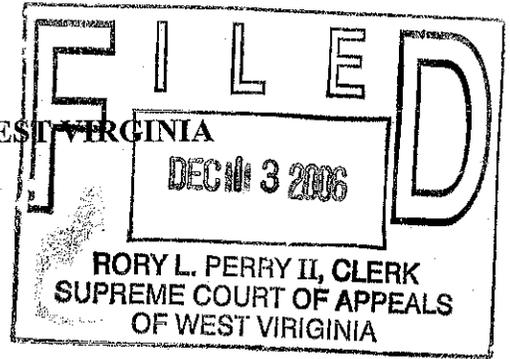


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**AUGUST EUGENE PHILLIPS and
CHERYL PHILLIPS, his wife,**

Petitioners,

v.

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

Respondent.

**CIVIL ACTION NO. 04-C-33
(Boone County Circuit Court)**

APPEAL NO. 33194

**REPLY BRIEF OF PETITIONERS ON CERTIFIED QUESTION,
RESPONSE TO AMICUS BRIEFS & OBJECTION TO AMICUS AFFIDAVITS**

**Certification Order Entered
JUNE 2, 2006**

**J. ROBERT ROGERS
WV Bar No. 3153
FRANK M. ARMADA
WV Bar No. 0157
3972 Teays Valley Road
Hurricane, WV 25526
(304) 757-3809
Counsel for Petitioners**

Dated: December 13, 2006

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TO: The Honorable Justices of the WV Supreme Court of Appeals:

SUMMARY OF THE REPLY ARGUMENT

The certified question asks for a ruling on whether a "pharmacy" is a health care provider under West Virginia Code § 55-7B-2(c)(1986). The word "pharmacy" was omitted on purpose in 1986 from the statutory definition of "health care provider." The record is clear and uncontradicted that the Joint Conference Committee members considered inclusion of pharmacy in the statutory definition, but omitted it. No amount of briefing can change this undisputed fact.

A pharmacy does not provide health care, a pharmacy is not a licensed health care facility, and a pharmacy is not a licensed entity under the West Virginia Board of Pharmacy.

The declared purpose of the Medical Professional Liability Act (MPLA) was to provide tort relief to the medical community so that it could obtain affordable medical malpractice insurance, which would ultimately benefit the public. In 1986, pharmacies were not faced with any malpractice insurance crisis and were not threatening to close their doors.

The word “agents” as used in § 55-7B-2(c) was intended to include agents within the control of a principal, and not independent agents. For purposes of § 55-7B-2(c), a pharmacy selected independently by a patient to fill a prescription is not an “agent” within the control of a prescribing physician.

Short v. Appalachian OH-9, Inc., 203 W.Va. 246, 507 S.E.2d 124 (1998), is different from this case, and should not be considered grounds to enlarge the scope of persons and entities covered by the MPLA. Furthermore, the dictum provided at footnote 4 in *Short* is not authority to extend the MPLA to cover pharmacies.

All affidavits submitted with an *amicus curie* brief should be stricken, and Petitioners have objected to those affidavits, as more fully discussed below.

Other West Virginia statutes, unless *in pari materia* with the MPLA, should not be considered as controlling authority in determining the legislative intent when construing Section 55-7B-2(c)(1986).

REPLY TO RESPONDENT PHARMACY’S STATEMENT OF FACTS

Virtually all the “underlying facts” which the Respondent, Larry’s Drive-In Pharmacy, has presented at pp. 1 - 6 of its Brief are not relevant to this **certified question** which **asks only if a pharmacy** is within the MPLA’s statutory definition of “health care provider.” And whether or not Respondent Larry’s Drive-In Pharmacy’s version, or Petitioners Phillips’ version, of these underlying facts are the “true” facts also is not controlling. This case is not a review of a

summary judgment decision where a disputed material fact would require a reversal. This case presents a certified question presenting solely a question of law.

ADDITIONAL PROPOSED SYLLABUS POINTS

- 1 A non-party filing an *amicus curiae* brief in the Supreme Court may not file affidavits, nor introduce evidence. *Wiggins Bros., Inc. v. Department of Energy*, 667 F.2d 77 (Temp. Emer. Ct. App. 1981), *cert. denied* 456 U.S. 905 (1982); *U. S. Fidelity & Guaranty Co. v. Victory Land Co., Inc.*, 410 So.2d 359 (La. App. 4 Cir. 1982).

REPLY ARGUMENT

I. LEGISLATIVE PURPOSE OF THE MPLA.

In 1986, the physicians in West Virginia alleged that the state was facing a malpractice crisis. A number of medical malpractice suits were filed and physicians in certain areas of specialty, more particularly those with a history of claims, became high risk to issuers which meant dramatically increased premiums. Many insurers stopped offering medical malpractice insurance in West Virginia to certain specialties and high risk claim physicians. Many physicians alleged they were unable to obtain or afford malpractice insurance coverage, and that as a result, the public was facing a lack of available and affordable medical care. Physicians were threatening to leave the state or withdrawing from their specialty area of practice. Physicians were increasing fees to cover their dramatically increased malpractice premiums, or they were going without insurance.

