

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 33006

LARRY D. ELMORE, individually and as Administrator
of the Estate of Dorothy Mae Elmore, Deceased

Appellant,

vs.

JOHN M. JOHNSON, D.O.

Appellee.

CASE NO. 03-C-136 FROM THE CIRCUIT COURT OF GREENBRIER COUNTY

JOHN M. JOHNSON, D.O.'S RESPONSE TO THE
APPEAL BRIEF OF THE APPELLANT, LARRY D. ELMORE

FILED BY:

Barry M. Taylor, Esquire (WV Bar ID# 3697)
Max L. Corley, III, Esquire (WV Bar ID# 7434)
JENKINS FENSTERMAKER, PLLC
Post Office Box 2688
Huntington, West Virginia 25726-2688
Phone: (304) 523-2100

Counsel for Appellee,

JOHN M. JOHNSON, D.O.

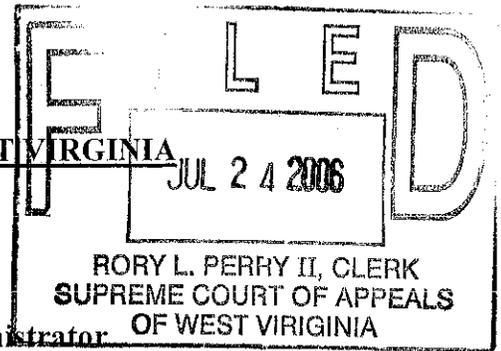


TABLE OF AUTHORITIES

Cases

Adams v. Roses, 183 Cal. App. 498, 228 Cal. Rptr. 339 (1986)	29
Adkins v. State Compensation Director, 149 W.Va. 540, 142 S.E.2d 455 (1965)	15
Barlett v. North Ottawa Community Hosp., 625 N.W.2d 470, 475-76 (Mich. App. 2001) ...	29
Barreiro v. Morais, 723 A.2d 1244 (N.J. Super. A.D. 1999)	37
Boggs v. Settle, 150 W.Va. 330, 145 S.E.2d 446 (1965)	15
Brooks v. Isinghood, 213 W.Va. 675, 584 S.E.2d 531 (2003)	5
Burkes v. Fas-Chek Food Mart, Inc., 217 W.Va. 291, 617 S.E.2d 838, 843 (2005)	18, 19
Cannelton Industries, Inc. v. Aetna Cas. & Sur. Co., 460 S.E.2d 18 (W.Va. 1974).....	6
Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995).....	5, 6
Chizmadia v. Smiley's Point Clinic, 768 F.Supp. 266, 268, fn. 8 (D.Minn. 1991)	30
City of New Orleans v. Dukes, 427 U.S.297, 303, 96 S.Ct. 2513, 2517, 49 L.Ed. 2d 511, 517 (1976)	25
Click v. Click, 98 W.Va. 419, 127 S.E. 194 (1925)	11
Conner v. Conner, 175 W.Va. 512, 334 S.E.2d 650 (1985)	15
Conseco Fin. Serv'g Corp. v. Myers, 211 W.Va. 631, 567 S.E.2d 641 (2002)	11
Crowley v. Krylon Diversified Brands, 216 W.Va. 408, 607 S.E.2d 514 (2004)	18, 19
Daigle v. Maine Medical Center, 14 F.3d 684 (1 st Cir. 1994)	30
DiAntonio v. Northhampton-Accomack Memorial Hosp., 628 F.2d 287 (4 th Cir. 1980)	30
DiLeo v. Ernst & Young, 901 F.2d 624, 627 (7 th Cir. 1990).....	22
Duke Power Co. v. Carolina Env'tl. Study Group, Inc., 438 U.S. 59, 83, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978)	33
Duquesne Light Co. v. State Tax Dept., 174 W.Va. 506, 511, 327 S.E.2d 683, 688 (1984)	23

Erie R.R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)	36
Exparte Watson, 82 W.Va. 201, 95 S.E.2d 648 (1918)	34
Evans v. Holt, 193 W.Va. 578, 457 S.E.2d 515 (1995)	18, 19
Fein v. Permanente Medical Group, 695 P.2d 665, 679 (Cal 1985)	32
Findley v. State Farm Mutual Automobile Insurance Co., 213 W.Va. 80, 576 S.E.2d 807 (2002)	13, 34
Fisk v. Lemons, 201 W.Va. 362, 497 S.E.2d 339, 342 (1997).....	8
Garland v. Kaunten, 567 N.E.2d 707 (Ill. App., 4 th Dist 1991)	37
Gibson v. West Virginia Department of Highways, 185 W.Va. 214, 406 S.E.2d 440 (1991)	25, 28
Hinchman v. Gillette, 217 W.Va. 378, 618 S.E.2d 387.....	8, 10, 12, 20
Hosaflook v. Consolidation Coal Co., 201 W.Va. 325, 497 S.E.2d 174, 180 (1997)	8
In re Urcarco Sec. Litig., 148 F.R.D. 561, 566 (N.D. Tex. 1993)	22
Keyes v. Humana Hospital Alaska, Inc., 750 P.2d 343 (Alaska 1988)	30
Kirkland v. Blain County Medical Center, 4 P3d 1115 (Idaho 2000)	32
Lawson v. Hoke, 77 P.3d 1160, 1169-1171 (Or. App. 2003)	32
Lewis v. Canaan Valley Resorts, Inc., 185 W.Va. 684, 691, 408 S.E.2d 634, 641 (1991)	25, 27, 28
Linder v. Smith, 629 P.2d 1187, 1192 (Mont. 1981)	30
Mahoney v. Doerhoff Surgical Services, Inc., 807 S.W.2d 503 (Mo. 1991)	30
Mangus v. Ashley, 199 W.Va. 651, 487 S.E.2d 309, 314 (1997)	8
Melder v. Morris, 127 F.3d 1097 (5 th Cir. 1994).....	22
Mildred L.M. v. John O.F., 192 W.Va. 345, 452 S.E.2d 436 (1994)	34
Morris v. Calhoun, 119 W.Va. 603, 195 S.E. 341 (1938)	13
Neal v. Oakwood Hosp. 575 N.W.2d 68, 75 (Mich. App. 1997)	29

Oaks v. Monongahela Power Co., 207 S.E.2d 191, 194 (W.Va. 1994).....	6
Painter v. Peavy, 451 S.E.2d 755, 758, note 5 (W.Va. 1994).....	6
Pulliam v. Coastal Emergency Services of Richmond, Inc., 257 Va. 1. 509 S.E.2d 307, 317-318 (1999)	32
Robinson v. Charleston Area Medical Center, 186 W.Va. 720, 414 S.E.2d 877 (1991)	24, 26, 27, 28, 29, 32
Rust v. Sullivan, 500 U.S. 173, ---, 111 S.Ct. 1759, 1767, 114, L.Ed. 2d 233, 249 (1991)	25
Sands v. Security Trust Co., 143 W.Va. 522, 102 S.E.2d 733 (1958)	23
Shields v. Amoskeag Bank Shares, Inc., 766 F. Supp. 32, 38 (D. N.H. 1991).....	22
Sisario v. Amsterdam Memorial Hosp., 552 N.Y.S.2d 989 (N.Y.App.Div. 1990)	30
Smith v. Workmen’s Compensation Com’r., 159 W.Va. 108, 219 S.E.2d 361 (1975)	8
Stanley v. United States, 321 F.Supp.2d 805 (N.D. W.Va. 2004).....	13, 23, 36
State v. General Daniel Morgan Post No. 548, V.F.W., 144 W.Va. 137, 145, 107 S.E.2d 353, 358 (1959)	25
State v. Kerns, 183 W.Va. 130, 135, 394 S.E.2d 532, 537 (1990)	11
State v. Richards, 206 W.Va. 573, 577, 526 S.E.2d 539, 543 (1999)	25
State <i>ex rel.</i> Appalachian Power Co. v. Gainer, 149 W.Va. 740, 143 S.E.2d 351 (1965)	24
State <i>ex rel.</i> Farber v. Mazzone, 213 W.Va. 661, 666, fn 7, 584 S.E.2d 517, 522, fn. 7 (2003)	18
State <i>ex rel.</i> Frazier v. Meadows, 193 W.Va. 20, 24, 454 S.E. 2d 65, 69, 70, fn.8 (1994)	8, 10, 32, 36
State <i>ex rel.</i> Miller v. Stone, 216 W.Va. 379, 607 S.E.2d 485, 489 (2004)	8, 9, 10, 21, 22
State <i>ex rel.</i> Mobile Corp. v. Gaughan, 211 W.Va. 106, 113, 563 S.E.2d 419, 426 (2002) ...	23
State <i>ex rel.</i> Orlofske v. City of Wheeling, 212 W.Va. 538, 546-547, 575 S.E.2d 148, 156-157 (2002).....	25

State <i>ex rel.</i> Weirton Medical Ctr. v. Mazzone, 214 W.Va. 146, 152, 587 S.E.2d 122, 128 (2002)	35
Thomas v. Fellows, 456 N.W.2d 170 (Iowa 1990)	30
Verba v. Graphery, 210 W.Va. 30, 36, 552 S.E.2d 406, 412 (2001)	25, 27, 32
Verizon West Virginia, Inc. v. West Virginia Bureau of Employment Programs, 214 W.Va. 95, 121, 586 S.E.2d 170, 196 (2003)	28
West Virginia Human Rights Comm'n v. Garretson, 196 W.Va. 118, 123, 468 S.E.2d 733, 738 (1996)	10
West Virginia Secondary School Activities Commission v. Wagner, 143 W.Va. 508, 520-21, 102 S.E.2d 901, 909 (1958)	13, 23
White v. Gosiene, 187 W.Va. 576, 420 S.E.2d 567, 572-573 (1992)	34
Williams v. Precision Coil, Inc., 459 S.E.2d 329 (W.Va. 1995)	6
Wilson v. United States, 375 F.Supp.2d 467 (E.D. Va. 2005)	32, 33

Statutes

Article III, § 13 of the West Virginia Constitution	27
Article V, § 1 of the West Virginia Constitution	24
Article VIII, § 3 of the West Virginia Constitution	35
W.Va. Code § 55-7B-1	1, 26, 29, 33
W.Va. Code § 55-7B-1 (1986)	24, 28
W.Va. Code § 55-7B-6	1, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 20, 24, 26, 29, 35, 36, 37
W.Va. Code § 55-7B-6 (2001)	4, 6, 7, 29
W.Va. Code § 55-7B-6(a)	6, 7, 13, 14, 16
W.Va. Code § 55-7B-6(b)	7, 13, 20

