

No. 33194

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

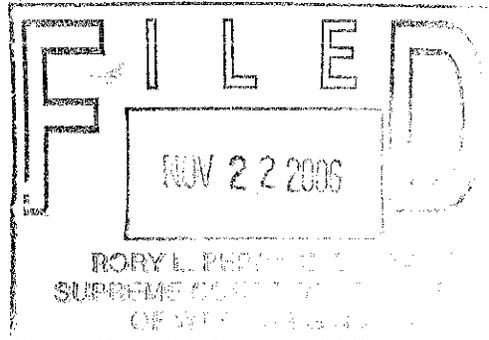
**AUGUST EUGENE PHILLIPS and
CHERYL PHILLIPS, his wife,**

Petitioners,

v.

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

Respondent.



BRIEF OF RITE AID OF WEST VIRGINIA, INC. AS *AMICUS CURIAE*

G. Nicholas Casey, Jr. (W. Va. No. 666)
Webster J. Arceneaux, III (W. Va. No. 155)
Michael J. Folio (W. Va. No. 6314)
Steven B. Wiley (W. Va. No. 9373)
LEWIS, GLASSER, CASEY & ROLLINS, P.L.L.C.
Post Office Box 1746
Charleston, West Virginia 25326
304-345-2000

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INTRODUCTION

The certified question in this case raises a simple question, whether licensed community pharmacies are “health care providers” under the Medical Professional Liability Act (“MPLA”), W. Va. Code §§ 55-7B-1, *et seq.* In its June 2, 2006 Certification Order, the Circuit Court of Boone County answered affirmatively relying, in part, on a prior statement from the West Virginia Board of Pharmacy and the Circuit Court of Mercer County’s decision in *McDowell v. Rite Aid of W. Va., Inc.*, Civil Action No. 04-C-174-S (Mercer Co. Cir. Ct. 2004) filed as exhibits by the Respondent in this case. The Circuit Court of Boone County reached the proper conclusion in this matter, to wit: licensed community pharmacies are “health care providers” under the MPLA. As will be shown herein, this Court should affirm the Circuit Court’s well reasoned decision in this case.

Since 2000, this Court has decided approximately twenty five cases arising under the MPLA, with many of the recent cases focused on the 2003 amendments to the Act. The parties are in agreement that this case predates the effective date of the 2003 amendments, so none of those provisions are at issue in this case. Rather, this case requires the Court to examine the definition of a “health care provider” under the MPLA, W. Va. Code § 55-7B-2(c)(1986). This Court thoroughly examined that provision in *Short v. Appalachian OH-9, Inc.*, 203 W. Va. 246, 507 S.E.2d 124 (1998), as it concluded that emergency medical service (“EMS”) personnel were “health care providers” under the MPLA, W. Va. Code § 55-7B-2(c)(1986), even though EMS personnel were not specifically enumerated in the statute. Contrary to the arguments of the Petitioners in this case, *Short* is dispositive of the issues before this Court. For the same reasons that this Court concluded that EMS personnel were “health care providers,” this Court should conclude that licensed

community pharmacies, their pharmacists and pharmacy technicians, are “health care providers” under the MPLA.

Licensed community pharmacies, their pharmacists and pharmacy technicians are “health care providers” under the MPLA because the West Virginia Legislature mandated that they are to be licensed and subject to comprehensive regulation by the West Virginia Board of Pharmacy under W. Va. Code §§ 30-5-1, *et seq.* As such, they meet the legislative definition of a “health care provider” under the MPLA, W. Va. Code § 55-7B-2(c)(1986), even though pharmacies, pharmacists and pharmacy technicians are not specifically enumerated under that subsection. As this Court concluded in *Short*, when the West Virginia Legislature used the admonition “including, but not limited to” it clearly intended parties other than those enumerated to be included within the definition of “health care provider” under the MPLA, W. Va. Code § 55-7B-2(c)(1986).

The Complaint alleges in this case that the Colochicine dispensed to Mr. Philips was the medication prescribed by Dr. Sriramloo Kesari and the instructions on the bottle were in the precise fashion issued by the treating physician, Complaint at 15. However, the Respondent has been sued in this matter for failing to “observe and correct the erroneous and incomplete drug order as a member of the plaintiff’s healthcare team,” Complaint at 30(c). These allegations certainly seem to implicate an “act” of “health care” “on behalf of a patient during the patient’s medical care, treatment or confinement” as those terms are defined under the MPLA, W. Va. Code § 55-7B-2 (1986). This Court should recognize, as did the Boone County Circuit Court, that the Petitioners cannot have it both ways. They cannot, on the one hand, sue the Respondent for professional negligence, claiming that its pharmacist should have exercised independent medical judgment and caught the doctor’s alleged mistake and then, on the other hand, claim that a person in a pharmacy is a mere customer

and that the pharmacy is nothing more than a vending machine that robotically dispenses medications. Under the laws and regulations of the State of West Virginia, the Petitioners had it right in the Complaint, the Respondent is a member of the patient's healthcare team and as such, the Respondent is a "health care provider" for purposes of the MPLA.

For these reasons, and the other reasons more fully spelled out in this *Amicus* Brief, this Court should affirm that the Circuit Court of Boone County properly concluded that licensed community pharmacies are "health care providers" under the MPLA, W. Va. Code § 55-7B-2(c).

ARGUMENT

I. LICENSED PHARMACIES, PHARMACISTS, AND PHARMACY TECHNICIANS IN WEST VIRGINIA ARE "HEALTH CARE PROVIDERS" UNDER W. VA. CODE § 55-7B-2(c), THE MEDICAL PROFESSIONAL LIABILITY ACT.

The Petitioners' Brief challenges the Circuit Court of Boone County's decision that a licensed community pharmacy is a "health care provider" under the MPLA, W. Va. Code § 55-7B-2(c)(1986).¹ Under this Court's precedents, the standard of review for a certified question under W. Va. Code § 58-5-2 is *de novo*. Syllabus Point 1, *Clark v. Druckman*, 218 W.Va.427, 624 S.E.2d 864 (2005); Syllabus Point 1, *Gallapoo v. Wal-Mart Stores*, 197 W.Va. 172, 475 S.E.2d 172 (1996).