The MPLA was intended to address these problems and to afford some fiscal protection to physicians and hospitals by capping non-economic damage awards and defining what constituted an expert witness in a malpractice suit. It further addresses joint and several liability. Against this background, the Joint Conference Committee for Senate Bill 714 sought to fashion legislation to balance the protections that the new MPLA offered to medical professionals with the rights of tort victims. The "Legislative Findings and Declaration of Purpose," as provided in

§ 55-7B-1 (1986) is attached hereto as Exhibit A for the convenience of the Court. Protecting “pharmacies” is not within the scope of this legislative purpose.

II. REPLY TO BRIEF OF RESPONDENT LARRY’S DRIVE-IN PHARMACY.

A. The “Agent” Argument.

At pp. 6 - 9, Respondent pharmacy argues that the word “agent” as used in Section 55-7B-2(c) mandates a ruling that pharmacies are “health care providers” under the MPLA. This argument is based on dicta from footnote four in *Short v. Appalachian OH-9, Inc.*, 203 W.Va. 246, 507 S.E.2d 124 (1998), which provides:

The definition of “health care provider” set forth in W.Va. Code, 55-7B-2(c) [1986], of the West Virginia Medical Professional Liability Act also includes the “agent” of those listed in that statute. In that regard, we note the definition of “medical command” found in W.Va. Code, 16-4C-3(m) [1996], of the West Virginia Emergency Medical Services Act, which means “the issuing of orders by a physician from a medical facility to emergency medical service personnel for the purpose of providing appropriate patient care.” We, thus, recognize an issue concerning agency in the “medical command” context which would appear to further link the West Virginia Medical Professional Liability Act and the West Virginia Emergency Medical Services Act. The parties, however, have not addressed that issue, no doubt because the record herein reveals no medical command between any physician and the appellee's ambulance personnel while those personnel were at the scene on October 11, 1993. Accordingly, this Court need not definitively or preemptively settle the agency question in this opinion. *See, Short v. Appalachian OH-9, Inc.*, 203 W.Va. at 128 n.4, 507 S.E.2d at 250 n.4 (1998).

Thus, this Court has considered the possibility of expanding the scope of the MPLA’s “health care provider” based on the statutory use of the word “agent.” However, the *Short* court

further noted that the lower court record did not reveal, and the parties did not argue, that any “medical command” as used within the W. Va. Emergency Medical Services Act, W.Va. Code § 16-4C-3(m)(1996), existed between the *Short* physician and the *Short* EMT. Thus, there was a lack of proof of agency.

To decide the instant case based on agency principles, this Court must find an agency relationship between Dr. Kesari, the physician who prescribed Colchicine to the Petitioner, August Eugene “Gene” Phillips, and Larry’s Drive-In Pharmacy, and must further find that Dr. Kesari also directed Mr. Phillips to go to Larry’s Drive-In Pharmacy to have the prescription filled.¹ The record does not support such a finding [because Mr. Phillips, not Dr. Kesari, selected the drugstore, or pharmacy, to fill the prescription]. Rather, Dr. Kesari gave the prescription with direction for Mr. Phillips to have the prescription filled at any pharmacy of Mr. Phillips’ choice. The drafters of the MPLA did not intend for a prescribing doctor to be subject to legal liability for a pharmacy’s actions, in the way a principal may be held liable for the actions of his agent. If the pharmacy was an agent of the prescribing doctor, then the prescribing doctor would be liable for the pharmacy’s actions.

B. “But Not Limited To”.

Respondent pharmacy argues at pp. 10 - 12 of its Brief that the phrase “but not limited to” offers this Court the opportunity to expand the statutory definition of “health care provider” to include pharmacies. The *Short* decision was based in part on this reasoning, as well on the fact that EMTs are licensed and regulated by the state, and that they have a “hands-on” direct responsibility for providing medical care in first responder emergencies. See, *Short v. Appalachian OH-9, Inc.*, 203 W.Va. at 128-29, 507 S.E.2d at 250-52 (1998). Petitioners’ main

¹Petitioners know of no physicians who require their patients to have prescriptions filled at any particular pharmacy.

brief already discussed the fact that pharmacists have a derivative professional relationship with a patient, while an EMT has a direct one. This is a critical difference.

For licensing purposes, pharmacies are not like EMTs. Pharmacies in West Virginia do not get licensed by the Board of Pharmacy -- rather, the pharmacy, or drugstore, must have "on staff" a licensed pharmacist. The licensed pharmacist must sign an application for a *permit* or renewal. The West Virginia Board of Pharmacy issues a *permit* to a pharmacy. Without an application being signed by a licensed "Pharmacist in Charge" who is in good standing, the Board of Pharmacy will not issue the *permit*. See, W. Va. Code § 30-5-14; W. Va. CSR § 15-1-14; Exhibit B [permit form provided to pharmacies by the W. Va. Board of Pharmacy].

