

No. 33335

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

ALLISON J. RIGGS and
JACK E. RIGGS, M.D.,

Appellants/Plaintiffs,

v.

From the Circuit Court of
Monongalia County, West Virginia
CIVIL ACTION NO. 01-C-147

WEST VIRGINIA UNIVERSITY
HOSPITALS, INC.,

Appellee/Defendant.

BRIEF OF APPELLEE

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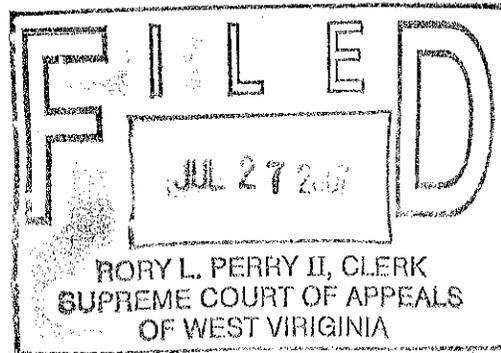


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To The Honorable Justices Of
The Supreme Court Of Appeals Of West Virginia

I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

On or about March 16, 2001, the Appellants filed a civil action against West Virginia University Hospitals, Inc. (hereinafter "WVUH") alleging claims of medical professional liability pursuant to West Virginia Code §57-7B-1, *et seq.* and arising out of an infection sustained by Allison Riggs which the Appellants alleged was contracted during surgery performed at WVUH on April 4, 1995.

The trial of Appellants' claims against WVUH commenced in the Circuit Court of Monongalia County, West Virginia on August 22, 2006, and concluded on September 2, 2006, when the jury returned a verdict in favor of Appellants in the amount of \$84,989.39 for past medical expenses and \$10,000,000.00 for non-economic damages.

On September 12, 2006, Judge Robert B. Stone entered judgment in favor of the Appellants in the amount of \$84,989.39 for past medical expenses and \$1,000,000.00 for non-economic damages after applying the non-economic damages cap established by West Virginia Code §55-7B-8. Appellants subsequently filed post-trial motions seeking, *inter alia*, reinstatement of the full jury verdict for non-economic damages. In their motion, Appellants asserted for the very first time, in a litigation that had gone on for more than five (5) years, that this was not a medical malpractice action and that, consequently, their claims were not governed by the West Virginia Medical Professional Liability Act, West Virginia Code § 55-7B-1, *et seq.* Such a position is completely contrary to every argument Appellants have made in this case since its inception.

At no time prior to the trial court reducing the jury's non-economic verdict did the Appellants ever characterize their claims against WVUH as anything other than a medical

malpractice claim nor did they ever seek to apply any standard or law other than the MPLA. Accordingly, the trial correctly ruled that the MPLA did apply, specifically finding that the infection control practices of WVUH were “in the nature of rendering health care services.” (9/29/06 Tr. at 7-8). Thereafter, on October 26, 2006 the trial court entered its “Order Concerning Post Trial Motions and Final Judgment Order” which denied Appellants’ Motion to Reinstate Damages Awarded in the Jury Order. It is from this Order that the Appellants now appeal.

II. RESPONSE TO ASSIGNMENT OF ERROR

Appellee and defendant below, West Virginia University Hospitals, Inc., asserts that the trial court properly concluded that 1) infection control practices and services are encompassed within the definition of “health care” as that term is defined by West Virginia Code §55-7B-2(a) and “health care services” referred to in West Virginia Code §55-7B-2(d); and, 2) this civil action is governed by the West Virginia Medical Professional Liability Act, West Virginia Code §55-7B-1 *et seq.*, including the \$1 million cap on non-economic damages provided for by West Virginia Code §55-7B-8. Moreover, the doctrine of judicial estoppel precludes the Appellants from now asserting that their claims are not governed by the MPLA. Accordingly, the judgment of the trial court should be affirmed.

III. STATEMENT OF FACTS

In March, 2001, the Appellants filed this civil action alleging that a *serratia* bacteria cultured from Allison Riggs’ knee in June 1999 was introduced during a surgery performed at WVUH more than four (4) years earlier in 1995. Specifically, the

Complaint alleged that WVUH negligently rendered care directly to Allison Riggs as follows:

18. At all times relating to this action, Defendants negligently failed to exercise that degree of care, skill and learning required of or expected of reasonably careful healthcare providers acting in the same or similar circumstances in treating Plaintiff, Allison J. Riggs, and such negligence was the proximate cause of Plaintiff, Allison J. Riggs' exposure to the *serratia* bacteria and resulting complications
19. As a direct and proximate result of the negligent failure of the Defendants to exercise the proper degree of skill, care and learning required of reasonable prudent healthcare providers, Plaintiff, Allison J. Riggs, was required to incur medical bills and suffer agonizing physical pain and suffering, mental anguish and anxiety and permanent physical injury

(Complaint at ¶¶ 18 and 19) (emphasis added). The allegations against WVUH contained in the Appellants' Complaint track the elements of a medical professional liability cause of action as mandated by the MPLA, W.Va. Code §55-7B-3. The Appellants specifically relate those elements directly to treatment of plaintiff, Allison J. Riggs by "the Defendants", plural, including WVUH.

In addition, Appellants further alleged that the environment at WVUH in April 1995 increased Allison's risk of contracting a *serratia* infection,¹ asserting that WVUH's negligence "increased the risk of harm" to the Appellant. (Complaint at ¶ 21). Again, such allegations echo the claims and law applicable in medical professional liability actions.

¹ WVUH and Allison Riggs had a hospital-patient relationship in April 1995, which is an essential element of a medical professional liability cause of action. Gooch v. West Virginia Dept. of Public Safety, 195 W.Va. 357, 495 S.E. 2d 628 at syl pt. 7 (1995) ("To establish a hospital-patient relationship, unless otherwise imposed by law, there must be a natural person who receives or should have received health care from a licensed hospital under a contract, expressed or implied. W.Va. Code § 55-7B-2(e). . .").

Throughout the course of this five (5) year litigation, the Appellants at all times referred to this as a “medical malpractice case” and to their claims as “medical malpractice claims.” For example, in Appellants Motion to Compel discovery filed against WVUH in April, 2002, Appellants described their claims against WVUH as a “medical malpractice action” and specifically averred as follows:

At issue in this medical malpractice action is whether WVUH appropriately monitored, investigated, remediated and disclosed the presence of the *serratia* bacteria up to and including the date of Allison J. Riggs’ ACL reconstructive knee surgery procedure.

(See Motion to Compel at ¶ 3) (emphasis added).