W.Va. Code § 55-7B-6(d)	9, 12
W.Va. Code § 55-7B-6(e)	6, 7, 8, 11
W.Va. Code § 55-7B-6(f)(2001)	6, 30
W.Va. Code § 55-7B-6(f)	6, 7, 8, 27
W.Va. Code § 55-7B-6(h)	12
W.Va. Code § 55-7B-8	31
W.Va. Code § 55-7B-10	34
West Virginia MPLA	referenced throughout
W.Va. Code § 56-3-31	19
W.Va. Code § 56-3-31(h)(1)	19
Alaska Stat., § 09.17.010	31
Colo. Rev. Stat. § 13-64-302 (2005)	31
Hawaii Rev. Stat. § 663-8.7 (2005)	31
Idaho Code Ann. § 6-1603 (2005)	31
Kansas Stat. Ann. § 60-19a02 (2005)	31
La. Rev. Stat. Ann. § 40:1299.42 (2006)	31
Mich. Comp. Laws § 600.1483 (2006)	31
Miss. Code Ann. § 11-1-60 (2006)	31
Mo. Rev. Stat. § 538.210 (2006).....	31
Mont. Code Ann. § 25-9-411 (2005)	31
N.M. Stat. Ann. § 41-5-6 (2006)	31
Or. Rev. Stat. § 31.715 (2006)	31
S.D. codified Laws § 21-3-11 (2006)	31

Texas Civ. Prac. & Rem. Code Ann. § 74.301 (Vernon 2006)	31
Utah Code Ann. § 78-14-7.1 (2006)	31
Va. Code Ann. § 8.01-581.15 (2006)	31

Rules

Rule 1, W. Va. Rules of Civil Procedure	14, 36
Rule 2, W. Va. Rules of Civil Procedure	14
Rule 3, W. Va. Rules of Civil Procedure	14
Rule 4, W. Va. Rules of Civil Procedure	14, 37
Rule 4(d)(1)(A)-(C), W. Va. Rules of Civil Procedure	15
Rule 4(d)(1)(A)-(E)(1998), W. Va. Rules of Civil Procedure	18
Rule 5, W. Va. Rules of Civil Procedure	14, 15, 36, 37
Rule 5(b), W. Va. Rules of Civil Procedure	14
Rule 9(b), Federal Rules of Civil Procedure	22
Rule 12(b)(6), W. Va. Rules of Civil Procedure.....	3
Rule 15, W. Va. Rules of Civil Procedure.....	8
Rule 26, Federal Rules of Civil Procedure	36
Rule 56(c), W. Va. Rules of Civil Procedure	6

Reference Text

Black's Law Dictionary, 155 (abridged 6 th ed. 1991)	13
Webster's New World College Dictionary 1050 (2004)	22

Other

United States Postal Service Domestic Mail Manual	16
---	----

TABLE OF CONTENTS

Memorandum of Parties iii

Table of Authorities iv

I. Kind of Proceeding and Nature of Ruling Below1

II. Statement of the Facts2

III. Responses to Assignments of Error.....5

IV. Standard of Review.....5

V. Argument

A. The Circuit Court Correctly Held that Appellant Failed to Comply with the Pre-Filing Requirements of West Virginia Code § 55-7B-6 (2001), *et seq.* and Dismissal of the Complaint Against Dr. Johnson was Appropriate.....6

1. Appellant Failed to Provide Dr. Johnson with the Requisite Thirty (30) Days to Respond to the Notice and Certificate Before Filing Suit.....6

2. Appellant Did Not Properly Serve the Notice of Claim and Certificate of Merit on Dr. Johnson Pursuant to Rule 4 of the West Virginia Rules of Civil Procedure13

B. Appellant’s Constitutional Challenges to the 2001 Version of the MPLA Are Not Ripe for Consideration.....22

C. Assuming the Constitutionality of the 2001 Version of § 55-7B-6 is Ripe for Consideration, The Statute is Constitutional and Should be Enforced24

1. The Pre-Filing Requirements of the 2001 Version of §55-7B-6 are Presumed to Be Constitutional.....24

2. Application of the Pre-Filing Requirements of MPLA Does Not Infringe Upon Petitioner’s Right To Trial Pursuant to Article III, Section 13 of the West Virginia Constitution27

3. The Circuit Court’s Dismissal of this Action Pursuant to §55-7B-6 Did Not Violate Due Process.....28

4. **Retroactive Application of 2003 Version of the MPLA is Not
An Unconstitutional “Taking” of Property.....31**

5. **The Pre-Filing Requirements of §55-7B-6 of the MPLA Do
Not Conflict with The Rules of Civil Procedure and,
Therefore, Are Constitutional.....35**

VI. Conclusion37

MEMORANDUM OF PARTIES

Counsel for Appellee, John M. Johnson, D.O.

Barry M. Taylor, Esquire (WV 3697)
Max L. Corley, III, Esquire (WV 7434)
JENKINS FENSTERMAKER, PLLC
Post Office Box 2688
Huntington, West Virginia 25726-2688
(304) 523-1200

*Counsel for Appellant, Larry D. Elmore, Individually and as Administrator
of the Estate of Dorothy Mae Elmore*

Marvin W. Masters, Esquire (WV Bar ID# 2359)
Julie N. Langford, Esquire (WV Bar ID# 8567)
MASTERS & TAYLOR, L.C.
181 Summers Street
Charleston, West Virginia 25301

I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

Appellee John M. Johnson, D.O. respectfully responds to the appeal brief filed on behalf of the Appellant. The trial court's June 16, 2005 *Order Dismissing Defendant John M. Johnson, D.O.* was correct and should be affirmed for reasons set forth in detail below.

By way of Background, Appellant, Larry D. Elmore, individually and as the Administrator of the Estate of his deceased spouse, Dorothy Mae Elmore, has sued John M. Johnson, D.O.¹ twice for the same incident. Civil Action No. 04-C-91, which is not being appealed, now is pending in the Circuit Court of Greenbrier County. Trial was set for March 28, 2006, but the matter has been continued.² A new trial date will be set in an August conference.

As to the case at bar, appellant seeks reversal of the June 16, 2005 *Order Dismissing Defendant John M. Johnson, D.O.* entered by the Circuit Court of Greenbrier County dismissing, without prejudice, Appellant's other medical professional liability action against Dr. Johnson, D.O., Civil Action No. 03-C-136. The circuit court's ruling was based on Appellant's failure to comply with the Notice of Claim pre-filing requirements of West Virginia's *Medical Professional Liability Act* ("MPLA") as codified in West Virginia § 55-7B-1, *et seq.*³

The medical negligence claims against BJSJ Med, Inc ("BJSJ")⁴ and Triad Hospitals, Inc d/b/a Greenbrier Valley Medical Center ("GVMC") in Civil Action No. 03-C-136 were

¹ Dr. Johnson is board certified by the Board of Certification in Emergency Medicine and is licensed to practice medicine in West Virginia. He practices emergency medicine in Greenbrier County, West Virginia and has over nineteen (19) years of experience.

² The parties jointly agreed to a trial continuance to accommodate personal matters of plaintiff's counsel.

³ W.Va. Code § 55-7B-6 has been amended pursuant to the 2003 enactments of the West Virginia Medical Professional Liability Act. Therefore, discussion of W.Va. Code § 55-7B-6 herein will reference the 2001 version of the statute.

⁴ BJSJ Med, Inc. employs Dr. Johnson as an emergency medicine physician and it contracted with Greenbrier Valley Medical Center to supply physicians to staff the emergency department at the hospital. Dr. Johnson also serves as President of BJSJ Med, Inc.

dismissed without prejudice prior to Dr. Johnson's dismissal. Only the June 16, 2005 Order dismissing Dr. Johnson is at issue on this appeal.

II. STATEMENT OF THE FACTS

The underlying facts pertaining to Dr. Johnson's care of the decedent, Dorothy Elmore, are summarized briefly for background. Ms. Elmore was a fifty-five (55) year old, insulin dependent diabetic, who presented to GVMC on February 16, 2002 with complaints of "flu" symptoms for which she was seen by her family physician on February 15 and also leg complaints. Laboratory studies and cultures were drawn, an IV line and catheter were placed and a 12-lead EKG was performed.

Dr. Johnson examined Ms. Elmore, ordered further tests and reviewed their results, then diagnosed Ms. Elmore with leg pain, urinary tract infection and renal insufficiency. He advised her of his diagnosis, prescribed an antibiotic and pain medicine and provided specific discharge instructions. Moreover, she was to call or go back to the emergency department or see her primary care physician for any worsening symptoms. Ms. Elmore did not call or return to GVMC.

On February 18, 2002, Ms. Elmore was transported by EMS to Columbia Allegheny Regional Hospital ("CARH") in Low Moor, Virginia, following a 911 call. She was seen by several physicians and diagnosed with sepsis syndrome accompanied by evidence of a necrotizing process in the left leg. The sepsis syndrome evolved into shock and acute renal failure. Her death was pronounced on February 19, 2002.

Appellant filed a Complaint in the Circuit Court of Greenbrier County, West Virginia (Civil Action No. 03-C-136) alleging medical negligence against Dr. Johnson, and others, on

June 30, 2003.⁵ Dr. Johnson timely answered the Complaint, denied its substantive allegations and preserved a number of affirmative defenses, including failure to state a claim pursuant to Rule 12(b)(6), West Virginia Rules of Civil Procedure, for Appellant's failure to comply with statutory pre-filing requirements of the MPLA.

Prior to filing this action, Appellant, by counsel, attempted to serve a letter and Notice of Claim upon Dr. Johnson sent Friday, May 30, 2003 via certified mail, return receipt requested. The letter and Notice were accompanied by a Screening Certificate of Merit executed by plaintiff's retained witness, James Mathews, M.D., a physician in Chicago, Illinois. (See Exhibit B attached to Dr. Johnson's Motion to Dismiss). Counsel's letter was sent to GVMC; Dr. Johnson, however, was not an employee of GVMC and he utilized a business address separate from the hospital's address. In fact, Dr. Johnson has not designated GVMC's address as his business or personal address. (*Id.*; see also Exhibit E, *Affidavit of John M. Johnson, D.O.*, attached to Dr. Johnson's Motion to Dismiss).

Teresa Shinn Morgan, a clerk at GVMC, signed for the certified letter on Saturday, May 31, 2003, even though Dr. Johnson never authorized Ms. Morgan or any other GVMC personnel to accept certified business mail or other service of process on his behalf. Dr. Johnson, however, did not work at GVMC that day and was not scheduled to work and did not work again at GVMC until Tuesday, June 4, 2003. Dr. Johnson received Ms. Langford's letter, the Notice of Claim and the Screening Certificate for the first time on June 4. (See Dr. Johnson's Motion to Dismiss and Exhibit E, *Affidavit of John M. Johnson, D.O.* and Exhibit F, Domestic Return Receipt, each attached to Dr. Johnson's Motion to Dismiss). Thus, Appellant filed the

⁵ Plaintiff filed this medical negligence action just one (1) day before the 2003 reforms to West Virginia's MPLA were to take effect.

