

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

DR. DANNY RAY WESTMORELAND,

Plaintiff,

v.

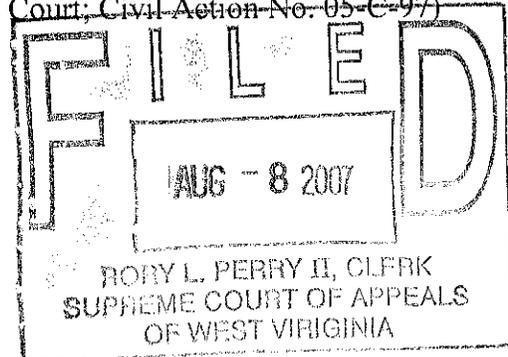
APPEAL NO. 33459

(Appealed from Mason County Circuit

Court: Civil Action No. 05-C-97)

SHRIKANT K. VAIDYA, MD,

Defendant.



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**DEFENDANT'S RESPONSE TO APPEAL  
BRIEF OF PLAINTIFF/APPELLANT  
DANNY RAY WESTMORELAND**

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August 8, 2007

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## I. STATEMENT OF FACTS

The sole issue before this Court is whether the circuit court properly dismissed a medical professional liability action filed by Appellant Danny Westmoreland, D.O. (“Appellant” or “Dr. Westmoreland”), because he failed to serve the Appellee Shrikant K. Vaidya, M.D. (“Dr. Vaidya”), with a Certificate of Merit (“Certificate” or “Certificate of Merit”) as required by the Medical Professional Liability Act (“MPLA”). This Court need only look to the pertinent facts of this case, summarized below, as well as the pre-filing requirements contained in the MPLA, to determine that the circuit court properly dismissed Dr. Westmoreland’s lawsuit and affirm the circuit court’s ruling.

### STATEMENT OF PERTINENT FACTS

Dr. Vaidya is a urologist duly licensed to practice medicine in the State of West Virginia. On June 16, 2003, Dr. Vaidya performed a cystoscopy to remove a stent temporarily inserted into the Appellant’s ureter to address an obstructed kidney. The procedure is performed by inserting a scope into the bladder, which enables the physician to visualize and remove the stent. The cystoscopy performed on the Appellant by Dr. Vaidya was “uneventful.” (See Appellant’s Medical Records, attached as Exh. 2 to Dr. Vaidya’s Reply to Plaintiff’s Response to Motion to Dismiss (“Dr. Vaidya’s Reply”).)

The Appellant is a licensed family physician with a general medical practice in Mason County, West Virginia. Dr. Westmoreland claims to have intimate knowledge of the procedure at issue in that he “has personally performed between 40 and 50 cystoscopies during the course of his practice.” (*Appeal*, Statement of Facts at 4.)

Given the thorough recitation of facts contained in Dr. Vaidya's Response to the Appellant's Petition for Appeal, this brief focuses on only those facts that are determinative as to whether the circuit court properly dismissed the Appellant's lawsuit.<sup>1</sup>