Thereafter, when a discovery issue was the subject of a Writ of Prohibition filed with this Court by WVUH, Appellants continued to categorize their claims against WVUH as those for medical malpractice. In “Respondents’, Allison J. Riggs and Jack E. Riggs, Response to the Petition for Writ of Prohibition,” the Appellants made numerous representations to this Court identifying their claims against WVUH as claims for medical malpractice:

- (1) [T]he causal nexus between the requested *serratia* data and this medical malpractice action is substantiated by multiple expert witness disclosures. (Response at p. 5);
- (2) This medical malpractice action arises out of an intra-operative infection acquired by Allison J. Riggs. . . . (Response at p. 5);
- (3) One principal factual issue distinguishes this medical malpractice case from the typical post-operative infection case. (Response at p. 6);
- (4) At issue in this medical malpractice action is whether WVUH appropriately monitored, investigated, remediated and disclosed the presence of the *serratia* epidemic up to and including the date of Allison J.

Riggs' ACL reconstructive knee surgery procedure.
(Response at p. 6).

("Respondents", Allison J. Riggs and Jack E. Riggs, Response to the Petition for Writ of Prohibition" at pp. 5-6, filed October 22, 2002; *see also* "Plaintiffs' Fourth Supplemental Disclosure of Expert Witnesses" at p. 7, filed September 1, 2004, containing these same assertions, verbatim).

Identification of Appellants' claims in this matter as those for "medical malpractice" continued up through and including trial. In "Plaintiffs' Motion for Approval of Partial Settlement Agreement" filed on July 11, 2006, Appellants articulated their claims against WVUH as follows:

This **medical professional negligence action** alleges that physicians employed by the WVU Board of Governors and **certain infection health care providers employed** jointly by the WVU Board of Governors and West Virginia University Hospitals, Inc. ('WVUH') **deviated from the standard of care** proximately causing personal injuries and damages thereby.

("Plaintiffs' Motion for Approval of Partial Settlement Agreement" at p. 1) (emphasis added).

Thereafter, at a hearing on various motions *in limine*, the trial court inquired of Appellants' counsel as to their theory of case: "What is the malpractice in this case?" (8/14/06, Tr. at 22). In response, Appellants' counsel did not attempt to dissuade the trial court of the notion that this was a medical malpractice action, but rather a premises liability action. Instead, Appellants' counsel stated that the "standard of care" applicable to WVUH required that they "diagnose and recognize . . . an epidemic within the hospital" and thereafter that they take appropriate action to treat the "epidemic." (8/14/06, Tr. at 22-24) (emphasis added). Counsel further asserted an "informed

consent” cause of action throughout the course of the trial, alleging that WVUH had a responsibility to inform both physicians and patients within the hospital of the ongoing infection ‘epidemic.’ (8/14/06, Tr. at 24). Claims of deviation from the standard of care and informed consent fall within the parameters of the MPLA. *See Neary v. Charleston Area Medical Center, Inc.*, 194 W. Va., 329, 460 S.E.2d 464 (1995).

During voir dire, Appellants articulated their theory of liability to the jury as follows:

that the problems that [Allison Riggs] asserts that she incurred and the resulting injuries and damages she claims as a result of the hospital failing to meet the applicable standard of care in monitoring the infectious disease control procedures within the hospital and perhaps in some other ways that they were guilty of medical negligence and thereby proximately caused her injuries. As I said, I’m just trying to give you a summary of this. It’s certainly much more involved than that. . . .

(8/22/06, Tr. at 35) (emphasis added).

Appellants now conveniently assert that their claims “evolved,” seemingly admitting that their claims against WVUH began as medical malpractice, such that by the time they arrived at trial this was no longer a medical professional liability action but was actually more akin to a premises liability action. In the “Statement of the Facts of the Case” set forth in the “Brief of the Appellants,” Appellants describe their theory of liability presented at trial against WVUH, “as aptly described by the Circuit Court, involved the ‘failure to maintain a safe and proper hospital environment with respect to infection control.’” (Brief of Appellant at p.3). In reality, counsel for the Appellant flatly denied this characterization of their case, verbatim, during oral argument on formulation of the jury instructions:

MR. FARRELL: I don't want the statement that we are alleging that the hospital failed to maintain a safe and proper hospital environment with respect to infection control. That's not all my case is. My case is a little more complicated than that and a little more broad than that.

(8/31/06, Vol 1, Tr. at 83).

Instead, Appellants submitted jury instructions which tracked the elements and law applicable to medical professional liability actions pursuant to the MPLA. In fact, Appellants went so far as to propose a jury instruction reciting the preamble to the MPLA and specifically citing in the instruction "W. Va. Code § 55-7B-1 and 3 [2003]," including, *inter alia*, as follows:

The West Virginia Legislature has declared 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.

* * * *

In support of these state interests the **Legislature has declared that a health care facility, such as West Virginia University Hospitals, Inc.,** may be held financially responsible for its **medical professional negligence.**

Plaintiffs allege that West Virginia University Hospitals, Inc. deviated from the standard of care by negligently failing to properly conduct surveillance, prevention and control of a serratia epidemic proximately causing Ms. Allison Rigs to become severely ill and suffer injuries and damages.

The Court instructs the jury that **the following are elements of proof that an injury resulted from the failure of a healthcare facility to follow the accepted standard of care. . . .**

(Plaintiff's Jury Instruction No. 1) (emphasis added). Ironically, Appellants now assert to this Court that "the MPLA has no application to this case." (Brief of Appellant at p.8).

At no time, however, did the Appellants treat their claim as anything other than a claim for medical professional liability pursuant to the MPLA. Importantly, Appellants counsel actually acknowledged during the trial that the caps set forth in the MPLA **would** be applied in this case should they prevail:

MR. FARRELL: I like where you are going with it, judge, because let's say by some chance we win and **we have all these caps that come in to reduce the verdict.** If that happens, this hospital is self-insured so all those caps for the benefit of an insurance crisis I'm going to argue are inapplicable to a self-contained limit.

(8/30/06 Tr. at 126) (emphasis added). Appellants' counsel did not argue, as they do now, that the MPLA did not apply to their claims because the case did not involve health care rendered to Allison Riggs, but readily acknowledged that this case was governed by the MPLA and its caps would be applied to reduce any verdict in excess of the statutory amount. Rather, Appellants' counsel simply stated his intent to try to distinguish the self-insured status of WVUH from the purpose of the statutory caps.

