

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
APPEAL NO. 33224

DONNA JOAN BLANKENSHIP, an individual; DENAE WILLIAMS, an infant, by LYNN WILLIAMS, Mother and Guardian of DENAE WILLIAMS; ROBERT B. ADAMS, an individual; ALBERT SHAFFER, an individual; DANNY KINDER, an individual; and KENNETH FISHER, an individual,

Appellants,

v.

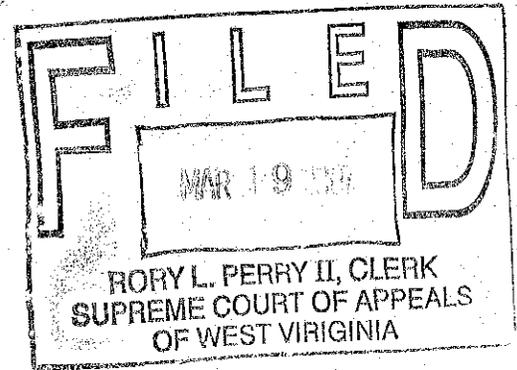
ETHICON, INC., a New Jersey corporation; JOHNSON & JOHNSON, a New Jersey corporation; JOHNSON & JOHNSON HOSPITAL SERVICES, INC., a New Jersey corporation; JOHNSON & JOHNSON HEALTH CARE SYSTEMS INC., a New Jersey corporation; SENECA MEDICAL, INC., an Ohio corporation; SKYLAND HOSPITAL SUPPLY, INC., a Tennessee corporation; AMERISOURCE MEDICAL SUPPLY, INC., a Tennessee corporation; BAXTER HEALTHCARE CORPORATION, a Delaware corporation; MCKESSON MEDICAL-SURGICAL MEDIMART INC., a Minnesota corporation; OWENS & MINOR, INC., a Virginia corporation; CHARLESTON AREA MEDICAL CENTER, INC., a West Virginia corporation; and HERBERT J. THOMAS MEMORIAL HOSPITAL ASSOCIATION, a West Virginia corporation,

Appellees.

BRIEF OF APPELLANTS

Respectfully submitted,

Marvin W. Masters
West Virginia State Bar No. 2359
The Masters Law Firm, lc
181 Summers Street
Charleston, West Virginia 25301
(304) 342-3106
Counsel for Appellants



Appeal No. 33224
Civil Action No. 03-C-1313
Circuit Court of Kanawha County
(Honorable Charles King)

TABLE OF CONTENTS

I. KIND OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL..... 1

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY..... 2

III. ASSIGNMENTS OF ERROR11

 A. It Was Error To Dismiss This Case Because West Virginia Hospitals Have A Duty To Notify Current And Former Patients When They Have Been Implanted At That Hospital With A Medical Device That Is The Subject Of A Recall.11

 B. The Circuit Court Committed Reversible Error In Granting The Harsh Sanction Of Dismissal Rather Than Permitting Petitioners Additional Time To Meet The Filing Requirements Of The MPLA.11

 C. The Circuit Court Committed Reversible Error In Dismissing All Of Petitioners’ Claims Against The Defendant Hospitals, Including Their Claims For Equitable Relief, Tort Of Outrage, Fraud And Violation Of The Consumer Credit And Protection Act.12

 D. The Circuit Court Committed Reversible Error In Concluding That All Of Plaintiffs’ Claims Are Governed And Barred By The West Virginia Medical Professional Liability Act (“MPLA”), W.Va. Code §§ 55-7B-1, *et seq.*12

 E. The Circuit Court Committed Reversible Error In Concluding That The Common Law Of West Virginia Does Not Permit Product Liability Claims To Be Made Against Health Care Providers As The Distributor Or Seller Of Products.12

IV. POINTS AND AUTHORITIES RELIED UPON12

V. DISCUSSION OF LAW.....16

 A. It Was Error To Dismiss This Case Because West Virginia Hospitals Have A Duty To Notify Current And Former Patients When They Have Been Implanted At That Hospital With A Medical Device That Is The Subject Of A Recall.16

B.	The Circuit Court Committed Reversible Error In Granting The Harsh Sanction Of Dismissal Rather Than Permitting Petitioners Additional Time To Meet The Filing Requirements Of The MPLA.	17
C.	The Circuit Court Committed Reversible Error In Dismissing All Of Petitioners' Claims Against The Defendant Hospitals, Including Their Claims For Equitable Relief, Tort Of Outrage, Fraud And Violation Of The Consumer Credit And Protection Act.	18
D.	The Circuit Court Committed Reversible Error In Concluding That All Of Plaintiffs' Claims Are Governed And Barred By The West Virginia Medical Professional Liability Act ("MPLA"), W.Va. Code §§ 55-7B-1, <i>et seq.</i>	18
E.	The Circuit Court Committed Reversible Error In Concluding That The Common Law Of West Virginia Does Not Permit Product Liability Claims To Be Made Against Health Care Providers As The Distributor Or Seller Of Products.	29
VI.	<u>PRAYER FOR RELIEF</u>	36

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>PAGE</u>
<u>Adkins v. K-Mart Corp.</u> , 204 W.Va. 215, 511 S.E.2d 840 (1998)	14, 30
<u>Boggs v. Camden-Clark Mem. Hosp. Corp.</u> , 216 W.Va. 656, 609 S.E.2d 917 (2004)	1, 11, 18, 21, 22
<u>Branch v. Willis-Knighton Medical Center</u> , 636 So.2d 211 (La. 1994)	25, 27
<u>Brawn v. Oral Surgery Associates</u> , 819 A.2d 1014 (ME. 2003)	14, 16
<u>Budding v. SSM Healthcare Sys.</u> , 19 S.W.3d 678 (Mo. 2000)	34
<u>Burch v. A. H. Robbins Co., Inc., et al.</u> , Civil Action No. 97-C-204 (1-11), Slip Opinion (March 12, 1998) (Risovich, J.).....	23, 24, 32, 33
<u>Chapman v. Kane Transfer Co., Inc.</u> , 160 W.Va. 530, 236 S.E.2d 207 (1977)	12, 13
<u>Coleman v. Deno</u> , 813 So.2d 303 (La. 2002).....	27
<u>Cox v. Paul</u> , 828 N.E.2d 907 (Ind. 2005)	16
<u>Donna Joan Blankenship, et al. v. Ethicon, Inc., et al.</u> , Civil Action No. 2:03-0622, Slip Opinion (S.D.W.Va. November 6, 2003) (Goodwin, J.)	7, 8, 10, 24
<u>Dunn v. Kanawha County Bd. Of Educ.</u> , 194 W.Va. 40, 459 S.E.2d 151 (1995).....	4, 23, 30
<u>Foster v. Memorial Hosp. Assoc. of Charleston</u> , 159 W.Va. 147, 219 S.E.2d 916 (1975).....	14, 15, 31, 32, 35
<u>Gray v. Mena</u> , 218 W.Va. 564, 625 S.E.2d 326 (2005).....	1, 11, 15, 17, 18, 21, 22
<u>Harris v. Raymond</u> , 715 N.E.2d 388 (Ind. 1999).....	14, 16
<u>Hartley v. CSX Transportation, Inc.</u> , 187 F.3d 422 (4 th Cir. 1999).....	13
<u>Holbrook v. Holbrook</u> , 196 W.Va. 720, 474 S.E.2d 900 (1996) (per curiam).....	12
<u>Ilosky v. Michelin Tire Corp.</u> , 172 W.Va. 435, 307 S.E.2d 603 (1983)	14, 30

<u>In re Breast Implant Product Liability</u> , 503 S.E.2d 445 (S.C. 1998).....	24, 34
<u>In Re: Implants I</u> , Civil Action No. 93-C-9595, Slip Opinion (December 6, 1994) (King, J.).....	23, 32, 33, 34
<u>John W. Lodge Distrib. Co. v. Texaco, Inc.</u> , 161 W.Va. 603, 245 S.E.2d 157 (1978).....	12, 13
<u>Mandolidis v. Elkins Indus., Inc.</u> , 161 W.Va. 695, 246 S.E.2d 907 (1978).....	12, 13
<u>Marshall v. Manville Sales Corporation</u> , 6 F.3d 229 (4 th Cir. 1993).....	13
<u>McCormick v. Walmart Stores, Inc.</u> , 2004 W.Va. Lexis 26 (W.Va. 2004) (per curiam)....	12
<u>Monahan v. Weichart</u> , 82 A.D.2d 102, 442 N.Y.S.2d 295 (4 th Dep't 1981).....	14, 16
<u>Morningstar v. Black & Decker Mfg. Co.</u> , 162 W.Va. 857, 253 S.E.2d 666 (1979).....	14, 30, 31
<u>Netherland v. Ethicon, Inc.</u> , 813 So.2d 1254 (La. App. 2 nd Cir.), <u>writ denied</u> , 819 So.2d 339 (La. 2002)	29
<u>Osborne v. United States</u> , 211 W.Va. 667, 567 S.E.2d 677 (2002).....	20
<u>Providence Hospital v. Truly</u> , 611 S.W.2d 127 (1980).....	33
<u>Pullano v. City of Bluefield</u> , 176 W.Va. 198, 342 S.E.2d 164 (1986).....	13, 19, 35
<u>Pumphrey v. C.R. Bard, Inc.</u> , 905 F.Supp. 334, N.D.W.Va. (1995).....	13, 16, 33
<u>Seagraves v. Legg</u> , 147 W.Va. 331, 127 S.E.2d 605 (1962).....	13, 19
<u>Sesco v. Norfolk and Western Ry. Co.</u> , 189 W.Va. 24, 427 S.E.2d 458 (1993) (per curiam)	12, 13
<u>Sewell v. Doctors Hospital</u> , 600 So.2d 577 (La. 1992).....	27, 28
<u>Star Furniture Co. v. Pulaski Furniture Co.</u> , 171 W.Va. 79, 297 S.E.2d 854 (1982).....	14, 30
<u>State v. Hosea</u> , 199 W.Va. 62, 483 S.E.2d 62 (1996).....	13, 20, 35