### Timeline of Events

1. December 6, 2004: Appellant files a complaint against Dr. Vaidya with the West Virginia Board of Medicine ("Board of Medicine" or "Board"), asserting Dr. Vaidya had committed malpractice. (Dr. Vaidya's Reply at 3, ¶ 8.) The Board of Medicine initiates an investigation to determine whether Dr. Vaidya breached the standard of care, thereby necessitating action against his license. (See Decision at 1-2, ¶ 3, entered Nov. 14, 2005.)
2. May 2, 2005: Appellant serves a handwritten Notice of Intent to Bring Suit to initiate his medial malpractice action against Dr. Vaidya. ("Notice of Intent," "Notice of Claim" or "Notice"). No Certificate of Merit is produced.
3. June 10, 2005: Appellant files suit against Dr. Vaidya in the Circuit Court of Mason County, West Virginia, filing the Notice of Intent as his Complaint ("Complaint.")
4. June 30, 2005: Dr. Vaidya files a Motion to Dismiss and Memorandum in Support, asserting that the Appellant's claims were subject to the MPLA and his failure to serve a Certificate of Merit violated the pre-suit requirements. (See Mt. to Dismiss and Memo in Supp.)
5. July 11, 2005: Appellant moves for default judgment on the grounds that Dr. Vaidya did not answer the Complaint. (See Regarding Summ. Jud.)
6. November 14, 2005: The Board of Medicine renders its decision with respect to the Appellant's complaint, determining "*there was no evidence of a failure to practice medicine with that level of care, skill and treatment which is recognized by a reasonable, prudent physician engaged in the same specialty as being acceptable under similar conditions and circumstance, and determined that there is no reason to proceed against the license to practice medicine of Dr. Vaidya . . .*" (See Decision at 1-2, ¶ 6, Nov. 14, 2005, attached as Exh. 3 to Dr. Vaidya's Reply) (emphasis added).

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<sup>1</sup> In his Petition for Appeal and Appeal Brief, the Appellant has pled a multitude of factual assertions that were not before the circuit court, most likely in a vain attempt to sway this Court into issuing a ruling based upon emotions rather than facts. Given the multitude, as well as the magnitude, of these assertions, we have taken the liberty of highlighting each assertion that was not before the circuit court in the document attached hereto as Exhibit A.

7. February 10, 2006: Judge Kaufman hears argument from the parties regarding Dr. Vaidya's Motion to Dismiss and grants the Appellant additional time to respond to the motion. In addition, he asks the parties to engage in settlement negotiations.
8. February 14, 2006: Appellant files a response to Dr. Vaidya's Motion to Dismiss. (*See* Response to Request for Dismissal).
9. October 25, 2006: Judge Kaufman again hears arguments regarding Dr. Vaidya's Motion to Dismiss.
10. October 26, 2006: Judge Kaufman dismisses Appellant's lawsuit finding that this case is controlled by the 'MPLA and must meet its requirements . . . , including filing a certificate of merit and providing an expert witness to testify to the deviation of the standard of care." (*See* Order, Oct. 30, 2006 ("Dismissal Order") at 2) (emphasis in the original).
11. November 16, 2006: Appellant files a motion asking the circuit court to reconsider dismissing the lawsuit via his new counsel. (*See* Mot. for Reconsid. and for Relief from J. Under Civil Rule 60 and Supplement thereto (collectively referred to as "Motion for Reconsideration"), filed Nov. 16, 2006).
12. December 7, 2006: Dr. Vaidya responds to the Appellant's Motion for Reconsideration. (*See* Defendant's Response to Plaintiff's Mot. for Reconsid.)
13. December 13, 2006: The circuit court denies the Appellant's Motion for Reconsideration, finding that he "knew of the Certificate of Merit requirement when he filed his claim and he was reminded of his noncompliance when Dr. Vaidya filed his Motion to Dismiss of June 30, 2005. This means that for the past 18 months Plaintiff has neglected to address these deficiencies." (Order denying Mot. Reconsider, Dec. 13, 2006 ("Order Denying Mot. to Reconsider" at 3.) Furthermore, the Appellant "has also failed to show 'any other reason' warranting reconsideration for his failure to comply with the MPLA." (*Id.*)

Importantly, the Appellant knew for a period of 18 months that he had failed to comply with the MPLA's pre-suit requirements by electing not to produce a Certificate of Merit, yet he made absolutely no attempt to right his wrong. Instead, as is demonstrated below, the Appellant focused his efforts on attempting to rewrite history, by asserting one version after another as to why he did not comply with the Certificate of Merit requirement.

