

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AUGUST EUGENE PHILLIPS and
CHERYL PHILLIPS, his wife,

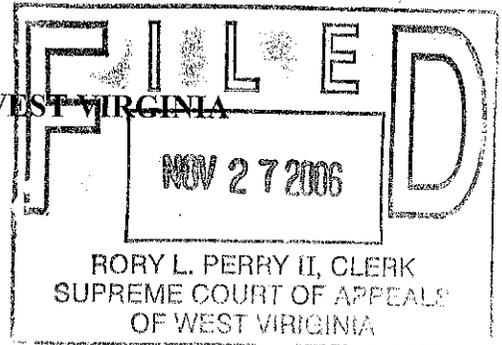
Plaintiffs/Petitioners,

V.

APPEAL No. 06-1511

LARRY'S DRIVE-IN PHARMACY, INC.,
a West Virginia corporation.

Defendant/Respondent



BRIEF OF RESPONDENT ON CERTIFIED QUESTION

CERTIFICATION ORDER ENTERED
JUNE 2, 2006

JAY M. POTTER (#2949)
SCHUMACHER, FRANCIS & NELSON
P.O. Box 3029
Charleston, WV 25331
304/342-4567
Counsel for Respondent
Larry's Drive-In Pharmacy

Dated: November 27, 2006

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AUGUST EUGENE PHILLIPS and
CHERYL PHILLIPS, his wife,
Plaintiffs/Petitioners,

V.

APPEAL No. 06-1511

LARRY'S DRIVE-IN PHARMACY, INC.,
a West Virginia corporation.
Defendant/Respondent

TABLE OF CONTENTS

	<u>Page</u>
Introduction	1
I. Respondent's Statement of Omissions and Inaccuracies in Petitioner's Statement of Facts	1
II. Respondent's Statement to Meet Errors Alleged by Petitioners.....	3
Authorities Relied Upon	6
Arguments	6
I. Even though the W.Va. Code § 55-7B-3(c) definition of "health care provider" does not contain an express "pharmacy" provider category, a pharmacy can be – and the respondent pharmacy here is – a "health care provider" because, under this Court's reasoning in <u>Short v. Appalachian OH-9, Inc.</u> , a pharmacy can be – and the respondent pharmacy here is – an agent of the prescribing physician; and the "agent" of a "health care provider" is, by definition, a "health care provider".....	6
II. Even though the W.Va. Code § 55-7B-2(c) definition of "health care provider" does not contain an express "pharmacy" provider category, the respondent pharmacy here is a "health care provider" Because of the statute's inclusionary "but not limited to" provision and because of the nature of the claim being asserted against the respondent pharmacy	10

III.	Pharmacies, <i>per se</i> , are “health care providers” because the plaint language of W.Va. Code § 30-5-1, <i>et seq.</i> brings pharmacies within the W.Va. Code § 55-7B-2(c) definition of “health care provider”	12
IV.	The affidavits of the petitioners’ own counsel and four other former Legislators proffered by the petitioners in relation to Senate Bill 714 are not appropriate evidence on the issue of whether or not the respondent is a “health care provider”.	14
V.	Neither House Bill 2871 nor Senate Bill 486 is appropriate evidence on the issue of whether or not the respondent is a “health care provider”.....	17
VI.	The Circuit Court of Boone County was entitled to consider the opinion orders entered in the unreported Mercer County and Kanawha County civil actions.....	18
VII.	The Circuit Court of Boone County was entitled to consider the opinion statement of the Executive Director and General Counsel of the West Virginia Board of Pharmacy.....	19
	Conclusion.....	19
	Certificate of Service.....	20
	Table of Authorities.....	iii

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**AUGUST EUGENE PHILLIPS and
CHERYL PHILLIPS, his wife,
Plaintiffs/Petitioners,**

V.