When the jury ultimately returned a verdict in favor of Appellants which included an award of \$10,000,000.00 for non-economic damages, the trial court applied the MPLA cap, as predicted by Appellants' counsel, to reduce the verdict in accordance with the statute. It was then, for the very first time, that Appellants raised their novel argument that this was not an MPLA action because WVUH had not provided a health care service to Allison Riggs. The trial court was not persuaded by Appellants' new theory and subsequently denied their motion to reinstate the full jury verdict award. It is this Order from which the Appellants now appeal.

IV. TABLE OF POINTS AND AUTHORITIES RELIED UPON

Cases

Banfi v. American Hospital for Rehabilitation, 207 W.Va. 135,
529 S.E.2d 600 (2000) 25

Banker v. Banker, 196 W. Va. 535, 474 S.E.2d 465 (1996). 23

Bell v. Maricopa Med. Ctr., 755 P.2d 1180 (Ariz. Ct. App. 1988). 32

Boggs v. Camden-Clark Memorial Hospital, 216 W. Va. 656,
609 S.E.2d 917 (2004). 24-25

Bullman v. D & R Lumber Company, 195 W. Va. 129, 464 S.E.2d 771 (1995). 23

Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E. 2d 415 (1995). 11

Consumer Advocate Division v. Public Service Commission, 182 W. Va. 152,
386 S.E.2d 650 (1989). 24

Cross v. Trapp, 170 W.Va. 459, 294 S.E. 2d 446 (1982). 28

Donley v. Bracken, 192 W. Va. 383, 452 S.E.2d 699 (1994) 24

E.H. v. Martin, 428 S.E.2d 523 (W.Va. 1993) 12

Gooch v. West Virginia Dept. of Public Safety, 195 W.Va. 357,
495 S.E. 2d 628 (1995) 3

Goodwin v. Hale, 198 W. Va. 554, 482 S.E.2d 171 (W. Va. 1996) 30-31

Gray v. Mena, 218 W.Va. 564, 625 S.E. 2d 326 (2005) 24

Hollen v. Linger, 151 W. Va. 255, 151 S.E.2d 330 (W. Va. 1966) 31

Hubbard v. State Farm Indem. Co., 213 W. Va. 542, 584 S.E. 2d 176 (W.Va. 2003). . . 12

Matheny v. Fairmont General Hospital, Inc., 212 W. Va. 740,
575 S.E.2d 350 (2002). 30-31

Neary v. Charleston Area Medical Center, Inc., 194 W. Va. 329,
460 S.E.2d 464 (1995) 5

Pegram v. Herdich, 530 U.S. 211 (2000) 12

Phillips v. Larry's Drive-In Pharmacy, Inc.,
(W. Va. Slip Op. 33194, filed June 28, 2007) 24-27

Reynolds v. City Hospital, Inc., 207 W. Va. 101, 529 S.E.2d 341 (2000) 32

Short v. Appalachian OH-9, Inc., 203 W. Va. 246, 507 S.E.2d 124 (1998)..... 26

State ex rel. Frazier v. Meadows, 193 W. Va. 20, 454 S.E.2d 65 (1994). 24

State ex rel. Weirton Medical Center v. Mazzone, 214 W.Va. 146,
587 S.E. 2d 122 (2002) 29

State of West Virginia v. Morgan Stanley & Co., Inc., 459 S.E.2d 906 (W. Va. 1995).. 30

Vaughn v. Mem'l. Hosp., 100 W.Va. 290, 293, 130 S.E. 2d 481 (1925) 28

Walker v. West Virginia Ethics Comm'n, 201 W.Va. 108, 492 S.E. 2d 167 (1997). . . . 11

West Virginia Dept. of Transp. v. Robertson, 217 W. Va. 497,
618 S.E. 2d 506 (2005) 11-13, 17

Statutes

W.VA. CODE §18-11C-4(d) (1984) 28

W.VA. CODE § 55-7B-1, *et seq.* West Virginia Medical Professional Liability Act (1986)

W.VA. CODE § 55-7B-1 1-2, 6, 8, 11, 25, 33

W.VA. CODE § 55-7B-2(a) 2, 19-20, 29, 33

W.VA. CODE § 55-7B-2(c) 19, 26, 27

W.VA. CODE § 55-7B-2(d) 2, 22, 33

W.VA. CODE § 55-7B-2(e) 2, 23

W.VA. CODE § 55-7B-3. 6, 13-15

W.VA. CODE § 55-7B-6. 14

W.VA. CODE § 55-7B-7. 14

W.VA. CODE § 55-7B-8. 2, 19, 33

W.VA. CODE § 55-7B-9(g) 28

Additional Authorities

Cleckley, Davis and Palmer, LITIGATION HANDBOOK, § 3(f) (Supp. 2005). 13, 17

V. STANDARD OF REVIEW

Appellants seek reversal of the trial court's interpretation and application of the West Virginia Medical Professional Liability Act's limitation on non-economic losses and, consequently, reduction of the non-economic damage award to \$1,000,000.00 in accordance therewith. Where, as here, the issue on an appeal from the trial court is a question of law or involves an interpretation of a statute, this Court applies a *de novo* standard of review. Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E. 2d 415 at syl. pt. 1 (1995); Walker v. West Virginia Ethics Comm'n, 201 W.Va. 108, 492 S.E. 2d 167 at syl. pt. 2(1997).

VI. LAW AND ARGUMENT

A. **Appellants Are Estopped From Asserting That This Action Is Not Governed By The MPLA**

Since the inception of this case more than five (5) years ago, Appellants have characterized their claims against WVUH as those for "medical malpractice" and medical professional liability governed by the Medical Professional Liability Act, W. Va. Code § 55-7B-1, *et seq.* ("MPLA"), and specifically requested that the jury be instructed on the law applicable to such claims. Ultimately, the Appellants were successful in this action based upon the jury's application of the MPLA to the facts of this case. Consequently, the law prohibits the Appellants from now changing their argument and the law applicable to their claims. The doctrine of judicial estoppel precludes the Appellants "from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." West Virginia Dept. of Transp. v.

Robertson, 217 W. Va. 497, 504, 618 S.E. 2d 506, 513 (W. Va. 2005) (quoting Pegram v. Herdich, 530 U.S. 211, 227 n.8 (2000)).

This Court has specifically recognized that “[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.” Id. (citing Hubbard v. State Farm Indem. Co., 213 W. Va. 542, 552, 584 S.E. 2d 176, 186 n.21 (W.Va. 2003)); see also E.H. v. Martin, 428 S.E.2d 523 (W.Va. 1993) (holding that “[p]arties will not be permitted to assume successive inconsistent positions in the course of a suit or a series of suits in reference to the same fact or state of facts.”).