¹ This Court should note that there are several types of pharmacies subject to regulation by the West Virginia Board of Pharmacy under the provisions of W. Va. CSR §§ 15-1-1 *et seq.* The Board of Pharmacy broadly characterizes all pharmacies as either "institutional pharmacies" for inpatient delivery of medications, § 15-1-2.1.20 or "outpatient pharmacy" for the retail sale of medications, § 15-1-2.1.30. Rite Aid and Larry's Drive-In meet the Board of Pharmacy definition of "outpatient pharmacy" and are referred to herein to as licensed community pharmacies. Presumably, even the Petitioners in this case would concede that institutional pharmacies, such as hospital-based pharmacies are "health care providers" under W. Va. Code § 55-7B-2(c)(1986) since they are affiliated with an entity specifically enumerated in this subsection. Therefore, the only issue that arises in this case is the narrow question of whether a licensed community pharmacy is a "health care provider" under the MPLA, W. Va. Code § 55-7B-2(c)(1986).

In examining the legal issue of whether licensed community pharmacies are “health care providers” under the MPLA on a *de novo* basis, this Court should conclude that the Circuit Court of Boone County reached the correct decision.

The definitional provisions of the MPLA, W. Va. Code § 55-7B-2 (1986), read as follows, in their entirety:²

(a) “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.

(b) “Health care facility” means any clinic, hospital, nursing home, or extended care facility in and licensed by the State of West Virginia and any state operated institution or clinic providing health care.

(c) “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 officer’s, employee’s, or agent’s employment.

(d) “Medical professional liability” means any liability for damages resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a “health care provider” or health care facility to a patient.

(e) “Patient” means a natural person who receives, or should have received health care, from a licensed “health care provider” under a contract, expressed or implied.

(f) “Representative” means the spouse, parent, guardian, trustee, attorney, or other legal agent of another.

² For purposes of this *Amicus* Brief, Rite Aid will use the present tense although referring to the MPLA as it existed prior to the 2003 amendments since the parties are in agreement that the law prior to the amendments controls in this case. Notwithstanding said amendments, Rite Aid asserts that nothing in the current version of the MPLA changes the fact that pharmacies, pharmacists, and pharmacy technicians are “health care providers” for actions filed after the effective date of the 2003 amendments.

(g) "Noneconomic loss" means losses including, but not limited to, pain, suffering, mental anguish, and grief. (1986, c. 106.)

Under the plain wording of the Act, it is clear that pharmacies, pharmacists, and pharmacy technicians do provide "health care" and are "health care providers" under the MPLA.³

A. PHARMACIES, PHARMACISTS, AND PHARMACY TECHNICIANS PROVIDE "HEALTH CARE" UNDER THE PLAIN DEFINITION OF THE TERM "HEALTH CARE."

The initial determination of whom or what is a "health care provider" turns on the question of whether such person or entity provides "health care." "Health care" under the MPLA means, in relevant part, "any act or treatment performed or furnished, or which should have been performed or furnished" as a part of a patient's "medical care, treatment or confinement." W. Va. Code § 55-7B-2(a). This definition was intended by the West Virginia Legislature to be very broad and inclusive.

The Legislature has enacted a comprehensive array of statutes governing the practice of pharmacy. *See*, W. Va. Code §§ 30-5-1, *et seq.* Of particular importance, the Legislature has defined a "pharmacy" as, in relevant part, "any drugstore, apothecary or place within this state where

³ Rite Aid has broadened the discussion to include pharmacy technicians because they are employed by pharmacies and are agents of and work under the direct supervision of licensed pharmacists and thus "pharmacy technicians" are also "health care providers" under the MPLA. Indeed, the West Virginia Board of Pharmacy has established standards for the training and regulation of "pharmacy technicians." *See*, W. Va. CSR §§ 15-7-1, *et seq.* Similarly, despite the Petitioners' contention that the instant certified question only deals with whether pharmacies, and not pharmacists, are "health care providers" under the MPLA, this *Amicus* Brief deals with the status of pharmacists and pharmacies as "health care providers," consistent with the MPLA's consideration that natural persons and the institutions for which they work may be "health care providers." W. Va. Code § 55-7B-2(c); *see also*, *Henry v. Mylan Pharmaceuticals, Inc.*, 2005 U.S. Dist. LEXIS 36692 (W.D. Mo. 2005)(Missouri's statutory definition of pharmacists as "health care providers" extends to the pharmacies employing such pharmacists).

drugs are dispensed and sold at retail or displayed for sale at retail *and pharmaceutical care is provided.*” W. Va. Code § 30-5-1b(v)(emphasis added). In turn, “pharmaceutical care” is defined

as:

[T]he provision of drug therapy and other pharmaceutical patient care services intended to achieve outcomes related to the cure or prevention of a disease, elimination or reduction of a patient’s symptoms or arresting or slowing of a disease process as defined in the rules of the board [of pharmacy].

W. Va. Code § 30-5-1b(s) (brackets added).

Under the authority granted it by the Legislature, the West Virginia Board of Pharmacy has defined the “practice of pharmacy” to mean:

[T]he personal health service concerned with the preparing, compounding and dispensing of drugs and medical devices used in the diagnosis, treatment or prevention of disease, dispensed on the prescription of a practitioner, or otherwise legally dispensed or sold and shall include the proper and safe storage of drugs, the maintenance of proper records and the dissemination of information to other health care professionals and proper counseling to the patient concerning the therapeutic value and proper use of drugs and devices.

W. Va. C.S.R. § 15-1-2.1.41.⁴

The Petitioners argue in this case that pharmacies and pharmacists “only serve to dispense medication” to “customers,” not “patients,” and that this does not constitute “health care.” In their Petition urging acceptance of this certified question, the Petitioners quoted an out-of-context portion

⁴ It should be noted that, in their Brief, the Petitioners spend a substantial amount of effort to argue that the Circuit Court “relied” on a letter authored by William T. Douglass, Jr., general counsel for the Board of Pharmacy, and that such alleged “reliance” was improper due to supposed unreliability and unimportance of Mr. Douglass’ views. The statements Mr. Douglass made in his letter are essentially what is set forth in the Board of Pharmacy’s regulations and their enabling statutes. The Petitioners fail to discuss the regulations and statutes upon which Mr. Douglass’ letter is based. This Court should consider the Board of Pharmacy’s regulations and their enabling statutes in concluding that the Circuit Court reached the correct decision in this case.

of the West Virginia Board of Pharmacy's regulations and argue that pharmacists are not ethically allowed to make diagnoses. *See* Petition at pp. 7 and 14; *quoting* W. Va. C.S.R. § 15-1-19.6 (citation omitted in original). The Petitioners' essential argument is that the definition of "health care" is limited to making diagnoses, and any other "act" or "treatment" performed or furnished does not constitute "health care." Taken to its logical extreme, this line of reasoning could lead to absurd results.⁵ The Petitioners' argument also flies in the face of the plain language of W. Va. Code § 55-7B-2(a), which encompasses "any act or treatment performed or furnished . . . during the patient's medical care, treatment or confinement." Given the responsibilities of pharmacies, pharmacists, and pharmacy technicians to provide pharmaceutical care for "patients," as set forth by the Legislature and the West Virginia Board of Pharmacy, it is clear that the dispensing of prescription medications is an "act or treatment" under the MPLA's definition of "health care."⁶

⁵ For instance, a surgeon performing an operation to repair a badly broken bone diagnosed by an emergency room physician would not be providing "health care" under the Petitioners' logic since he did not make a diagnosis. Furthermore, the plain language of the MPLA states that, among others, nurses and physical therapists are protected "health care providers." However, individuals practicing in these professions do not generally make diagnoses but rather implement treatment plans and/or initiatives developed by physicians and similarly-situated professionals.