APPEAL No. 06-1511

**LARRY'S DRIVE-IN PHARMACY, INC.,
a West Virginia corporation.
Defendant/Respondent**

TABLE OF AUTHORITIES

	<u>Page</u>
Medical Professional Liability Act of 1986 (MPLA), W.Va. Code §§ 55-7B-1, <i>et. seq.</i>	2
W.Va. Code § 55-7B-2(c)	3, 4, 5, 6, 7, 9, 10, 11, 12, 15, 17
W.Va. Code § 55-7B-8	3
W.Va. Code § 55-7B-2(a)	3, 10, 11
<u>Short v. Appalachian OH-9, Inc.</u> , 507 S.E. 2d, 124 (W.Va. 1998)	6, 7, 15
W.Va. Code § 30-5-4	11
W.Va. Code § 30-5-3	11
W.Va. Code § 55-7B-2(a)	11
W.Va. Code § 30-5-1	12
W.Va. Code § 30-5-3a	13
W.Va. Code § 30-5-1b (26), (22)	13
W.Va. Code § 30-5-1b (11)(A)	13
W.Va. Code § 30-5-1b(6)	13, 14
Senate Bill 714	14, 17

<u>Subcarrier Communications, Inc. v. Nield</u> , 624 S.E. 2d 729, 734 (W.Va. 2005)	15
<u>State v. General Daniel Morgan</u> Post No. 548, V.F.W.W.Va., 107 S.E. 2d, 353, 358 (W.Va. 1959)	15, 16, 17
<u>Cogan v. City of Wheeling</u> , 274 S.E. 2d, 516, 518 (W.Va., 1981)	16, 17
House Bill 2871	17
Senate Bill 486	17
Senate Bill 714	17
<u>James McDowell v. Rite Aid of West Virginia, Inc. and John Mallory</u> , Civil Action No. 04-C-174-S (Mercer Co. Cir.Ct. 2004)	18
<u>Arthur Shaffer and Joan Facemyer v. Rite Aid of West Virginia Inc., et. al.</u> , Civil Action No. 03-C-1480 (Kanawha Co. Cir.Ct. 2003)	18

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AUGUST EUGENE PHILLIPS and
CHERYL PHILLIPS, his wife,

Plaintiffs/Petitioners,

V.

APPEAL No. 06-1511

LARRY'S DRIVE-IN PHARMACY, INC.,
a West Virginia corporation.

Defendant/Respondent.

BRIEF OF RESPONDENT ON CERTIFIED QUESTION

INTRODUCTION

I. Respondent's Statement of Omissions and Inaccuracies in Petitioners' Statement of Facts.

With regard to the petitioners' statement (Brief of Petitioners, p. 1) that the petitioner "Mr. Phillips sustained toxic poisoning from too much Colchicine", the respondent contends that Mr. Phillips' medical condition is unrelated to colchicine ingestion.

With regard to the petitioners' statement (Brief of Petitioners, p. 1) that the respondent dispensed colchicine via a prescription with "incomplete typed instructions", the respondent contends that (1) the instructions were not incomplete and (2) the instructions that the respondent typed were exactly the same instructions that the prescribing physician had directed the respondent to type. The latter contention is actually an undisputed fact. The petitioners' Complaint alleged that the prescribing physician, S. Kesari, MD, "did carelessly and negligently write a prescription" that instructed Mr. Phillips to "take 1 tablet every hour until pain stops or diarrhea starts or nausea". (Complaint, paragraph 13). The Complaint's counterpart allegation

against the respondent is that it “filled” the prescription “with typed incomplete instructions to take 1 tablet every hour until pain stops or diarrhea starts or nausea.” (Complaint, paragraph 15).

With regard to (1) the petitioners’ statement (Brief of Petitioners, p. 2) that they asserted, “(w)hile still in the pretrial stage”, that the Medical Professional Liability Act of 1986 (the “MPLA”) “did not apply” to the respondent and (2) the petitioners’ statement (Brief of Petitioners, p. 2) that their assertion of inapplicability was made “by reason that the” respondent had “raised (the MPLA) as a defense in its Answer”, the respondent believes that this Court should have a bit more information about those two assertions.

The petitioners’ initial assertion regarding the MPLA was that it did apply. That assertion was made in a pre-suit November 19, 2002 letter from petitioners’ counsel to the respondent. (Exhibit A to respondent’s Response Objecting to the Docketing of the Certified Question). The letter referenced the MPLA, enclosed the MPLA-required certificate of merit, alerted the respondent to the MPLA’s time-frame requirements, and expressed petitioners’ counsel’s intention to file suit pursuant to the MPLA. The petitioners filed suit on March 13, 2003; and the respondent filed its Answer on April 14, 2003. During the next almost-three years, the issue of MPLA applicability never arose.