Complaint twenty-six (26) days after Dr. Johnson received the Notice of Claim and Screening Certificate of Merit.

Dr. Johnson moved to dismiss the Complaint on the grounds that Appellant had failed to provide him with thirty (30) days to respond to Appellant's Notice of Claim and Screening Certificate of Merit and because the Certificate of Merit did not meet the statutory requirements. Dr. Johnson's motion to dismiss was heard by the trial court on December 22, 2003. Judge Rowe granted the motion on the ground that West Virginia Code § 55-7B-6, when read as a whole and consistent with legislative intent, required Appellant to provide Dr. Johnson with thirty (30) days from the date he received the Notice of Claim and Screening Certificate of Merit to respond in writing to the same or request pre-litigation mediation. Appellant also was permitted to seek reconsideration of this ruling should he obtain information establishing that Ms. Morgan was Dr. Johnson's authorized agent for service. (*See* December 22, 2003 Hearing Transcript, p. 12-15).

On February 18, 2004, Appellant moved the circuit court to reconsider its ruling of December 22, 2003 and further requested an evidentiary hearing to take the testimony of Dr. Johnson and Ms. Morgan. Appellant, however, abandoned this first effort. On March 10, 2004, Appellant again moved the circuit court for reconsideration of its prior ruling and argued that Ms. Morgan was Dr. Johnson's authorized agent for service because her job duties in the GVMC mail room were as a refund clerk. Dr. Johnson responded and provided the Affidavit of Ms. Morgan that she was an employee of GVMC and not an employee of Dr. Johnson or his employer, BJSM Med, Inc. She also testified that Dr. Johnson never authorized her to accept certified business mail or service of process on his behalf, and she never had signed or executed any document designating her as Dr. Johnson's agent for service. (*See* Exhibit 2, *Affidavit of*

Teresa Morgan (Formerly Teresa Shinn), attached to Dr. Johnson's Response to Plaintiff's Motion for Reconsideration)).

The circuit court heard Appellant's motion for reconsideration on April 25, 2005 and denied it and granted Dr. Johnson's motion to dismiss. The *Order Dismissing Defendant John M. Johnson, D.O.* was entered on June 16, 2005.

Appellant re-filed his Complaint (Civil Action No. 04-C-91) against Dr. Johnson, his employer, BJSM Med, Inc., and GVMC on April 14, 2004, during the pendency of the rulings being appealed herein, to prosecute his claim under the 2003 version of the MPLA. As noted, this matter is pending with a new trial date to be set at an August Conference.

III. RESPONSES TO ASSIGNMENTS OF ERROR

- A. The Circuit Court properly dismissed Appellant's Complaint because he failed to comply with the pre-filing requirements of the 2001 MPLA. The statute is clear and unambiguous and the express intent of the legislature mandated that healthcare providers, such as Dr. Johnson, be provided thirty (30) days from the date the notice of claim and screening certificate of merit were received to respond in writing or request mediation prior to the filing of a lawsuit.
- B. The pre-filing requirements of § 55-7B-6 (2001) are constitutional and do not violate Appellant's right to trial, due process or this Court's rule-making authority.

IV. STANDARD OF REVIEW

The standard of appellate review of the Circuit Court's Order granting a motion to dismiss is *de novo*. Syl. Pt. 1, Brooks v. Isinghood, 213 W.Va. 675, 584 S.E.2d 531 (2003). In addition, a *de novo* standard of review also is employed where the issue on appeal involves the interpretation of statutory law. Syl. Pt. 1, Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459

S.E.2d 415 (1995). This case involves interpretation of the MPLA and, therefore, a *de novo* standard should be utilized.⁶

V. ARGUMENT

A. **The Circuit Court Correctly Held that Appellant Failed to Comply with the Pre-Filing Requirements of West Virginia Code § 55-7B-6 (2001), *et seq.* and Dismissal of the Complaint Against Dr. Johnson was Appropriate**

The circuit court correctly applied the plain language and legislative intent of West Virginia Code § 55-7B-6 (2001), *et seq.*, for three (3) reasons. First, Appellant violated West Virginia Code § 55-7B-6 by failing to provide Dr. Johnson with the requisite thirty (30) days to respond to the Notice of Claim and Certificate of Merit before filing his medical negligence lawsuit against Dr. Johnson. Second, Appellant's service of the notice and certificate was improper. Third, the screening certificate of merit, signed by Appellant's retained witness, Dr. James Matthews, did not meet the statutory requirements for such certificates.

1. **Appellant Failed to Provide Dr. Johnson with the Requisite Thirty (30) Days to Respond to the Notice and Certificate Before Filing Suit**

West Virginia Code § 55-7B-6(a) has required that certain prerequisites be met by a claimant before he or she may file a medical malpractice action against a healthcare provider.

Specifically, it has provided that: *“. . . no person shall file a medical professional liability*

⁶ Should this Court determine that the summary judgment standard of review applies because the Circuit Court may have relied on materials outside of the pleadings, dismissal of Appellant's Complaint still was appropriate. Rule 56(c), West Virginia Rules of Civil Procedure, has provided that the Court shall render the judgment sought of the moving party "if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law" *See also Painter v. Peavy*, 451 S.E.2d 755, 758, note 5 (W.Va. 1994), quoting *Oaks v. Monongahela Power Co.*, 207 S.E.2d 191, 194 (W.Va. 1974); *Cannelton Industries, Inc. v. Aetna Cas. & Sur. Co.*, 460 S.E.2d 18 (W. Va. 1995); *Williams v. Precision Coil, Inc.*, 459 S.E.2d 329 (W.Va. 1995). No genuine issue of material fact exists that Appellant filed his Complaint before thirty (30) days expired from the date Dr. Johnson received the notice of claim and screening certificate of merit. Therefore, Dr. Johnson's right to respond in writing and to request pre-litigation mediation, or otherwise address errors in the documents, was cut short in violation of West Virginia Code § 55-7B-6(e) and (f) (2001).

action against any healthcare provider without complying with the provisions of this section.”

(emphasis added). The legislature’s clear intent was to prohibit the filing of a medical malpractice action pending a claimant’s compliance with the pre-filing requirements of the statute.

Section 55-7B-6(b) also has mandated that:

[a]t least thirty days prior to the filing of a medical professional liability action against a healthcare provider, the claimant shall serve by certified mail, return receipt requested, a notice of claim on each healthcare provider the claimant will join in the litigation. The notice of claim shall include a statement of the theory or theories of liability upon which a cause of action may be based, and a list of all healthcare providers and health care facilities to whom notices of claim are being sent, together with a screening certificate of merit. The screening certificate of merit shall be executed under oath by a healthcare provider qualified as an expert under the West Virginia rules of evidence and shall state with particularity: (1) the expert’s familiarity with the applicable standard of care in issue; (2) the expert’s qualifications; (3) the expert’s opinion as to how the applicable standard of care was breached; and (4) the expert’s opinion as to how the breach of the applicable standard of care resulted in injury or death. A separate screening certificate of merit must be provided for each healthcare provider against whom a claim is asserted. The person signing the screening certificate of merit shall have no financial interest in the underlying claim, but may participate as an expert witness in any judicial proceeding. Nothing in this subsection may be construed to limit the application of rule 15 of the rules of civil procedure.

(Emphasis added.)

West Virginia Code § 55-7B-6(e) further has provided that a healthcare provider receiving a notice of claim has the opportunity to “respond, in writing, to the claimant or his counsel **within thirty (30) days of receipt of the claim . . .**” (Emphasis added). West Virginia Code § 55-7B-6(f) further stated that “[u]pon receipt of the notice of claim . . ., the health care provider is entitled to pre-litigation mediation before a qualified mediator upon written demand to the claimant.” (Emphasis added). West Virginia common law now has provided that the thirty (30) day period also is important for objecting to the Notice and Certificate by

requesting a more definite statement; otherwise such objections are waived. See Hinchman v. Gillette, 217 W.Va. 378, 618 S.E.2d 387 (W.Va. 2005).

The statutory language of § 55-7B-6, when read as a whole, demonstrated the Legislature's intent that thirty (30) days elapse *after* a healthcare provider has received a notice of claim and screening certificate of merit before an action may be commenced. Otherwise, a healthcare provider would be denied the full opportunity to respond to a notice of claim prior to a lawsuit being filed.

This Court has recognized that a statute which is "clear and unambiguous and [where] the legislative intent is plain" should be applied by a court and not construed, and the plain and ordinary meaning of every word employed in the statute should be given effect. State ex rel. Miller v. Stone, 216 W.Va. 379, 607 S.E.2d 485, 489 (2004) (*per curiam*). "Courts are not free to read into the language what is not there, but rather should apply the statute as written." State ex rel. Frazier v. Meadows, 193 W.Va. 20, 24, 454 S.E.2d 65, 69 (1994).

Even if this Court finds it necessary to resort to the canons of statutory construction, the Court's primary objective in applying a statute must be to ascertain and effectuate legislative intent by reading statutes dealing with the same subject matter as a whole, or *in pari materia*. Fisk v. Lemons, 201 W.Va. 362, 497 S.E.2d 339, 342 (1997); Hosaflook v. Consolidation Coal Co., 201 W.Va. 325, 497 S.E.2d 174, 180 (1997); Mangus v. Ashley, 199 W.Va. 651, 487 S.E.2d 309, 314 (1997); Syl Pt. 3, Smith v. Workmen's Compensation Com'r, 159 W.Va. 108, 219 S.E.2d 361 (1975).

Application of these guiding principles leads to the same result reached by the trial court. The encouragement of pre-litigation mediation was one of the major policies behind the thirty (30) day period between receipt of the Notice of Claim and the filing of the Complaint. This

mandate has provided healthcare providers with a brief opportunity to assess the allegations, develop a pre-suit mediation strategy, determine the extent of available insurance coverage, evaluate the merit and settlement potential of claims, if any, prior to suit being filed and evaluate the documents delivered for possible objection.

This Court already has recognized the legislative intent in enacting § 55-7B-6 and the thirty (30) day requirement and applied the statute accordingly. *See State ex rel. Miller v. Stone*, 216 W.Va. 379, 607 S.E.2d 485, 489 (2004) (*per curiam*). In *Miller*, plaintiff filed a notice of claim pursuant to the 2001 MPLA and served it on the defendant physicians on May 9, 2003. 607 S.E.2d at 486. Plaintiff advised the physicians in the notice of claim that she intended to file a screening certificate of merit within sixty (60) days of receipt of the notice as mandated by W.Va. Code § 55-7B-6(d). *Id.* at 487.