C. Pharmacies Are Not *Per Se* "Health Care Providers".

Respondent **pharmacy** argues at pp. 12 - 14 of its Brief that a **pharmacy** provides health care services, pursuant to certain language used in pharmacy-related statutes, and thus, a **pharmacy** *must* be a "health care provider" under the MPLA. If the **pharmacy** regulatory statutes were *in pari materia* with the MPLA, this argument might have some weight, but the statutes are not in pari materia. Furthermore, Petitioners maintain that the services provided by a **pharmacy** are in the nature of selling drugs. Dispensing the medication prescribed by a physician is provided by the **pharmacist** - - not by the **pharmacy**.

D. The Drafter's Affidavits.

At pp. 14-17, Respondent pharmacy argues that the Affidavits of the Joint Conference Committee members Chambers, Shaw, Tucker, Rogers and Chafin should not be considered. First, Respondent pharmacy argues that § 55-7B-2(c) is unambiguous, so that no extrinsic matter should be considered in determining its meaning. If this Court finds that § 55-7B-2(c) is unambiguous, then Petitioners agree that affidavit evidence should not be considered, and in that

case, the Court surely must decide that § 55-7B-2(c) does not include pharmacy as a “health care provider.” Clearly “pharmacies” are not specifically included in the definitions section of “health care provider.” However, Petitioners believe the Court will find an ambiguity, and therefore, will be permitted to consider the drafters’ affidavits.

Messrs. Chambers, Shaw, Tucker, Rogers and Chafin were on the Conference Committee which drafted the legislation in question. Their consistent affidavit testimony is not what they believed, but the intent of the Legislature when the bill was passed. Their testimony is that the drafters specifically discussed whether to include “pharmacies” and that the final version of the bill did not include pharmacy within the MPLA definition of “health care provider.”

Additionally, these Drafters’ Affidavits are of record, having been properly and timely filed in the circuit court. Respondent Larry’s Drive-In Pharmacy did not object to these affidavits, nor did it offer any counter-affidavit in the circuit court.

In *Cogan v. City of Wheeling*, 166 W.Va. 393, 274 S.E.2d 516 (1981), the trial court's decision was based in part on testimony from members of the city council and a local human rights commission as to what those members believed to be the intent of an ordinance adopted four years earlier. The high court ruled that such testimony ordinarily cannot be considered when offered to prove legislative intent. See, Cogan v. City of Wheeling, 166 W.Va. at 395, 274 S.E.2d at 518. The *Cogan* opinion does not require exclusion of affidavits from legislative drafters offering undisputed proof that certain language was discussed and purposefully omitted from a statute.

The Chambers, Shaw, Tucker, Rogers and Chafin Affidavits are not offered as expert testimony. They are not offered as legal authority. They are offered to prove the facts of what was discussed in and by the Joint Conference Committee in 1986 when the statute at issue was

drafted, and to explain that the exact categories “pharmacist” and “pharmacy” were considered, but excluded, from the MPLA definition of “health care provider.” This Court is obliged not to add to statutes something the Legislature purposely omitted. *Banker v. Banker*, 196 W.Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996).

E. Recent Failed Legislation.

At p. 17, Respondent pharmacy argues that recent attempts to amend W. Va. Code § 55-7B-2(c) should not be construed as legislative intent regarding the 1986 statute. Petitioners agree. However, Petitioners did not offer the recent failed legislation to prove the legislative intent behind § 55-7B-2(c) in the year 1986. Rather, Petitioners offered the recent failed legislation to show that: (1) at least pharmacies or those responsible for its introduction believe that pharmacies were not included in the MPLA definition of “health care provider;” and (2) if the people of West Virginia want to include pharmacies under the MPLA, then the vehicle for accomplishing that is to amend the statute. Laws in West Virginia are made by the Legislature. Courts are charged with enforcing and upholding the laws -- not re-writing them at the request of powerful interest groups.

F. Unpublished Circuit Court Orders.

At p. 18, Respondent pharmacy argues that the Supreme Court may consider unpublished circuit court orders, which it certainly may. However, it should not adopt the reasoning of those orders.

G. Douglass 8/13/04 Statement.

At p. 19, Respondent pharmacy mentions Mr. Douglass’ 8/13/04 statement, but does not base any argument on it, so Petitioners offer no reply argument based on it.

III. RESPONSE TO BRIEF OF AMICUS CURIAE WEST VIRGINIA PHARMACISTS ASSOCIATION, INC.

A. Objection to Amicus Affidavits.

Petitioners object to the attempt by the West Virginia Pharmacists Association, Inc. ["WVPA"] to introduce four affidavits into "evidence." Petitioners hereby request that the Affidavits of William T. Douglass, Jr., Sam Kapourales, Richard Stevens, and Sandra Justice, marked as Exhibits A, B, C and D respectively, and attached to the "Brief of West Virginia Pharmacists Association, Inc. as Amicus Curiae" deem filed by this Court on November 28, 2006, be stricken from the record.