State ex rel. McGraw v. Scott Runyan Pontiac-Buick, 194 W.Va. 770,
461 S.E.2d 516 (1995).....12

State ex rel. Smith v. Maynard, 193 W.Va. 1, 454 S.E.2d 46 (1994).....13, 20, 35

State ex rel. Van Nguyen v. Berger, 199 W.Va. 71, 483 S.E.2d 71 (1996).....13, 19

Stewart Title Guaranty Co. v. Sterling, 822 S.W.2d 1 (1991).....33

Stricklen v. Kittle, 168 W.Va. 147, 287 S.E.2d 148 (1981)12, 13

OTHER AUTHORITIES:

W.Va. Code § 46-6-101.....2, 3, 4, 5

W.Va. Code § 46-2-31415, 23, 31, 33

W.Va. Code § 46-2-315.....15, 23, 31, 33

W.Va. Code § 55-7-23.....10, 35

W.Va. Code §§ 55-7B-1 *et seq.*1, 2, 3, 12, 18, 19, 20, 23, 31, 33

W.Va. Code § 55-7B-2(d).....20, 21, 24

W.Va. Code § 55-7B-320

W.Va. Code § 55-7B-615, 17

W.Va.R.Civ.P. 12(b)(6).....13

W.Va.R.Civ.P. 19(a).....17

La. Rev. Stat. 40:1299.41A(8).....27

I. KIND OF PROCEEDING AND NATURE OF RULING IN LOWER TRIBUNAL

This case concerns the failure of the manufacturer of contaminated surgical sutures and/or the hospitals that purchased them and implanted them into their patients to inform the patients of the fact that defective, contaminated sutures were implanted in their bodies. One of plaintiffs' requested remedies is equitable relief to require defendants to inform the patients. In this regard, only the hospitals have this information and they are necessary parties in this litigation.¹ Plaintiffs seek various other relief from all defendants, including the hospital defendants.

The Circuit Court of Kanawha County dismissed this action against the hospital defendants by order dated March 15, 2006, holding:

1. All of plaintiffs' claims were barred by the failure to obtain a certificate of merit, pursuant to W.Va. Code §§ 55-7B-1 *et seq.*; and
2. West Virginia common law does not provide a remedy against a hospital or distributor of contaminated products for implanting the contaminated sutures into a patient's body, whether product liability, negligence, breach of warranty.

This case was previously before this Honorable Court by Appeal No. 32294 and remanded with direction to the circuit court to reconsider its initial ruling of May 18, 2004, in light of Boggs v. Camden-Clark Memorial Hosp. Corp., 216 W.Va. 656, 609 S.E.2d 917 (2004). Now, in the interim, this Honorable Court has decided the case of Gray v. Mena, 218 W.Va. 564, 625 S.E.2d 326 (2005), and, while plaintiffs appeal the

¹ It should be noted that discovery has been stayed pending resolution of these issues.

Order of the Circuit Court of Kanawha County, plaintiffs/appellants have no objection to providing a certificate of merit if the same is deemed required under the West Virginia Medical Professional Liability Act ("MPLA"), W.Va. Code §§ 55-7B-1, *et seq.* However, this appeal contains several other issues, including whether hospitals have duties to inform patients of their exposure to a defective, contaminated product, and whether the hospital has liability in any capacity, distribution or otherwise, for their role in the unfortunate implantation of hundreds of West Virginia residents.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

This proposed class action was filed on June 2, 2003, in the Circuit Court of Kanawha County, West Virginia. Plaintiffs have asserted numerous claims against the defendants collectively, including claims of product liability (negligence, strict liability, and breach of express and implied warranties), violations of the West Virginia Consumer Credit and Protection Act, W.Va. Code § 46-6-101, *et seq.*, fraud, the intentional infliction of emotional distress and plaintiffs request equitable relief.

Plaintiffs' claims arise out of the manufacture, production, packaging, advertisement, distribution, sale and use of contaminated (non-sterile) Vicryl sutures that were eventually the subject of recalls as well as the subsequent failure to inform patients of the use of such contaminated sutures. Vicryl sutures are a standardized, commercially manufactured product which are amenable to quality control by a manufacturer.

Plaintiffs filed this civil action against the hospital defendants (two West Virginia corporations) and various other defendants who either manufactured or distributed

surgical sutures to health care providers in West Virginia. Plaintiffs are West Virginia residents who, as patients, were implanted with contaminated sutures and were exposed to serious infections or the significant risk thereof as a result. Plaintiffs request certification as a class action and seek compensatory damages (legal and equitable) as well as punitive damages.

The hospital defendants filed a joint motion to dismiss in this action on July 3, 2003, wherein they contend that they should be dismissed from this action because: (a) the West Virginia Medical Professional Liability Act ("MPLA"), W.Va. Code §§ 55-7B-1, *et seq.*, constitutes the sole remedy for actions against health care providers and that plaintiffs' claims of product liability, tort of outrage, fraud, and violations of the Consumer Credit and Protection Act are not permitted by or provided for under the MPLA; (b) plaintiffs have not met certain prerequisites to filing suit under the MPLA, including serving notices of claim and certificates of merit within the required time prior to filing suit; (c) West Virginia common law does not permit product liability claims to be made against health care providers as the distributor or seller of products; and (d) the statutes of limitation have run on plaintiffs' claims.

Plaintiffs contend that the hospital defendants are necessary parties in this action in light of, among other things, their claims for equitable relief, that an investigation be conducted and notice provided to all West Virginia residents who had contaminated sutures implanted in their bodies. More specifically, in Count VI of their complaint, plaintiffs complain that defendants, including the hospitals, engaged in unfair deceptive practice including "concealment, suppression or omission of material fact

with intent that others rely." (Par. 51, Complaint). In paragraph 52 of the complaint, plaintiffs then allege:

That the acts and conduct above violated West Virginia Code, § Chapter 46A, Article 6, Section 101, et seq., in that defendants had a duty to investigate all persons who were implanted with the defective sutures and to in good faith inform them or their patients' guardians or estates of that fact, but defendants intentionally, knowingly and/or recklessly failed and refused to inform plaintiffs or the class of the true facts of the sutures and whether they were used in their bodies.

In the prayer for relief, plaintiffs request that:

1. That the Court, through its injunctive and equitable powers, provide for investigation and notice to the class of individuals who were implanted with the defective sutures that were implanted in their bodies; and

* * *

3. Damages as provided for under and pursuant to W.Va. Code § 46A-101 et seq., including compensatory and punitive damages and equitable and injunctive relief; and

* * *

6. Equitable and injunctive relief for providing notice to plaintiffs and the class; and
7. That the Court find that this is an appropriate action to be prosecuted as a class action pursuant to W.Va.R.Civ.P. 23, and that the Court find that plaintiffs and their counsel are appropriate representatives and appropriate counsel for the class and that this action shall proceed as a class action on the common issues of law and fact all as this Court deems just and proper; and
8. For such other further and general relief, compensatory, punitive, equitable or injunctive, as the Court deems just and proper.

Accordingly, plaintiffs are requesting that the Court, through its equitable power, require the defendants, including the hospitals who have all the information, to

investigate to determine what patients were implanted with the sutures and to inform them as they definitely have a right to know. Defendants clearly have never done this even though they know that patients were implanted with defective sutures and were never told. Hospitals purchase surgery supplies and then resell them to patients. Patients have no choice about where the hospital chooses surgical supplies. Therefore, the hospitals are clearly distributors of these particular sutures.

Further, plaintiffs alleged in paragraphs 27-31 of their complaint that:

27. Defendants and each of them became aware of infections and injuries which have occurred and will occur as a result of the manufacturers and distributors use of the aforesaid sutures and their implantation in class members.
28. Defendants, while knowing and being aware of said infections and injuries, had a duty to initiate a prompt, proper, effective and complete recall of said defective sutures, to inform all patients or their parents, guardians or estates of the fact that they had or may have defective sutures, that the patient was injured, required health care or other expenses, if any, as a result of said sutures, and to fully inform all such patients of this important fact.
29. Defendants failed to do an effective, complete or appropriate recall of the sutures, failed to inform or attempt to inform patients that they may have defective sutures used in their body, and otherwise violated plaintiffs' right to be informed of the facts surrounding their treatment and care, including whether they had incurred additional medical bills, treatment, injuries and/or diseases.
30. As a proximate result of defendants' acts and conduct, plaintiffs were injured and damaged as hereinafter alleged.
31. Defendants and each of them omitted informing plaintiffs and all West Virginians who had the sutures implanted in them of the fact that they were implanted.