The petitioners’ “pretrial stage” assertion that the MPLA “did not apply” was made via a Motion in Limine that they filed on March 9, 2006, which was 12 days before trial was to commence and immediately after they had negotiated a settlement with the respondent’s co-defendant, the prescribing physician. So the petitioners did not, as they now contend, assert that the MPLA was inapplicable because of the Answer that the respondent had filed almost three years earlier. They asserted it in furtherance of an eleventh-hour change in trial strategy.

II. Respondent's Statement to Meet Errors Alleged by Petitioners.

The petitioners' basic contention is that the Circuit Court of Boone County erroneously interpreted W.Va. Code § 55-7B-2(c), which contains the MPLA definition of "health care provider". According to the petitioners, the respondent, as a pharmacy, does not fit within that definition and, as a result, is not entitled to the limit on liability provided by W.Va. Code § 55-7B-8. The respondent, on the other hand, contends that, as a pharmacy, it is a "health care provider" and that the Circuit Court ruling to that effect was not erroneous.

The statutory provision primarily at issue, W.Va. Code § 55-7B-2(c), states as follows:

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

The supporting definition of "health care" is contained in W.Va. Code § 55-7B-2(a), which states as follows:

"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."

The respondent's contention that it fits within the W.Va. Code § 55-7B-2(c) definition of "health care provider" is based on the "but not limited to" phrase in the definition. In other words, the respondent asserts that, as a pharmacy, it fulfills all of that section's requirements for a "health care provider" and that the "but not limited to" phrase allows it to be a "health care

provider” even though neither a “pharmacy” nor a “pharmacist” is one of the expressly listed “health care providers”.

The petitioners’ corresponding contention is that the “but not limited to” phrase does not apply to pharmacists because the Legislature intended to exclude pharmacists from W.Va. Code § 55-7B-2(c). So the essence of the petitioner’s position is that the Circuit Court should have read that statute as if it had been written as follows:

“Health care provider” means a person, partnership, corporation, facility or institution licensed by, or certified in, this state or another state, to provide health care or professional health care services, **excluding a pharmacy or pharmacist** but otherwise not limited to, a physician, osteopathic physician, hospital, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, or psychologist, or an officer, employee or agent thereof acting in the course and scope of such officer’s, employee’s or agent’s employment.”

In other words, according to the petitioners, an entity that does not lie within one of the expressly listed categories can be a “health care provider” as long as that entity is not a pharmacist or pharmacy.

The petitioners do not contend that W.Va. § 55-7B-2(c) was ever actually amended into the hypothetical version shown above. Their basic contention is that the Legislature had such a strong intent that the statute be read in this anything-but-a-pharmacy/pharmacist manner that an actual amendment was unnecessary. Their primary support for that contention consists of five affidavits from former Legislators, one of whom is, conveniently, the petitioners’ own counsel.

In the petitioners’ Brief, their counsel characterizes himself and the other four former Legislators as “highly regarded witnesses” (Brief of Petitioners p.16) whose affidavits constitute “powerful and persuasive”, “overwhelming”, and “undisputed evidence” (Brief of Petitioners pp.

7, 9, 20) that the Legislature “intentionally and purposefully excluded” (Brief of Petitioners p. 9) pharmacies from W.Va. Code § 55-7B-2(c).

The respondent believes that this Court should disregard the affidavits and the anything-but-a-pharmacy/pharmacist theory which they supposedly support. The specific reasons why the Court should do this are set forth in the Arguments that follow; however, at the risk of editorializing, it largely comes down to a matter of propriety.

Our state is populated with potential witnesses. Most of those witnesses are not former Legislators; but some of them are; and some of those who are former Legislators are also attorneys. If the Court accepts the type of “powerful”, “persuasive”, “overwhelming” and “undisputed evidence” that the petitioners are proffering via their five affidavits, it will be telling the citizenry of our state that, under our judicial system, there are two classes of “witnesses”.

The first, more common, class is made up of people who have information to offer but who are not permitted to offer that information in court unless they have been disclosed as witnesses and subjected to the discovery process. The second, more elite, class is made up of former Legislators who are so “highly regarded” that they exempt from disclosure and discovery requirements and are therefore able to offer information to the courts whenever and however they desire. And, if they are within the attorney subset of former Legislatures, they can even act as witnesses on behalf of clients whom they represent as attorneys.