### **Timeline of Versions Why No Certificate of Merit was Produced**

1. May 2, 2005: “All of the urologists refused to sign the certificate of merit for social reasons . . .”. (See Notice.)
2. July 11, 2005: Two experts were willing to execute a Certificate, but one required a \$40,000 fee. (See Regarding Summ. Jud. at 1, ¶ 4.)
3. December 16, 2005: No urologist will testify against another. (See Dec. 16, 2005 letter.)
4. February 14, 2006: Could have retained an expert, but elected not to. (See Response to Request for Dismissal.)
5. November 16, 2006: 12 urologists contacted and 2 agreed to execute the Certificate of Merit, but both required a fee of \$40,000. (See Mot. for Reconsid.)
6. February 16, 2007: No Certificate of Merit was required because the Appellant is a physician and can act as his own expert. (See Petition for Appeal at 15.)

Whatever the reasoning, one thing is absolutely clear, the Appellant never produced a Certificate of Merit, and under West Virginia law, a Certificate of Merit is required when a medical professional liability action is brought and no exception to the Certificate applies. The circuit court determined that no such exception applied under these facts; consequently, it dismissed the Appellant’s suit for failure to comply with the MPLA and the Appellant now seeks relief from this Court.

## **II. DISCUSSION OF LAW AND ARGUMENT**

### **A. THE CIRCUIT COURT’S DECISION TO DISMISS APPELLANT’S LAWSUIT SHOULD BE AFFIRMED BECAUSE DR. WESTMORLAND FAILED TO COMPLY WITH THE MPLA PRE-SUIT REQUIREMENTS WHEN HE FILED SUIT.**

Under West Virginia law, actions against physicians for medical professional liability are governed by the MPLA. See W. Va. Code § 55-7B-1-et seq. The MPLA contains pre-suit requirements plaintiffs must follow before filing a medical professional liability action

against a health care provider. See W. Va. Code § 55-7B-6. These requirements were enacted to “prevent[] the making and filing of frivolous medical malpractice claims and lawsuits; and promote[] the pre-suit resolution of non-frivolous medical malpractice claims.” Syl. pt. 6, *Hinchman v. Gillette*, 217 W. Va. 378, 618 S.E.2d 387 (2005) (emphasis added). Importantly, the MPLA is a definition based statute, in that courts must apply its provisions when the facts of an action fall within perimeters defined in the MPLA. See Syl. pt. 3, *State ex rel Weirton Med. Ctr. v. Mazzone*, 214 W. Va. 146, 587 S.E.2d 122 (2002); *Daniel v. Charleston Area Medical Ctr., Inc.*, 209 W. Va. 203, 544 S.E.2d 905 (2001).

The MPLA defines “medical professional liability actions” to include “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-2(i) (emphasis added). The MPLA defines “health care provider” as “a person, partnership, corporation, professional limited liability company, health care facility or institution licensed by, or certified in, this state or another state, to provide health care or professional health care services, including, but not limited to, a physician.” W. Va. Code § 55-7B-2(g). Dr. Vaidya is a licensed urologist who practices medicine in West Virginia, and as such, is a health care provider under the MPLA. See W. Va. Code § 55-7B-2(g).

**1. The Appellant Violated the MPLA By Failing to Serve Dr. Vaidya With a Certificate of Merit Because His Claims Cannot Be Proven Without Expert Testimony.**

W. Va. Code § 55-7B-6 sets forth the mandatory procedure plaintiffs must follow before filing a medical malpractice action against a health care provider. West Virginia Code § 55-7B-6 states:

(b) At least thirty days prior to the filing of a medical professional liability action against a health care provider, the claimant shall serve . . . a notice of claim on each health care provider the claimant will join in litigation. *The notice of claim shall include a statement of the theory or theories of liability upon which a cause of action may be based, and a list of all health care providers and health care facilities to whom notices of claim are being sent, together with a screening certificate of merit.* The screening certificate of merit shall be executed under oath by a health care provider qualified as an expert under the West Virginia rules of evidence and shall state with particularity: (1) The expert's familiarity with the applicable standard of care in issue; (2) the expert's qualifications; (3) *the expert's opinion as to how the applicable standard of care was breached;* and (4) *the expert's opinion as to how the breach of the applicable standard of care resulted in injury or death.*

(Emphasis added).