The two West Virginia hospital defendants are necessary parties to this civil action. It goes without saying that patients who have had infected and defective medical supplies implanted in them have a right to know. Here, neither the manufacturer nor the hospitals have made any attempt to notify plaintiffs or other patients of this fact.

Plaintiffs have also responded by arguing: (a) the MPLA is not the exclusive remedy available against health care providers and that said statute does not in clear and unambiguous terms prohibit claims of product liability (strict liability, negligence, and breach of warranty), tort of outrage, fraud, and violations of the Consumer Credit and Protection Act from being made against health care providers; (b) plaintiffs need not meet the prerequisites of the MPLA inasmuch as plaintiffs have not asserted medical malpractice claims and the MPLA is not the exclusive remedy available against health care providers; (c) the common law does not prohibit product liability and related claims from being brought against health care providers as distributors and sellers of products; and (d) the discovery rule applies to the running of the relevant statutes of limitation in West Virginia, and defendants cannot demonstrate that plaintiffs' statutes of limitation have run based upon the pleadings alone -- rather, discovery must be conducted on issues relevant to the discovery rule and defendants may then move for summary judgment if deemed appropriate.²

² Because the Order granting the hospital defendants' joint motion to dismiss does not rely upon the statute of limitations defense as a basis for its ruling, appellants will not further discuss it in this brief.

It also should be noted in this appeal that on July 3, 2003, the manufacturing defendants, Ethicon, Inc., and Johnson & Johnson, removed this action to federal court alleging that the hospital defendants were fraudulently joined and, therefore, diversity of citizenship jurisdiction exists in this case. The manufacturing defendants asserted essentially the same arguments in support of their claim of fraudulent joinder as the hospital defendants asserted in support of their joint motion to dismiss.

On August 4, 2003, plaintiffs filed a motion to remand and supporting memorandum of law. Plaintiffs asserted essentially the same arguments in support of their motion to remand and in opposition to the manufacturing defendants' claim of fraudulent joinder as they have now asserted in opposition to the hospital defendants' joint motion to dismiss.

On November 6, 2003, the Honorable Joseph R. Goodwin, United States District Judge for the Southern District of West Virginia, rejected defendants' arguments and found that the hospital defendants were not fraudulently joined in this action and remanded the case to the Circuit Court of Kanawha County. Donna Joan Blankenship, et al. v. Ethicon, Inc., et al., Civil Action No. 2:03-0622, Slip Opinion (S.D.W.Va. November 6, 2003) (Goodwin, J.).

More specifically, Judge Goodwin held:

The defendants' arguments do not convince the court that the MPLA bars all strict product liability and breach of warranty claims against health care providers. The text of the MPLA simply does not support the defendants' argument. First, the statute does not expressly prohibit strict product liability or breach of warranty claims from being made against healthcare providers. Second, the fact that the MPLA requires proof of negligence suggests that the statute may not govern

strict product liability and breach of warranty claims. See W.Va. Code § 55-7B-3.

The defendants assert, however, that even though the text of MPLA does not *expressly* refer to strict product liability and breach of warranty claims, it nevertheless means to prohibit plaintiffs from bringing these claims against covered healthcare providers. As a basis for this argument, the defendants argue that the MPLA was intended to stem an insurance crisis confronting health providers by regulating medical malpractice claims; and that, to this end, the legislature intended the MPLA to codify the "long-standing rule recognized by the West Virginia Supreme Court of Appeals in *Foster v. Memorial Hosp. Assoc. of Charleston*, 219 S.E.2d 916, 919-20 (W.Va. 1975), that providers of services, such as hospitals who use a product incidental to the service, cannot be held liable on non-fault based warranty and strict liability claims." Contrary to the defendants' assertion, no provision of the MPLA purports to codify the holding in *Foster*. Furthermore, the removing defendants cite no support for the proposition that the statute codifies *Foster*. Therefore, the removing defendants have failed to show that the enactment of the MPLA precludes the possibility of bringing strict product liability and breach of warranty claims against healthcare providers.

Blankenship v. Ethicon, Inc., Slip Op. at pp. 5-6.

Judge Goodwin also held:

Alternatively, the defendants contend that even if the MPLA does not prohibit the commencement of strict product liability or breach of warranty claims against the non-diverse defendants as healthcare providers, West Virginia common law does not provide such claims. See *Foster*, 219 S.E.2d at 919-20. In *Foster*, the plaintiffs initiated a breach of warranty claim against a hospital after receiving impure blood during a transfusion. *Id.* at 918. The court noted that a doctor does not neatly fit the mold of a merchant under warranty law because a doctor supplies medicine to a patient in the course of a professional relationship rather than by a promotion or sale. See *id.* at 919-20. Accordingly, the court held that "where an individual contracts for Professional services involving an incidental transfer of personal property as a necessary part of such service, and where the appropriate use of such personal property depends primarily upon the skill and judgment of the person rendering the service, such a transfer of personal property by the professional is not [subject to a breach of warranty claim] and any injury or damage resulting from such transferred personal property must be recovered by an action grounded in negligence and not by an action grounded in warranty." *Id.* at 921-22. In

light of this holding in *Foster*, the defendants assert that there is no possibility that the plaintiffs can establish a cause of action for breach of warranty or strict production liability based upon the non-diverse defendants' transfer of contaminated sutures because, like the transfer of blood in *Foster*, the transfer of the sutures is an "incidental transfer of personal property as a necessary part of such service." *See id.* Therefore, the defendants contend that any damages resulting from the transfer of the sutures must be recovered by "an action grounded in negligence." *See id.*

To bolster its argument that the plaintiffs cannot bring strict product liability and breach of warranty claims against healthcare providers, the defendants also cite to supporting cases from other jurisdictions. The court recognizes that in many jurisdictions a plaintiff cannot bring breach of warranty or strict product liability claims against a healthcare provider for injuries suffered from medical instruments, drugs, prostheses and implants used in treatment. . . . These courts reason that a hospital cannot be characterized as a seller under theories of strict product liability and breach of warranty. . . . The defendant notes that the *Foster* court similarly drew a distinction between the provision of medical services to a patient and a typical buyer-seller transaction. Therefore, the defendant suggests that *Foster*, like the cases cited from other jurisdictions, should be interpreted to prohibit warranty and strict liability claims against hospitals. *See* 219 S.E.2d at 919-22.

The plaintiffs refute this interpretation of *Foster* and assert that *Foster's* prohibition of warranty and strict product liability claims against healthcare providers does not apply to actions based upon standardized, commercial products. The plaintiffs point out that *Foster* drew a distinction between the transfer of blood during a transfusion and situations involving the use of a standard commercial products, such as the sutures at issue here. *See id.* at 917-18, 921. The court stated that "[u]nlike standard commercial products . . . blood is dispensed under a wide variety of circumstances which do not lead to the imposition of the type of uniform standard of care envisaged by the law of warranty. In this regard blood which is manufactured in the human body can be distinguished from standardized drugs in that *the latter are amenable to quality control by the manufacturer while human blood is obviously not.*" *Id.* at 922 (emphasis added). In other words, the court reasoned that the propriety of performing a blood transfusion before having an opportunity to test the blood must be considered in light of the standard of care to properly assess liability, but "if the medicine itself is a standard product, and is defective in the sense that it deviates from the accepted standard, then the law of warranty would apply." *Id.* at 921. The plaintiffs also note that the Kanawha County Circuit Court has interpreted *Foster* to allow a breach of

warranty action against "a provider of professional services who transfers a product while performing those services if the product is a standardized, commercially manufactured item which is inherently defective for the purpose for which it was intended." *In re: Implants I*, Civil Action 93-C-9595 (Dec. 6, 1994) (citing *Foster*, 219 S.E.2d at 916). Therefore, the plaintiffs argue that breach of warranty and strict product liability claims based on the contaminated sutures are not barred by *Foster* because the sutures are a standardized, commercially manufactured product which are inherently defective for their originally intended purpose. See *Foster*, S.E.2d at 918. Given the distinction made in *Foster*, this court cannot find that there is no possibility that the plaintiffs will be able to establish their strict product liability and breach of warranty claims against the healthcare providers under West Virginia common law.

Blankenship v. Ethicon, Inc., Slip Op. at pp. 7-9.

On April 9, 2005, W.Va. Code § 55-7-23 was adopted with the following provisions added:

Provided, That the provisions of this section shall not apply if: (1) The health care provider had actual knowledge that the drug or device was inherently unsafe for the purpose for which it was ... used or (2) a manufacturer of such drug or device publicly announces changes in the dosage or administration of such drug or changes in contraindications against taking the drug or using the device and the health care provider fails to follow such publicly announced changes and such failure proximately caused or contributed to plaintiff's injuries or damages.

W.Va. Code § 55-7-23(a).

Plaintiffs submit that if the MPLA already prohibited the filing of product liability and related claims against health care providers, as the hospital defendants contend, then there clearly would be no need to amend the MPLA as above. In this regard, plaintiffs further note that there was no language in the amendment which indicates that it is meant to merely clarify existing law due to confusion or a conflict

among lower courts. Rather, its purpose is clearly stated to be that of relieving health care providers of such liability in certain circumstances as quoted above.