The respondent believes that there is only one class of witness in our state and that, for purposes of our Certified Question, the petitioners’ counsel and other four former Legislators are not in it.

AUTHORITIES RELIED UPON

ARGUMENTS

- I. **Even though the W.Va. Code § 55-7B-2(c) definition of “health care provider” does not contain an express “pharmacy” provider category, a pharmacy can be – and the respondent pharmacy here is – a “health care provider” because, under this Court’s reasoning in Short v. Appalachian OH-9, Inc., a pharmacy can be – and the respondent pharmacy here is – an agent of the prescribing physician; and the “agent” of a “health care provider” is, by definition, a “health care provider”.**

There is probably only one pharmacist with whom every single member of this Court is already acquainted. His name is Emil Gower. We shall get back to him in a moment, after first discussing our Certified Question in the context of Short v. Appalachian OH-9, Inc., 507 S.E.2d, 124 (W.Va. 1998).

Short is the only case in which this Court has been called upon to decide whether a type of entity not expressly categorized as a “health care provider” in West Virginia Code § 55-7B-2(c) is, or is not, a health care provider.

Short involved an unfortunate situation in which an infant died from SIDS (sudden infant death syndrome). The infant’s parents sued the ambulance service that had transported the infant to the hospital. Their theory of liability was that the EMS personnel should have – but did not – continue the CPR efforts that the family had been making before the ambulance arrived. Causation was an issue because the hospital emergency room physician placed the infant’s time of death prior to the time that the ambulance had even been called. The trial court granted summary judgment to the defendant ambulance service because the plaintiffs had been unable to

fulfill the MPLA requirement for physician-expert testimony that the EMS personnel had caused the infant's death.

On appeal, the parents claimed that the expert requirement did not apply because "inasmuch as the definition of 'health care provider' in West Virginia Code § 55-7B-2(c) [1986], the Medical Professional Liability Act, does not expressly refer to emergency medical service providers, such providers are not covered by that Act." 507 S.E. 2d at 128.

The Court ruled that the MPLA expert requirement did apply because "West Virginia Code § 55-7B-2(c) [1986], in defining 'health care provider,' contains the admonition 'but not limited to' in reference to those included in the definition. Thus, the definition of 'health care provider' is subject to the inclusion of emergency medical personnel." 507 S.E. 2d at 128. In applying the "but not limited to" language to EMS personnel, the Court cited various statutory and factual connections between EMS services and other aspects of health care.

The Short Court also noted one aspect of the MPLA's definition of "health care provider" that was not applicable to Short but that is applicable to our Certified Question. This is the West Virginia Code § 55-7B-2(c) inclusion, as a "health care provider", of the "agent" of an expressly listed "health care provider". 507 S.E. 2d at 128. The Court noted that the "agent" concept would become an issue in a situation in which "a physician for a medical facility" issued "orders . . . to emergency medical service personnel." However since EMS personnel in Short received no orders from any physician, the Court decided that it "need not definitively or preemptively settle the agency question in" the Short opinion. 507 S.E. 2d at 129.

Having discussed the relationship between Short and this Certified Question, we can now consider Emil Gower and the relationship between his pharmaceutical practice and the Certified Question.

Mr. Gower, as virtually everyone in this country recalls every Christmas, was the pharmacist in the 1946 movie "It's A Wonderful Life". After learning that his son had died of influenza, Mr. Gower became distracted and mistakenly mixed a poison into a prescription for some sort of capsules. However harm was averted when George Bailey, who realized what had occurred, refused to deliver the prescription.

Larry Bowen, the pharmacist in our certified question, is not Emil Gower. In other words, Mr. Bowen is not being accused of negligently disregarding a physician's orders and acting independently in some harmful way. The petitioners' claims against Mr. Bowen's pharmacy are just the opposite. Mr. Bowen is accused of having negligently followed the instructions of the prescribing physician, who was himself allegedly negligent.

This relationship between the prescribing physician and Mr. Bowen is exactly the kind of "agent" situation that the Short Court was contemplating when it posed the scenario of a non-physician EMT receiving, and presumably acting on, "orders" issued by a physician.