Plaintiff then filed her medical malpractice action on June 9, 2003 prior to serving defendants with the screening certificate of merit, which was not served until June 20, 2003. The defendant physicians moved to dismiss the claim on the grounds that plaintiff's certificate of merit was untimely and improper. *Id.* The circuit court decided that plaintiff's action would be governed by the 2003 version of the statute and plaintiff sought a writ of prohibition in this Court. *Id.*

This Court analyzed the statute and stated that:

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

Id. at 489.

Thus, this Court held that plaintiff could not file her medical malpractice action until at least thirty (30) days after the screening certificate of merit was filed. This conclusion was based on plaintiff's premature filing of her claim, which "completely foreclosed the healthcare provider's statutorily granted right to demand *pre-litigation* mediation—in other words, mediation *prior to* the filing of any action." State ex rel. Miller v. Stone, 607 S.E.2d at 490 (emphasis added).

This Court further has clarified that the thirty (30) day time period for a healthcare provider, such as Dr. Johnson, to respond to a notice of claim or screening certificate of merit runs from the date the healthcare provider receives the notice and certificate. See Hinchman v. Gillette, 217 W.Va. 378, 618 S.E.2d 387, 395 (2005). In Hinchman, the Court specifically held as follows:

... [W]hen a healthcare provider receives a pre-suit notice of claim and screening certificate of merit that the healthcare provider believes to be legally defective or insufficient, **the healthcare provider may reply within thirty days of receipt of the of notice and certificate** ...

Id.

Thus, it is the healthcare provider's receipt of the pre-suit documents that triggers the pre-suit process and time requirements before which a plaintiff may file his complaint. This process has ensured that healthcare providers are given the full thirty (30) days mandated by the legislature to conduct a brief pre-suit evaluation and make decisions regarding their response, if any, or the potential efficacy of pre-litigation mediation.

In this case, Appellant cut short Dr. Johnson's pre-suit rights. Appellant mailed the Notice of Claim and Screening Certificate of Merit addressed to Dr. Johnson at GVMC's address, not his business or personal address, on May 30, 2003. Dr. Johnson did not receive it

until June 4, 2003. The Complaint, however, was filed on June 30, 2003, only twenty-six (26) days after Dr. Johnson received the Notice and Certificate.

Dr. Johnson, therefore, was denied his right to respond or object to the notice of claim and certificate of merit or to request pre-litigation mediation within the allotted thirty (30) days. *See* § 55-7B-6(e). Appellant's premature filing simply was a last-ditch and untimely effort to avoid having his claims governed by the 2003 MPLA.

Appellant's approach has nullified the legislature's express intent to provide healthcare providers with the right to respond or object to the notice and certificate and seek pre-litigation mediation before the lawsuit is actually filed. This Court has long sought to avoid such results, which are unjust.

It is "the duty of this Court to avoid whenever possible a construction of a statute which leads to *absurd, inconsistent, unjust or unreasonable results.*" State v. Kerns, 183 W.Va. 130, 135, 394 S.E.2d 532, 537 (1990) (emphasis added); *See also*, Syl. pt. 2, Conseco Fin. Serv'g Corp. v. Myers, 211 W.Va. 631, 567 S.E.2d 641 (2002) ("It is the duty of a court to construe a statute according to its true intent, and give to it such construction as will uphold the law and further justice. It is as well the duty of a court to disregard a construction, though apparently warranted by the literal sense of the words in a statute, when such construction would lead to injustice and absurdity."); Click v. Click, 98 W.Va. 419, 127 S.E. 194 (1925).

Appellant's choices regarding the date he mailed the pre-suit documents and the address he utilized should not prejudice Dr. Johnson. Appellant had ample time to mail the requisite documents and afford Dr. Johnson his full right to respond, object or request pre-litigation mediation and then to file this action before the July 1, 2003 effective date of the 2003 MPLA.

Moreover, Appellant was not precluded from re-filing his claims and, in fact, he did so after complying with the procedure mandated by the Legislature.

Appellant's argument that healthcare providers effectively can prevent the filing of a lawsuit against them by avoiding service or refusing to accept certified mail is without merit. As the circuit court noted, Appellant had legal recourse if this occurred and would have had proof that he sent the certified mail addressed to the healthcare provider at his or her appropriate personal or business address. Any action by the healthcare provider in avoiding or refusing to claim the certified mail would weigh against the healthcare provider's objection to the pre-filing documents. Dr. Johnson never refused the certified mail, he simply did not receive it until June 4, 2003.

A more likely scenario is that the mail may be delayed by no fault of the parties. In that circumstance, the healthcare provider may not receive the mail until several days or more after the mailing date. Should Appellant's position be adopted, the healthcare provider would, in nearly all cases, be prejudiced by the loss of a significant portion of his or her thirty (30) day right to respond in writing, request pre-litigation mediation or otherwise object to the screening certificate pursuant to Hinchman.

Appellant's argument that that healthcare provider can manipulate the statute of limitation by avoiding mail delivery has been addressed by the MPLA, namely West Virginia Code § 55-7B-6(d) and (h). The statute is tolled upon mailing of the notice of claim, not receipt of the pre-suit documents. Claimants, not healthcare providers, control the statute of limitation. This case at bar does not involve the statute of limitation.

Even if this Court finds that Dr. Johnson received the Notice of Claim on May 31, 2003 when Ms. Morgan at GVMC signed for the certified letter, Appellant still failed to wait the

mandatory thirty (30) day period. Under this scenario, the first day of the thirty (30) day period would have been June 1, 2003 (the day after receipt) and Appellant filed this action on the thirtieth day, rather than waiting one more day to comply with the statute.

Accordingly, the circuit court correctly applied §55-7B-6. Appellant failed to comply with the mandatory prerequisites for filing this medical malpractice action and the circuit court properly dismissed plaintiff's claims. See Section 55-7B-6(a) and (b); See also Stanley v. United States, 321 F. Supp.2d 805 (2004) (finding that the pre-filing requirements of the West Virginia MPLA were substantive, rather than procedural, and plaintiff's noncompliance barred his medical negligence claim); See also West Virginia Secondary School Activities Commission v. Wagner, 143 W.Va. 508, 520-21, 102 S.E.2d 901, 909 (1958) (citing Morris v. Calhoun, 119 W.Va. 603, 195 S.E. 341 (1938)) (holding that the absence of jurisdiction over either the subject matter or the parties "is fatal" to the Court's authority to hear and determine an action); Findley v. State Farm Mutual Automobile Insurance Co., 213 W.Va. 80, 576 S.E.2d 807 (2002) (recognizing the Legislature's authority to promulgate laws establishing the fundamental requisites for a party to have standing to file a lawsuit).

2. Appellant Did Not Properly Serve the Notice of Claim and Certificate of Merit on Dr. Johnson

Appellant's attempt to provide Dr. Johnson with the notice and certificate mailed on May 30, 2003 by certified mail addressed to him at GVMC, rather than to his business or personal address or authorized agent for service, was inadequate. Therefore, service was not accomplished until Dr. Johnson actually received the notice and certificate on June 4, 2003.

"Certified mail" has been defined as a "[f]orm of mail similar to registered mail by which sender may require return receipt from addressee." Black's Law Dictionary 155 (abridged 6th ed.

1991). The purpose of certified mail is to put the document in the hands of the addressee or designee to ensure delivery to the addressee. The Legislature chose that the notice and certificate be sent via certified mail, rather than first class mail, establishing its intent to ensure timely receipt of the documents by the healthcare provider, i.e. Dr. Johnson.

Rule 5 of the West Virginia Rules of Civil Procedure does not govern service of the pre-filing documents as asserted by Appellant. In fact, the Rules of Civil Procedure govern “civil actions” pending before the trial courts, but such actions are not “commenced” until a complaint is filed with the trial court. *See* W.Va.R.Civ.P. 1, 2 and 3. Therefore, Rule 5 does not apply to the MPLA’s pre-filing requirements because the Rule, by its own terms, pertains only to pleadings filed after the original complaint. *See* W.Va.R.Civ.P. 5 .

Moreover, even if Rule 5 applied to the service of the Notice and Certificate in this case, Appellant still failed to comply with the rule. Rule 5(b) has provided that service upon a party “shall be made by delivering a copy to the . . . party; or by mailing it to the . . . party at the . . . party’s last-known address, or, if no address is known, by leaving it with the clerk of the court” Appellant did none of those things.

The circuit court correctly noted that § 55-7B-6(a) was not specific regarding the manner and perfection of service and, in deference to this Court’s rule making power, correctly recognized that West Virginia law has recognized various forms of service. The circuit court reconciled the service provision of the MPLA as analogous to Rule 4 of the West Virginia Rules of Civil Procedure. (*See* December 22, 2003 Hearing Transcript, p. 12-14). Appellant failed to properly serve the notice and certificate because it was not served on Dr. Johnson personally or on his authorized agent for service. (*Id.*).

Rule 4(d)(1)(A)-(C) has provided that service of process by a party on an individual is perfected by delivering the documents to the individual personally, at his dwelling place to a member of his family over sixteen (16) years of age or to “an agent or attorney-in-fact authorized by appointment or statute to receive or accept service . . .” (See December 22, 2003 Hearing Transcript, p. 12-14). As noted, Appellant’s argument that service was perfected upon mailing pursuant to Rule 5 of the West Virginia Rules of Civil Procedure is misplaced. Rule 4 involves service of a pre-suit summons, but Rule 5 relates to service of documents on an attorney for the opposing party after suit is filed, not before.

Appellant also cited Conner v. Conner, 175 W.Va. 512, 334 S.E.2d 650 (1985), Boggs v. Settle, 150 W.Va. 330, 145 S.E.2d 446 (1965) and Adkins v. State Compensation Director, 149 W.Va. 540, 142 S.E.2d 466 (1965) for the proposition that service is complete upon mailing, but these cases do not apply to the facts of this case. All of those cases involved statutes requiring only that notice be provided to another party; they did not specify that the notices be sent via certified mail to ensure delivery to the addressee. Thus, the mailings at issue in those cases were sent by regular U.S. mail, rather than by certified mail. Those cases also were analyzed under Rule 5 of the West Virginia Rules of Civil Procedure, which governed service of documents on opposing parties or counsel, because suit already had been filed or counsel had already represented a claimant in an administrative proceeding. *Id.*

Moreover, Appellant’s argument that service was completed upon mailing ignored the fact that he did not mail the documents to the addressee at the appropriate address. Appellant’s position would allow him to send the certified mail to Dr. Johnson at the local YMCA if he knew that Dr. Johnson was a member there. The same prejudicial result would occur if any

undesigned person received the certified mail and delayed its delivery or never provided it to the healthcare provider.