It was only after reduction of the jury verdict that the Appellants decided that application of the MPLA, while to their benefit during the trial phase, is to their financial detriment in the post-trial phase. However, the doctrine of judicial estoppel bars the Appellants from making a convenient change of position, inconsistent with their stated position during the entirety of the litigation and trial, when: 1) the party assumed a position on the issue that is completely inconsistent with a position taken earlier in the same case; 2) the positions were taken in proceedings involving the same adverse party; 3) the party taking the inconsistent positions received some benefit from his/her original position; and, 4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process. Robertson, 618 S.E. 2d at 515. Furthermore, the doctrine of judicial estoppel “bars contradicting a court’s determination that was based on

that party's position." *Id.* at 513 (citing *Cleckley, Davis and Palmer*, LITIGATION HANDBOOK, § 3(f) (Supp. 2005)).

A review of the Complaint filed in this civil action reveals that since its inception, the Appellants have considered this case to be one for medical professional liability or "medical malpractice" against WVUH. For example, while the Appellants now claim that "no allegation has been made that WVUH negligently rendered care directly to Allison Riggs," the Complaint states otherwise:

18. At all times relating to this action, Defendants negligently failed to exercise that degree of care, skill and learning required of or expected of reasonably careful healthcare providers acting in the same or similar circumstances in treating Plaintiff, Allison J. Riggs, and such negligence was the proximate cause of Plaintiff, Allison J. Riggs' exposure to the *serratia* bacteria and resulting complications
19. As a direct and proximate result of the negligent failure of the Defendants to exercise the proper degree of skill, care and learning required of reasonable prudent healthcare providers, Plaintiff, Allison J. Riggs, was required to incur medical bills and suffer agonizing physical pain and suffering, mental anguish and anxiety and permanent physical injury

(Complaint at ¶¶ 18 and 19) (emphasis added). The Complaint filed by the Appellants in this matter echoes the elements of a medical professional liability cause of action as set forth in W.Va. Code §55-7B-3, and relates those elements directly to treatment of plaintiff, Allison J. Riggs by "the Defendants", plural, including WVUH.

Moreover, throughout the course of this five (5) year litigation, Appellants have repeatedly referred to this as a "medical malpractice" case or a "medical professional liability" action in various pleadings and motions. (See "Plaintiffs' Response to West Virginia University Hospitals, Inc.'s Motion for Protective Order and Motion to Quash Subpoena on Bonny McTaggart," filed March 6, 2002, asserting that "(t)his medical

malpractice action involves a horrible serratia infection suffered by Plaintiff, Allison Riggs, arising out of a surgical procedure on or about April 4, 1995”; *see also* “Plaintiffs’ Supplemental Disclosure of Expert Witnesses,” filed May 14, 2002, alleging that “(t)he Plaintiffs have conducted extensive discovery in this medical professional negligence case.”; and “Plaintiffs’ Response to Defendant’s (*sic*) Joint Motion to Strike the Opinion Testimony of David A. Stoll, M.D.,” filed August 19, 2005, stating “The true nature of the WVBOG and WVUH complaint is the nature and scope of the Affidavit of David A. Stoll, M.D. which contradicts the factual defenses asserted by the Defendants in this medical professional negligence action” (emphasis added).

More recently, in “Plaintiffs’ Motion for Approval of Partial Settlement Agreement,” filed July 11, 2006, Appellants described their claims in this matter as follows:

Comes now the Plaintiffs . . . and respectfully requests this Honorable Court to approve a partial settlement of this medical professional negligence action. **This medical professional negligence action alleges** that physicians employed by the WVU Board of Governors and **certain infection control health care providers employed jointly by the WVU Board of Governors and West Virginia University Hospitals, Inc. (“WVUH”) deviated from the standard of care proximately causing personal injuries and damages thereby.**

(emphasis added).

Consistent with the requirements of the MPLA, W.Va. Code §§ 55-7B-3, 55-7B-6 and 55-7B-7, -- and without objection to their obligation to do so --Appellants identified and presented the trial testimony of expert witnesses to establish the standard of care applicable to the WVUH infection control department and to further establish WVUH’s alleged failure to meet the standard of care.

Importantly, jury instructions submitted by the Appellants during the trial of this matter quoted extensively from the preamble and provisions of the Medical Professional Liability Act, included direct references to WVUH's "medical professional negligence," and alleged deviations from the "standard of care by failing to properly conduct surveillance, prevention and control of a *serratia* epidemic." Not only did the Appellants seek to have the jury instructed as to the law applicable to medical professional liability actions, Appellants' proposed verdict form similarly made direct references to the elements of proof required by the MPLA, W.Va. Code § 55-7B-3. At no time did the Appellants seek to have the court instruct to the jury as to any law other than the provisions of the MPLA, nor did they ever make reference to the law applicable to a premises liability action as they would now assert this matter to be. Consequently, in the "Judge's Charge to Jury," Judge Stone made repeated references to this matter as involving claims of "medical negligence."

Most importantly, and as requested by the Appellants, Judge Stone specifically instructed the jury as to the elements of a medical professional liability cause of action, tracking the requirements and language of the MPLA, including the following:

The Court further instructs you that in cases involving allegations of **medical negligence**, the law recognizes that the complexity of the human body and medical science places questions as to **standard of medical care** beyond the knowledge of the average lay person. Therefore, the law requires that expert medical testimony be presented to establish the standard of care to be exercised by **medical care providers**, whether the defendants' conduct amounted to a deviation from this appropriate **standard of care**, and whether any **deviation from the standard of care** was a proximate cause of the injuries and damages of the plaintiff.

The jury is instructed that **the medical care providers against whom medical negligence is asserted, that is, the healthcare providers at West Virginia University Hospitals**, by virtue of their education, training and experience, are qualified and entitled to give opinion testimony concerning **the medical issues in this case** as are the medical experts called by either the plaintiffs of the defendant in this case. . . .

* * * *

For plaintiffs to recover on their claims, they must prove to you by a preponderance of the evidence that **the defendant was negligent in its care and treatment of Allison J. Riggs** by failing to maintain a safe and proper hospital environment with respect to infection control, and that its negligence was also a proximate cause of Allison J. Riggs' injuries and damages.

Healthcare providers owe the patients they treat a duty to refrain from medical negligence. "**Medical malpractice or negligence**" is the failure **to treat a patient** in accordance with the degree of care, skill and learning required of a reasonably prudent **health care provider** in the profession or class to which the defendant belongs acting in the same or similar circumstances which proximately causes injury to the patient. That is, **a healthcare provider** must have and use the same knowledge and skill and exercise the same care as that which is usually had and exercised in the **medical profession**. **A healthcare provider** whose conduct does not meet this **standard of care** is negligent.