Surprisingly – considering that the petitioners here are requesting what amounts to a blanket prohibition against pharmacists being considered "health care providers" under any circumstances – the Complaint that initiated this action asserted that an "agency" relationship existed between the pharmacy and the prescribing physician. It stated that "(a)t all times relevant to this Complaint" there was "a relationship of agency" between "the defendant Dr. S. Kesari" (the prescribing physician) and "Larry's Drive-in Pharmacy". (Complaint, paragraph 9)

All this leaves us in a rather bizarre situation in which (1) the petitioners allege the existence of an agency relationship; (2) the facts, considered in light of Short, support the existence of an agency relationship; (3) an “agent” of a “health care provider” is, by statutory definition, a “health care provider”; and yet (4) the petitioners, at least for purposes of this appeal, are skipping right over the “agent” aspect of the “health care provider” definition, presumably in the hope that this Court will assume that it really is necessary for the defendant pharmacy to fit itself within the “but not limited to” aspect of West Virginia Code § 55 -7B-2(c) in order to be a “health care provider”.

At the risk of carrying movie analogies too far, this “but not limited to” issue might put one in mind of a particular scene in the 1969 film “Butch Cassidy and the Sundance Kid”. Having been chased by a posse after robbing a Union Pacific Train, Butch and Sundance were trapped on a rocky ledge overlooking a river far, far below; and they were faced with the choice of either surrendering or jumping off the cliff. Sundance said: “I can’t swim!”. Butch replied: “Why, you crazy – the fall’ll probably kill ya!”.

The approach being taken to this Certified Question is analogous to Sundance’s last-things-first approach to jumping off the cliff. We are trying to decide if there is a blanket prohibition against a pharmacy being a “health care provider” under the “but not limited to” category, even though we are bound eventually to conclude that a pharmacy can be – and in this particular case clearly is – a “health care provider” by virtue of being the agent of a physician.

II. Even though the W.Va. Code § 55-7B-2(c) definition of “health care provider” does not contain an express “pharmacy” provider category, the respondent pharmacy here is a “health care provider” because of the statute’s inclusionary “but not limited to” provision and because of the nature of the claim being asserted against the respondent pharmacy.

As discussed above, the respondent pharmacy does not understand how the petitioners can contend that a pharmacy, by its very nature, is categorically prohibited from being a “health care provider” when a pharmacy, like any other entity, could be positioned to act as an “agent” of a statutorily named “health care provider” and therefore be statutorily considered as a “health care provider”. However for purposes of this argument section, let us presume that the respondent pharmacy really is missing something in all of this and that there is something about a pharmacy or pharmacists that will keep them, under any set of circumstances, from ever acting as an “agent” of a physician or other statutorily named health care provider.

Phrased more simply, if the “agent” category of health care providers were magically extracted from West Virginia Code § 55-7B-2(c), could the respondent pharmacy still be a “health care provider” even though there is no “pharmacy” category specified in that statute? The respondent contends that, under those circumstances, it could be considered a “health care provider” by virtue of the “but not limited to” provision of the statute.

The first stage of the respondent’s statutory analysis relates to West Virginia Code § 55-7B-2(a), in which “health care” is defined as meaning “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.” In the context

of this particular Certified Question, we might particularly keep in mind the “or which should have been performed or furnished” phrase. We will get back to that phrase in a moment.

The second stage of the respondent’s statutory analysis relates to West Virginia Code § 55-7B-2(c), which defines “health care provider” as a “person, partnership, corporation, facility or institution licensed by, or certified in, this state or another state, to provide health care or professional health care services.” That basic provision is augmented by the phrase “including, but not limited to, a physician, osteopathic physician, hospital, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, or psychologist, or an officer, employee or agent thereof acting in the course and scope of such officer’s, employee’s or agent’s employment”.

As a threshold matter, pharmacies meet the “licensed by. . .this state” requirement cited above. W.Va. Code § 30-5-4 requires that pharmacists be “licensed”; and W.Va. Code § 30-5-3 requires that all pharmacies have a “pharmacist”.

The essence of the petitioners’ Certified Question argument is that the “including, but not limited to” phrase does not apply to pharmacies, because pharmacies do not provide “health care”. In other words, what they do is not an “act or treatment performed or furnished, **or which should have been performed or furnished . . .** during the patient’s medical care, treatment or confinement.” West Virginia Code § 55-7B-2(a) (emphasis added).