The Appellant claims that a Certificate of Merit is unnecessary because “the common person would not need to have an expert verify the breech [sic] of standard of care.” (See Complaint at 1, ¶ 1.) The thrust of the Appellant’s medical malpractice claim is that Dr. Vaidya injured him by “forc[ing] a scope into my genitals even though I ordered it to be stopped, or discontinued, removed,” resulting in “permanent structural damage.” (See *id.* at pg. 1, ¶¶ 1-2). In addition, the Appellant asserts that Dr. Vaidya’s acts have caused him to lose 80 lbs, almost die from renal failure, and suffer from Peyronie’s disease and infrequent urination. (See Appeal, Statement of Facts at 5.)

Importantly, how a cystoscopy is performed and whether performing it improperly can result in weight loss, renal failure, Peyronie’s disease and difficulty urinating is not within the general knowledge of a layperson. See *Banfi v. Am. Hosp. for Reha.*, 207 W. Va. 135, 529 S.E.2d 600, 608-609 (2000) (ruling that “whether a defendant has properly diagnosed and/or treated a patient entrusted to his/her care necessitates expert testimony because such a question is outside the common knowledge of the typical jury.”) Rather, expert testimony is

required to: (1) explain how to properly perform a cystoscopy; (2) identify what Dr. Vaidya allegedly did or failed to do which breached the standard of care; and (3) establish whether the injuries claimed could even result from the breach alleged. Unquestionably, expert testimony is required to prove the Appellant's claims under these facts, and the Appellant was required to serve Dr. Vaidya with a Certificate of Merit in accordance with the MPLA.

As this Court has recognized when analyzing the provisions of the MPLA, “[w]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such a case it is the duty of the courts not to construe but to apply the statute.” Syl. pt. 2, *State ex rel. Miller v. Stone*, 216 W. Va. 379, 607 S.E.2d 485 (2004) (citing Syl. pt. 5, *State v. General Daniel Morgan Post No. 548, V.F.W.*, 144 W. Va. 137, 107 S.E.2d 353 (1959)). In *Miller*, the plaintiff filed suit against the defendants/physicians *after* serving notice of her claim, but *before* she produced a Certificate of Merit. *Id.* at 384, 490. Upon review, this Court determined that the Legislature clearly intended for plaintiffs to file suit at least thirty days after producing a Certificate of Merit, so that defendants had an opportunity to demand pre-litigation mediation. Accordingly, this Court held that the plaintiff filed her lawsuit prematurely in “contravention of the clear provisions of the statute.” *Id.* at 383-4, 489-90.

Similar to the facts present in *Miller*, the Appellant has filed suit against Dr. Vaidya in contravention of the provisions of the MPLA. The Legislature's clear intent in enacting the MPLA was to require plaintiffs to produce a Certificate of Merit prior to filing suit. As this Court has recognized, this requirement was enacted to “*prevent[] the making and filing of frivolous medical malpractice claims and lawsuits; and promote[] the pre-suit resolution of non-frivolous medical malpractice claims.*” Syl. pt. 6, *Hinchman v. Gillette*, 217 W. Va. 378, 618 S.E.2d 387 (2005) (emphasis added). By failing to produce a Certificate of Merit, the Appellant

filed suit against Dr. Vaidya in violation of the statute, and therefore, the circuit court properly dismissed his claim.

The Appellant asserts that he, in effect, served a Certificate of Merit by signing the Notice of Intent, because he is a licensed physician who has intimate knowledge of the procedure at issue. (*See Appeal at 16.*) This assertion fails to take into account W. Va. Code § 55-7B-6, which states that “[t]he person signing the screening certificate of merit *shall have no financial interest in the underlying claim.*” Needless to say, none of the assertions contained in the Appellant’s Notice of Intent satisfy the Certificate of Merit requirement. In addition, the Appellant’s claim that his duty to serve a Certificate is averted by an exception contained in the MPLA is likewise false.