The Court instructs you that at various times throughout this trial you have heard the term "**standard of care**." That term means the level of **medical care** that should be given by a **healthcare provider** in a given class at a given time and which is reasonably prudent under the circumstances. It is what you find from the evidence to be what is reasonable for a prudent and competent **healthcare provider** engaged in the same or similar practice to have done under the same set of circumstances.

The standard of care for medical professionals and healthcare providers is a national standard of care. **West**

Virginia University Hospitals is a healthcare provider under the law.

“Judge’s Charge to Jury,” pp. 5, 10-11). If it is now Appellants’ position that this was never a medical professional liability action, but rather something else, then the trial court improperly instructed the jury on the law to be applied in this case and such improper instructions prejudiced WVUH and constitute reversible error.

Nevertheless, at no time prior to the trial court’s reduction of the jury award did the Appellants consider this case to be anything other than a medical professional liability action under the MPLA. Rather, at all times prior hereto, the Appellants pursued their action against WVUH as a medical professional liability governed by the MPLA and specifically requested that the jury be instructed regarding the provisions of the MPLA. And ultimately, the Appellants were successful in this claim based upon the jury’s application of the MPLA to the facts of this case. Accordingly, the law prohibits the Appellants from now changing their theory of liability and the law applicable to their claims. See Robertson, 618 S.E.2d at 513 (*citing* Cleckley, Davis and Palmer, LITIGATION HANDBOOK, § 3(f) (Supp. 2005) (Judicial estoppel “bars contradicting a court’s determination that was based on that party’s position.”)).

In the present case, the trial court obviously made a determination, based upon the repeated representations of all parties, that this was a medical malpractice case and instructed the jury accordingly. Appellants’ current position, developed only after obtaining a verdict in excess of the MPLA’s cap on recoverable non-economic damages, is blatantly disingenuous given (1) the allegations in the Complaint, (2) the manner in which the case was developed during discovery, (3) the way Appellants’ evidence was presented at trial, (4) the jury instructions submitted by the Appellants to instruct the jury

on the law applicable to this case, and (5) the trial court's charge to the jury regarding the applicable law. In fact, Appellants' counsel actually acknowledged during oral arguments regarding jury instructions that the caps set forth in the MPLA **would** be applied by the trial court should they prevail:

MR. FARRELL: I like where you are going with it, judge, because let's say by some chance we win and **we have all these caps that come in to reduce the verdict.**

((8/30/06 Tr. at 126) (emphasis added).

Appellants maintained right up until the verdict was reduced that this was a medical malpractice case. The jury was instructed as to the law applicable to such claims and the Appellants prevailed on their original position. To allow them to now assert a contrary position would be unduly prejudicial to Appellee inasmuch as WVUH prepared and presented a defense to Appellants' medical malpractice action, and its heightened standard of care, rather than a simple negligence or premises liability claim.

The doctrine of judicial estoppel precludes the Appellants from succeeding under one theory of liability and subsequently seeking to appeal based upon another. The trial court instructed the jury on the law applicable to medical malpractice actions and that is the law which the jury was required to apply to reach their verdict. If the jury was instructed as to the wrong standard to apply and, thereafter, applied that incorrect standard in reaching their verdict, then WVUH has been severely prejudiced in this matter. (*See* discussion *infra* at Part VI.C). As such, the Appellants should now be estopped from claiming that this is not a medical malpractice action governed by the Medical Professional Liability Act.

B. Appellants' Claims Are Governed By The Provisions Of The MPLA.

Should this Court determine that the doctrine of judicial estoppel does not apply, infection control is, nevertheless, an essential and basic health care service provided to all patients during their hospitalization and claims arising out of that service fall with the purview of the West Virginia Medical Professional Liability Act. By its terms, the MPLA governs "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." W. VA. CODE § 55-7B-8 (1986). Thus, whether the Appellants' claims against WVUH are governed by the MPLA is determined by a review of the definition of "health care" as contained in the MPLA:

any act . . . 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.

W.VA. CODE §55-7B-2(a) (1986) (emphasis added). For purposes of this statute, "health care provider" specifically includes a "**hospital**" or "any officer, employee or agent thereof acting in the course and scope of such officer's, employee's or agent's employment." W.VA. CODE §55-7B-2(c) (1986) (emphasis added).

1. **Infection control services are "health care" as defined by the MPLA.**

The MPLA unambiguously defines health care as "**any act . . . performed . . .** or which should have been performed . . . by any health care provider **for**, to, or **on behalf of a patient** during the patient's medical care, treatment or confinement." W.VA. CODE

§55-7B-2(a) (1986) (emphasis added). This definition specifically contemplates the provision of health care services by a health care provider for, and not just “directly to,” a patient.

At issue in this case are the practices and procedures of WVUH which comprise “infection control,” specifically including the alleged acts and/or omissions of Rashida Khakoo, M.D., an epidemiologist, and nurse practitioner Bonnie McTaggart, RN. Ms. McTaggart served as the Infection Control Practitioner for the Infection Control Department at WVUH. This job required a nurse with clinical experience in a hospital setting and a working knowledge of the principals of epidemiology and infectious disease. (Plaintiffs’ Exhibit No. 18). Ms. McTaggart’s additional job duties included, *inter alia*:

- (1) Detecting and recording of nosocomial infections on a systemic and current basis;
- (2) Analyzing nosocomial infections in collaboration with the hospital epidemiologist (Dr. Khakoo);
- (3) Preparing a monthly report for the hospital infection control committee;
- (4) Advising other healthcare workers regarding the hospitals isolation policy and the disposition of patients admitted with infections;
- (5) Epidemiologic investigation of all significant clusters of infections above the expected level, together with the hospital epidemiologist (Dr. Khakoo);
- (6) Assisting in the development and implementation of approved infection control measures;
- (7) Assisting with in-service training programs related to infection prevention and control;

- (8) If directed by the hospital epidemiologist, be responsible for the liaison with local health department in reporting infectious disease in the hospital; and
- (9) Responsible to the administration, the Department of Nursing and infectious disease section of the hospital.

(8/24/06, Tr. at 87-95; Plaintiffs' Exhibit No. 18).