On July 23, 2004, plaintiffs filed a timely petition for appeal (No. 32294) which was granted by this Court on December 9, 2004, with directions for the trial court to reconsider its initial ruling of May 18, 2004, in light of this Court's intervening opinion in Boggs v. Camden-Clark Memorial Hosp. Corp., 216 W.Va. 656, 609 S.E.2d 917 (2004). A hearing was then held before the Circuit Court on April 27, 2005, and the parties filed memoranda addressing the potential effect of Boggs. An additional hearing was held on February 17, 2006, during which this Court's more recent decision in Gray v. Mena, 218 W.Va. 564, 625 S.E.2d 326 (2005), was discussed. Thereafter, the parties submitted orders containing amended findings of fact and conclusions of law. Judge King entered defendants' proposed order on March 14, 2006. Said Order was then filed by the Kanawha County Circuit Clerk on March 15, 2006. Plaintiffs submitted their petition for appeal on July 11, 2006, and said petition was granted. Plaintiffs now submit the present appeal brief.

III. ASSIGNMENTS OF ERROR

- A. **It Was Error To Dismiss This Case Because West Virginia Hospitals Have A Duty To Notify Current And Former Patients When They Have Been Implanted At That Hospital With A Medical Device That Is The Subject Of A Recall.**
- B. **The Circuit Court Committed Reversible Error In Granting The Harsh Sanction Of Dismissal Rather Than Permitting Petitioners Additional Time To Meet The Filing Requirements Of The MPLA.**

- C. The Circuit Court Committed Reversible Error In Dismissing All Of Petitioners' Claims Against The Defendant Hospitals, Including Their Claims For Equitable Relief, Tort Of Outrage, Fraud And Violation Of The Consumer Credit And Protection Act.
- D. The Circuit Court Committed Reversible Error In Concluding That All Of Plaintiffs' Claims Are Governed And Barred By The West Virginia Medical Professional Liability Act ("MPLA"), W.Va. Code §§ 55-7B-1, *et seq.*
- E. The Circuit Court Committed Reversible Error In Concluding That The Common Law Of West Virginia Does Not Permit Product Liability Claims To Be Made Against Health Care Providers As The Distributor Or Seller Of Products.

IV. POINTS AND AUTHORITIES RELIED UPON

A. "Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syl. Pt. 2, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, 194 W.Va. 770, 461 S.E.2d 516 (1995). Accord Syl. Pt. 1, McCormick v. Walmart Stores, Inc., 2004 W.Va. Lexis 26 (W.Va. 2004) (per curiam); Syl. Pt. 2, Holbrook v. Holbrook, 196 W.Va. 720, 474 S.E.2d 900 (1996) (per curiam).

B. A complaint is construed in the light most favorable to the plaintiff, and its allegations are taken as true. The complaint will be found insufficient only if it appears beyond doubt that the plaintiff can prove no set of facts in support of any claim which would entitle it to relief. Sesco v. Norfolk and Western Ry. Co., 189 W.Va. 24, 427 S.E.2d 458 (1993) (per curiam); Chapman v. Kane Transfer Co., Inc., 160 W.Va. 530, 236 S.E.2d 207 (1977); John W. Lodge Distrib. Co. v. Texaco, Inc., 161 W.Va. 603, 245 S.E.2d 157 (1978); Mandolidis v. Elkins Indus., Inc., 161 W.Va. 695, 246 S.E.2d 907 (1978); Stricklen v. Kittle, 168 W.Va. 147, 287 S.E.2d 148 (1981).

C. While the fraudulent joinder standard is even more liberal than the standard for reviewing a Rule 12(b)(6) motion to dismiss for failure to state a claim, both standards are very liberal and a plaintiff's burden in resisting them are relatively light ones. Compare Sesco, supra; Chapman, supra; John W. Lodge Distrib. Co., supra; Mandolidis, supra; Stricklen, supra, with Hartley v. CSX Transportation, Inc., 187 F.3d 422, 425 (4th Cir. 1999); Marshall v. Manville Sales Corporation, 6 F.3d 229, 232 (4th Cir. 1993).

D. "If the Legislature intends to alter or supersede the common law, it must do so clearly and without equivocation. Our common law is not to be construed as altered or changed by statute, unless legislative intent to do so be plainly manifested." State ex rel. Van Nguyen v. Berger, 199 W.Va. 71, 483 S.E.2d 71, 75 (1996) (quoting Syl. Pt. 4, Seagraves v. Legg, 147 W.Va. 331, 127 S.E.2d 605 (1962)). Moreover, "[t]he Legislature is presumed to know the state of existing relevant law when it enacts or amends a statute." Pullano v. City of Bluefield, 176 W.Va. 198, 342 S.E.2d 164, 172-73 (1986) (quoting Narragansett Food Services, Inc. v. Rhode Island Department of Labor, 420 A.2d 805, 808 (R.I. 1980)). Accord State v. Hosea, 199 W.Va. 62, 483 S.E.2d 62, 68 n. 15 (1996) ("we assume that elected representatives know the law at the time of any amendment to a statute"); State ex rel. Smith v. Maynard, 193 W.Va. 1, 454 S.E.2d 46, 53-54 (1994) (same).

E. Medical facilities have affirmative legal duties, once informed of defective devices or medical supplies being implanted in a patient, to make reasonable efforts to inform the patient. Pumphrey v. C.R. Bard, Inc., 905 F.Supp. 334, N.D. W.Va. (1995);

Monahan v. Weichert, 82 A.D.2d 102, 442 N.Y.S.2d 295 (4th Dep't 1981); Harris v. Raymond, 715 N.E.2d 388 (Ind. 1999); Brawn v. Oral Surgery Associates, 819 A.2d 1014 (ME. 2003); Foster v. Memorial Hosp. Ass'n of Charleston, 159 W.Va. 147, 219 S.E.2d 916 (1975).

F. Under the common law of West Virginia, not only are manufacturers of defective products responsible for product liability but distributors/suppliers or sellers of such products are also liable and they are not required to have knowledge of the defective nature of the products in order to be liable under applicable theories of product liability (i.e., strict liability, negligence, failure to warn, and breach of warranties). Dunn v. Kanawha County Bd. Of Educ., 194 W.Va. 40, 459 S.E.2d 151, 157 (1995) ("strict liability extends to those in the product's chain of distribution. Thus, an innocent seller can be subject to liability that is entirely derivative simply by virtue of being present in the chain of distribution of the defective product. . . . The liability of a party in the chain of distribution is based solely upon its relationship to the product and is not related to any negligence or malfeasance."); Adkins v. K-Mart Corp., 204 W.Va. 215, 511 S.E.2d 840, 846 (1998) (same); Morningstar v. Black & Decker Mfg. Co., 162 W.Va. 857, 253 S.E.2d 666, 683 n. 22 (1979) ("This rule applies to both the manufacturer and the seller, who are engaged in the business of selling such product which is expected to and does reach the user without substantial change in the condition in which it was sold."). See also Star Furniture Co. v. Pulaski Furniture Co., 171 W.Va. 79, 297 S.E.2d 854 (1982); Ilosky v. Michelin Tire Corp., 172 W.Va. 435, 307 S.E.2d 603 (1983).

G. "Where an individual contracts for *professional* services which involve an incidental transfer of personal property in the performance of the service, such transfer is not within the contemplation of W.Va. Code, 46-2-314 [1963] and 46-2-315 [1963] concerning implied warranties and warranties of fitness for a particular purpose unless the transferred property consisted of a standardized, commercially manufactured product which was inherently defective for the purpose for which it was originally intended." Syllabus, Foster v. Memorial Hosp. Ass'n of Charleston, 159 W.Va. 147, 219 S.E.2d 916 (1975) (emphases added).

H. "[I]n the present case, the plaintiff filed the civil action and did not characterize the action as one falling within the realm of the Medical Professional Liability Act. Thus, under the particular circumstances of this case, dismissal appears to be a disproportionately harsh sanction. Given the newness of the statute and the approach taken by [other] courts . . . , we do not believe that the Appellant's case should have been dismissed. . . . The statute of limitations for bringing an action under West Virginia Code § 55-7B-6 should be tolled during this court assessment, and the Appellant should be provided with an additional thirty days after the court decision to comply with the provisions of the statute." Gray v. Mena, 625 S.E.2d at 332-33.³

³ It should be noted that plaintiffs recognize that Court's ruling in Gray v. Mena, 218 W.Va. 564, 625 S.E.2d 326 (2005), and although plaintiffs disagree that the application of Gray requires their claims to be brought under the MPLA, if this Court deems it necessary, plaintiff's are prepared to comply with the statute.

V. DISCUSSION OF LAW

A. **It Was Error To Dismiss This Case Because West Virginia Hospitals Have A Duty To Notify Current And Former Patients When They Have Been Implanted At That Hospital With A Medical Device That Is The Subject Of A Recall.**

A medical facility has an independent obligation to keep informed with respect to safety and potential problems prescription drugs and/or medical devices and products. Pumphrey v. C.R. Bard, Inc., 905 F.Supp. 334, 338, N.D. W.Va. (1995). The patient relies solely on the medical facility or physician for their treatment. Id. The medical facility determines what information to disclose to the patient. Id.