⁶ In their Petition, the Petitioners recited several sections of the West Virginia Board of Pharmacy's regulations dealing with the responsibilities of pharmacies and pharmacists to exercise professional standards and judgment, including questioning uncertain prescriptions, performing drug regimen reviews, and patient counseling, with regard to the provision of pharmaceutical care. *See* Petition at pp. 3-4. The Petitioners' recognition of these legal duties imposed upon pharmacies and pharmacists undermines the Petitioners' argument that pharmacies and pharmacists do not provide "health care." Furthermore, the Petitioners' Complaint in the underlying Circuit Court action alleges that the Respondent failed in its duties to make appropriate "health care" judgments regarding the Petitioners' prescribed medications. The precise nature of this allegation further undermines the Petitioners' current argument that pharmacies and pharmacists do not provide "health care," as it appears that the Petitioners' are alleging in the Complaint that the Respondent failed to provide "health care" and this negligence resulted in the Petitioners' injuries.

B. W. VA. CODE § 55-7B-2(C) IS CLEAR AND UNAMBIGUOUS THAT THE TERM "HEALTH CARE PROVIDER" INCLUDES ALL LICENSED ENTITIES PROVIDING "HEALTH CARE."

The Petitioners gloss over the plain language of W. Va. Code § 55-7B-2(c) in order to make their argument that pharmacies, pharmacists, and pharmacy technicians are not included within the MPLA's definition of a "health care provider" and are therefore excluded. This argument ignores the clear and unambiguous language of the Act. The subsection defining "health care provider" can be broken down into two parts. The first, and controlling part, reads:

"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,....

See, W. Va. Code § 55-7B-2(c). The Petitioners essentially ignore this first part of the subsection, particularly the key phrase at the end, "including, but not limited to." Instead, the Petitioners would have this Court focus only on the second part, which reads:

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.

Id. Under the Petitioners' reading of the Act, ignoring the first part of the subsection and its inclusive language regarding licensed entities that provide "health care," the second part is supposedly an exhaustive list of "health care providers" covered for purposes of the MPLA. Under the Petitioners' logic, since pharmacies, pharmacists, and pharmacy technicians are not included in this list, they must be excluded. This reading ignores the first part of the subsection containing the licensure and health care provision standards, as well as the clear and unambiguous language "including, but not limited to."

1. Pharmacies, Pharmacists, and Pharmacy Technicians are Licensed by the State of West Virginia.

As recognized by the Petitioners, pharmacies, pharmacists, and pharmacy technicians are subject to extensive licensure and regulatory standards and requirements. *See*, W. Va. Code §§ 30-5-1, *et seq.* W. Va. Code § 30-5-5(a) sets forth the legislative requirements for a pharmacist to be licensed in this State as follows:

- (1) Be eighteen years of age or older;
- (2) Present to the board satisfactory evidence that he or she is a graduate of a recognized school of pharmacy as defined by the board of pharmacy;⁷
- (3) Present to the board satisfactory evidence that he or she has completed at least fifteen hundred hours of internship in a pharmacy under the instruction and supervision of a pharmacist;
- (4) Pass an examination approved by the board of pharmacy; and
- (5) Present to the board satisfactory evidence that he or she is a person of good moral character, has not been convicted of a felony involving controlled substances or violent crime, and is not addicted to alcohol or the use of controlled substances.

The West Virginia Board of Pharmacy has promulgated further regulations regarding the licensure and examination of pharmacists within this State at W. Va. CSR § 15-1-5. Pharmacy technicians are required to register and be trained pursuant to W. Va. Code § 30-5-5a and the West Virginia Board of Pharmacy has developed a detailed regulatory program for pharmacy technicians at W. Va. CSR §§ 15-7-1, *et seq.* The pharmacy itself is not licensed, but pursuant to W. Va. Code

⁷ This Court may take judicial notice that the required college pharmacy program is now a six-year program culminating in a Doctor of Pharmacy degree. *See*, <http://www.hsc.wvu.edu/sop/index.html>. The Court may further take judicial notice that the West Virginia University School of Pharmacy is part of the Robert C. Byrd Health Sciences Center. Finally, the Health Sciences Center has affiliated with the Charleston Area Medical Center to offer clinical and non-clinical residencies for pharmacy practice, very similarly to residencies available to new physicians. *See*, <http://www.hsc.wvu.edu/charleston/sopc/departementooverview1.html>.

§ 30-5-14 and W. Va. CSR § 15-1-14, pharmacies are subject to registration and permitting requirements administered by the West Virginia Board of Pharmacy. The Legislature further mandated that pharmacies cannot operate without a licensed pharmacist:

It is unlawful for the proprietor of any store or pharmacy to permit any person not a pharmacist to compound or dispense prescriptions or prescription refills or to retail or dispense the poisons and narcotic drugs named in sections two, three and six, article eight, chapter sixteen of this code . . .