The primary responsibility of these medical professionals performing infection control at WVUH is to provide patients with "all possible protection from the development of infections, including the diagnosis, monitoring, and prevention of nosocomial infections." (8/24/06, Tr. at 96; Plaintiffs' Exhibit No. 18). At trial, it was established that infection control surveillance is designed "to meet the requirement of the Joint Commission of Accreditation of Healthcare Organizations in the accepted standards of patient care." (8/24/06, Tr. at 97) (emphasis added). As stated by Appellants' infection control practitioner and expert, Ruth Carrico, "it's a programmatic process and each one of these individuals is a patient that has entered the hospital that expects us to provide them with safe care. . . ." (8/23/06, Tr. at 175) (emphasis added).

In questioning their infectious disease expert, Dr. Martin Raff, Appellants delineated for the jury the duty of the WVUH Department of Infection Control as follows:

Q: [Mr. Farrell] Describe for me what you believe is the role of a department of infections control and what duty it owes to the patients at a health care facility?

A: [Dr. Raff] Well, the first is surveillance. That is keeping a steady eye out on the types of bacteria that are being isolated in the facility, locating the areas in the facility in which they have been isolated. . . . And then once having identified the presence of an outbreak, it's the committee's duty to sit down and make a determination of how to interrupt that outbreak and also to educate the

medical staff, the nurses, doctors, and so on that this is in process so that they will have a greater awareness and therefore take greater precautions in trying to prevent infections with this organism.

That's the basic role of a committee. A committee is not there just to collect data and then to present it at a meeting. It's – the purpose of infection control committee is to control infection.

(8/24/06, Tr. at 23-24) (emphasis added).

The alleged breach of the standard of care by WVUH is premised on medical services -- the diagnosis, surveillance, monitoring and prevention of infections -- performed by licensed medical professionals, Dr. Khakoo and Bonnie McTaggart, RN, as part of the patient care rendered by WVUH to all of its patients. In fact, as hospital services go, infection control is one of the most fundamental and important services rendered by a hospital to its patients. WVUH's alleged breach of the standard of care with respect to infection control falls squarely within the MPLA's definitions of both health care and medical professional liability.

As set forth previously, the MPLA includes in its definition of "medical professional liability" all "health care services rendered, or which should have been rendered, by a health care facility to a patient." See W.VA. CODE 55-7B-2(d) (emphasis added). Appellants' claims against WVUH in this matter are, therefore, governed by the MPLA notwithstanding that the alleged breach of the standard of care was not the result of "hands-on" treatment provided by a particular nurse or physician directly to Allison Riggs.

2. The MPLA governs claims involving health care rendered for and/or on behalf of patients and not merely those services rendered “directly” to an individual patient.

It is undisputed that WVUH qualifies as a health care provider within the terms of the MPLA. In fact, the jury in this action was specifically so instructed by the trial court: “West Virginia University Hospitals is a healthcare provider under the law.” (Judge’s Charge to Jury at p. 10).

Likewise, it is undisputed that Allison Riggs was a “patient” at WVUH during the relevant procedure. The MPLA defines a “patient” as “a natural person who receives or should have received health care from a licensed health care provider under a contract, expressed or implied.” W.VA. CODE §55-7B-2(e) (1986). So, in their effort to avoid the damage cap, the only thing that the Appellants can now attempt to dispute is whether or not the infection control services provided by WVUH for and on behalf of all its patients are tantamount to health care services rendered to Allison Riggs. In so doing, the Appellants argue that WVUH did not render health care “directly to” Allison Riggs by virtue of not “laying hands” on her.

However, “health care,” as defined by the MPLA, is not limited to medical care or treatment rendered “directly” to a patient. A review of the statute establishes that the words “direct” or “directly” are not contained anywhere within the definition of “health care” or “medical professional liability.” Consequently, this Court cannot add words to the statute which are not there: “Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obligated 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) (citing Bullman v. D & R Lumber Company, 195 W.

Va. 129, 464 S.E.2d 771 (1995); Donley v. Bracken, 192 W. Va. 383, 452 S.E.2d 699 (1994)); *see also*, State ex rel. Frazier v. Meadows, 193 W. Va. 20, 24, 454 S.E.2d 65, 69 (1994) (“Courts are not free to read into the language what is not there, but rather should apply the statute as written.”).

Moreover, “[a] statute . . . may not, under the guise of ‘interpretation,’ be modified, revised, amended or rewritten.” Consumer Advocate Division v. Public Service Commission, 182 W. Va. 152, 386 S.E.2d 650, syl. pt. 1 (1989). To interpret the MPLA as urged by the Appellants would require this Court (1) to ignore the inclusion of services provided “for” and/or “on behalf of” of a patient within the definition of “health care,” and (2) to insert the word “directly” into the phrase defining how the service must be rendered to the patient within the definition of “medical professional liability.” Such a strained reading would require this Court to rewrite the West Virginia Medical Professional Liability Act.

In support of their “interpretation” of the MPLA, Appellants focus on the fact that Rashida Khakoo, M.D. and Bonny McTaggart, RN did not provide “hands-on” medical treatment to Allison Riggs. In so doing, they point to this Court’s decisions in *Boggs v. Camden-Clark Memorial Hospital*, 216 W. Va. 656, 609 S.E.2d 917 (2004) and more recently in *Phillips v. Larry’s Drive-In Pharmacy, Inc.* (W. Va. Slip Op. 33194, filed June 28, 2007) as support for the proposition that such “hands-on” treatment is required under the MPLA. This argument is erroneous.

In *Boggs*, the Court found only that the MPLA does not apply to “intentional torts or acts ‘outside the scope of health care services.’” Boggs, 216 W.Va. 656 at 663, 609 S.E. 2d 917 at 924 (emphasis added). In the present case, Appellants’ have alleged that

WVUH negligently breached the applicable standard of care by failing to execute appropriate infection control practices resulting in Allison Riggs contracting a severe infection while she was a patient at WVUH. As such, the alleged breach of the standard of care by WVUH is neither an “intentional tort,” nor “outside the scope of health care services.”

On the contrary, infection control practices fall squarely within the scope of health care services provided by a hospital to all its patients as that term is defined in the MPLA. To this end, the Supreme Court of Appeals of West Virginia specifically recognized in *Gray v. Mena*, that its prior holding in *Boggs* was not intended to limit application of the MPLA:

the West Virginia Legislature’s definition of medical professional liability, found in West Virginia Code § 55-7B-2(i) (2003) includes liability for damages resulting from the death or injury of a person for *any* tort based upon health care services rendered or which should have been rendered. To the extent that *Boggs* suggested otherwise, it is modified.