Appellant incorrectly has claimed that claimants never will receive notice as to when they can file suit if the date of receipt controls over the date of mailing. This ignores, however, the process of sending certified mail, return receipt requested. Claimants will receive a Domestic Return Receipt (or green card) from the Postal Service showing the date that it was accepted, or signed for, and the identity of the person who signed for it. Thus, claimants always will receive notice by which to calculate the appropriate filing date or to determine whether the certified mail actually was delivered to the addressee.

The Legislature clearly did not intend for such a haphazard method of providing appropriate notice and pre-filing documents to healthcare providers. Rather, the mailing at issue involved mandatory pre-suit documents that the Legislature expressly intended to be sent by certified mail, return receipt requested, to ensure receipt of the same by the addressee. *See* W.Va. Code § 55-7B-6(a).

In addition, Appellant's reliance on the Domestic Mail Manual issued by the United States Postal Service is misplaced. The Domestic Mail Manual does not govern whether service was appropriate or perfected under the law; rather it merely controls the Postal Service's duties regarding the delivery or non-delivery of mail. Refusal to accept the mail is not at issue and Dr. Johnson does not dispute that Appellant mailed the notice of claim and screening certificate; nor does he claim that he never received them. Rather, Appellant chose to mail the pre-filing documents to an inappropriate address resulting in Dr. Johnson's receipt of the same on June 4, 2003 and thereby prejudiced his right to a full thirty (30) days to respond and/or object.

No question exists Appellant mailed the notice and certificate to GVMC, rather than to Dr. Johnson at his business address, or the address for BJSM Med, Inc., his employer. Dr. Johnson's business address at BJSM and his address for service were readily available to Appellant on the West Virginia Secretary of State's website. (See Exhibit H, attached to *Defendant's Reply to Plaintiff's Response to Defendant John M. Johnson's Motion to Dismiss*). In fact, Appellant mailed a set of pre-suit documents to BJSM at its business address a few days later knowing that Dr. Johnson was employed by BJSM. Appellant's counsel had the resources to determine the proper address upon which to service Dr. Johnson, but for reasons beyond Dr. Johnson's control, did not do so. Dr. Johnson, therefore, was denied his right to the thirty (30) day statutory period.

The circuit court provided plaintiff with ample opportunity to establish that the clerk at GVMC, Teresa Morgan (formerly Shinn), who signed for the certified mail, was Dr. Johnson's agent for service. Appellant could not meet his burden despite having over eighteen (18) months to do so.

Dr. Johnson, on the other hand, supplied the circuit court with Ms. Morgan's affidavit testimony. She confirmed that she signed for the Appellant's certified mail to Dr. Johnson without his authorization to do so. She also testified that she is an employee of GVMC and not Dr. Johnson or Dr. Johnson's employer, BJSM Med, Inc. (See *Exhibit 2, Affidavit of Teresa Morgan (Formerly Teresa Shinn)*, attached to Dr. Johnson's Response to Motion for Reconsideration). Dr. Johnson never has authorized Ms. Morgan to accept certified mail or service of process on his behalf; and she never signed or executed a document designating her as Dr. Johnson's agent or service of process. (See *Id.*). Dr. Johnson simply had no expectation that Ms. Morgan would sign for or receive legal documents triggering legal deadlines.

Appellant also proffered an *Affidavit* from Ms. Morgan, but she never stated in that *Affidavit* that she was Dr. Johnson's authorized agent for service, that she was designated by him to be his authorized agent or that she executed any forms or documents designating her as such. Ms. Morgan's "authorization" was from GVMC, not Dr. Johnson, as is required in this circumstance. Appellant's claim that Ms. Morgan was Dr. Johnson's agent for service on May 31, 2003 still lacks any factual basis. See State ex. rel. Farber v. Mazzone, 213 W.Va. 661, 666, fn. 7, 584 S.E.2d 517, 522, fn. 7 (2003) (holding that service of process on a defendant attorney was void or defective; defendant's legal secretary was not properly authorized to accept defendant's restricted mail because he did not authorize her to do so and she did not properly file an application to accept delivery of mail as his agent to successfully effect service); See also W.V.R.C.P. Rule 4(d)(1)(A)-(E).

This Court also has recognized the importance of the requirement that service of process by certified mail be accepted by duly authorized agents of domestic and foreign corporations and those principles are equally applicable here. See Burkes v. Fas-Chek Food Mart, Inc., 217 W.Va. 291, 617 S.E.2d 838, 843 (2005) (holding that postal service's return of attempted certified mail service of process on a defendant's registered agent to the Secretary of State as "unclaimed" or "Attempted-Not Known," rather than as "refused," was improper service); Crowley v. Krylon Diversified Brands, 216 W.Va. 408, 607 S.E.2d 514 (2004) (holding as a matter of first impression that an attempt to serve of process through the Secretary of State by certified mail on a corporation's authorized agent for service is insufficient where the certified mail is returned to the secretary as "undeliverable" rather than "refused"); Evans v. Holt, 193 W.Va. 578, 457 S.E.2d 515 (1995).

In Evans v. Holt, the Court noted that West Virginia Code § 56-3-31(h)(1), a statute governing service on non-resident defendants, defined who is considered a “duly authorized agent” to accept service of process and ultimately held that service of process on a non-resident defendant by certified mail was insufficient because it was not accepted by the defendant’s “duly authorized agent.” 457 S.E.2d at 522. Therefore, the person that signed for the certified mail was not put on notice that he was acting on behalf of a non-resident defendant in accepting service of process. Id. The Court further stated:

[I]mplicit in this definitional language is the requirement that a duly authorized agent is an individual who understands and is cognizant of the fact that he or she is accepting mail on behalf of the nonresident defendant. Clearly, an allegation in a complaint that an individual is an agent for the purposes of instituting a cause of action in negligence does not constitute compliance with the requirements of West Virginia Code § 56-3-31.

Id.

The Evans, Burkes and Crowley cases have made clear the requirement that service of process must be **accepted** by a defendant’s **duly authorized agent** to be perfected. Receipt and acceptance of service by one other than a duly authorized agent is insufficient and fails to place such a person on notice of the legal significance of the documents accepted or of their duty to the principle regarding the same. In this case, Dr. Johnson never designated Ms. Shinn-Morgan as his duly authorized agent to accept service of process on his behalf and the record is devoid of any evidence suggesting such an appointment. Moreover, Ms. Shinn-Morgan had no appreciation for the legal consequences and duties of signing for the certified mail and she never agreed to undertake such important duties.

On June 2, 2003, Appellant’s counsel received the Domestic Return Receipt for the certified mail accepted and signed for by Ms. Morgan. (See Exhibit F attached to Dr. Johnson’s Motion to Dismiss). Appellant knew that day that Dr. Johnson had not signed for it, may not have received it

timely or may not have received it at all. Appellant filed his Complaint prejudicing Dr. Johnson's statutory rights. This Court should not reward such conduct

Accordingly, the circuit court correctly dismissed Appellant's Complaint because he failed to comply with the pre-filing requirements of the MPLA. Its decision should be upheld.

3. Appellant's Certificate of Merit Failed to Meet the Particularity Requirements of West Virginia Code § 55-7B-6

As previously noted, Appellant's failure to provide Dr. Johnson with the requisite thirty (30) days to respond to the notice of claim and certificate of merit cut short his time to object to the certificate.⁷ Dr. Johnson argued below that Appellant's Certificate of Merit, which was executed by his retained medical witness, James Matthews, M.D., was deficient because it lacked the particularity required by the 2001 version of § 55-7B-6. *See* December 22, 2003 Hearing Transcript, p. 11; Exhibit D attached to Dr. Johnson's Motion to Dismiss.

The statute specifically has provided:

[T]he certificate of merit shall be executed under oath by a healthcare provider qualified as an expert under the West Virginia rules of evidence and *shall state with particularity*: (1) The expert's familiarity with the applicable standard of care in issue; (2) the expert's qualifications; (3) the expert's opinion as to how the applicable standard of care was breached; and (4) the expert's opinion as to how the breach of the applicable standard of care resulted in injury or death. . .

W.Va. Code § 55-7B-6(b) (2001) (emphasis added).

Examination of Dr. Matthews certificate of merit revealed its deficiencies. First, he failed to specifically identify any standard of care applicable to Dr. Johnson in this case. He only stated generally that Dr. Johnson breached the standard of care by failing to do certain generic things, including:

⁷ While this Court's decision in Hinchman provided that health care providers must specifically object in writing to deficiencies of the pre-filing notice and screening certificate, Hinchman did not involve the time requirement at issue in this case. Dr. Johnson still was not afforded the full thirty (30) days from receipt of the notice and screening certificate to object to the same. *See Hinchman*, 618 S.E.2d at 395.

- a. Failure to provide adequate, proper and safe medical care, advice and treatment to the said decedent during the course of examination and treatment of her;
- b. Failure to timely arrange for proper care and treatment, including but not limited to, providing intravenous antibiotics and/or admitting the decedent for further follow-up and diagnosis;
- c. Failure in delaying appropriate treatment, follow-up, and consultations;
- d. Failure to recognize evidence of septicemia;
- e. Failure to timely investigate and otherwise work up possible septicemia;
- f. Failure to recognize the severity of Dorothy Elmore's medical condition.; and
- g. Failure to timely and adequately diagnose, treat and/or otherwise care for the condition of said decedent.

(See Exhibit D attached to Dr. Johnson's Motion to Dismiss). Dr. Matthews also stated generally that Dr. Johnson's alleged breaches "resulted in" decedent's injuries. (*Id.*).

Dr. Matthews' use of such canned lawyer language fell well short of the Legislature's mandate that that the applicable standard of care and alleged breaches of that standard be stated with particularity. He failed to state the specific standard of care applicable to Dr. Johnson and further failed to support the alleged general breaches by Dr. Johnson with concrete medical facts to support his opinions. He did not provide particular facts to establish his vague causation opinion; therefore, Dr. Johnson was left to guess about the factual basis for Dr. Matthews' causation opinion and the link between his alleged conduct or omissions and decedent's injuries. Such generalities violated the express intent of the Legislature requiring claimants to specifically identify the factual foundation for the expert's opinion. As a result, no physician could evaluate Dr. Matthews' opinions in an effort to explore pre-litigation resolution of Appellant's claims.

The MPLA is silent regarding the definition of "particularity." However, the plain and ordinary meaning of every word employed in the statute should be given effect. State ex rel.