See, W. Va. Code § 30-5-3(b). On this basis, there can be no doubt that pharmacies, pharmacists, and pharmacy technicians are subject to licensure and regulation under the laws and regulations of the State of West Virginia.⁸

⁸ Rite Aid's position that pharmacies and pharmacists in West Virginia are subject to licensure and regulation is further supported by a letter dated August 13, 2004, from Mr. William T. Douglass, Jr., the Executive Director of the West Virginia Board of Pharmacy that states:

The West Virginia Board of Pharmacy licenses and regulates the practice of pharmacy and the conduct of pharmacists and pharmacies pursuant to W. Va. Code § 30-5-2. Like physicians and other "health care providers," pharmacists are licensed professionals and provide health care services to seek to cure or prevent disease, eliminate or reduce a patient's symptoms, and arrest or slow a patient's disease process. As licensed professionals, pharmacists are "health care providers" and members of a patient's health care team. Given the fact that pharmacists are licensed and provide health care, it is my opinion that pharmacists and pharmacies are "health care providers" and furnish health care as contemplated by W. Va. Code § 55-7B-1 *et seq.*

See, Exhibit G of Response Objecting to the Docketing of the Certified Question. This letter from Mr. Douglass is one of the items considered by the Circuit Court of Boone County in its June 2, 2006 Certification Order at p. 2. The Petitioners challenge the Circuit Court's consideration of this letter on the basis that it was issued by the Executive Director and not the West Virginia Board of Pharmacy. While this may be true, Rite Aid would counter that Mr. Douglass is certainly a very knowledgeable person with regard to West Virginia's licensure and regulatory programs for pharmacies and pharmacists in West Virginia. His opinion was properly based upon the West Virginia Board of Pharmacy's Regulations and enabling statutes and therefore, is entitled to some weight. While his opinion is certainly not binding, it is authoritative and this Court may consider it as the Circuit Court of Boone County considered it.

2. Pharmacies, Pharmacists, and Pharmacy Technicians Provide “Health Care” or Professional Health Services.

As set forth in greater detail above, *infra*, the Legislature and the West Virginia Board of Pharmacy recognize pharmacies, pharmacists, and pharmacy technicians as providing “health care” or professional health services. Pharmacists are subject to continuing education requirements to keep abreast of “the changing concepts in the *delivery of health care services in the practice of pharmacy.*” W. Va. Code § 30-5-3a (emphasis added). Pharmacies and pharmacists are considered by the Legislature to be members of the “health care team” in terms of exercising professional judgment concerning a “patient's health and well-being” in deciding whether to release confidential information about a patient to “other members of the health care team and other pharmacists.” W. Va. Code § 30-5-1b(d). The Legislature’s acknowledgment of pharmacies and pharmacists as members of a “health care team” with other “health care providers” demonstrates that the Legislature considers pharmacies and pharmacists to be providers of “health care” or professional health services.

Throughout the West Virginia Code, in other statutory schemes regarding health care, pharmacies and pharmacists are recognized as “health care providers.”⁹ Under the West Virginia Health Care Provider Professional Liability Insurance Availability Act, a licensed pharmacist is a

⁹ Pharmacies and pharmacists are also considered to be “health care providers” under certain federal regulations and are subject to regulatory schemes such as the privacy regulations of the Health Insurance Portability and Accountability Act. *See*, 45 C.F.R. §§ 160, *et seq.*; *see also Texas v. Orgamon USA, Inc. (In re Remeron End-Payor Antitrust Litig.)*, 2005 U.S. Dist. LEXIS 27011, *42 (D. N.J. 2005)(pharmacists are “health care providers” covered by [HIPAA]); *see also, Parker v. Quinn*, 2006 U.S. Dist. LEXIS 24239, *13 (N.D. Miss. 2006) (a pharmacy is a “health care provider” under HIPAA). Likewise, many pharmacies and pharmacists, including Rite Aid, provide and bill for health care services rendered to patients who are Medicaid beneficiaries. Medicaid provider enrollment is limited to “health care providers” and, accordingly, pharmacies and pharmacists acting as Medicaid participants are “health care providers”.

“health care provider.” W. Va. Code § 29-12B-3(b)(5). Like the MPLA, that Act’s focus is on ensuring the access of West Virginians to “quality medical care,” W. Va. Code § 29-12B-2.¹⁰ Pharmaceutical organizations are also included within the Health Care Peer Review Organization Protection Act. *See*, W. Va. Code §§ 30-3C-1, *et seq.* That Act not only covers pharmaceutical organizations, but also “individuals who are licensed to practice in any health care field under the laws of this state.” W. Va. Code § 30-3C-1. These individuals, who are known as “health care professionals,” include pharmacists who are licensed to practice pharmacy in the State of West Virginia.¹¹ *Id.* Finally, this Court has previously recognized that the practice of pharmacy is a distinct form of health care practice; holding that the Code prohibits licensed physicians from selling pharmaceuticals other than supplying their own patients with medications they prescribe for them. *Ye Olde Apothecary v. McClellan*, 163 W. Va. 19, 253 S.E.2d 545, syl. pt. (W. Va. 1979).¹²

¹⁰ In their Brief, the Petitioners cite *Taylor v. Hoffman*, 209 W. Va. 172, 544 S.E.2d 387 (2001) for the proposition that this Court should not look at other instances in the Code where the Legislature has defined pharmacists or pharmacies as “health care providers,” as such definitions cannot be read *in para materia* with the MPLA due to allegedly differing subject matter. Rite Aid submits that the underlying purpose of the MPLA and the State’s other legislative enactments governing health care is to ensure that West Virginians have reasonable access to quality medical and health care. Accordingly, it is proper for this Court to consider how the Legislature has generally considered pharmacists and pharmacies to be “health care providers” and to apply the statutory construction doctrine of *in para materia*, to the extent necessary.

¹¹ Likewise, the Legislature has not hesitated to specifically note when it does not consider pharmacies and pharmacists to be “health care providers” for the purposes of particular pieces of legislation. *See*, W. Va. Code § 16-29D-2(c) (pharmacies and pharmacists are not “health care providers” “for the sole purpose” of the article concerning health care services procured by state government).

¹² In other contexts, courts in other jurisdictions have considered pharmacists or pharmacies to be “health care providers” or medical professionals. *See*, *KOS Pharmaceuticals, Inc. v. Andrx Corp.*, 369 F.3d 700 (3rd Cir. 2004); *Happel v. Wal-Mart Stores, Inc.*, 2006 U.S. Dist. LEXIS 10837 (N.D. Ill. 2006); *Ramey v. Tran*, 2005 U.S. Dist. LEXIS 27332 (E.D. Cal. 2005); *Altieri v. CVS Pharmacy, Inc.*, 2002 Conn. Super. LEXIS 4041 (Conn. Super. Ct. 2002)(unpub. op.); *Lasley v.*

3. The Legislative Intent of an Inclusive Definition of “Health Care Provider” for Purposes of the MPLA is Clear and Unambiguous.