- a. The Appellant’s actions prior to filing the Notice of Intent clearly demonstrate that he believed a Certificate of Merit was required to pursue his claims against Dr. Vaidya.**

The MPLA does not require a Certificate of Merit in every instance. Specifically, W. Va. Code § 55-7B-6(c) provides:

*(c) Notwithstanding any provision of this code, if a claimant ... believes that no screening certificate of merit is necessary because the cause of action is based upon a well-established legal theory of liability which does not require expert testimony supporting a breach of the applicable standard of care the claimant ... shall file a statement specifically setting forth the basis of the alleged liability of the health care provider in lieu of a screening certificate of merit.*

(Emphasis added).

On May 5, 2002, the Appellant served Dr. Vaidya with a Notice of Intent, in which he asserted “[a]ll urologists refused to sign the certificate of merit for social reasons [sic] making it impossible to use legal counsel [sic] forcing me to expose the damages without their benefit.” (*See Notice of Intent at 1, ¶ 5.*) During the pendency of this action, the Appellant has

admitted that *prior to filing the Notice of Intent*, he contacted as many as 12 urologists regarding executing the Certificate of Merit.

It is commonly said that actions speak louder than words, and contacting 12 urologists speaks volumes. The undeniable conclusion from going to such great lengths is that the Appellant knew proper notice required a Certificate of Merit--and he knew it before he served the Notice of Intent. In fact, the Appellant's assertion that the urologists' refusal to sign the Certificate of Merit "*forc[ed] me to expose the damages without their benefit*" only strengthens this conclusion. (See Notice of Intent at 1, ¶ 5) (emphasis added).

Incredibly, the Appellant asserts "[t]he statute does not require that Westmoreland's belief be reasonable or in good faith – merely that he believe it." (Petition at 13.) Frankly, this statement is offensive and by all accounts, blatantly wrong. Our entire legal system is premised upon a standard of "reasonableness" and courts imply the duty to act in good faith on a daily basis. More importantly, this statement belies the Appellant's inability to argue that he "believed" a Certificate was not required "with a straight face."

The Appellant also points to the case of *Gray v. Mena* as support for his contention that he relied on the exception found at W. Va. Code § 55-7B-6(c) in good faith, but the facts in *Gray* are clearly distinguishable. (See Appellant at 14-5.) See also, *Gray*, 218 W. Va. 564, 625 S.E.2d 326 (2005). In *Gray*, the plaintiff filed suit against a physician claiming he physically assaulted her during the course of an examination. *Id.* at 566-57, 328-29. The plaintiff had been admitted to a hospital "with swelling in her lower extremities, abdominal pain, high blood sugar, a hormone deficiency, and Addison's disease." *Id.* at 567, 329. The physician examined the plaintiff behind a closed curtain, without a nurse or other staff present. During the

course of the examination, the physician moved the plaintiff's underclothing and inserted his finger inside her vagina, while not wearing protective gloves. *Id.*

The plaintiff filed suit without complying with the pre-suit requirements in the MPLA, instead alleging various common law claims, including assault and battery and sexual assault. Nowhere within the four corners of her Complaint did the plaintiff reference the MPLA or the fact that the defendant was a physician. *Id.* at n. 3.

The circuit court dismissed the plaintiff's lawsuit on the grounds that she failed to comply with the MPLA pre-suit requirements. The plaintiff asserted that the MPLA did not apply because *she was not asserting a medical malpractice action.* *Id.* This Court carefully considered the factual allegations the plaintiff pled in rendering its decision, recognizing that "whether the allegedly offensive action occurred within the context of rendering medical services is exceedingly fact-driven." *Gray*, 570, 332. This Court reinstated the plaintiff's suit finding that dismissal was too harsh a remedy because she and her counsel, in good faith, pled a suit for assault and battery, not medical malpractice. *Id.*

None of the determinative facts in *Gray* are present here. Rather, the Appellant filed a lawsuit seeking damages for injuries allegedly sustained while a medical procedure was being performed. (*See Complaint.*) Prior to filing suit, the Appellant served a Notice of Intent and waited for 39 days, just beyond the statutory period, before filing the Complaint. In addition, both the Notice and the Complaint are riddled with references to the MPLA.