218 W.Va. 564, 625 S.E. 2d 326 at syl. pt. 4 (2005) (emphasis in original); see also, Banfi v. American Hospital for Rehabilitation, 207 W.Va. 135, 140, 529 S.E. 2d 600, 605 (2000) (noting that “[c]laims of professional negligence arising from health care practices are generally governed by the Medical Professional Liability Act, W.Va. Code §55-7B-1 et. seq.”).

Earlier this year, this Court again addressed what claims are governed by the MPLA. In *Phillips v. Larry’s Drive-In Pharmacy, Inc.*, the Supreme Court was asked to determine whether a pharmacy is a “health care provider” within the meaning of the MPLA. The Court concluded that “because certain medical professionals are specifically

included under the MPLA, but pharmacies are not included, means that the Legislature intended to exclude pharmacies.” (Slip Op. 33194 at p.16). In so finding, this Court specifically noted that:

We believe that there is no better definition of what constitutes the medical care community, and therefore what groups and individuals are included as ‘health care provider[s]’ under the MPLA, than the unambiguous and exclusive list of defined providers in *W. Va. Code, 55-7B-2(c)*.

Id. at 17.

Despite the actual holding of this Court, the Appellants nevertheless argue that *Phillips* stands for the proposition that a medical professional must render “hands-on” treatment directly to a patient in order to fall within the purview of the MPLA. Such is not the case. On the contrary, in an effort to determine whether or not to “stretch” the MPLA to apply to a health care provider that was not specifically enumerated by the statute, this Court distinguished its decision in *Short v. Appalachian OH-9, Inc., 203 W. Va. 246, 507 S.E.2d 124 (1998)*, by noting that “first and foremost, the situation in *Short* involved a medical care provider who developed a hands-on relationship with the patient” despite not being a designated health care provider in the MPLA. Id. at 16. Thereafter, the Court noted that its holding in *Short* on this issue was “of dubious value because there is no mention of the rule of construction that statutes in derogation of the common law are to be given a narrow, not expansive and liberal, interpretation.” Id.

Ultimately, the *Phillips* Court reached its conclusion not on the basis of whether or not “hands-on” care had been rendered by the pharmacy to the plaintiff, but on the unambiguous language of the MPLA which did not include pharmacies within the definition of health care providers. Accordingly, this Court’s decision in *Phillips* does

not, as argued by the Appellants, stand for the proposition that the provision of “hands-on” care to a patient is the demarcation between what is and what is not health care pursuant to the MPLA. Rather, this Court relied upon the language of the statute and its exclusion of pharmacies from the list of recognized health care providers.

In the present case, WVUH is a hospital and hospitals are unambiguously included by the Legislature in the definition of “health care provider” as set forth in West Virginia Code § 55-7B-2(c). Moreover, the jury in this case was specifically instructed that in order for it to return a verdict in favor of the Appellants, the jury was required to find that WVUH was negligent in its “care and treatment” of the Appellant:

For plaintiffs to recover on their claims, they must prove to you by a preponderance of the evidence that **the defendant was negligent in its care and treatment of Allison J. Riggs** by failing to maintain a safe and proper hospital environment with respect to infection control, and that its negligence was also a proximate cause of Allison J. Riggs’ injuries and damages.

(“Judge’s Charge to Jury at p. 9) (emphasis added). Accordingly, the trial court correctly ruled, as the jury had been instructed, that the infection control services rendered by WVUH were in the nature of health care services within the meaning of the MPLA.

3. **WVUH’s stipulations regarding the agency of Rashida Khakoo, M.D. and Bonny McTaggart, RN do not change the nature of Appellants’ claims against WVUH.**

Appellants attempt to manipulate certain stipulations made by WVUH regarding the agency of Rashida Khakoo, M.D. and Bonny McTaggart, RN, to justify Appellants’ argument that this is not a medical malpractice case against the hospital, despite Appellants’ contrary legal position throughout this legal proceeding.

Prior to trial, Appellee made certain stipulations regarding the agency of Rashida Khakoo, M.D. and Bonny McTaggart, RN.² Neither Dr. Khakoo nor Bonny McTaggart is employed by WVUH.³ Generally, a hospital is not liable for the alleged negligence of non-employee physicians, but that is not absolute. Cross v. Trapp, 170 W.Va. 459, 294 S.E. 2d 446 (1982) (citing Vaughn v. Mem'l. Hosp., 100 W.Va. 290, 293, 130 S.E. 2d 481, 482, later app. 103 W.Va. 156, 136 S.E. 2d 837 (1925)).⁴ Because Dr. Khakoo and Bonny McTaggart, RN, were not employed by WVUH but they performed numerous duties on behalf of the Infection Control Department of WVUH during the relevant time period, they were its agents for purposes of the hospital's infection control functions and/or with respect to Allison Riggs' allegations concerning breaches of the standard of care by the hospital's infection control department. These individuals, particularly Dr. Khakoo, had various other jobs and responsibilities for patient care within the facility, individually and on behalf of West Virginia University. Consequently, the intent of these stipulations was simply to clarify and limit the scope of liability that WVUH was assuming for the alleged acts and/or omission on the part of these individuals.⁵

2 The stipulations were made before trial, but Appellants' counsel did not submit the Order incorporating those stipulations for entry until after the jury rendered its verdict.

3 As a School of Medicine faculty physician, Dr. Khakoo is an employee of the West Virginia University Board of Governors (formerly Board of Trustees). Bonny McTaggart elected to remain an employee of WVU when the Legislature created WVUH in 1984. W.Va. Code §18-11C-4(d) (1984).

4 However, see the current version of the MPLA, West Virginia Code §55-7B-9(g) (2003) which provides, in part, "[a] health care provider may not be held vicariously liable for the acts of a nonemployee pursuant to a theory of ostensible agency unless the alleged agent does not maintain professional liability insurance covering the medical injury which is the subject of the action in the aggregate of at least one million dollars." This provision of the MPLA is not applicable to the case *sub judice*.

5 Dr. Khakoo is also a West Virginia University (WVU) School of Medicine faculty physician who provides care to patients as an infectious disease specialist. In this capacity Dr. Khakoo is an employee and agent of WVU. See Burless v. WVUH, 215 W.Va. 765, 772, 601 S.E. 2d 85, 92 (2004).