In considering that premise under the facts at issue here, let us focus on the “or which should have been performed or furnished” phrase. The crux of the petitioner’s claim against the respondent is that the respondent did not perform an act that “should have been performed”. According to the petitioner, the respondent pharmacy should have – but did not – act to override

the decision of the prescribing physician. The physician had ordered a specific prescription; and the respondent filled that specific prescription. According to the petitioner, the respondent should have refused to fill that specific prescription.

Certainly no one would argue that a physician's action in ordering a prescription is not "health care". So if an act taken by a physician for the purpose of having a patient ingest a certain specific medication under certain specific circumstances does constitute "health care", how could an act taken by a pharmacy to nullify the prior act of the physician not also constitute "health care"?

In summary, the refusal to recognize as "health care" an action that a pharmacist should have taken to nullify a previous "health care" action by a physician makes about as much sense as asserting that the planting of corn in April is really "farming" but that the plowing under of corn debris in October is only "excavation".

III. Pharmacies, *per se*, are "health care providers" because the plain language of W.Va. Code § 30-5-1, *et seq.* brings pharmacies within the W.Va. Code § 55-7B-2(c) definition of "health care provider".

Even if we disregard the agency relationship between the respondent pharmacy and the prescribing physician (as discussed in Argument I above) and the specific claim being made against the respondent pharmacy in this case (as discussed in Argument II above) and look, beyond them, to the practice of pharmacy in general, it is clear that pharmacies are "health care providers".

Chapter 30 of the West Virginia Code regulates "professions and occupations"; and Article 5 of that chapter specifically regulates "pharmacists, technicians, interns & pharmacies".

The respondent's contention that a pharmacy is a "health care provider" is expressly supported by the "Legislative finding" in Section 3a of that Article that "changing concepts in the delivery of **health care services** in the practice of pharmacy" necessitate "uniform qualifications and licensure in the profession of pharmacy for the protection of the **health**" of West Virginians. W.Va. Code § 30-5-3a (emphasis added).

Since "the practice of pharmacy" involves the "delivery of health care services", how can a pharmacy not be a "health care provider"?

The respondent's contention that a pharmacy is a "health care provider" is also supported by the Section 1b(26) definition of "pharmacy" as a "place. . .where. . .pharmaceutical **care** is provided", coupled with the Section 1b(22) definition of "pharmaceutical care" as "the provision of . . . **patient care** services intended to achieve outcomes related to the **cure or prevention** of a **disease**." W.Va. Code § 30-5-1b(26), (22) (emphasis added).

Since a "pharmacy" is a place where a "patient" is provided with "care" related to the "cure or prevention of a disease", how can a pharmacy not be a "health care provider"?

The respondent's contention that a pharmacy is a "health care provider" is further supported by the Section 1b(26) definition of "pharmacy" as a "place. . .where drugs are dispensed", coupled with the Section 1b(11)(A) definition of a "drug" as an article "for use in the . . . **treatment or prevention of disease**". W.Va. Code §§ 30-5-1b(26) and (11)(A) (emphasis added).

Since a "pharmacy" is a place that dispenses medications that are used for the "treatment or prevention of disease", how can a pharmacy not be a "health care provider"?

Lastly, in the context of Chapter 30, Article 5, the respondent's contention that a pharmacy is a "health care provider" is expressly supported by the Section 1b(6) provision related to a pharmacist's "patient record" information. That provision limits a pharmacist's ability to disseminate that information but provides that the information can be "released. . .to **other members of the health care team**". W.Va. Code § 30-5-1b(6) (emphasis added).

If a pharmacist is one member of a patient's "health care team", how can that pharmacy not be a "health care provider"?

Interestingly, even the petitioners agree that the respondent was a member of their "health care team". Their Complaint asserts that in "failing to observe and correct the erroneous and incomplete drug order", the respondent pharmacy was functioning as "a member of (the petitioners') healthcare team". (Complaint, paragraph 30a).

IV. The affidavits of the petitioners' own counsel and four other former Legislators proffered by the petitioners in relation to Senate Bill 714 are not appropriate evidence on the issue of whether or not the respondent is a "health care provider".

According to the petitioners, the statutory wording cited above by the respondent should be disregarded in light of the "Legislative intent" expressed in the wording of affidavits from the petitioners' own counsel and four other former Legislators regarding Senate Bill 714.

In the respondent's view, the affidavit "evidence" is a lot like one of those drug-busts-gone-wrong about which we occasionally read in the newspapers. Government agents converge at a house, burst through the front door, subdue the startled occupants, and then discover that they are at the wrong address.