First, affidavits may not be submitted by any party for the first time in the Supreme Court. Allowing affidavits now would violate the right to cross-examination and open the door to endless litigation. Parties would feel free to introduce evidence in the Supreme Court, and would always be supplementing the record, and arguing a different result based on newly submitted facts. Thus, the Douglass, Kapourales, Stevens and Justice Affidavits are untimely.

Second, an amicus curiae may not submit affidavits. An *amicus curiae* ordinarily cannot file pleadings or motions, and is restricted to suggestions relative to matters apparent on the record or to matters of practice. An *amicus curiae* has no right to introduce evidence, and may file briefs only with permission of the court. An *amicus brief* is never intended to be an additional vehicle for presenting additional facts or additional evidence to an appellate level court. See, *Wiggins Bros., Inc. v. Department of Energy*, 667 F.2d 77 (Temp. Emer. Ct. App. 1981), *cert. denied* 456 U.S. 905 (1982); *U. S. Fidelity & Guaranty Co. v. Victory Land Co., Inc.*, 410 So.2d 359 (La. App. 4 Cir. 1982).

Third, the Douglass, Kapourales, Stevens and Justice Affidavits mostly contain inadmissible hearsay or irrelevant statements, to the extent they set forth allegedly factual statements.

Fourth, the question before this Court is purely a question of law -- not a question of fact. The parties and, with permission of this Court, *amicus curiae*, may submit arguments and authorities in their briefs, and may point out certain facts already in the record, but may not introduce additional facts into the record.

To the extent that the Affidavit of William T. Douglass, Jr. (Executive Director and General Counsel of the West Virginia Board of Pharmacy), sets out "expert" testimony containing his personal legal opinion, such is inadmissible. Mr. Douglass was not named as an expert in the case below. Furthermore, the distinguished members of the Supreme Court are qualified to form their own legal opinions regarding the interpretation of a statute without the aid of Mr. Douglass' personal opinion.

This Court should disregard all the *Amicus* affidavits, and should issue an order striking them from the record.

B. If Admissible, The WVPA's Affidavits Do Not Require A Ruling That A Pharmacy Is A "health care provider" Under The MPLA.

1. Douglass Affidavit.

William T. Douglass, Jr., is the Executive Director for the West Virginia Board of Pharmacy. His affidavit does not claim that a pharmacy is a "health care provider" under the MPLA. He does say that the practice of pharmacy is a profession, and makes many statements about pharmacists, and their professionalism. Nothing in his affidavit is relevant to whether the Legislature in 1986 intended a pharmacy [rather than a pharmacist] to be within the scope of the MPLA. Thus, his affidavit, if "admitted," should be disregarded as largely irrelevant and

immaterial. The certified question does not address whether a pharmacist is or is not a health care provider under the MPLA.

2. The Kapourales Affidavit.

Similarly, the Affidavit of Sam Kapourales, a state-licensed and registered pharmacist and a member of the West Virginia Board of Pharmacy, presents mostly irrelevant and immaterial information. If the question before this Court were “Is a pharmacist a health care provider under the MPLA,” then the Kapourales Affidavit might have some relevance. But the certified question addresses only pharmacies. Mr. Kapourales makes no statement concerning whether the Board of Pharmacy considers pharmacies to be “providers of health care.” Thus, the Kapourales Affidavit, if “admitted,” also should be disregarded as largely irrelevant and immaterial.

3. The Stevens Affidavit.

The Affidavit of Richard Stevens, if otherwise “admissible,” does not prove that the legislature intended to include **pharmacies** within the MPLA definition of health care provider. Mr. Stevens was and is employed by the West Virginia Pharmacy Association, and he represented the pharmacy industry in 1986. His affidavit clearly states that his organization, the WVPA, supported the final version of the MPLA. The MPLA clearly does not specifically name pharmacists or pharmacies as health care providers.

Like the Affidavits of Mr. Douglass and Mr. Kapourales, Mr. Stevens’s Affidavit claims that he had always thought of a **pharmacist** as a health care provider. Stevens Aff. ¶9. He does not make any statement regarding whether a **pharmacy** is a provider of health care. And, in any event, Mr. Steven’s thoughts are not admissible.

There has never been any representation that Mr. Stevens did not support Senate Bill 714. All of the interested parties, and their lobbyists, knew what class of people were covered and considered to be health care providers as defined by the MPLA in the 1986 bill. Mr. Stevens, the interested party's lobbyist, was aware at that time that pharmacies and pharmacists were omitted, and yet he supported the bill.