As set forth above, the Petitioners focus on the listing of various categories of “health care providers” in the second part of W. Va. Code § 55-7B-2(c) as support for their argument that, since pharmacies, pharmacists, and pharmacy technicians are not specifically listed, they are not “health care providers” under the MPLA. The Petitioners’ argument in this regard essentially ignores the first part of W. Va. Code § 55-7B-2(c) through the phrase “including, but not limited to.” As set forth above, pharmacies, pharmacists, and pharmacy technicians are licensed, permitted and certified, and provide health care or professional health services. They therefore meet the two requirements for being considered a “health care provider” under the MPLA.¹³ The fact that pharmacies and pharmacists are not listed in the second part of W. Va. Code § 55-7B-2(c) is of no import since they meet the two standards for consideration as a “health care provider” in the first part of the subsection. The Legislature’s use of the phrase “including, but not limited to” in the subsection demonstrates the Legislature’s clear and unambiguous intent in making a list of providers was simply to provide examples and not an exhaustive listing. To ignore this language, as the Petitioners would have this Court do, violates well settled rules of statutory construction. *See, Osborne v. United States*, 211 W. Va. 667, 567 S.E.2d 667 (2002) (each word in a statute must be given effect).

Shrake's Country Club Pharmacy, 880 P.2d 1129 (Ariz. Ct. App. 1994); *Boudot v. Schwallie*, 178 N.E.2d 599 (Ohio Ct. App. 1961).

¹³ *See, Harrell v. Lusk*, 263 Ga. 895, 439 S.E.2d 896 (1994) (license requirements plus educational requirements make pharmacists “professionals”).

This Court has previously recognized that the use of the phrase “including, but not limited to” in a statute shows that the Legislature intended for the statute to be read broadly and inclusively. Specifically, in construing W. Va. Code § 55-7B-6, this Court has noted that the Legislature’s use of “including, but not limited to” rendered the “health care provider” definition subject to the inclusion of emergency medical service personnel, who were not then specifically listed. *Short v. Appalachian OH-9, Inc.*, 203 W. Va. 246, 250, 507 S.E.2d 124, 128 (1998). This year, this Court considered the State Tax Commissioner’s construction of W. Va. Code § 47-21-15(a) related to raffle expenses in the face of the phrase “including, but not limited to” and found that the Commissioner’s interpretation was too narrow. *Loyal Order of Moose, Martinsburg Lodge No. 120 v. State Tax Commissioner*, __ W. Va. __, 632 S.E.2d 59 (2006)(*per curiam*). In its decision, this Court stated “the Commissioner’s interpretation of W. Va. Code § 47-21-15 was applied much too strictly against the Moose Lodge and should have been read in its entirety so that *all* of the sections of the statute were given proper weight and consideration.” (emphasis in original). Last year, this Court noted that the Legislature’s amendment of the definition of “behavioral health services” in the context of the privilege tax to include the phrase “including, but not limited to” created a broader statement of what sorts of activities could be considered as included under the statute. *Helton v. REM Community Options, Inc.*, 218 W. Va. 165, 624 S.E.2d 512 (2005)(discussing W. Va. Code § 11-13A-2(d)(2004)).

In construing West Virginia’s wrongful death statute, this Court concluded that the Legislature’s use of the similar phrase “but may not be limited to” before enumerating the types of damages a jury may award created a broad and “almost unfettered discretion” in juries. *McDavid v. United States*, 213 W. Va. 592, 601, 584, S.E.2d 226, 235 (2003)(interpreting W. Va. Code § 55-

7-6(c)(I)(1992). In construing the powers of the Human Rights Commission, this Court found that it has "broad remedial powers" due to the Legislative use of the phrase "including, but not limited to" before a statutory recitation of the types of actions the Commission may take to remedy discrimination. *Greyhound Lines-East, Operating Div. of Greyhound Lines v. Geiger*, 179 W. Va. 174, 366 S.E.2d 135 (1988)(construing W. Va. Code § 5-11-10).¹⁴

Had the Legislature intended the result the Petitioners seek, it would have simply defined "health care provider" by only including the list of included providers and would not have used the language of the subsection up to and including the phrase "including, but not limited to." Since the Legislature begins its definition of "health care provider" with a two-part standard, which pharmacies, pharmacists, and pharmacy technicians meet, followed by an explicitly non-exclusive list of examples of "health care providers," it is apparent that pharmacies, pharmacists, and pharmacy technicians fall under the inclusive definition of "health care provider" for purposes of the MPLA.¹⁵

¹⁴ The United States District Court for the Northern District of West Virginia has also found that the use of "including, but not limited to" in West Virginia's statute regarding review of errors in criminal convictions creates a broad grant of power to fashion appropriate remedies. *Wright v. Boles*, 303 F.Supp. 872 (N.D. W. Va. 1969); *Petry v. Boles*, 275 F.Supp. 744 (N.D. W. Va. 1967)(discussing W. Va. Code § 53-4A-7(c)).

¹⁵ The Petitioners' faulty and hyper-exclusive interpretation of the MPLA, as a practical matter, necessarily leads to tortured and counter-intuitive results. For example, a psychologist providing marriage counseling services is a "health care provider" under the Petitioners' interpretation, while a pharmacist dispensing potentially life-threatening drugs to members of the public, while charged with ensuring that the patient receives the proper drugs, in the correct dosage, educating the lay person as to the proper use of the drug and checking to protect the patient from potentially negative counter-indications with other drugs said patient may be taking, is not a "health care provider." Further, as previously noted, under the Petitioners' theory, a pharmacist working in a hospital is a health care provider in that he or she is acting as an agent of the hospital, which is a specifically enumerated provider. However, that same hypothetical pharmacist, under the Petitioners' interpretation, would cease to be a health care provider if he or she quit working for the hospital and went to work for a licensed community pharmacy, even while dispensing the same drugs to the same patients he or she had earlier served in the hospital. Such cannot be the logical

II. THIS COURT'S DECISION IN *SHORT V. APPALACHIAN OH-9, INC.*, MANDATES THAT PHARMACIES, PHARMACISTS, AND PHARMACY TECHNICIANS ARE INCLUDED IN THE DEFINITION OF "HEALTH CARE PROVIDER."

In *Short v. Appalachian OH-9, Inc.*, 203 W. Va. 246, 507 S.E.2d 124 (1998), this Court was called upon to determine whether emergency medical service ("EMS") providers were "health care providers" under the MPLA even though EMS providers were not specifically enumerated in the MPLA as it was written at that time. *Short* represents the only occasion, since enactment of the MPLA in 1986, this Court has had to determine whether a specific entity was a "health care provider" under the MPLA when such entity was not specifically listed. This Court, in construing the MPLA, determined that EMS providers were "health care providers" under the MPLA, although they were not among the explicitly listed providers as the statute existed at that time. *Id.* at Syllabus Point 2.