Of note, this Court in *Gray* stated "[i]n this situation, the defendants should be permitted to request compliance with the statutory requirements. The circuit court should thereafter examine the issues raised by the defendants and require the Appellant to comply with the statute." *Gray*, 570, 332. In other words, upon remand, the plaintiff had to comply with the

MPLA pre-suit requirements, at the physician's option, even though she was not alleging medical malpractice. In addition, this Court issued a warning to future litigants filing suits against health care providers, stating "[w]e caution all litigants preparing a complaint in such matters to be diligent in adhering to the requirements of the Medical Professional Liability Act where the healthcare provider's action could possibly be construed as having occurred within the context of the rendering of health care services." *Gray*, 570, 332 (emphasis added).

Clearly, the holdings by this Court in *Gray*, as well as the Appellant's actions prior to filing suit, do not support his claim of good faith reliance upon the statutory exception found at W. Va. Code § 55-7B-6(c). More importantly, the instructions to the circuit court and the warning to future litigants in *Gray* prove beyond all doubt that this Appellant was required to comply with the MPLA pre-suit requirements, and his failure to do so warranted dismissal of his case.

- b. Contrary to the Appellant's claims, Dr. Vaidya did not waive his right to challenge the legal sufficiency of the Appellant's pre-suit notice of claim because the Appellant failed to produce a Certificate to which Dr. Vaidya could object.**

Under West Virginia law, "[b]efore a defendant in a lawsuit against a healthcare provider can challenge the legal sufficiency of a plaintiff's pre-suit notice of claim or screening certificate of merit under W. Va. Code § 55-7B-6 [2003], the plaintiff must have been given written and specific notice of, and an opportunity to address and correct, the alleged defects and insufficiencies." *Hinchman*, 217 W. Va. at 378, 618 S.E.2d at 387. First and foremost, the rulings contained in *Hinchman* were not rendered until *after* the deadline had run for Dr. Vaidya to respond to the Appellant's Notice of Intent. The Appellant served Notice on May 2, 2005 and filed the Complaint June 10, 2005. Dr. Vaidya moved to dismiss the Appellant's suit on June 30,

2005. The rulings in *Hinchman* were not filed until July 5, 2005, five days after Dr. Vaidya moved to dismiss the Appellant's lawsuit. However, even if Dr. Vaidya had a duty to notify the Appellant of the insufficiencies, the *Hinchman* concerns are not present in this action.

In this instance, the Appellant was well aware that he failed to serve Dr. Vaidya with a Certificate of Merit. In fact, he went so far as to address its absence in the Notice of Intent, stating "[a]ll urologists refused to sign the certificate of merit." (*See* Notice of Intent at 1, ¶ 5.) Moreover, based upon this representation, Dr. Vaidya had no reason to believe the Appellant could address this insufficiency. If "all urologists" refused to sign the Certificate of Merit before the Appellant served the Notice of Intent, Dr. Vaidya had no reason to believe their stance would change after the Notice was served.