Like the misdirected agents in the example, the affidavits filed by the petitioners are in a place where they do not belong.

The first reason why the affidavits do not belong in this appeal is that they serve no purpose. The petitioners are proffering them for the Court's use in interpreting W.Va. Code § 55-7B-2(c); however that statute is not open to interpretation because, as this Court stated in the 2005 case of Subcarrier Communications, Inc v. Nield: "A statute is open to construction only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning." Subcarrier Communications, Inc. v. Nield, 624 S.E. 2nd 729, 734 (W.Va. 2005).

In the context of our Certified Question, there is no portion of W.Va. Code § 55-7B-2(c) that is susceptible to "two or more constructions" or that has "doubtful or obscure meaning." This is especially true with regard to the "but not limited to" phrase, inasmuch as this Court already ruled (as discussed above on page 6) in Short v. Appalachian OH-9, Inc. that this provision allows the inclusion of "health care providers" that are not expressly listed in the statute.

The second reason why the affidavits do not belong in this appeal is that, even if W.Va. Code § 55-7B-2(c) were ambiguous and, as a result, this Court needed to construe the statute in conformity with the "intent of the Legislature", the affidavits of petitioners' counsel and the other former Legislators are inappropriate avenues for this Court's use in reaching that intent. This is because, under West Virginia case law, the intent of a lawmaking body regarding the construction of a statute cannot be determined by evidence extrinsic to the statute at issue.

This Court established that principle in State v. General Daniel Morgan Post No. 548, V.F.W.W.Va., a 1959 case that involved a criminal statute relating to bribery. The Court acknowledged that “(i)n the interpretation of a statute, the legislative intention is the controlling factor” but went on to state that “(t)he only mode in which the will of the legislature is spoken is in the statute itself” and “no intent may be imputed to the legislature other than that supported by the face of the statute itself”. State v. General Daniel Morgan Post No. 548, V.F.W.W.Va., 107 S.E. 2d 353, 358 (W.Va. 1959).

This Court subsequently applied that principle specifically to after-the-fact lawmaker testimony in Cogan v. City of Wheeling, a 1981 case that involved a city ordinance. The trial court had interpreted the ordinance in part “based on testimony from members of City Council and the (Wheeling Human Rights) Commission as to what they believed the intent of the ordinance to be”; however this Court reversed the lower court because “(o)rdinarily a court cannot consider the individual views of members of the Legislature or city council which are offered to prove the intent and meaning of a statute or ordinance after its passage and after litigation has arisen over its meaning and intent.” Cogan v. City of Wheeling, 274 S.E. 2d, 516, 518 (W.Va. 1981).

The respondent suggests that this Court might begin its analysis of the “affidavit” issue by attempting to place the five affiants within some recognized category of civil-action participants. Unless the respondent is missing something in all this, the category that comes the closest to being appropriate for them is that of an expert witness. However they could not really be considered as expert witnesses because none of them appeared in the petitioners’ expert-witness disclosures; and, inasmuch as the respondent first became aware of their “involvement” at the

motion-in-limine stage just days before trial, they were, as a practical matter, “immune” from the discovery process. This is doubly true for the affiant J. Robert Rogers, since he is the petitioners’ own counsel.

The petitioners, on the other hand, seem to believe that former Legislators possess what might be described as a judicial-system counterpart to the “Advance to Go” card in the game Monopoly. Rules that do apply to witnesses who lack their particular form of status simply do not apply to them or to whatever testimony they desire to offer.

Although the petitioner is not without respect for former Legislators, it believes that there are rules applicable to their testimony and that these rules have been articulated by this Court in Cogan v. City of Wheeling, based on the reasoning that it expressed in State v. General Daniel Morgan Post No. 548, V.F.W.W.Va. Under those rules, the five affidavits are irrelevant to our Certified Question.

V. Neither House Bill 2871 nor Senate Bill 486 is appropriate evidence on the issue of whether or not the respondent is a “health care provider”.

According to the petitioners, since House Bill 2871 and Senate Bill 486 would have included “pharmacy or pharmacist” within the list of “health care providers” expressly named in W.Va. Code § 55-7B-2(c), and since neither bill “reported out of committee or, in simpler terms, passed”, the Legislature must have intended that pharmacists and pharmacies not be “health care providers”. (Brief of petitioners p. 11).