In *Short*, this Court recognized that the definition of "health care provider" is broad and flexible under W. Va. Code § 55-7B-2(c). This Court noted that the claims against the defendant EMS provider were based on the provision of "health care." The Court further relied heavily on the licensing requirement of the MPLA's definition of "health care provider;" *Id.*, at 128, the first part of W. Va. Code § 55-7B-2(c) that the Petitioners ignore. This Court, in *Short*, found that EMS providers are required to be licensed in West Virginia and that they must meet certain statutory requirements and are subject to administrative oversight. *Id.*, discussing W. Va. Code §§ 16-4C-1, *et seq.*

intent of the Legislature in enacting the MPLA.

Similar to EMS provider licensing, pharmacies, pharmacists, and pharmacy technicians are required to obtain state licenses and permits, in order to engage in the practice of pharmacy and to render pharmaceutical care, as discussed in greater detail above, *infra*. See, W. Va. Code §§ 30-5-1, *et seq.* Pharmacies, pharmacists, and pharmacy technicians, like EMS providers and other “health care providers,” are subject to stringent practice guidelines and oversight.¹⁶ *Id.* Like EMS providers, pharmacies, pharmacists, and pharmacy technicians provide “health care” or professional health services to patients. Since the role of pharmacies and pharmacists is similar to that of EMS providers, in that they are licensed or permitted to provide “health care” and professional health services, this Court should determine that the decision in *Short* is controlling precedent in this case. The same logic that dictates that EMS providers are “health care providers” under the MPLA even though they were not specifically listed (at the time) in the non-exhaustive listing of “health care providers” set forth in the second part of W. Va. Code § 55-7B-2(c) applies with full force and effect

¹⁶ Aside from pharmacists, pharmacies, pharmacy technicians and pharmacy interns, Chapter Thirty of the West Virginia Code addresses the licensing and oversight of, among others, physicians, dentists, anesthesiologists, dental laboratories, licensed professional nurses, practical nurses, optometrists, osteopathic physicians and surgeons, assistants to osteopathic physicians and surgeons, nurse-midwives, chiropractors, physical therapists, psychologists and radiological technologists. See, W. Va. Code, Chapter 30. The placement of pharmacists and pharmacies in the same Chapter of the Code as other licensed, professional health care professionals, evinces the Legislature's intent that pharmacies, pharmacists, and pharmacy technicians are health care professionals. Contained in Chapter Sixteen of the Code are provisions relating to, among others, home health services, birthing centers, EMS providers, hospitals and similar institutions, nursing homes, personal care homes, legally unlicensed health care facilities, residential board and care homes, hospices, clinical laboratories and residential care communities. See, W. Va. Code, Chapter 16. All of these professions could be considered part of the “health care team” and the Legislature has recognized pharmacies and pharmacists belong as a part of that team.

to the analysis of whether or not pharmacies and pharmacists are likewise “health care providers” under the MPLA.¹⁷

III. THE LEGISLATIVE INTENT BEHIND THE MPLA SUPPORTS THE INCLUSION OF PHARMACIES, PHARMACISTS, AND PHARMACY TECHNICIANS AS “HEALTH CARE PROVIDERS.”

In its prior cases, this Court has recognized that the Legislature enacted the MPLA to improve the delivery of health care services to patients within the State of West Virginia. W. Va. Code § 55-7B-1 specifically states:

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.

As this Court recognized in *Short*, “[p]ursuant to that Act, certain reforms were made in the common law and statutory law of this State in order to ensure ‘the best medical care and facilities available’ for West Virginia citizens. W. Va. Code § 55-7B-1 (1986).” This Court has approvingly cited the purpose behind the MPLA, stating that it is “quite sensitive to the need for reform in medical

¹⁷ Courts in other jurisdictions have found that pharmacies and/or pharmacists are to be considered “health care providers” or professionals for purposes of statutory schemes similar to the MPLA even when, as under the MPLA, pharmacies or pharmacists are not specifically listed as such. In Alabama, that state's Medical Liability Act contained language very similar to the non exclusive definition of “health care provider” of the MPLA. The Alabama Supreme Court determined that the act of filling prescriptions is so inextricably linked to the provision of health services by physicians and other specifically enumerated providers that pharmacists engaged in filling prescriptions fall under the definition of “health care provider.” *Cackowski v. Wal-Mart Stores, Inc.*, 767 So.2d 319 (Ala. 2000); *see also, Ex parte Rite Aid of Ala., Inc.*, 768 So.2d 960 (Ala. 2000). The Michigan Court of Appeals has found that pharmaceutical mis-fills are medical malpractice for purposes of Michigan's malpractice statute of limitations. *Becker v. Meyer Rexall Drug Co.*, 367 N.W.2d 424 (Mich. App. 1985). In Georgia, pharmaceutical mis-fill cases are “clearly” professional malpractice, thus requiring plaintiffs to abide by that state's medical malpractice act. *Sparks v. Kroger Co.*, 200 Ga. App. 135, 407 S.E.2d 105 (1991).

malpractice litigation” and that it “wholeheartedly applaud[s] the efforts of the Legislature in attempting to find a balance between the rights of injured persons and the desire to maintain a stable health care system in our State.” *Louk v. Cormier*, 218 W. Va. 81, 622 S.E.2d 788, 799 (2005). This Court has recognized that the MPLA’s definitions and requirements are designed for the purpose of providing for a comprehensive resolution of the issues discussed in W. Va. Code § 55-7B-1. *Osborne v. United States*, 211 W. Va. 667, 672, 567 S.E.2d 677, 682 (2002). When upholding the constitutionality of the MPLA, this Court has cited W. Va. Code § 55-7B-1 as a statement of the “proper governmental purpose,” the MPLA was designed to further. *Robinson v. Charleston Area Medical Center*, 186 W. Va. 720, 414 S.E.2d 877 (1991).

As set forth above, the Legislature considers pharmacies and pharmacists to be members of the “health care team.” Pharmacies, pharmacists, and pharmacy technicians are subject to licensing boards, professional oversight and, most importantly, provide health care services to the public. Like other members of the health care team, pharmacies, pharmacists, and pharmacy technicians are subject to claims of professional liability, as demonstrated by the present case. The MPLA, W. Va. Code §§ 55-7B-1, *et seq.* recognizes the State’s interest in balancing the rights of injured patients with the ability of “health care providers” to remain in the profession of providing health care in light of liability and insurance costs. The position of pharmacies, pharmacists, and pharmacy technicians vis a vis liability issues is similar to that of other members of the health care team. In enacting the MPLA, W. Va. Code §§ 55-7B-1, *et seq.*, the West Virginia Legislature recognized the importance of offering some protection to all “health care providers,” and not just doctors, hospitals, or other specifically enumerated providers. In so doing, the Legislature contemplated that the MPLA would provide protection to the entire “health care team” in order to balance the important state interest of

an affordable and competent health care system with the rights of injured patients. Prescription drug therapy is an extremely integral part of the health care system and given the Legislature's stated intent to help maintain the health care system, it should not be disputed that the Legislature intended to include pharmacies, pharmacists, and pharmacy technicians that dispense medications to patients within the coverage of the MPLA.