Miller, 607 S.E.2d at 489. The plain meaning of “particularity” is as follows: “1 the state, quality, or fact of being particular; specif., a) individuality, as opposed to generality or universality b) the quality of being detailed, as a description c) attention to detail; painstaking care d) the quality of being fastidious or hard to please . . . 2 something particular; specif., . . . b) a minute detail.” Webster’s New World College Dictionary 1050 (2004).

A similar “particularity” requirement is found in the West Virginia and Federal Rule of Civil Procedure 9(b), both of which state that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” The United States District Court for the Northern District of Texas has stated that the Rule 9(b) “particularity” requirement “. . . means stating circumstances in detail. ‘This means the who, what, when, where and how: the first paragraph of any newspaper story.’” In re Urcarco Sec. Litig., 148 F.R.D. 561, 566 (N.D. Tex. 1993) (citing DiLeo v. Ernst & Young, 901 F.2d 624, 627 (7th Cir. 1990), *aff’d* Melder v. Morris, 127 F.3d 1097 (5th Cir. 1994)). “[A]llegations in the form of mere conclusions, accusations or speculation are not sufficient to meet Rule 9(b)’s particularity requirement without supporting facts. . . .” Shields v. Amoskeag Bank Shares, Inc., 766 F. Supp. 32, 38 (D. N.H. 1991).

Appellant’s certificate simply made general, blanket statements falling well short of particularity. It was devoid of any details regarding the applicable standard of care, the specific manner in which that standard was breached or how those alleged breaches caused decedent’s injury or death. Upholding case dismissal is appropriate on these facts.

B. Appellant’s Constitutional Challenges to the 2001 Version of the MPLA Are Not Ripe for Consideration

Appellant never raised the constitutionality of the 2001 MPLA below. None of Appellant’s pleadings or hearing transcripts contain any mention of the constitutionality of the

applicable statute. The circuit court never addressed this issue as Appellant never once raised it, and the court did not render any decision on the issue.

This Court long has held that it will not decide constitutional or nonjurisdictional issues on appeal that have not been decided by the trial court. See Duquesne Light Co. v. State Tax Dept., 174 W.Va. 506, 511, 327 S.E.2d 683, 688 (1984) (stating the general rule that “[T]his Court will not pass on a nonjurisdictional question that has not been decided by the trial court in the first instance” and refusing to address the constitutionality of a statute imposing a business and occupation tax because it was not raised below) (citing Syl. Pt. 2, Sands v. Security Trust Co., 143 W.Va. 522, 102 S.E.2d 733 (1958)); State ex rel. Mobile Corp. v. Gaughan, 211 W.Va. 106, 113, 563 S.E.2d 419, 426 (2002) (holding that the Court would not decide issues not ruled upon by the trial court).

Moreover, even though the circuit court stated in its decision that it lacked subject matter jurisdiction, the circuit court’s decision was not based on jurisdiction. Rather, the court’s decision centered on Appellant’s failure to comply with the mandatory pre-filing requirements of the 2001 MPLA. The fact that the court did not have subject matter jurisdiction was collateral to its decision that Appellant did not satisfy the statute. Therefore, the questions of whether the circuit court had jurisdiction or whether the MPLA was jurisdictional were not at issue.

Strict compliance with § 55-7B-6, nevertheless, was required before Appellant was permitted by the Legislature to bring this lawsuit. His failure to comply with the statute resulted in the circuit court losing subject matter jurisdiction. See West Virginia Secondary School Activities Comm’n v. Wagner, 143 W.Va. 508, 520-521, 102 S.E.2d 901, 909 (W.Va. 1958) (stating that subject matter jurisdiction is required for a court to hear and determine an action); See also Stanley v. United States, 321 F.Supp.2d 805, 808 (2004) (District Judge J. Keely

presiding (holding the pre-filing requirements of the MPLA were state “substantive” law). Therefore, the circuit court properly dismissed Appellant’s claim for failure to comply with the pre-filing requirements.

C. Assuming the Constitutionality of the 2001 Version of § 55-7B-6 is Ripe For Consideration, The Statute is Constitutional and Should be Enforced

West Virginia Code §55-7B-6 is presumed to be constitutional as written and, in fact, is constitutional as demonstrated below. Appellant’s newly raised arguments that the MPLA’s pre-filing requirements and the circuit court’s interpretation of the same violated his right to trial, procedural and substantive due process, the separation of powers doctrine and interfered with this Court’s rule-making powers, are without merit.

1. The Pre-filing Requirements of the 2001 Version of § 55-7B-6 Are Presumed to Be Constitutional

Courts are required to exercise “due restraint” in considering whether a legislative enactment is constitutional in deference to the “separation of powers” among the judicial, legislative and executive branches of government and “and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question.” *See* Syl. Pt. 1, State ex rel. Appalachian Power Co. v. Gainer, 149 W.Va. 740, 143 S.E.2d 351 (1965). Accordingly, legislative enactments ordinarily are entitled to a presumption of constitutionality in light of the “separation of powers” principle of Article V, § 1, of the West Virginia Constitution. *See* Robinson v. Charleston Area Medical Center, Inc., 186 W.Va. 720, 414 S.E.2d 877, 882-883 (1991).

This Court, therefore, should not serve as a “superlegislature” and question the policy determinations of the West Virginia Legislature in enacting the 2001 amendments to the MPLA

or rewrite the statute. *See* City of New Orleans v. Dukes, 427 U.S. 297, 303, 96 S.Ct. 2513, 2517, 49 L.Ed. 2d 511, 517 (1976); Verba v. Ghaphery, 210 W.Va. 30, 36, 552 S.E.2d 406, 412 (2001); State ex rel. Orlofske v. City of Wheeling, 212 W.Va. 538, 546-547, 575 S.E.2d 148, 156-157 (2002) (stating that “[t]he judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.”) (citations omitted). Moreover, “[i]t is not the province of the courts to make or supervise legislation, and a statute may not, under the guise of interpretation, be modified, revised, amended, distorted, remodeled, or rewritten[.]” State v. Richards, 206 W.Va. 573, 577, 526 S.E.2d 539, 543 (1999) (quoting State v. General Daniel Morgan Post No. 548, V.F.W., 144 W.Va. 137, 145, 107 S.E.2d 353, 358 (1959)).

A suit for damages for personal injury has been deemed an economic right. *See* Syl. Pt. 4, Gibson v. West Virginia Department of Highways, 185 W.Va. 214, 406 S.E.2d 440 (1991). This Court, in Gibson, provided that where economic rights are concerned, the Court must determine whether the classification is a rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally. *Id.* Thus, the minimum level of constitutional scrutiny is applied.

The Court, in Lewis v. Canaan Valley Resorts, Inc., 185 W.Va. 684, 691, 408 S.E.2d 634, 641 (1991), set forth the following test in considering a facial challenge to a statute that limited the liability of ski resort operators:

[A] facial challenge to the constitutionality of legislation is the most difficult challenge to mount successfully. The challenger must establish that no set of circumstances exists under which the legislation would be valid; the fact that the legislation might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid. Rust v. Sullivan, 500 U.S. 173, ---, 111 S.Ct. 1759, 1767, 114 L.Ed.2d 233, 249 (1991)

The pre-filing requirements of § 55-7B-6 involve purely economic rights, rather than fundamental rights, and are entitled to a presumption of constitutionality. Moreover, these provisions are rationally related to legitimate legislative purposes, through the reduction of the filing of frivolous claims, promotion of judicial economy by allowing healthcare providers the opportunity to explore early resolution of viable claims and preservation of available and affordable medical malpractice insurance. *See* W.Va. Code §55-7B-1; *see also* Syl. Pt. 2, Robinson, 414 S.E.2d at 887-888 (finding that the non-economic damages cap of the MPLA affected economic rights and was constitutional).⁸

⁸ West Virginia Code § 55-7B-1 expressly provided the legislative purpose of the MPLA as follows:

The Legislature hereby finds and declares that the citizens of this state are entitled to the best medical care and facilities available and that healthcare providers offer an essential and basic service which requires that the public policy of this state encourage and facilitate the provision of such service to our citizens:

That as in every human endeavor the possibility of injury or death from negligent conduct commands that protection of the public served by healthcare providers be recognized as an important state interest;

That our system of litigation is an essential component of this state's interest in providing adequate and reasonable compensation to those persons who suffer from injury or death as a result of professional negligence;

That liability insurance is a key part of our system of litigation, affording compensation to the injured while fulfilling the need and fairness of spreading the cost of the risks of injury;

* * *

That in recent years, the cost of insurance coverage has risen dramatically while the nature and extent of coverage has diminished, leaving the healthcare providers and the injured without the full benefit of professional liability insurance coverage;

* * *

Therefore, the purpose of this enactment is to provide for a comprehensive resolution of the matters and factors which the Legislature finds must be addressed to accomplish the goals set forth above. In so doing, the Legislature has determined that reforms in the common law and statutory rights of our citizens to compensation for injury and death, in the regulation of rate making and other practices by the liability insurance industry, and in the authority of medical licensing boards to effectively regulate and discipline the healthcare providers under such board must be enacted together as necessary and mutual ingredients of the appropriate legislature response. (1986, c. 106.)

2. Application of the Pre-filing Requirements of the 2001 MPLA Does Not Infringe Upon Appellant's Right To Trial Pursuant to Article III, Section 13 of the West Virginia Constitution

Requiring a claimant to wait until thirty (30) days after the healthcare provider receives the notice and certificate does not infringe Article III, Section 13 of the West Virginia Constitution. The pre-filing requirements do not impair Appellant's right to trial as nothing prevented him from filing a civil action pursuant to the 2001 MPLA; provided that he met the prerequisites mandated by the Legislature. He failed in this endeavor. Moreover, nothing has prevented Appellant from complying with the pre-filing requirements of the MPLA and refile his action, as he has done.

The right to trial provided by Article III, Section 13 of the West Virginia Constitution is not a fundamental right. See Robinson, 414 S.E.2d at 884. Article III, Section 13 also has provided the legislature with "general authority to alter or repeal the common law" and to consider "clear economic or social conditions in the state in deciding to alter or repeal the common law." *Id.* (citing Lewis, 185 W.Va. at 694-695, 408 S.E.2d at 644-645). Thus, the legislature is vested with the power to place statutory limitations upon causes of action, including the establishment of statutes of limitation, statutes of repose, the creation and abolition of old and new presumptions and causes of action and reasonable limits on recoverable damages. See Verba, 552 S.E.2d at 411.

The legislature enacted the pre-filing requirements of the 2001 MPLA to address economic concerns affecting the state and Appellant was not precluded from pursuing his medical negligence action after having met the prerequisites for doing so. The legislature has the power to abolish entire causes of action without infringing a person's right to a trial; that right certainly is not infringed by the enactment of reasonable prerequisites to filing an action.