The respondent views this argument as being nothing more than the petitioners’ Senate Bill 714 argument, but without the former-Legislator affidavits; and the respondent’s Argument IV, offered above in relation to that bill, applies equally to these two bills. In other words, for

purposes of statutory construction, Legislative committee action does not equate to Legislative intent.

VI. The Circuit Court of Boone County was entitled to consider the opinion orders entered in the unreported Mercer County and Kanawha County civil actions.

The petitioners assert that Judge Swope's September 21, 2004 Order in James McDowell v. Rite Aid of West Virginia, Inc. and John Mallory, Civil Action No. 04-C-174-S (Mercer Co. Cir. Ct. 2004). (Exhibit E to respondent's Response Objecting to the Docketing of the Certified Question) "is not binding precedent". (Brief of Petitioners, p. 12). And the petitioners presumably feel the same way about Judge Kaufman's November 10, 2003 Order in Arthur Shaffer and Joan Facemyer v. Rite Aid of West Virginia, Inc., et al, Civil Action No. 03-C-1480 (Kanawha Co. Cir. Ct. 2003). (Exhibit F to respondent's Response Objecting to the Docketing of the Certified Question).

The respondent agrees that neither Order is "binding precedent"; however it suggests that the Circuit Court of Boone County was fully entitled to consider the reasoning, on the issue of the applicability of the MPLA to pharmacies, set forth in both Orders.

The respondent is uncertain as to how it can best reply to the petitioners' specific assertion that Judge Swope's Order "lacks credibility" (Brief of Petitioners, p. 15). That assertion by the petitioners was based on an investigation, for lack of a better term, that their counsel conducted into the circumstances surrounding Judge Swope's entry of that Order. Since neither the respondent nor its counsel has investigated those circumstances, they have no similar he-said-she-said "evidence" of their own to offer. However they can offer the observation that neither they – nor, apparently the petitioners – can cite a single circuit court case in which the

court has ruled that the MPLA is not applicable to a pharmacy or pharmacist.

VII. The Circuit Court of Boone County was entitled to consider the opinion statement of the Executive Director and General Counsel of the West Virginia Board of Pharmacy.

The respondents assert that the August 13, 2004 written statement of the Executive Director and General Counsel of the State of West Virginia Board of Pharmacy (Exhibit G to respondent's Response Objecting to the Docketing of the Certified Question) is "merely Mr. Douglass's opinion, for what it is worth and not binding precedent which this Court must adopt". (Brief of Petitioners, p. 14).

The respondent agrees with that assertion but suggests that Mr. Douglass' "opinion" is "worth" this Court's consideration, particularly because one of the allegations against the respondent is that it violated "regulations issued . . . by the State of West Virginia Board of Pharmacy governing pharmacy practices." (Complaint, paragraph 30a).

CONCLUSION

This Court should conclude that the June 2, 2006 Certification Order of the Circuit Court of Boone County correctly answered this Certified Question.

**LARRY'S DRIVE-IN PHARMACY, INC.
By Counsel**

**SCHUMACHER, FRANCIS & NELSON
P.O. Box 3029
Charleston, WV 25331
304/342-4567**

By: _____

Jay M. Potter

JAY M. POTTER (#2949)

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

AUGUST EUGENE PHILLIPS and
CHERYL PHILLIPS, his wife,
Plaintiffs/Petitioners,

V.

APPEAL No. 06-1511

LARRY'S DRIVE-IN PHARMACY, INC.,
a West Virginia corporation.
Defendant/Respondent

CERTIFICATE OF SERVICE

I, Jay M. Potter, counsel for defendant, Larry's Drive-In Pharmacy, Inc., do hereby certify that I have served a true and accurate copy of the foregoing **Brief of Respondent on Certified Question** upon the following counsel of record by depositing the same in the United States mail, with postage prepaid, on November 27, 2006, addressed as follows:

J. Robert Rogers, Esquire
Armada, Rogers & Thompson
3972 Teays Valley Road
Hurricane, West Virginia 25526
Counsel for Petitioners

LARRY'S DRIVE-IN PHARMACY, INC.
By Counsel

SCHUMACHER, FRANCIS & NELSON
P.O. Box 3029
Charleston, WV 25331
304/342-4567

By: _____

Jay M. Potter

JAY M. POTTER (#2949)