A. THE LEGISLATURE'S USE OF THE PHRASE "INCLUDING, BUT NOT LIMITED TO" MUST BE GIVEN EFFECT AND THE DOCTRINE OF EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS SHOULD NOT BE APPLIED.

The Petitioners attempt to disregard the "including, but not limited to" clause in the MPLA, W. Va. Code § 55-7B-2(c), without offering any statutory or jurisprudential authority for their contention that such language should not be read to mean what it says. This plainly violates the rules of statutory construction that effect is to be given to every part of a statute under *Osborne, supra*. For similar reasons, the Legislature's use of the "including, but not limited to" clause completely undermines the Petitioners' arguments based upon the statutory construction doctrine of *expressio unius est exclusio alterius*, since the Legislature plainly did not intend for the second half of W. Va. Code § 55-7B-2(c) to be an exhaustive or exclusive list.

As set forth above, this Court has previously applied the statutory language "including, but not limited to" as a broad and inclusive language, rather than narrow and exclusive, reading of the subsequent language. The use of this language by the Legislature renders the statutory construction doctrine of *expressio unius est exclusio alterius* (the express mention of one thing implies exclusion of all others) inapplicable. This doctrine only applies when the Legislature explicitly limits application of a doctrine or rule to one specific factual situation. *State ex rel. Riffle v. Ranson*, 195

W. Va. 121, 464 S.E.2d 763, 770 (1995). Here, the Legislature did not explicitly limit the definition of “health care provider,” rather it specifically included the language “included, but not limited to” to indicate a broad and inclusive application. Every part of the definition statute must be given effect and, accordingly, the application of the doctrine of *expressio unius est exclusio alterius* cannot be properly applied to interpret the MPLA. *See also, Henry v. Mylan Pharmaceuticals, Inc.*, 2005 U.S. Dist. LEXIS 36692 (W.D. Mo. 2005)(similar inclusive language in Missouri’s statutory definition of “health care provider” precluded the application of the doctrine).

B. THE PETITIONERS' LEGISLATIVE AFFIDAVITS AND THE SUBSEQUENT FAILURE OF THE LEGISLATURE TO SPECIFICALLY ADD PHARMACIES AND PHARMACISTS IN THE LISTING OF “HEALTH CARE PROVIDERS” IS NOT APPROPRIATE FOR THIS COURT’S CONSIDERATION.

As set forth above, the plain wording of W. Va. Code § 55-7B-2(c) shows a clear and unambiguous legislative intent to consider any entity or person licensed and certified to provide health care or professional health services to be a “health care provider” under the MPLA. Accordingly, it is unnecessary and improper to look beyond the wording of the Act by using outside “evidence” of legislative intent. A statute is open to such construction “only where the language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning.” *Subcarrier Communications, Inc. v. Nield*, 218 W. Va. 292, 624 S.E.2d 729, 734-35 (2005); citing *Sizemore v. State Farm General Insurance Co.*, 202 W. Va. 591, 596, 505 S.E.2d 654, 659 (1998). As set forth above, the subsection at issue in this case, when read in its entirety, is not ambiguous or susceptible of any construction other than as an inclusive and non-exclusive definition of “health care providers” that includes any entity licensed or certified to

provide health care or professional health services. Furthermore, the construction of the subsection as being inclusive so as to include pharmacies, pharmacists, and pharmacy technicians who are licensed or permitted to provide health care and professional health services, is not doubtful or obscure due to the numerous and explicit recognitions throughout the West Virginia Code of pharmacies and pharmacists as being “health care providers” and members of the health care team. When the language of a statute is plain, the language, and not some divination of the legislative intent behind the language, controls. *See, Napier v. Board of Education*, 214 W. Va. 548, 552-53, 591 S.E.2d 106, 110-11 (2003). As the inclusive nature of W. Va. Code § 55-7B-2(c) is clear and unambiguous, the Petitioners’ purported evidence of an alternate legislative intent to somehow exclude pharmacies, pharmacists, and pharmacy technicians from the definition of “health care provider” is without any weight or merit. However, it bears pointing out that, even if legislative intent beyond the clear and unambiguous language of W. Va. Code § 55-7B-2(c) is necessary to be examined, the “evidence” presented by the Petitioners in this case is not proper evidence of legislative intent.

The Petitioners suggest that this Court should rely upon affidavits of five individuals who were members of the West Virginia Legislature in 1986 and served on the Conference Committee appointed to come to a final version of the MPLA for presentation to both houses of the Legislature.¹⁸ “Ordinarily, a court cannot consider the individual views of members of the Legislature or city counsel which are offered to prove the intent and meaning of a statute or

¹⁸ One of the affidavits is signed by J. Robert Rogers, attorney for the Petitioners. Ironically, even though Mr. Rogers tendered an affidavit to this Court, his law firm provided a Certificate of Merit to the Respondent pursuant to W.Va. Code § 55-7B-6 affirmatively and voluntarily acknowledging that pharmacies and pharmacists are “health care providers” under the MPLA. *See*, Exhibit A of Response Objecting to the Docketing of the Certified Question.

ordinance after its passage and after litigation has arisen over its meaning and intent.” *Cogan v. Wheeling*, 166 W. Va. 393, 396, 274 S.E.2d 516, 518 (1981); *see also, Harvey v. City of Elkins*, 65 W. Va. 305, 64 S.E. 247 (1909). Accordingly, even if legislative intent beyond the plain language of W. Va. Code § 55-7B-2(c) and other sections of the West Virginia Code was at issue, the Petitioners’ proffered affidavits are not proper proof of such intent.

In their Brief, the Petitioners cite a California case, *Silver v. Brown*, 63 Cal.2d 841, 48 Cal. Rptr. 609, 409 P.2d 689 (1966), for the proposition that affidavits of legislators are admissible as an aid in ascertaining legislative intent, even going so far as to suggest that this Court incorporate this idea into West Virginia’s common law by making it a syllabus point in any published decision rendered on the certified question. Not only does the Petitioners’ proposed syllabus point directly contradict established West Virginia precedent, it does not reflect the California court’s actual decision in *Silver*.