3. The Circuit Court's Dismissal of this Action Pursuant to § 55-7B-6 Did Not Violate Due Process

Due process principles have required this Court to give deference to the Legislature where the legislation is economic in nature or affects economic rights. *See Gibson*, 406 S.E.2d at 443-444. As previously noted, this Court has recognized that the right to sue to recover personal injury damages is an economic right. *Id.* at 444. Legislation based on economic classifications receives the “rational basis” test of judicial scrutiny. *Id.* Where economic rights are concerned, this Court should uphold the Legislature’s economic classification “if it is reasonably related to the achievement of a legitimate state purpose.” *Lewis*, 408 S.E.2d at 641-642.

The deference afforded the Legislature in addressing economic and social problems is based on its unique responsibility to alleviate important social ills by allocating the costs of such problems among various groups. Thus, courts generally do not interfere with or second guess legislative efforts to cure serious economic and social concerns. *See Verizon West Virginia, Inc. v. West Virginia Bureau of Employment Programs*, 214 W.Va. 95, 121, 586 S.E.2d 170, 196 (2003).

This Court previously has recognized that the Legislature enacted the MPLA for economic purposes, namely to facilitate the best possible health care for citizens of this state. *See Robinson*, 414 S.E.2d at 881; W.Va. Code § 55-7B-1 (1986). Regardless of whether the Legislature’s factual basis for enacting the MPLA was justified or speculative, this Court has deferred to the legislative purpose where “the legislature reasonably could conceive to be true the facts upon which the challenged statute was based.” *Id.* at 887.

This Court, in addressing the constitutionality of the noneconomic damages cap of the MPLA, further has stated that the legislature “reasonably could conceive to be true the facts upon which the Medical Professional Liability Act, including the medical malpractice cap, is based.”

Verba, 552 S.E.2d at 411. The Court also recognized that the Legislature was in the best position to determine whether the statute continued to serve its purpose for enactment and if not, could amend it “as it sees fit” to fulfill that purpose. *Id.* at 412.

The pre-filing requirements of § 55-7B-6 are rationally related to the legitimate legislative purposes of alleviating the medical professional liability insurance crisis by encouraging pre-suit resolution of viable medical negligence claims and to weed out frivolous claims. Such mechanisms reduce exorbitant litigation costs that cause malpractice insurance premiums to rise dramatically forcing competent physicians to leave the state, thereby frustrating the Legislature’s goal that the citizens of this state be afforded quality health care. *See W.Va. Code § 55-7B-1.*

Other courts have upheld similar constitutional challenges to state certificate of merit statutes. The Court of Appeals for the Second District of California rejected plaintiff’s challenge to § 411.30 of the Code of Civil Procedure requiring a claimant to file a certificate of merit for filing suit. Adams v. Roses, 183 Cal. App.3d 498, 228 Cal. Rptr. 339 (1986). The court, in Adams, found that the classifications set forth in its medical malpractice act pertaining to certificates of merit were rationally related to the legitimate legislative goals of retaining adequate medical care and preserving adequate and reasonable insurance coverage. 228 Cal. Rptr. at 344; *See also* Robinson, 414 S.E.2d at 886; Barlett v. North Ottawa Community Hosp., 625 N.W.2d 470, 475-76 (Mich. App. 2001) (finding that affidavits of merit were rationally related to the legitimate state interest of “[d]eterring the filing of frivolous lawsuits”); Neal v. Oakwood Hosp. Corp., 575 N.W.2d 68, 75 (Mich. App. 1997) (holding that Michigan’s pre-filing requirement that a claimant provide notice 182 days before filing suit was constitutional, that dismissal of the complaint without prejudice was appropriate and stating that “allowing

plaintiff to disregard § 2912b(1) and prematurely commence his action simply in order to avoid the 1995 legislation and obtain the benefit of supposedly more favorable law . . . would undercut the statutory purpose of encouraging settlement before formal litigation is commenced.”); Mahoney v. Doerhoff Surgical Services, Inc., 807 S.W.2d 503 (Mo. 1991); Thomas v. Fellows, 456 N.W.2d 170 (Iowa 1990); Daigle v. Maine Medical Center, Inc., 14 F.3d 684 (1st Cir. 1994); Sisario v. Amsterdam Memorial Hosp., 552 N.Y.S.2d 989 (N.Y.App.Div. 1990); Chizmadia v. Smiley’s Point Clinic, 768 F.Supp. 266, 268, fn. 8 (D. Minn. 1991).

Medical statutes in other states have provided for the more stringent requirement of presenting claims before a pre-litigation screening panel before lawsuits may be filed. These statutes also withstood constitutional due process challenges. *See* Keyes v. Humana Hospital Alaska, Inc., 750 P.2d 343 (Alaska 1988) (holding that statutory requirement of mandatory review of medical malpractice claims by a pretrial review panel did not violate plaintiff’s constitutional right to jury trial or substantive due process because the legislation was a reasonable response to the medical malpractice insurance crisis); Linder v. Smith, 629 P.2d 1187 (Mont. 1981); DiAntonio v. Northhampton-Accomack Memorial Hosp., 628 F.2d 287 (4th Cir. 1980).

Prior to the enactment of the 2001 amendments to the MPLA, defendants more often were required to prosecute substantial and costly discovery spanning several months to years only to obtain a dismissal of the claims after plaintiffs failed to proffer competent expert support. The notice of claim and screening certificate of merit requirements allow healthcare providers to more promptly assess the claims against them before costly litigation is begun and has provided them with an avenue to resolve those claims through pre-litigation mediation. *See* § 55-7B-6(f).

Even if the healthcare provider is unwilling to resolve the claim at the pre-suit stage, the notice and certificate requirements significantly narrow case issues and conserve valuable time, money and judicial economy. This statute is rationally related to legitimate government interests and the Legislature's choice to reach its goals of improving the state's economy and quality of health care.

4. Application of the 2003 Version of the MPLA To This Claim Is Not An Unconstitutional "Taking" of Property

Application of the 2003 amendments to the MPLA which revised the noneconomic damages cap in West Virginia Code § 55-7B-8,⁹ does not infringe upon Appellant's existing property rights. As previously noted, this Court has upheld the constitutionality of the noneconomic damages cap against constitutional challenges that it violated equal protection, special legislation, substantive due process, the "certain remedy" and right to jury trial provisions

⁹ The 2001 version of § 55-7B-8 retained the limit of noneconomic damages recoverable against a healthcare provider of one million dollars (\$1,000,000.00). The 2003 version of the MPLA provided a cap of five hundred thousand dollars (\$500,000.00) per occurrence in cases involving wrongful death and other defined injuries, with an inflation escalator.

Other states have enacted damage caps similar to the 2003 version of § 55-7B-8 of the MPLA. *See* Alaska Stat. § 09.17.010 (\$400,000.00 or \$8,000.00 times life expectancy cap); Colo. Rev. Stat. § 13-64-302 (2005) (\$250,000.00 cap on noneconomic damages in Colorado); Hawaii Rev. Stat. § 663-8.7 (2005) (Hawaii's \$375,000.00 cap on pain and suffering damages); Idaho Code Ann. § 6-1603 (2005) (Idaho's \$250,000.00 noneconomic damages cap); Kansas Stat. Ann. § 60-19a02 (2005) (\$250,000.00 non-economic damages cap); La. Rev. Stat. Ann. § 40:1299.42 (2006) (Louisiana's \$500,000.00 limitation on damages in general exclusive of future medical care costs and benefits); Mich. Comp. Laws § 600.1483 (2006) (Michigan statute limiting non-economic damages to \$280,000.00 or to \$500,000.00 in severe injury cases); Miss. Code Ann. § 11-1-60 (2006) (\$500,000.00 noneconomic damages cap in Mississippi); Mo. Rev. Stat. § 538.210 (2006) (\$350,000.00 noneconomic damages cap in Missouri); Mont. Code Ann. § 25-9-411 (2005) (\$250,000.00 noneconomic damages cap in Montana); N.M. Stat. Ann. § 41-5-6 (2006) (New Mexico's total limit of damages to \$600,000.00 in medical cases); ORS § 31.715 (Oregon's statute barring recovery of noneconomic damages in auto collision cases where plaintiff does not have liability insurance at the time of the collision); S.D. Codified Laws § 21-3-11 (2006) (\$500,000.00 noneconomic damages cap in South Dakota); Texas Civ. Prac. & Rem. Code Ann. § 74.301 (Vernon 2006) (\$250,000.00 noneconomic damages cap); Utah Code Ann. § 78-14-7.1 (2006) (Utah's \$400,000.00 noneconomic damages cap with inflation adjustments); Va. Code Ann. § 8.01-581.15 (2006) (Virginia's \$1,500,000.00 cap on total damages in medical cases).

of the West Virginia Constitution. *See Robinson v. Charleston Area Medical Center*, 186 W.Va. 720, 414 S.E.2d 877 (1991); *Estate of Verba v. Ghaphery*, 210 W.Va. 30, 552 S.E.2d 406 (2001).

This Court, in *Robinson*, cited with approval the principles set forth in *Fein v. Permanente Medical Group*, 695 P.2d 665, 679 (Cal. 1985), which stated “[I]t is well established that plaintiff has no vested property right in a particular measure of damages and that the Legislature possesses broad authority to modify the scope of and nature of such damages.” (citations omitted). Other jurisdictions have rejected similar constitutional challenges to legislative caps on the amount of damages recoverable in a medical malpractice action. *See Pulliam v. Coastal Emergency Services of Richmond, Inc.*, 257 Va. 1, 509 S.E.2d 307, 317-318 (1999) (rejecting plaintiff’s argument that Virginia’s cap on medical malpractice damages violated the “Takings” provision of the state constitution, thereby recognizing the legislature’s right to limit remedies for causes of action and stating that “ ‘[n]obody has a vested right in the continuance of the rules of the common law.’ ”) (citations omitted). *See also Kirkland v. Blain County Medical Center*, 4 P.3d 1115 (Idaho 2000) (holding that the statutory cap on noneconomic damages did not violate right to jury trial or separation of powers doctrine because the Legislature was vested with the power to limit remedies); *Lawson v. Hoke*, 77 P.3d 1160, 1169-1171 (Or. App. 2003) (holding that the statutory cap on noneconomic damages for those who did not have liability insurance at the time of an auto collision did not violate the remedy clause of Oregon’s constitution because plaintiff’s cause of action was not abolished; rather only the remedy was limited and the remaining remedy for economic damages was substantial).