A medical facility has a duty of due care that continues post-treatment. Monahan v. Weichert, 82 A.D.2d 102, 442 N.Y.S.2d 295 (4th Dep't 1981). **As a matter of law, medical facilities who insert or implant medical products or devices in their patients have a duty to warn the patient of safety issues raised by the manufacturer and/or the FDA, and that duty applies to both current and former patients.** Harris v. Raymond, 715 N.E.2d 388 (Ind. 1999) (emphasis added); Brawn v. Oral Surgery Associates, 819 A.2d 1014 (ME. 2003); Cox v. Paul, 828 N.E.2d 907 (Ind. 2005). The duty applies to later discovered dangers associated with implanted materials or devices. Brawn at 1028. Medical facilities and/or providers should make reasonable efforts to communicate these safety issues to all current and former patients. Cox, at 912. A safety alert or a recall notice, at the very least, "triggers the need to make reasonable efforts" to notify patients. Harris at 395.

Here, the plaintiffs have been damaged by the defendants' failure to promptly inform them of the fact that defendants implanted defective sutures in their bodies. This falls under any number of plaintiffs' causes of action. However, plaintiffs, on behalf of the proposed class, are requesting equitable relief; that is, that the Court order defendants, including the hospital defendants, to inform their patients of the tragic fact that they were so implanted. In order to afford complete equitable relief, it appears that the hospitals' joinder would be required. W.Va.R.Civ.P. 19(a).

B. The Circuit Court Committed Reversible Error In Granting The Harsh Sanction Of Dismissal Rather Than Permitting Petitioners Additional Time To Meet The Filing Requirements Of The MPLA.

To the extent that any of plaintiffs' claims are governed by the MPLA, it must be noted that, contrary to the express dictates of this Court's decision in Gray, supra, the Circuit Court also committed reversible error in granting the harsh sanction of dismissal rather than permitting petitioners additional time to meet the filing requirements of the MPLA. Gray, 625 S.E.2d at 332-33 ("in the present case, the plaintiff filed the civil action and did not characterize the action as one falling within the realm of the Medical Professional Liability Act. Thus, under the particular circumstances of this case, dismissal appears to be a disproportionately harsh sanction. Given the newness of the statute and the approach taken by [other] courts . . . , we do not believe that the Appellant's case should have been dismissed. . . . The statute of limitations for bringing an action under West Virginia Code § 55-7B-6 should be tolled during this court assessment, and the Appellant should be provided with an additional thirty days after

the court decision to comply with the provisions of the statute.”). (See also Transcript of Hearing of February 17, 2006, at p. 8).

C. The Circuit Court Committed Reversible Error In Dismissing All Of Petitioners’ Claims Against The Defendant Hospitals, Including Their Claims For Equitable Relief, Tort Of Outrage, Fraud And Violation Of The Consumer Credit And Protection Act.

Apart from the product liability claims, plaintiffs note that neither the hospital defendants nor the Circuit Court have offered any support for West Virginia common law barring plaintiffs’ claims of tort of outrage, fraud, and violation of the Consumer Credit and Protection Act from being brought against health care providers. Indeed, the dismissal of these claims which are beyond any doubt merely contemporaneous to or related to the provision of health care services is entirely contradictory to this Court’s holdings in Boggs and Gray. Accordingly, unless this Court overrules its prior holdings in Boggs and Gray and finds that the MPLA constitutes the sole remedy against health care providers, period, it is clear that such claims should not have been dismissed. Simply put, defendants have failed to meet their burden of establishing that these distinct claims should have been dismissed.

D. The Circuit Court Committed Reversible Error In Concluding That All Of Plaintiffs’ Claims Are Governed And Barred By The West Virginia Medical Professional Liability Act (“MPLA”), W.Va. Code §§ 55-7B-1, et seq.

As noted above, plaintiffs have asserted numerous claims against the defendants collectively, including claims of product liability (negligence, strict liability, and breach of express and implied warranties), violations of the West Virginia Consumer and Credit Protection Act, fraud, negligence, and intentional infliction of emotional

distress and requested equitable relief, as well as other relief. Plaintiffs have not asserted any claims against the hospital defendants pursuant to the West Virginia Medical Professional Liability Act ("MPLA"), W.Va. Code §§ 55-7B-1, *et seq.*

Defendants contend (and the circuit court agreed) that the "MPLA" essentially constitutes the **sole remedy for actions against health care providers** and that plaintiffs' product liability and related claims are not permitted by or provided for under the "MPLA". (Said Act was initially enacted in 1986 and has been recently amended in 2001, 2003 and 2005.) While plaintiffs do not dispute that the MPLA (which is more commonly referred to in the legal community as the medical malpractice or medical negligence act) and its amendments were expressly intended to alter or supersede West Virginia common law claims which are based upon medical malpractice/negligence, plaintiffs respectfully submit that the MPLA was not intended to alter or supplant West Virginia common law or statutory law regarding product liability claims or other claims, such as the tort of outrage, fraud or violations of the CPA.

The West Virginia Supreme Court of Appeals has noted that "[i]f the Legislature intends to alter or supersede the common law, it must do so clearly and without equivocation. Our common law is not to be construed as altered or changed by statute, unless legislative intent to do so be plainly manifested." State ex rel. Van Nguyen v. Berger, 199 W.Va. 71, 483 S.E.2d 71, 75 (1996) (quoting Syl. Pt. 4, Seagraves v. Legg, 147 W.Va. 331, 127 S.E.2d 605 (1962)). Moreover, "[t]he Legislature is presumed to know the state of existing relevant law when it enacts or amends a statute." Pullano v. City

of Bluefield, 176 W.Va. 198, 342 S.E.2d 164, 172-73 (1986) (quoting Narragansett Food Services, Inc. v. Rhode Island Department of Labor, 420 A.2d 805, 808 (R.I. 1980)). Accord State v. Hosea, 199 W.Va. 62, 483 S.E.2d 62, 68 n. 15 (1996) (“we assume that elected representatives know the law at the time of any amendment to a statute”); State ex rel. Smith v. Maynard, 193 W.Va. 1, 454 S.E.2d 46, 53-54 (1994) (same).

Defendants apparently base their contention, in large part, on § 55-7B-2(d) which states that “‘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.” Of course, such section must be read *in para materia* which other sections of the statute.

A review of § 55-7B-3 which sets forth the elements of proof clearly reveals that the statute is addressing claims of medical negligence involving a health care provider’s breach of the accepted standard of care. Moreover, the legislative findings set forth in § 55-7B-1 refer to “negligent conduct” or “professional negligence” as being the conduct of health care providers meant to be regulated by the Act. (“That as in every human endeavor the possibility of injury or death from **negligent conduct** commands that protection of the public served by health care providers be recognized as an important state interest” . . . “That our system of litigation is an essential component of this state’s interest in providing adequate and reasonable compensation to those persons who suffer from injury or death as a **result of professional negligence**” (emphases added)). Indeed, in Osborne v. United States, 211 W.Va. 667, 567 S.E.2d 677, 682-83 (2002), the

West Virginia Supreme Court of Appeals noted that “[i]n recognizing the need for greater reparation of injuries occasioned by medical negligence, the Legislature further clarified the term ‘‘medical professional liability’’ to mean [] 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.” (quoting W.Va.Code § 55-7B-2(d) (1986) (Repl. Vol. 2000) (emphasis added)).

This Court, in Gray v. Mena, 218 W.Va. 564, 625 S.E.2d 326 (2005), clarified a portion of its holding in Boggs.⁴ More specifically, fearing that attorneys were interpreting its holding in Boggs to exclude all intentional torts from coverage by the MPLA, the Court stressed that the MPLA applies to claims for damages for any tort, including intentional torts, based on health care services rendered or which should have been rendered. Gray v. Mena, 625 S.E.2d at 330-31 (“In Boggs, . . . this Court stated that the Act’s protection does not extend to intentional torts; yet the Act itself states that it applies to ‘any tort,’ thus encompassing intentional torts. . . . The current case illuminates the deficiency in the Boggs statement regarding intentional torts. . . . To the extent that Boggs suggested otherwise, it is modified.”). See also Gray, 625 S.E.2d at 333-34 (Davis, J., concurring) (“In its analysis of this language, the majority suggests that the reference to ‘intentional torts’ implies that Boggs’ interpretation of the MPLA was that it did not apply to intentional torts despite the MPLA’s express language stating that it applies to ‘any tort.’ . . . Reading the entire sentence from

⁴ Boggs v. Camden-Clark Memorial Hosp. Corp., 216 W.Va. 656, 609 S.E.2d 917 (2004).

Boggs containing this phrase, however, demonstrates that such was not the construction intended by the Boggs Court. . . . [I]t is clear that the only type of intentional torts the Boggs Court found to be outside the rubric of the MPLA where those intentional torts that do not pertain to the rendering of 'health care services.'").