4. The Justice Affidavit.

The Affidavit of Sandra Justice, if procedurally admissible, also presents mostly irrelevant and immaterial information. Ms. Justice is a practicing pharmacist who, in 1986, was an officer of the WVPA. Her affidavit proves that the WVPA supported the passage of the MPLA in 1986, which is not disputed. Her affidavit further proves that she considered herself to be a provider of health care. Ms. Justice has not been named as an expert in this case and may not provide expert opinion testimony. Furthermore, her affidavit says **nothing** about whether the 1986 Legislature intended a "pharmacy" to be included as a "health care provider" under the MPLA. Thus, again, the Justice affidavit should be disregarded as largely irrelevant and immaterial

C. The WVPA Fails To Distinguish Between A Pharmacy & A Pharmacist.

A close reading of the WVPA's Brief from pp. 5 - 9 reveals that the WVPA is arguing for inclusion of "**pharmacists**" within the definition of "healthcare provider" under the MPLA. There is very little use of the word "**pharmacy**." However, the question before this Court is whether a **pharmacy** is a "health care provider" under the MPLA. Arguments addressing possible inclusion of **pharmacists** should be entirely disregarded.

D. WVPA's Statutory Interpretation Argument.

At pp. 9-15 of its Brief, the WVPA argues that Section 55-7B-2(c)(1986) is clear and unambiguous, and that it includes pharmacies and many other types of facilities "that have emerged in the market." WVPA Brief at 13. If the drafters had meant to include a pharmacy as a health care provider, why did they not specifically name "pharmacy?" A pharmacy is an establishment that can sell drugs only through a licensed pharmacist. Pharmacies do not provide any health care, but sell and dispense products. Neither in 1986, nor today, is a pharmacy a "health care provider" under the MPLA.

E. WVPA's Argument Based on Other Pharmacy-related Statutes.

At pp. 15 - 20 of its Brief, the WVPA argues that other West Virginia statutes treat **pharmacists** as "health care providers." However, the WVPA makes no argument about **pharmacies** being health care providers. This is not mere semantics. A pharmacist and a pharmacy are separate legal entities. A pharmacist is licensed by the Board of Pharmacy; a pharmacy is a retail store, or drugstore, that sells and dispenses drugs and other products through a licensed pharmacist. A pharmacy is not licensed, but given a *permit*, by the Board of Pharmacy.

IV. RESPONSE TO BRIEF OF AMICUS CURIAE RITE AID OF WEST VIRGINIA, INC.

At pp. 2-3 of its Brief and at other places throughout, Amicus Curiae Rite Aid of West Virginia, Inc. ("Rite Aid") has mischaracterized Petitioners' argument concerning the relationship between a pharmacist and a customer in a drug store. The relationship is one of mere salesman & customer when over-the-counter items are sold. Only when the customer presents a prescription to be filled does a professional, *but derivative*, relationship arise out of the prior physician-patient relationship. Petitioners fully agree that a pharmacist filling a prescription for

a customer is acting in a professional, *but derivative*, capacity toward that customer. The professional service is not the provision of health care or medical care — it is the provision of pharmaceutical care.

Some customers do not go to the doctor at all. Instead, they visit the local drugstore, or pharmacy, seeking “free” advice and recommendations on how to treat or manage a condition or symptom. Practicing pharmacists are familiar with this type of customer and would not claim to have a professional relationship with this customer.

However, when the customer has previously seen a physician [or other professional authorized by law to issue orders for prescription medication], and in the course of the pre-existing physician-patient relationship, the customer has received a prescription to be filled, then the groundwork is laid for a pharmacist of the customer’s choosing to provide services in dispensing medication. But the average person getting a prescription filled does not consider himself to be the “patient” of the pharmacist, and certainly not of the “pharmacy.”

Rite Aid raises an issue in footnote one, on page 3 of its Brief, when it asks whether a “hospital-based pharmacy” is a “health care provider” under W. Va. Code § 55-7B-2(c). Because the parties agree that Respondent Larry’s Drive-In Pharmacy is not a “hospital-based pharmacy,” that question does not need to be answered.

At pp. 5 - 8 of its Brief, Rite Aid has broadened the issue to include “pharmacy technicians.” The Respondent/Defendant is a pharmacy — not a pharmacist, and not a pharmacy technician. Thus, all arguments addressing whether a pharmacist or a pharmacy technician are “health care providers” are academic - - not relevant.

At pp. 8 - 15, Rite Aid argues that the plain language of Section 55-7B-2(c)(1986) unambiguously extends to include pharmacies, as well as pharmacists and pharmacy technicians,

in the defined term “health care provider,” even though none of those words (pharmacies, pharmacists, pharmacy technicians) are used in the statute. This statutory interpretation argument has been addressed in Petitioners’ main brief and elsewhere in this Reply.

Rite Aid has cited several West Virginia statutes at pp. 9 - 12 of its Brief, all presumably to “show” that pharmacists and pharmacies are providers of health care under the MPLA, apparently claiming, without substantiation, that these other statutes are *in pari materia* with the MPLA.