It must also be noted that Dr. Vaidya's Motion to Dismiss was pending for 18 months prior to the dismissal. In all that time, the Appellant never retained a medical expert or made any representations to the circuit court that he was attempting to do so. Instead, the Appellant concentrated his efforts on espousing one reason after another for why he did not serve a Certificate of Merit or retain an expert. In furtherance of this point, the record shows: (1) the Appellant first claimed no urologist would execute the Certificate; (2) then, he claimed 2 out of 12 would, but one required a \$40,000 fee; (3) soon after, he went back to claiming no urologist would sign; 4) later, the Appellant claimed he was able to secure an expert, but apparently elected not to; 5) next, he claimed 2 agreed to execute the Certificate, but both demanded a \$40,000 fee; and 6) finally, the Appellant now asserts that he is qualified to appear as his own expert. (*See* Notice of Intent at 1, ¶5; Motion for SJ at 1, ¶ 4; Westmoreland Affidavit at 1.)

You need a scorecard to keep up with the different versions of events being asserted. Now the Appellant looks to this Court for additional time to do what the Appellant

knew he needed to do when the Notice of Intent was filed in 2005---retain an expert. The Appellant's decision to sit on his laurels should not be rewarded by reinstating his case.

In any event, the Appellant's failure to serve a Certificate of Merit cannot now be laid at Dr. Vaidya's feet as proof that he waived his right to challenge the notice. Failing to produce a Certificate is vastly different from requiring physicians to identify deficiencies found within the four corners of a Certificate. Had the Appellant served a Certificate that contained deficiencies, Dr. Vaidya would have been afforded the opportunity to point them out. That did not occur and Dr. Vaidya is entitled to challenge the legal sufficiency of the Appellant's notice under these facts.

**2. The MPLA Governs the Entirety of the Appellant's Statutory and Common Law Claims Because He is Seeking Damages Allegedly Resulting from Health Care Services Rendered, Which Require Expert Testimony.**

The MPLA defines "medical professional liability actions" to include "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-2(i) (emphasis added). Based on the record, the sole claim in this case is an alleged negligent cystoscopy.

The Appellant seeks damages for alleged medical malpractice, civil battery, slander and fraud. (*See Appeal, Kind of Proceeding at 3.*) All of these claims arise from the cystoscopy Dr. Vaidya performed on June 16, 2003, and statements he made while defending against the Appellant's complaint before the Board of Medicine. Likewise, all of these claims, including the common law claims of civil battery, slander and fraud, fall squarely within the confines of "*any tort . . . based on health care services rendered*" and are governed by the MPLA. *See W. Va. Code § 55-7B-2(i).* (emphasis added).

The Appellant cites *Boggs v. Camden-Clark Mem. Hosp. Corp., et al.* as support for his proposition that the common law claims are not governed by the MPLA. (See Appeal at 34.) See also, 216 W. Va. 656, 609 S.E.2d 917 (2004). However, the holdings in *Boggs* are distinguishable from the facts in the above-captioned matter.

In *Boggs*, the plaintiff's wife ("Ms. Boggs") was scheduled for surgery for a fractured ankle. *Boggs*, 659, 920. Her physician recommended spinal, rather than general, anesthesia. Mrs. Boggs died soon after the spinal anesthetic was administered. *Id.* Mrs. Boggs' husband ("plaintiff") filed suit against her physician for malpractice, as well as the hospital and anesthesiology group for negligent hiring and vicarious liability. *Id.* The plaintiff also asserted several common law claims believing some of the defendants had engaged in a cover-up, including fraud, destruction of records, the tort of outrage, and spoliation of evidence. *Id.* The plaintiff served the parties with Notices of Intent and Certificates of Merit, but the Certificates were mistakenly blank. Upon realizing his mistake, the plaintiff mailed new Certificates to the parties using an overnight carrier and then filed suit 27 days after the second mailing. *Id.* at 660, 921.