The *Silver* case involved legislation designed to re-apportion and re-district both houses of the California legislature. The enacted legislation contained numerous technical errors, particularly in its description of the new district boundaries. The court found that the errors rose to such a level as to render the re-apportionment improper and in violation of both the United States and California constitutions if the boundary description errors, were to be given literal effect. In this narrow context, the California Supreme Court approved the use of legislator affidavits for the limited purpose of properly defining district boundaries so as to avoid malapportionment. The Court specifically limited its use of affidavits to this “peculiar problem,” and further qualified its use of the affidavits due to the extraordinary circumstances present at the time concerning legislative apportionment under a recent United States Supreme Court decision. 409 P.2d at 692.

Silver does not stand for the general proposition put forward by the Petitioners. It represents a special solution to an extraordinary issue. See, *City of Sacramento v. Pub. Employees' Retirement Sys.*, 22 Cal. App. 4th 786, 796-97 (Cal. App., 3rd Dist. 1994). *Silver* provides no basis or justification for the Petitioners' use of legislators' affidavits in the present matter. The law in West Virginia is clear that the Petitioners' proffered affidavits are not properly used to establish Legislative intent and therefore, they should be disregarded in this case.

The Petitioners also attempt to rely upon the non-passage of a proposed 2005 bill that would have expressly added pharmacies and pharmacists to the non-exclusive listing of "health care providers" in W. Va. Code § 55-7B-2(c). This Court has recognized that, in a situation where the Legislature has failed to amend a statute, that failure to amend can be given two implications; either the Legislature believed the statute was clear as written or that the Legislature did not intend to reach the result that would be effectuated by the amendment. *Miners in General Group v. Hix*, 123 W. Va. 637, 656-57, 17 S.E.2d 810, 820 (1941) *overruled on other grounds by Lee-Norse Co. v. Rutledge*, 170 W. Va. 162, 291 S.E.2d 477 (1982). In *Hix*, unlike the current case, the amendment that was not passed would have substantially changed the statute at issue, in that it would have allowed for previously-disallowed unemployment benefits for voluntarily striking miners. Accordingly, this Court in *Hix* took the subsequent failure to amend as a non-decisive indication that the Legislature did not intend the statute at issue to permit the payment of unemployment benefits to striking miners.

In this case, the 2005 amendment would not have substantially changed the definition of "health care provider," it would have simply explicitly added pharmacies and pharmacists to the non-exclusive listing of "health care providers." Under *Hix*, the Legislature's failure to pass the bill adding the explicit listings of pharmacies and pharmacists is more likely evidence of the

Legislature's belief that such an addition would be redundant and pointless in the face of the clear two-prong standard for determining which entities are "health care providers," which pharmacies and pharmacists meet as set forth above.¹⁹ Of course, this analysis is of limited utility due to the clear inclusive wording of W. Va. Code § 55-7B-2(c) and the lack of need to resort to attempting to determine the legislative intent behind the statute.

IV. THE PETITIONERS' ARGUMENTS REGARDING THE BOONE COUNTY CIRCUIT COURT'S CONSIDERATION OF THE ORDERS ENTERED IN THE *MCDOWELL V. RITE AID* AND *SHAFFER V. RITE AID* CASES ARE WITHOUT MERIT.

The Petitioners challenge the Boone County Circuit Court's citation of a Dismissal Order entered in the unreported Circuit Court decisions of *McDowell v. Rite Aid of W. Va., Inc.*, Civil Action No. 04-C-174-S (Mercer Co. Cir. Ct. 2004)(*See*, Exhibit E of Response Objecting to the Docketing of the Certified Question) and further challenge the Respondent's citation below to an Order in *Shaffer v. Rite Aid of W. Va., Inc.*, Civil Action No. 03-C-1480 (Kanawha Co. Cir. Ct. 2003)(*See*, Exhibit F of Response Objecting to the Docketing of the Certified Question) regarding expert designations under the MPLA. The Petitioners' arguments regarding these orders are without merit.

Rite Aid is unaware of any party claiming in the instant matter that the Circuit Court Orders entered in *McDowell* and *Shaffer* are controlling on this Court or were controlling on the Boone County Circuit Court. Furthermore, Rite Aid is unaware of any reliance of the Boone County Circuit Court on *McDowell* and/or *Shaffer* as controlling law. Rite Aid would argue that the reasoning of the orders at issue, particularly that entered in *McDowell*, is persuasive and is properly looked at by

¹⁹ Indeed, if the Legislature was so intent on excluding pharmacies and pharmacists from the clear definition of health care provider, why has it not passed a bill specifically amending the MPLA to reflect such an exclusion, as it explicitly excluded pharmacies under W. Va. Code § 16-29D-2(c)? *See*, footnote 11, *infra*.

other Circuit Courts as a non-controlling indication of how other judges and courts have treated the issue of whether pharmacies, pharmacists, and pharmacy technicians are “health care providers” under the MPLA.²⁰

CONCLUSION

Based upon the foregoing discussion, this Court should examine the certified question of whether licensed community pharmacies are “health care providers” under the Medical Professional Liability Act (“MPLA”), W. Va. Code §§ 55-7B-1, *et seq.* and it should conclude that the Circuit Court of Boone County answered this question correctly in its June 2, 2006, Certification Order and, on that basis, affirm the Circuit Court’s ruling in this case.

RITE AID OF WEST VIRGINIA, INC.,
By Counsel,

LEWIS GLASSER CASEY & ROLLINS, P.L.L.C.



G. Nicholas Casey, Jr. (W. Va. No. 666)
Webster J. Arceneaux, III (W. Va. No. 155)
Michael J. Folio (W. Va. No. 6314)
Steven B. Wiley (W. Va. No. 9373)
Post Office Box 1746
Charleston, West Virginia 25326

²⁰ The Petitioners set forth in their Brief alternative grounds to disregard these orders based on their collateral investigation of the same. Undersigned counsel would merely represent to the Court that they were involved in both cases representing Rite Aid and that the Orders are a direct result of bench rulings made by each of the respective courts after arguments related to the effect of the MPLA upon Rite Aid. In each instance, as reflected in the Orders, the Circuit Courts agreed that Rite Aid was a “health care provider” to be afforded the protections of the MPLA. In any event, the un-sworn and self-serving factual allegations of the Petitioners’ counsel are of no import and should be disregarded by this Court.