However, importantly, this Court in Gray reaffirmed its holding in Boggs that the MPLA "does not apply to other claims that may be contemporaneous to or related to the alleged act of medical professional liability." Syl. Pt. 3, Gray, supra (quoting Syl. Pt. 3, Boggs, supra). In the instant case, plaintiffs have not asserted any claim of an alleged act of medical professional liability against the hospital defendants. Rather, plaintiffs' claims are merely contemporaneous to or related to the provision of health care services by the hospital defendants. Similar to such "other" claims in Boggs, it is clear that plaintiffs' claims in this case of the tort of outrage, fraud and violations of the CPA are not alleged acts of medical professional liability but are merely claims that are contemporaneous to or related to the provision of health care services by the hospital defendants.

Similarly, plaintiffs submit that their claims of product liability against the hospital defendants are also not claims of alleged acts of medical professional liability. Stated otherwise, plaintiffs' claims of product liability are not premised upon some alleged fault of the hospital defendants in rendering health care services or in failing to provide health care services which should have been rendered. Rather, plaintiffs' claims of "product liability" against the hospital defendants are premised solely upon such defendants' status as innocent sellers of a defective, standardized commercial

product, the sale of which was merely contemporaneous to or related to the provision of health care services by the hospital defendants.

Accordingly, for all of the above reasons, plaintiffs submit that the MPLA is not their exclusive remedy and that the defendants are not entitled to dismissal on such basis.

Nowhere in the MPLA does the Legislature specifically indicate that its terms are meant to alter or supplant the West Virginia common law or statutory law concerning a hospital's product liability responsibility as a supplier/seller in the chain of distribution⁵ or a hospital's liability for committing fraud and/or violating the West Virginia Consumer Credit and Protection Act.

Moreover, both the Kanawha County Circuit Court in In Re: Implants I, Civil Action No. 93-C-9595, Slip Op. at 3-5 (December 6, 1994) (King, J.) (breast implants class action), and the Brooke County Circuit Court in Burch v. A. H. Robbins Co., Inc., et al., Civil Action No. 97-C-204 (1-11), Slip Op. at 4-6 (March 12, 1998) (Risovich, J.) (diet drugs class action), have held that strict liability and breach of warranty claims may be asserted against health care providers. These courts have held that their holdings are further supported by the fact that neither the West Virginia Medical Professional Liability Act, W.Va.Code §§ 55-7B-1 *et seq.*, nor the West Virginia Commercial Code, W.Va.Code §§ 46-2-314 & 315, contain language expressly prohibiting the filing of strict

⁵ Plaintiffs note to the extent that a hospital's liability is ultimately premised solely upon its status as an innocent supplier in the chain of distribution that the manufacturer is obligated to indemnify the hospital for its responsibility. See Dunn v. Kanawha County Bd. Of Educ., 194 W.Va. 40, 459 S.E.2d 151, 157 (1995). In such a situation, the hospital's medical malpractice insurance, as well as concerns over its affordability, typically would not be at issue.

liability or breach of warranty claims against health care providers or otherwise excluding such providers from liability for such claims. Burch, slip op. at 4-6; In Re: Breast Implants I, slip op. at 3-5. Because the language of § 55-7B-2(d) quoted above has been in existence since the statute's enactment in 1986, any persuasiveness of such opinions would also apply in the present case.

In addressing this issue in his Remand Order, Judge Goodwin explained:

The defendants' arguments do not convince the court that the MPLA bars all strict product liability and breach of warranty claims against health care providers. The text of the MPLA simply does not support the defendants' argument. First, the statute does not expressly prohibit strict product liability or breach of warranty claims from being made against healthcare providers. Second, the fact that the MPLA requires proof of negligence suggests that the statute may not govern strict product liability and breach of warranty claims. See W.Va. Code § 55-7B-3.

The defendants assert, however, that even though the text of MPLA does not *expressly* refer to strict product liability and breach of warranty claims, it nevertheless means to prohibit plaintiffs from bringing these claims against covered healthcare providers. As a basis for this argument, the defendants argue that the MPLA was intended to stem an insurance crisis confronting health providers by regulating medical malpractice claims; and that, to this end, the legislature intended the MPLA to codify the "long-standing rule recognized by the West Virginia Supreme Court of Appeals in *Foster v. Memorial Hosp. Assoc. of Charleston*, 219 S.E.2d 916, 919-20 (W.Va. 1975), that providers of services, such as hospitals who use a product incidental to the service, cannot be held liable on non-fault based warranty and strict liability claims." Contrary to the defendants' assertion, no provision of the MPLA purports to codify the holding in *Foster*. Furthermore, the removing defendants cite no support for the proposition that the statute codifies *Foster*. Therefore, the removing defendants have failed to show that the enactment of the MPLA precludes the possibility of bringing strict product liability and breach of warranty claims against healthcare providers.

Blankenship v. Ethicon, Inc., Slip Op. at pp. 5-6.

Interestingly, courts in Louisiana have addressed arguments similar to those raised by defendants in the instant action. In Branch v. Willis-Knighton Medical Center, 636 So.2d 211 (La. 1994), the Supreme Court of Louisiana rejected an argument that the special statute of limitations applicable to medical malpractice actions applied to a product liability action sounding in strict liability. The Court reasoned:

The [medical malpractice] law does not apply to strict tort products liability actions arising out of the sale of blood in a defective condition unreasonably dangerous to the user or consumer. In fact, R.S. 9:5628 does not contain any provision that expressly or implicitly refers to strict liability or products liability. Instead, the title, "§ 5628. Actions for medical malpractice," and all of the other earmarks of the statute indicate that the legislature intended to deal only with actions traditionally classified under the generally prevailing meaning of "medical malpractice", viz., suits based on negligence, breach of express agreement, abandonment, assault or lack of informed consent. . . . The constellation of terms used to define the object of the statute refers only to such typical medical malpractice actions, i.e., "action[s] for damages for injury or death against any physician, dentist, or hospital . . . whether based upon tort, or breach of contract, or otherwise, arising out of patient care . . . [based on] the alleged act, omission or neglect" of the health care provider.

Most medical malpractice actions are based on the physician's alleged failure to exercise the requisite skill and care. . . . In modern times two separate bases, implied contract and tort, have been recognized for the identical duty of exercising due care. . . . Therefore, R.S. 9:5628 in its application to actions "based upon tort, . . . contract, or otherwise" evinces a legislative intent to cover every kind of medical malpractice action but does not display an aim to affect suits outside this field. Likewise, the statutory terms, "acts," "omissions" and "neglect" are part of the language of negligence, both generally and as regards medical or professional negligence, . . . and are not commonly used in the sphere of strict products liability. . . . "Arising out of patient care" is descriptive of an action for damages that results from a physician's failure to exercise the "standard of care" required of him in the treatment of a patient. . . .

Strict products liability actions, on the other hand, arise out of the sale of a product in a defective condition unreasonably dangerous to the user or consumer and the causation thereby of physical harm to such a

person. See, e.g., Restatement (Second) Torts § 402A. Furthermore, R.S. 9:5628 does not contain terms or concepts indispensable to the definition, classification and administration of strict tort products liability actions, such as "strict liability," "defective condition," "unreasonably dangerous," "normal use," or "user or consumer." Nor does it apply to the most common sellers of medical products, such as drug and medical supply companies.

The background and history of R.S. 9:5628 also reflect that products liability actions do not fall within its ambit. The purpose of the statute is to check the increase in medical malpractice insurance premiums by restricting the volume and retrospective nature of medical malpractice litigation. There is no evidence that the legislature intended by R.S. 9:5628 to curb any type of litigation other than traditional medical malpractice actions.

* * *

The Medical Malpractice Act, like the special malpractice statute of limitations, does not mention strict liability or products liability and uses terms associated with the traditional medical malpractice actions based primarily on professional negligence and implied contract concepts, viz., "legal wrong," "breach of duty," "negligent or unlawful act or omission," "standard of care," "professional services," "degree of skill ordinarily employed," "same community or locality," "reasonable care and diligence," "breach of contract" and "treatment performed or furnished." On the other hand, like the medical malpractice statute of limitations, the Medical Malpractice Act does not contain the terms and concepts indispensable to the definition, classification and administration of strict tort products liability actions. Interpreting the special statute of limitation for medical malpractice actions in reference to the Medical Malpractice Act, therefore, makes firmer our conclusion that it was not the legislative aim to subject any strict tort product liability action to the special statute of repose for malpractice suits.

For the foregoing reasons we are convinced that R.S. 9:5628 was intended to apply only to medical malpractice actions and was not intended to apply to strict products liability actions in tort. Furthermore, because the statute grants immunities or advantages to a special class in derogation of the general rights available to tort victims, it must be strictly construed against limiting the tort claimants' rights against the wrongdoer." ...

Branch, 636 So.2d at 214-17 (citations omitted). Accordingly, the court held that the special statute of limitations which applied to medical malpractice actions did not apply and that the plaintiff could maintain a strict liability claim against the hospital for the sale and transfusion of contaminated blood which caused him to contract hepatitis.⁶ See also Coleman v. Deno, 813 So.2d 303, 315 (La. 2002) (noting “[t]he MMA applies only to ‘malpractice;’ all other tort liability on the part of a qualified health care provider is governed by general tort law”; also noting “even though all medical malpractice claims are personal injury claims, the opposite is not true: every personal injury claim is not a medical malpractice claim.” (citation omitted)).