Importantly, at p. 9 of its Brief, **Rite Aid concedes that pharmacies are not licensed in West Virginia** — but rather are subject to registration and permitting. Did the Legislature really intend to include an entity, such as a pharmacy, which operates without a professional license, as a “health care provider” under the Medical Professional Liability Act?

At pp. 11 - 12 of the Rite Aid Brief, arguments are advanced again which focus on the status of the **pharmacist**, forgetful that the Respondent/Defendant is a **pharmacy**. The certified question asks only if a pharmacy is a “health care provider” under the MPLA.

At pp. 13 - 15, Rite Aid argues that the phrase “including but not limited to” in Section 55-7B-2(c) means the enumerated list is only by way of example. Petitioners assert that the phrase “including but not limited to” does not automatically grant this Court *cart blanche* to add an unlicensed entity, which does not provide medical care or health care or health services, to the MPLA statutory definition of “health care provider.” This is particularly true in light of the Chambers, Shaw, Tucker, Rogers and Chafin Affidavits which undisputedly prove that the drafters of the statute at issue discussed whether or not to include pharmacies and pharmacists, and the final version omitted them.

At pp. 16 - 17 of its Brief, Rite Aid discusses *Short v. Appalachian OH-9*, *supra*. *Short* is different from *Phillips v. Larry's Drive-In Pharmacy*, and thus, not controlling. In *Short* there was no affidavit testimony from the statute's drafters stating that EMTs had been discussed for inclusion, but finally omitted. In *Phillips v. Larry's Drive-In Pharmacy*, unchallenged and uncontradicted multiple consistent affidavit evidence proves that pharmacies were discussed for inclusion, and were omitted. EMTs were required to be licensed; pharmacies are not required to be licensed. EMTs are an independent direct provider of services; a pharmacy is not. A pharmacy only provides services through a licensed pharmacist, and only then as a derivative relationship which follows the physician-patient relationship, when the physician issued a prescription. *Short* is certainly important to this certified question, but it is distinguishable on multiple grounds, and thus, not controlling.

At pp. 18 - 19, Rite Aid argues that the Legislative Findings and Purpose, as declared in West Va. Code Section 55-7B-1 support inclusion of a pharmacy as a "health care provider" under Section 55-7B-2(c). Petitioners disagree. The findings and purpose address the malpractice crisis then being faced by medical doctors. It was the doctors, not the pharmacies, who were leaving the state due to inability to get or afford malpractice insurance. It was the doctors, and not the pharmacies, which were limiting or restricting their practice, or retiring early. It was the doctors, not the pharmacies, who were increasing their fees so they could pay the sky-high insurance premiums. It was the people of West Virginia who were finding it difficult or sometimes impossible to find local, affordable health care. The people of West Virginia had no reported trouble locating a drug store.²

²Citizens possibly had trouble paying for prescription medications, but the high cost of drugs is not what drove the 1986 Legislature to enact the Medical Professional Liability Act.

At p. 20, Rite Aid offers some of its reasons not to apply the rule of *expressio unius est exclusio alterius*. Given the Affidavit testimony from Messrs. Chambers, Shaw, Tucker, Rogers and Chafin, this rule of statutory construction certainly should be applied.

At pp. 22 - 25, Rite Aid says that the Affidavits of Chambers, Shaw, Tucker, Rogers and Chafin are “not proper evidence of legislative intent.” In their main Brief, Petitioners cited *Cogan v. Wheeling, supra*, and distinguished that case because in *Cogan* the people whose testimony was excluded offered their personal opinions on what they thought the ordinance meant. *Cogan* does not prevent this Court from considering the Affidavits submitted by Petitioners. Messrs. Chambers, Shaw, Tucker, Rogers and Chafin all state that they discussed the possibility of including pharmacies and pharmacists in the definition part of the MPLA, and that the final version of the Act did not include pharmacies and pharmacists. This is multiple consistent affidavit testimony which bears directly on the question at issue, and should be considered in ascertaining legislative intent.

V. RESPONSE TO BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CHAIN DRUG STORES.

Amicus Curiae National Association of Chain Drug Stores (“NACDS”) discusses at pp. 5 - 8 of its Brief the statutes of other states. Petitioners have already brought to this Court’s attention that other states, which have addressed this issue, have handled it in various ways.

At pp. 9 - 10, the NACDS discusses West Virginia statutes. Most of these statutes address only pharmacists (and not pharmacies). There is no evidence in the record that Dr. Kesari, Mr. Phillips, and any pharmacist at Larry’s Drive-In Pharmacy entered into any collaborative pharmacy practice agreement under W. Va. Code § 30-5-1b(4).

CONCLUSION

This Court accepted the request of the Boone County Circuit Court to determine the following question of law:

CERTIFIED QUESTION:

In a civil action against a defendant licensed pharmacy for allegedly having negligently dispensed medication, is the pharmacy a "health care provider", as defined by West Virginia Code § 55-7B-2(c)?

ANSWER OF THE CIRCUIT COURT: Yes.