The United States District Court for the Eastern District of Virginia recently addressed the issue of whether the noneconomic damages cap of the West Virginia MPLA was unconstitutionally retroactive. *Wilson v. United States*, 375 F.Supp.2d 467 (E.D. Va. 2005). In

Wilson, plaintiff brought an action against the United States pursuant to the Federal Tort Claims Act regarding injuries he allegedly sustained following colon surgery at the VA Medical Center in Martinsburg, West Virginia on September 4, 2001. *Id.* at 468-470. The government argued successfully that West Virginia's MPLA and specifically, the 2003 non-economic damages cap of \$250,000.00, applied to the plaintiff's claim, which was filed after July 1, 2003, the effective date of 2003 MPLA. *Id.* at 472.

As importantly, the District Court found that the non-economic damages cap to be "a classic example of an economic regulation—a legislative effort to structure and accommodate the 'burdens and benefits of economic life.'" *Id.* (citing Duke Power Co. v. Carolina Env'tl. Study Group, Inc., 438 U.S. 59, 83, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978)) (internal citations omitted). It stated:

[I]t is well-settled that a legislative limitation on a common law measure of recovery, such as that imposed in the MPLA, does not violate a fundamental constitutional right or create a suspect classification for constitutional purposes . . . [I]t is also clear that Congress and state legislatures may, consistent with the Constitution, enact retroactive legislation provided they can establish a rational basis for doing so . . .

[H]ere the West Virginia legislature, in enacting both the original and amended damages limitations set forth in the MPLA, had a rational basis for balancing (i) the need for fair compensation for patients injured by medical negligence with (ii) the ability of healthcare providers and their insurance carriers to afford such compensation.

Wilson, 375 F.Supp.2d at 472-473 (citing W.Va. Code § 55-7B-1 providing the legislative findings and declaration of purpose). The Court further found that the statute did not raise constitutional retroactivity concerns because plaintiff had not yet filed the action or obtained a final judgment. *Id.*

Appellant's one cited case for his argument, Mildred L.M. v. John O.F., 192 W.Va. 345, 452 S.E.2d 436 (1994), is inapplicable. This case involved statutory amendments that became effective during the pendency of an action involving paternity testing. Moreover, the Court stated that the determination of whether a statute can be applied retroactively is determined by rules of statutory construction and found that the statute applied retroactively to the pending case. *Id.* at 442, n. 10. In this matter, Appellant's action had not been filed properly as of July 1, 2003 because he violated the pre-filing requirements of the statute.

This Court also has held that legislative enactments which attach new legal consequences to completed events in a pending case shall apply where the Legislature expressly has made clear its intentions for the statute to apply retroactively. See Findley, 576 S.E.2d at 819; White v. Gosiene, 187 W.Va. 576, 420 S.E.2d 567, 572-573 (1992) (holding the amendments to the wrongful death statute did not apply retroactively because had the Legislature wanted the statute to apply retroactively, "it could easily have done so by changing only a few words of subsection (d) to make a positive statement to that effect, *i.e.*, that the amendment *shall* apply to wrongful death actions brought after a specific date.").

The Legislature has expressed its clear intent regarding the application of the 2003 MPLA. The 1986 MPLA applied to all claims in which the "injuries" occurred after the effective date of the statute, or June 6, 1986. The 2001 MPLA applied to all claims "filed," rather than accruing, on or after March 1, 2002. The 2003 MPLA applied to all medical malpractice claims "filed," rather than accruing, on or after July 1, 2003. See W.Va. Code § 55-7B-10. Thus, the Legislature clearly contemplated the difference between the "filing" and the "accrual" of a cause of action and chose the "filing" date as the trigger for application of the 2001 and 2003 amendments. See Syllabus, Ex parte Watson, 82 W.Va. 201, 95 S.E. 648 (1918)

(setting forth the proposition that “[I]t is presumed that the legislature had a purpose in the use of every word, phrase and clause found in a statute and intended the terms so used to be effective...”).

In this case, Appellant did not comply with the pre-filing requirements of the 2001 MPLA and, therefore, did not timely and properly file his action. He also has not obtained a final judgment against Dr. Johnson to implicate his property rights or a taking thereof under the West Virginia or Federal Constitutions. Accordingly, this Court should affirm the circuit court’s order dismissing plaintiff’s claim in recognition of this appropriate and rational legislative action.

5. The Pre-filing Requirements of § 55-7B-6 of the MPLA Do Not Conflict With The Rules of Civil Procedure and, Therefore, Are Constitutional.

The MPLA does not conflict with the Rules of Civil Procedure promulgated by this Court pursuant to its rule-making power set forth in Article VIII, Section 3 of the West Virginia Constitution.¹⁰ Rules promulgated by the Court pursuant to authority granted by the state constitution generally prevail over legislative enactments where a conflict exists between the two. Specifically, this Court has held that the MPLA provisions “govern actions falling within its parameters, subject to this Court’s power to promulgate rules for all cases . . . pursuant to Article VIII, Section 3 of the West Virginia Constitution.” State ex. rel. Weirton Medical Ctr. v. Mazzone, 214 W.Va. 146, 152, 587 S.E.2d 122, 128 (2002). A procedural rule of the court is not

¹⁰ Article VIII, § 3 of the West Virginia Constitution provides:

[t]he court shall have the power to promulgate rules for all cases and proceedings, civil and criminal, of the Court of the State relating to writs, warrants, process, practice and procedure, which shall have the force and effect of law.

violated by a statute where no “direct conflict” exists between the two. State ex rel. Frazier v. Meadows, 193 W.Va. 20, 25, fn. 8, 454 S.E.2d 65, 70, n.8 (1994).

No “direct” conflict exists between § 55-7B-6 and Rule 5 of the West Virginia Rules of Civil Procedure. The pre-filing requirements of the MPLA explicitly apply to the conduct of parties before a lawsuit is filed. Rule 5, however, specifically applies to service of documents after a lawsuit is filed. (See Section A, Subsection 2 of this Response). In fact, Rule 1 of the West Virginia Rules of Civil Procedure has provided that the rules “govern the procedure in all trial courts of record in all actions, suits, or other judicial proceedings of a civil nature . . .” As noted, Appellant’s action had not been filed at the time he attempted to serve the Notice of Claim and Certificate of Merit on Dr. Johnson; therefore, he was subject to the legislative pre-filing procedures of § 55-7B-6 and not Rule 5. The MPLA’s pre-filing requirements simply do not involve court procedures. Rather, they are akin to legislative standing and statute of limitation or repose provisions and fall within the Legislature’s power to change the parameters of common law causes of action.

The United States District Court for the Northern District of West Virginia, Chief Judge Keely presiding, has addressed this very issue. See Stanley v. United States, 321 F. Supp.2d 805 (N.D. W.Va. 2004). Chief Judge Keely held that the MPLA’s pre-filing requirements were “substantive,” rather than procedural, and applied in federal court pursuant to Erie R.R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) (holding that federal courts must apply state substantive law when presiding over state law causes of action and federal procedural law). She further stated that § 55-7B-6 “imposes special requirements that must be met *before* suit can be filed.” Stanley, 321 F.Supp.2d at 808. “[B]ecause Rule 26 only applies after an action is filed, there is not conflict between Rule 26 and § 55-7B-6.” *Id.* Plaintiff’s claims,

therefore, were dismissed for his failure to comply with the pre-filing requirements of the MPLA. *Id.* at 809.

Even assuming that the pre-filing requirements of the MPLA have implicated this Court's rule-making authority, the circuit court interpreted the statute consistent with the service requirements of Rule 4 of the West Virginia Rules of Civil Procedure. Service upon a designated agent for service of process has avoided the creation of a set of service rules inconsistent with rules promulgated by this Court. (*See Order Dismissing Defendant John M. Johnson, D.O.*).

Other courts have upheld statutory certificate of merit provisions against similar constitutional challenges relating to separation of powers. *See Barreiro v. Morais*, 723 A.2d 1244 (N.J. Super. A.D. 1999) (recognizing that the separation powers doctrine was not violated by certificate of merit requirement); *Garland v. Kaunten*, 567 N.E.2d 707 (Ill. App. 4th Dist. 1991) (holding that statutory certificate of merit requirement did not violate separation of powers doctrine).

The pre-filing requirements of § 55-7B-6 apply to pre-suit conduct of the parties. This Court's rule-making power and Rule 5 of the West Virginia Rules of Civil Procedure are not implicated. The trial court's decision was consistent with Rule 4. Accordingly, the statute is constitutional and should be upheld.

VI. CONCLUSION

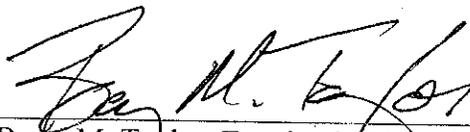
For all of the foregoing reasons, the Circuit Court of Greenbrier County, West Virginia correctly held that Appellant failed to comply with the pre-filing requirements of the 2001 version of § 55-7B-6 of the Medical Professional Liability Act. Therefore, the circuit court's

Order dismissing Appellant's Complaint against Appellee John M. Johnson, D.O. should be affirmed.

Respectfully submitted,

JOHN M. JOHNSON, D.O., Appellee

By Counsel

A handwritten signature in black ink, appearing to read "Barry M. Taylor", written over a horizontal line.

Barry M. Taylor, Esquire (WV Bar ID# 3697)
Max L. Corley, III, Esquire (WV Bar ID# 7434)
JENKINS FENSTERMAKER, PLLC
Post Office Box 2688
Huntington, West Virginia 25726-2688
Phone: (304) 523-2100

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 33006

**LARRY D. ELMORE, individually and as Administrator
of the Estate of Dorothy Mae Elmore, Deceased**

Appellant,

vs.

JOHN M. JOHNSON, D.O.

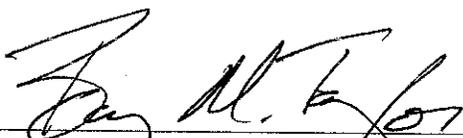
Appellee.

CASE NO. 03-C-136 FROM THE CIRCUIT COURT OF GREENBRIER COUNTY

CERTIFICATE OF SERVICE

I, Barry M. Taylor, counsel for John M. Johnson, D.O., do hereby certify that a copy of the foregoing *John M. Johnson, D.O.'s Response to the Appeal Brief of the Appellant, Larry D. Elmore* was served upon the following individuals via regular U.S. Mail, postage prepaid, this *21st day of July, 2006*:

Marvin W. Masters, Esquire (WV Bar ID# 2359) (*Via Facsimile 304/34-3189*)
Julie N. Langford, Esquire (WV Bar ID# 8567)
Masters & Taylor, L.C.
181 Summers Street
Charleston W: 25301
(*Counsel for Plaintiff*)



Barry M. Taylor, Esquire (WV Bar ID# 3697)

JENKINS FENSTERMAKER, PLLC
Post Office Box 2688
Huntington, West Virginia 25726-2688
Phone: (304)523-2100