Applying similar reasoning two years earlier in Sewell v. Doctors Hospital, 600 So.2d 577 (La. 1992), the Supreme Court of Louisiana held that a patient’s claim that he was injured when a defective hospital bed collapsed while he was recuperating from surgery was not covered by the Medical Malpractice Act and that he could pursue a claim based on strict liability. The Court noted that for purposes of the applicable Medical Malpractice Act, as amended in 1987, malpractice was defined in La. Rev. Stat. 40:1299.41A(8) as follows:

“Malpractice” means any unintentional tort or any breach of contract based on health care or professional services rendered, or which should have been rendered, by a health care provider, to a patient, including failure to render services timely and the handling of a patient, including loading and unloading of a patient, and also includes all legal responsibility of a health care provider arising from defects in blood,

⁶ The court noted that an amendment to the Medical Malpractice Act which granted “physicians, hospitals and blood banks immunity from strict tort products liability for screening, processing, transfusion or medical use of blood and blood components resulting in transmission of viral disease undetectable by appropriate medical and scientific laboratory tests” did not apply to the case since the plaintiff had been injured prior to its effective date. Branch, 636 So.2d at 213.

tissue, transplants, drugs and medicines, or from defects in or failures of prosthetic devices, implanted in or used on or in the person of a patient.

Sewell, 600 S0.2d at 578-79 (emphasis and footnote omitted).⁷

Based upon such language of the Act, as amended, the Sewell Court reasoned:

The Legislature originally defined malpractice principally as any unintentional tort based on health care or professional services which were rendered or should have been rendered by a health care provider to a patient, clearly indicating an intent to include liability in negligence for all acts and omissions by a health care provider during the furnishing of medical care or treatment or the confinement of a patient. However, the Legislature further defined malpractice to "also include []" a health care provider's strict liability for some injury-causing defective things, specifically enumerating defective blood, tissues, transplants, drugs, medicine and prosthetic devices used during the course of the patient's treatment. Clearly, the Legislature did not intend to include liability for all defective things in the custody of the provider which cause injury to a patient. By including liability for all negligent acts or omissions by a health care provider in providing care and services and for only those defective things which are specifically enumerated, the Legislature intended to exclude from the definition of malpractice a health care provider's strict liability for other defective things, unless negligence by the health care provider caused the thing to be defective or unreasonably dangerous.

Id., at 579-80 (footnotes omitted).

More recently, based upon the rationale and holdings of the above cases, the Court of Appeal of Louisiana for the Second Circuit held that the Louisiana Medical Malpractice Act did not apply to a claim that the health care providers had used defective (non-sterile) Vicryl sutures manufactured by Ethicon, Inc., and that the plaintiff could maintain a claim of general negligence and strict liability against the health care provider and manufacturer

⁷ The Court noted that when the original version of the Act which was adopted in 1975, "health care providers were strictly liable for medical use of defective blood and possibly tissues and organs." Id., at 580 n. 5. However, an amendment was added in 1981 that purported to provide immunity to health care providers from certain strict liability. Id.

respectively. Netherland v. Ethicon, Inc., 813 So.2d 1254, 1257-59 (La.App. 2nd Cir.), writ denied, 819 So.2d 339 (La. 2002).⁸ The Court reasoned:

Based upon the above law and jurisprudence, we do not find that the use of the terms "tissue" and "prosthetic devices" in the MMA can be broadly interpreted at this stage of the proceeding to include the defective Vicryl suture. . . . [The health care provider] offered no evidence to show that the Vicryl sutures consist of human or animal tissue. Accordingly, we do not find that plaintiff's claim is covered by the MMA and any issue of prescription pertaining to an MMA claim is not present.

Netherland, 813 So.2d at 1259. Following the rendition of such decision, the health care provider's writ to the Supreme Court of Louisiana was denied. Netherland v. Ethicon, Inc., 819 So.2d 339 (La. 2002).

Petitioners respectfully submit that the rationale and holdings of the above Louisiana cases offer further support for plaintiffs' position that the MPLA, as adopted in West Virginia, is not the exclusive remedy for actions against health care providers and that the MPLA does not prohibit plaintiffs' product liability claims and other claims from being brought against the hospital defendants.

E. The Circuit Court Committed Reversible Error In Concluding That The Common Law Of West Virginia Does Not Permit Product Liability Claims To Be Made Against Health Care Providers As The Distributor Or Seller Of Products.

The hospital defendants contend (and the circuit court agreed) that they are entitled to dismissal because West Virginia common law does not permit product liability claims

⁸ The Court noted that while the Louisiana Products Liability Act, which was adopted in 1988, "imposes no liability on a non-manufacturer seller", its enactment "did not change Louisiana's law regarding the seller's negligence for injuries caused by its defective products when it knew or should have known of the defect." Id., at 1259-60 (citations omitted). The Court then remanded the action for an evidentiary hearing in order to determine whether the plaintiff's claim was barred by the applicable statute of limitations. Id. at 1260-61.

to be made against health care providers as the distributor or seller of products. This contention of the defendants and conclusion of the Circuit Court is also without merit. Simply put, under the law of West Virginia, not only are manufacturers of defective products responsible for product liability but distributors/suppliers or sellers of such products are also liable and they are not required to have knowledge of the defective nature of the products in order to be liable under applicable theories of product liability (i.e., negligence, strict liability, failure to warn, and breach of warranties). Dunn v. Kanawha County Bd. Of Educ., 194 W.Va. 40, 459 S.E.2d 151, 157 (1995) ("strict liability extends to those in the product's chain of distribution. Thus, an innocent seller can be subject to liability that is entirely derivative simply by virtue of being present in the chain of distribution of the defective product. . . . The liability of a party in the chain of distribution is based solely upon its relationship to the product and is not related to any negligence or malfeasance."); Adkins v. K-Mart Corp., 104 W.Va. 215, 511 S.E.2d 840, 846 (1998) (same); Morningstar v. Black & Decker Mfg. Co., 162 W.Va. 857, 253 S.E.2d 666, 683 n. 22 (1979) ("This rule applies to both the manufacturer and the seller, who are engaged in the business of selling such product which is expected to and does reach the user without substantial change in the condition in which it was sold."). See also Star Furniture Co. v. Pulaski Furniture Co., 171 W.Va. 79, 297 S.E.2d 854 (1982); Ilosky v. Michelin Tire Corp., 172 W.Va. 435, 307 S.E.2d 603 (1983). None of this Court's product liability decisions since Morningstar have held or even alluded that health care providers or any other class of potential defendants who have acted as distributors or sellers of

defective products should be treated differently under our common law than any other class of distributors or sellers of such products.

Indeed, as previously indicated, neither West Virginia decisional law in the field of product liability nor the West Virginia Medical Professional Liability Act, W.Va.Code 55-7B-1 *et seq.*, nor the West Virginia Commercial Code, W.Va.Code §§ 46-2-314 & 315, expressly prohibit product liability claims from being made against health care providers. In this regard, it must also be noted that contrary to defendants' contention otherwise, the West Virginia Supreme Court of Appeals' decision in Foster v. Memorial Hosp. Ass'n of Charleston, 159 W.Va. 147, 219 S.E.2d 916 (1975), does not prohibit warranty claims from being brought against health care providers. To the contrary, under the facts in this case, the Foster decision supports plaintiffs' claims.⁹

The Court's decision in Foster, which dealt with warranty claims under West Virginia's version of the Uniform Commercial Code, pre-dated the Court's adoption of product liability tort claims in Morningstar, *supra*, and its progeny. However, interestingly, the Syllabus of Foster provides:

Where an individual contracts for *professional* services which involve an incidental transfer of personal property in the performance of the service, such transfer is not within the contemplation of W.Va.Code, 46-2-314 [1963] and 46-2-315 [1963] concerning implied warranties and warranties of fitness for a particular purpose **unless the transferred property consisted of a standardized, commercially manufactured product which was inherently defective for the purpose for which it was originally intended.**

⁹ It is surprising how many defendants and circuit judges blindly cite the Foster decision for support for the proposition that warranty claims may never be brought against health care providers. Plaintiffs respectfully submit that those who do so have either not fully read the Foster decision or understood its caveat for standardized, commercially manufactured products which are inherently defective for the purpose for which they were originally intended.

(Emphases added).

Clearly, the Vicryl sutures were a standardized, commercially manufactured product which plaintiffs have alleged were unreasonably and inherently defective for its intended purpose. Accordingly, even under Foster, warranty claims can be made against health care providers for standardized products. This fact is further supported in the body of the opinion wherein the Court noted a distinction between standardized commercial products which are amenable to quality control by the manufacturer and blood which is manufactured in the human body and is not amenable to quality control by a manufacturer. Foster, 219 S.E.2d at 920-21. As explained by the Court:

The plaintiffs allege that the transfused blood contained serum hepatitis viruses and argue that the risk of this type of infection from the routine transfusion of blood should be borne by the hospital. **Unlike standard commercial products, however, blood is dispensed under a wide variety of circumstances which do not lead to the imposition of the type of uniform standard of care envisaged by the law of warranty. In this regard blood which is manufactured in the human body can be distinguished from standardized drugs in that the latter are amenable to quality control by the manufacturer while human blood is obviously not. . . .**

. . . If, however, the medicine itself is a standard product, and is defective in the sense that it deviates from the accepted standard, then the law of warranty would apply.

Id. (emphases added).