The certified question only addresses whether a "**pharmacy**" is included under the MPLA of 1986 and does not seek any answer relating to **pharmacists**. Virtually all of the Respondent pharmacy's arguments, advanced by the amicus briefs, focus on whether a pharmacist is a defined health care provider, which is not in issue.

Those parties, or lobbyists, representing pharmacies were not successful in or did not even attempt to place pharmacies, or pharmacists, in the definition of a health care provider as was set forth in Section 55-7B-2(c).

This Court has, for years, followed the proposition of law that in the event ambiguity exists in a statute passed by the Legislature, that it would look to the legislative intent to interpret the ambiguity. There is, obviously, an ambiguity in the interpretation of the language under Section 55-7B-2(c) which is why the certified question is before this honorable body. What could be more determinative of legislative intent than to rely on affidavits of the members of the Joint Conference Committee who drafted the Medical Professional Liability Act of 1986 that was passed.

In 1986, the drafting of the MPLA was one of the, if not the most, controversial legislative issues before the Legislature. It received tremendous amount of press coverage and

was subject to close scrutiny by all interested parties and their lobbyists or representatives. Each class identified in the definition of a health care provider had their lobbyist or representative provide input and/or information to the process.

The Respondent herein is Larry's Drive-In Pharmacy, a West Virginia corporation. There is no pharmacist named as a party. The Respondent pharmacy's brief, as well as the amicus curiae briefs, all address pharmacists and not pharmacies. There is a distinct difference in a pharmacy and a pharmacist. As previously stated, a pharmacy is an establishment which sells drugs through a registered and licensed pharmacist and sells other products including wine, food and other items. A pharmacy does not deliver health care. In fact, the pharmacy only has a customer relationship with its clientele - - a patient relationship does not exist. There are, simply, no doctors in a pharmacy.

Pharmacies were omitted from the health care provider definition because pharmacies are establishments who market drugs through a licensed pharmacist. Pharmacies provide no health care as was perceived by the Medical Professional Liability Act of 1986; therefore, pharmacies were excluded from the class of professionals defined in the MPLA that delivered health care to a patient.

The undisputed record, as proven by the Affidavits of the Joint Conference Committee members, makes clear that the drafters of the MPLA of 1986 specifically discussed whether to include pharmacies and pharmacists in the definition of "health care provider", Section 55-7B-2(c)(1986). The final draft signed into law omitted pharmacies and pharmacists from coverage. There is no reported West Virginia case that prevents this Court from considering the drafters affidavits. These affidavits offer what was discussed for inclusion/exclusion in the statute. If the people of West Virginia now want to include "pharmacy" or any other category within the

definition of "health care provider" under the MPLA, then the method for achieving that change is through statutory amendment - - not judicial activism. This Court should answer "No" to the certified question merely because the Respondent herein is a pharmacy, or as often referred to, a drug store. The Respondent pharmacy is not a health care provider. For this Court to answer in the affirmative would then be extending the definition, or coverage, under the MPLA, to the likes of Wal-Mart, Sam's, Target, Kroger, Rite-Aid, CVS, and any other like establishments or outlets which sell drugs to the public.

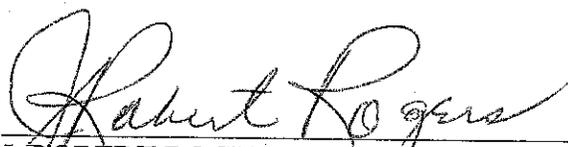
RELIEF PRAYED FOR

Petitioners request that this Honorable Court answer "No" to the certified question by ruling that the Respondent, Larry's Drive-In Pharmacy, and pharmacies throughout the State of West Virginia, are not defined or included as "health care providers" for purposes of W. Va. Code § 55-7B-2(c)(1986), and further request an Order granting Petitioner's Objection to the Amicus Affidavits and striking said affidavits from the record, and for such other relief this Court deems proper and just.

Respectfully submitted,

AUGUST EUGENE PHILLIPS and
CHERYL PHILLIPS, his wife

By Counsel



J. ROBERT ROGERS – WV Bar No. 3153
FRANK M. ARMADA – WV Bar No. 0157
3972 Teays Valley Road
Hurricane, West Virginia 25526
(304) 757-3809
Counsel for Petitioners

§ 55-7B-1 ACTIONS, SUITS AND ARBITRATION; JUDICIAL SALE

Sec. 55-7B-8. Limit on liability for noneconomic loss.	Sec. 55-7B-9c. Limit on liability for treatment of emergency conditions for which patient is admitted to a designated trauma center; exceptions; emergency rules.
55-7B-9. Several liability.	
55-7B-9a. Reduction in compensatory damages for economic losses for payments from collateral sources the same injury.	55-7B-10. Effective date; applicability of provisions.
55-7B-9b. Limitations on third-party claims.	55-7B-11. Severability.

§ 55-7B-1. Legislative findings and declaration of purpose.