Nevertheless, the hospital's stipulations do not concede or even suggest that Dr. Khakoo and Bonny McTaggart were not providing health care services at WVUH as they performed their duties with respect to infection control. Obviously, Dr. Khakoo as Medical Director of the Infection Control Department and Bonny McTaggart as Infection Control Nurse were acting as health care providers in diagnosing, monitoring, and preventing infections within the hospital. These health care services, while not rendered by applying "hands-on" to Allison Riggs,⁶ were rendered for, to and on behalf of every patient at WVUH in the provision of safe patient care. As such, both of these medical professionals were involved in "act(s) . . . performed or furnished, or which should have been performed or furnished . . . for, to or on behalf of a patient during the patient's medical care, treatment or confinement." West Virginia Code §55-7B-2(a).

Accordingly, the acts of Dr. Khakoo and Bonny McTaggart fall squarely within the definitions of the MPLA. The provisions of the Medical Professional Liability Act govern all actions falling within its parameters. *See State ex rel. Weirton Medical Center v. Mazzone*, 214 W.Va. 146, 587 S.E. 2d 122, syl. pt. 3 (2002). The trial court correctly ruled that the provisions of the MPLA, including the cap on non-economic damages, applied to the Appellants claims against WVUH and reduction of the jury award to conform to the provisions of this statute should be affirmed.

⁶ Appellants do allege that Allison Riggs contracted a *serratia* infection during surgery performed on April 4, 1995, and/or during the hospitalization attendant to that surgery. Obviously, "hands-on" care was provided to Allison Riggs by WVUH employees during this surgery and hospitalization and it is this "hands-on" care which Appellants allege was the source of Allison Riggs' infection.

formulating its charge to the jury so long as the charge accurately reflects the law. Id. The Supreme Court has specifically noted, however, that “an erroneous instruction is presumed to be prejudicial and warrants a new trial” unless it appears that the complaining party was not, in fact, prejudiced by such instruction. Id. (quoting Hollen v. Linger, 151 W. Va. 255, 151 S.E.2d 330, syl. pt. 2 (1966)).

In Goodwin v. Hale, the jury was instructed that they could only return a verdict in favor of the plaintiff if they found that the defendant had violated the “deliberate intention” elements imposed upon an employer under West Virginia Code § 23-4-2(c)(2)(ii). 482 S.E.2d 171, 174. The defendant, however, was not the plaintiff’s employer. Id.

In reviewing the case, the Supreme Court of Appeals of West Virginia noted that the defendant, non-employer, was held to the deliberate intention standard of an employer and that “simply is not the law in West Virginia. . . .” Id. Consequently, the Court determined that “[b]ecause this entire case was built upon a fallacious legal foundation that made its way through an erroneous instruction to the jury, this verdict must be set aside.” Id. at 175. In so doing, the Court specifically recognized that by remanding the case for a new trial they were requiring the plaintiff to retry their case “even though they prevailed under a heightened deliberate intention standard rather than a[n]. . . ordinary negligence standard, which is the theory of recovery the trial court should have applied.” Goodwin, 482 S.E.2d at 175.

In the present case, consistent with the West Virginia Medical Professional Liability Act, the jury was instructed that WVUH had a duty to exercise,

that degree of care, skill and learning required of a reasonably prudent health care provider in the profession or

class to which the defendant belongs acting in the same or similar circumstances. . . .That is, a healthcare provider must have and use the same knowledge and skill and exercise the same care as that which is usually had and exercised in the medical profession. A healthcare provider whose conduct does not meet this standard of care is negligent.

(Judge's Charge to Jury at p.10). This Court has specifically recognized that this is a heightened standard of care: "Within their areas of expertise, healthcare providers and other professionals are held to a higher standard of care than that of the ordinary prudent person." Reynolds v. City Hospital, Inc., 207 W. Va. 101, 108, 529 S.E.2d 341, 348 (2000) (quoting with approval Bell v. Maricopa Med. Ctr., 755 P.2d 1180, 1182-83 (Ariz. Ct. App. 1988)). In professional malpractices cases, "the reasonable man standard is therefore replaced by a standard based upon the usual conduct of other members of the defendant's profession in similar circumstances." Id.

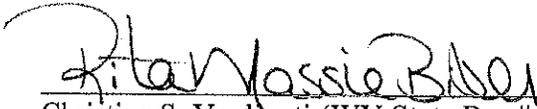
As a result, if the Appellants' claims are not, in fact, claims for medical professional liability pursuant to the MPLA, then they must be considered claims for simple negligence and determined under a different, lesser, standard of conduct. Consequently, the jury was misinstructed as to the type of case, the requirement of expert witness testimony, the standard of care, WVUH's duty, and this entire case "was built upon a fallacious legal foundation" from its very inception. Moreover, had WVUH been properly advised as to the true nature of the claims against it (and the applicable law), it may have presented a different defense, made different arguments and been held to a different standard of conduct. As such, the verdict was premised upon erroneous conclusions of law and must be set aside should this Court determine that the MPLA did not apply to Appellants' claims in this case.

VII. RELIEF PRAYED FOR

Appellee and defendant below, West Virginia University Hospitals, Inc., respectfully submits that the Order Concerning Post Trial Motions and Final Judgment Order entered by the Circuit Court of Monongalia County, West Virginia, Judge Stone, on October 26, 2006, is appropriate with respect to its denial of Appellee and Appellants' Motion to Reinstate Damages Awarded in the Jury Order. The trial court properly found that 1) the functions of WVUH's infection control department are encompassed within the definition of "health care" as that term is defined by West Virginia Code §55-7B-2(a) and "health care services" referred to in West Virginia Code §55-7B-2(d); and, 2) this civil action is governed by the West Virginia Medical Professional Liability Act, West Virginia Code §55-7B-1 *et seq.*, including the \$1 million cap on non-economic damages provided for by West Virginia Code §55-7B-8. Accordingly, the trial court's Order should be affirmed. Appellee further requests that the accrual of post-judgment interest on the judgment entered by the Circuit Court of Monongalia County, West Virginia, by order dated September 12, 2006, be suspended as of November 2, 2006, the date on which Appellants filed their Petition for Appeal.

In the alternative, should this Court determine that the Appellants' claims are not governed by the MPLA, then the jury verdict was premised upon erroneous conclusions of law and it must be set aside and this case remanded for a new trial.

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CERTIFICATE OF SERVICE

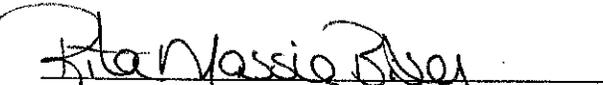
I, Rita Massie Biser, do hereby certify that I have filed and forwarded by United States Mail the "**Brief of the Appellee**" and served the same upon the following counsel of record by mailing a true copy thereof, by United States mail, postage prepaid on this 27th day of July, 2007:

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