condition was actually urgent upon presentment and, thus, the trauma cap applied. *Id.* at *3. The Court stated that if it

> were to assume that [the patient] was improperly classified [as non-urgent], then St. Mary's violated the Emergency Triage Procedures and its own manual with respect to classifications. W. Va. Code § 55-713-9c(f)(2) [sic] provides that the $500,000 cap in subsection (a) does not apply when there is a clear violation of the written protocols.

Id. at *3. Therefore, the Court found that because the patient was initially classified as non-urgent upon presentment, the trauma cap did not apply. *Id.* at *4.