Additionally, as already noted above, based at least in part upon these same distinctions, both the Kanawha County Circuit Court in In Re: Implants I, Civil Action No. 93-C-9595, Slip Op. at 3-5 (December 6, 1994) (King, J.) (breast implants class action), and the Brooke County Circuit Court in Burch v. A. H. Robbins Co., Inc., et al.,

Civil Action No. 97-C-204 (1-11), Slip Op. at 4-6 (March 12, 1998) (Risovich, J.) (diet drugs class action), have held that strict liability and breach of warranty claims may be asserted against physicians. These courts have also held that their holdings are further supported by the fact that neither the West Virginia Medical Professional Liability Act, W.Va.Code §§ 55-7B-1 *et seq.*, nor the West Virginia Commercial Code, W.Va. Code §§ 46-2-314 & 315, contain language expressly prohibiting the filing of strict liability or breach of warranty claims against health care providers or otherwise excluding such providers from liability for such claims. Burch, slip op. at 4-6; In Re: Breast Implants I, slip op. at 3-5. Such acknowledgment is also equally applicable in the instant case. See also Providence Hospital v. Truly, 611 S.W.2d 127 (1980), overruled on other grounds, Stewart Title Guaranty Co. v. Sterling, 822 S.W.2d 1 (1991) (finding hospital could be liable for breach of warranty in providing to patient contaminated drug used during cataract surgery; noting that applicable version of commercial code did not exclude such liability).

Furthermore, these defendants have a duty to notify current and former patients when they have been implanted with a medical device or product that is the subject of a recall. A medical facility has an independent obligation to keep informed with respect to safety and potential problems prescription drugs and/or medical devices and products. Pumphrey v. C.R. Bard, Inc., 905 F.Supp. 334, 338, N.D. W.Va. (1995). The patient relies solely on the medical facility or physician for their treatment. Id. The medical facility determines what information to disclose to the patient. Id.

Plaintiffs acknowledge that cases exist in other jurisdictions in which courts have found--pursuant to their respective law and the particular facts and claims involved--that claims of product liability, such as strict liability and breach of warranty, do not exist against a health care provider as opposed to claims of medical malpractice. The rationale and legal basis for these holdings vary from jurisdiction to jurisdiction. Some jurisdictions premise their holdings upon statutes which contain language that in clear and unequivocal terms renders malpractice actions the sole remedy against health care providers or otherwise excludes or bars product liability claims from being asserted against health care providers. See Budding v. SSM Healthcare Sys., 19 S.W.3d 678 (Mo. 2000) (court noting that Missouri medical malpractice statute abrogated the common law; statute, § 538.205(5) R.S.Mo. (2003), provides that "[p]rofessional services shall include, but are not limited to, transfer to a patient of goods or services incidental or pursuant to the practice of the health care provider's profession or in furtherance of the purposes for which an institutional health care provider is organized.").

Other jurisdictions focus on distinctions carved into the common law as to whether the transfer of the product is merely incidental to the service being provided or whether the transfer of the product is the paramount purpose of the transaction. In the former situation product liability claims are not permitted against the health care provider, while in the latter situation product liability claims are permitted. See In re Breast Implant Product Liability, 503 S.E.2d 445 (S.C. 1998) (and cases cited therein). Indeed, plaintiffs admit that in In Re: Implants I, Slip Op. at 4, Judge King noted that the "essence of breast implantation is the sale of the implants" and that when "the

physicians' 'service' amounts to the sale of a product, strict liability is a proper remedy to the recipient of the implants." This acknowledgement by the circuit court, however, does not change the fact that this Court recognized an exception in Foster where the product in question is a standardized, commercially manufactured product which is amenable to quality control.¹⁰

Plaintiffs submit that their contention that the common law does not bar product liability claims from being brought against health care providers as distributors/suppliers and sellers of products is also further buttressed the adoption of West Virginia Code § 55-7-23, insofar as if the common law barred such claims at the time this claim was filed, there would be no need to amend the MPLA in order to relieve health care providers from such liability. See Pullano v. City of Bluefield, 342 S.E.2d at 172-73 ("[t]he Legislature is presumed to know the state of existing relevant law when it enacts or amends a statute."); State v. Hosea, 483 S.E.2d at 68 n. 15 ("we assume that elected representatives know the law at the time of any amendment to a statute"); State ex rel. Smith v. Maynard, 454 S.E.2d at 53-54.

Accordingly, for all of the above reasons, plaintiffs submit that West Virginia common law does not bar their claims against the hospital defendants.

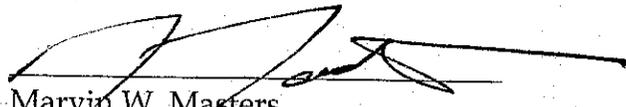
¹⁰ The other circuit court opinions upon which the hospital defendants relied in their joint motion to dismiss (and their proposed order which was entered by Judge King) simply fail to recognize such distinction drawn by this Court in Foster, supra. See "Memorandum Opinion and Order Granting Hospitals' Joint Motion to Dismiss" at pp. 8-10.

VI. PRAYER FOR RELIEF

For all of the foregoing reasons, plaintiffs respectfully pray that Your Honorable Court reverse the Circuit Court's Order granting the hospital defendants' joint motion to dismiss, and remand this action to the Circuit Court of Kanawha County and award Appellants their costs and disbursements and for such other further and general relief as the Court deems just and proper.

DONNA JOAN BLANKENSHIP, an individual; DENAE WILLIAMS, an infant, by LYNN WILLIAMS, Mother and Guardian of DENAE WILLIAMS; ROBERT B. ADAMS, an individual; ALBERT SHAFFER, an individual; DANNY KINDER, an individual; and KENNETH FISHER, an individual,

By Counsel



Marvin W. Masters
West Virginia Bar No. 2359
The Masters Law Firm lc
181 Summers Street
Charleston, West Virginia 25301
(304) 342-3106
Counsel for Plaintiffs/Appellants
f:\4\142\bo15a.doc

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
APPEAL NO. 33224

DONNA JOAN BLANKENSHIP, an individual; DENAE WILLIAMS, an infant, by LYNN WILLIAMS, Mother and Guardian of DENAE WILLIAMS; ROBERT B. ADAMS, an individual; ALBERT SHAFFER, an individual; DANNY KINDER, an individual; and KENNETH FISHER, an individual,

Appellants,

v.

ETHICON, INC., a New Jersey corporation; JOHNSON & JOHNSON, a New Jersey corporation; JOHNSON & JOHNSON HOSPITAL SERVICES, INC., a New Jersey corporation; JOHNSON & JOHNSON HEALTH CARE SYSTEMS INC., a New Jersey corporation; SENECA MEDICAL, INC., an Ohio corporation; SKYLAND HOSPITAL SUPPLY, INC., a Tennessee corporation; AMERISOURCE MEDICAL SUPPLY, INC., a Tennessee corporation; BAXTER HEALTHCARE CORPORATION, a Delaware corporation; MCKESSON MEDICAL-SURGICAL MEDIMART INC., a Minnesota corporation; OWENS & MINOR, INC., a Virginia corporation; CHARLESTON AREA MEDICAL CENTER, INC., a West Virginia corporation; and HERBERT J. THOMAS MEMORIAL HOSPITAL ASSOCIATION, a West Virginia corporation,

Appellees.

CERTIFICATE OF SERVICE

I, Marvin W. Masters, counsel for Appellants, do hereby certify that true and exact copies of the foregoing "Brief of Appellants" were served upon:

The Honorable Charles E. King
Judge, 13th Judicial Circuit
Kanawha County Judicial Annex
111 Court Street
Charleston, West Virginia 25301

Philip J. Combs
Allen, Guthrie, McHugh & Thomas, PLLC
500 Lee Street, East, Suite 800
Post Office Box 3394
Charleston, West Virginia 25333-3394
Counsel for Ethicon, Inc. and Johnson & Johnson

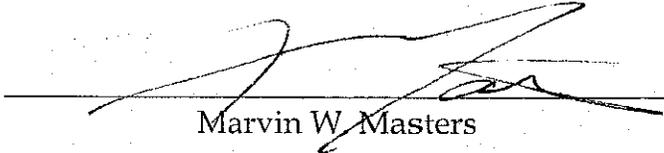
Mark A. Bramble
Kesner, Kesner & Bramble
112 Capitol Street
Charleston, West Virginia 25301
Counsel for Seneca Medical, Inc.

R. Scott Long
Stephen M. Schwartz
Hendrickson & Long
215 Capitol Street
Charleston, West Virginia 25301
*Counsel for Skyland Hospital Supply, Inc; AmerSource Medical Supply, Inc.;
and Owens & Minor, Inc.*

Richard D. Jones
Amy R. Humphreys
Flaherty, Sensabaugh & Bonasso
200 Capitol Street
Post Office Box 3843
Charleston, West Virginia 25338-3843
Counsel for Charleston Area Medical Center

Thomas J. Hurney
Laurie K. Marshall
JacksonKelly, PLLC
1600 Laidley Tower
Post Office Box 553
Charleston, West Virginia 25301
Counsel for Herbert J. Thomas Memorial Hospital Association

in envelopes properly addressed, stamped and deposited in the regular course of the
United States Mail, this 19th day of March, 2007.


Marvin W. Masters