The Legislature hereby finds and declares that the citizens of this state are entitled to the best medical care and facilities available and that health care 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 health care 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, and any limitation placed on this system must be balanced with and considerate of the need to fairly compensate patients who have been injured as a result of negligent and incompetent acts by health care providers;

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 a further important component of these protections is the capacity and willingness of health care providers to monitor and effectively control their professional competency, so as to protect the public and insure to the extent possible the highest quality of care;

That it is the duty and responsibility of the Legislature to balance the rights of our individual citizens to adequate and reasonable compensation with the broad public interest in the provision of services by qualified health care providers and health care facilities who can themselves obtain the protection of reasonably priced and extensive liability coverage;

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

That many of the factors and reasons contributing to the increased cost and diminished availability of professional liability insurance arise from the historic inability of this state to effectively and fairly regulate the insurance industry so as to guarantee our citizens that rates are appropriate, that purchasers of insurance coverage are not treated arbitrarily and that rates reflect the competency and experience of the insured health care providers and health care facilities;

WEST VIRGINIA BOARD OF PHARMACY

232 Capitol Street
Charleston, West Virginia 25301

APPLICATION FOR LICENSE PERMIT OR RENEWAL OF A PHARMACY

July 1, 2006 to June 30, 2007

1. CURRENT NAME OF BUSINESS TO BE LICENSED BY THIS PERMIT:

LICENSE # _____ COUNTY _____ DEA # _____ PHONE # _____

2. PHARMACIST IN CHARGE _____ RPh # _____

- a. Has your Pharmacist License ever been denied, suspended, or revoked in this or any other state? Yes _____ No _____
- b. Have you ever been convicted of a felony? Yes _____ No _____
- c. Have you ever been convicted of a misdemeanor other than a traffic violation? Yes _____ No _____
- d. Do you ever work parttime in any other pharmacy? Yes _____ No _____

If any answer in #2 is Yes, attach a detailed explanation.

3. RENEWAL FEES: Circle All Applicable a. through e.:

- a. PHARMACY - Inpatient _____ \$100.00
- b. PHARMACY - Outpatient _____ \$100.00
- c. CONTROLLED SUBSTANCE PERMIT _____ \$10.00
- d. STERILE PHARMACEUTICAL COMPOUNDING PERMIT _____ \$100.00
- e. NUCLEAR PHARMACY _____ \$100.00

Name of Enteral/Parenteral Pharmacist Manage _____ RPh # _____

ATTACH CHECK OR MONEY ORDER TO APPLICATION _____ TOTAL FEES \$ _____

4. CIRCLE APPLICABLE DRUG SCHEDULE II III IV V NARCOTIC
II III IV V NON-NARCOTIC
5. CIRCLE TYPE OF OWNERSHIP SINGLE PROPRIETOR PARTNERSHIP CORPORATION

6. NAMES OF PRINCIPLES AND TITLES: (Owner, Partners; Three Corporate Officers)

7. Has the applicant or any officer or partner of the applicant ever been convicted of a Felony?
8. The undersigned hereby swear, or affirm, that all statements made herein are true and correct, and that all provisions of the law and regulations relative to the practice of pharmacy, will be faithfully observed so long as any permit issue will be in force.

9. _____
Signature of Applicant, Managing Partner or Office Title Date

10. _____
Signature of Pharmacist in Charge RPh # Date

EXHIBIT B

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 33194 (06-1511)

AUGUST EUGENE PHILLIPS and
CHERYL PHILLIPS, his wife,

Petitioners,

v.

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

Respondent.

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that a true copy of the **REPLY BRIEF OF PETITIONERS ON CERTIFIED QUESTION, RESPONSE TO AMICUS BRIEFS & OBJECTION TO AMICUS AFFIDAVITS** has been furnished, this 13th day of December, 2006, by regular course of the U.S. Mail, postage prepaid, addressed as follows to:

JAY M. POTTER, ESQ.
Schumacher, Francis & Nelson,
P.O. Box 3029,
Charleston, WV 25331
Counsel for Respondent Larry's Drive-In Pharmacy, Inc.

WEBSTER J. ARCENEUX, III, ESQ.
Lewis, Glasser, Casey & Rollins, PLLC
P. O. Box 1746
Charleston, WV 25326
Counsel for Amicus Rite Aid of West Virginia, Inc.

ERICA M. BAUMGRAS, ESQ.
Flaherty, Sensabaugh & Bonasso
P. O. Box 3843
Charleston, V 25338
Counsel for Amicus National Assoc. of Chain Drug Stores

PHILIP A. REALE, ESQ.
1206 Virginia Street East
Suite 202
Charleston, WV 25301
Counsel for WV Pharmacists Assoc., Inc.

A handwritten signature in cursive script, reading "J. Robert Rogers", written over a horizontal line.

J. ROBERT ROGERS
WV Bar No. 3153
FRANK M. ARMADA
WV Bar No. 0157
3972 Teays Valley Road
Hurricane, WV 25526
(304) 757-3809
Counsel for Petitioners