The defendants moved to dismiss the suit asserting that the plaintiff failed to serve them with properly executed Certificates thirty days prior to filing suit. The circuit court granted their motion and dismissed the plaintiff's case in its entirety. This Court reinstated the plaintiff's lawsuit and then addressed the circuit court's decision to dismiss all of the plaintiff's claims, stating:

[f]raud, spoliation of evidence, or negligent hiring are no more related to 'medical professional liability' or 'health care services' than battery, larceny, or libel. There is simply no way to apply the MPLA to such claims. *The Legislature has granted special protection to medical professionals, while they are acting as such. This protection does not extend to intentional torts or acts outside*

*the scope of 'health care services.' If for some reason a doctor or nurse intentionally assaulted a patient, stole their possessions, or defamed them, such actions would not require application of the MPLA any more than if the doctor or nurse committed such acts outside of the healthcare context. Moreover, application of the MPLA to non-medical claims would be a logistical impossibility. No reputable physician would sign a certificate of merit for a claim of fraud or larceny or battery; how could such a certificate be helpful or meaningful?*

*Id.* at 662-63, 923-24 (emphasis added).

In other words, *Boggs* recognized that a health care provider's conduct may be sufficiently unrelated to the rendering of health care services such that it can be considered independently from a contemporaneously pled malpractice claim. This is especially true where expert testimony is not required to prove the common law claims at issue. The situation addressed in *Boggs* is not present in this action.

All of the Appellant's claims are directly related to the health care services Dr. Vaidya rendered, as demonstrated in the pleadings. For example, the Appellant asserts that Dr. Vaidya committed battery because he failed to immediately stop the procedure at the precise moment the Appellant allegedly withdrew his consent. (*See Appeal* at 34 (stating "At the precise moment of withdrawal of consent, any and all medical procedures should have terminated")). The Complaint itself makes it clear this "battery," which allegedly occurred during the cystoscopy, can only be proven with expert testimony. The Complaint alleges the procedure required a scope to be inserted into the penis. The procedure was well underway when Dr. Westmoreland allegedly withdrew his consent. (*See Complaint.*) Whether Dr. Vaidya could simply stop the cystoscopy at issue when the plaintiff "withdrew his consent" is a complex medical judgment which requires expert testimony. Only a urologist could answer this question because the medical negligence and battery claims are inseparable and both require expert testimony to prove.

The same is true of the “fraud” and “slander” claims, both of which arise from the Appellant’s assertions that Dr. Vaidya “falsified records making claims, (done without incident), [sic] (I started the IV myself because I was use [sic] to injecting myself IV [sic]).” (See Complaint.) At the outset, we must note that the Appellant’s claims of fraud and slander are entirely without merit because they are based upon the written summary of events that Dr. Vaidya provided *to the Board of Medicine, in defense of the Appellant’s complaint*. Under West Virginia law, all proceedings and records before the Board of Medicine are confidential and privileged and the records are not subject to discovery or admissible as evidence in a civil action. W. Va. Code ¶ 30-3C-3.<sup>2</sup> See Syl. pt. 5, *Belcher v. Wal-Mart Stores, Inc.*, 211 W. Va. 712, 568 S.E.2d 19 (2002) (holding that to prove slander against a private citizen, one must prove, among other things, that a *non-privileged* communication is made to a third-party). Hence, the Appellant’s claims of fraud and slander fail to state a claim upon which relief may be granted.

However, even if the claims had merit, they would be subject to the MPLA because the statements recited the events that occurred immediately prior to conducting the cystoscopy, thereby inseparably intertwining the procedure and the statements. Specifically, Dr. Vaidya stated that “His nurse could not establish IV access. Dr. Westmoreland stated he has injected himself in the past on several occasions and he can do it himself. He did his own

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<sup>2</sup> W. Va. Code ¶ 30-3C-3 states that:

[t]he proceedings and records of a review organization [such as the Board of Medicine] [are] confidential and privileged and shall not be subject to subpoena or discovery proceedings or be admitted as evidence in any civil action arising out of the matters which are subject to evaluation and review by such organization and no person who was in attendance at a meeting of such organization shall be permitted or required to testify in any such civil action as to any evidence or other matters produced or presented during the proceedings of such organization or as to any findings or members thereof.

injection of Valium.” (See Dr. Vaidya’s response to the Board of Medicine, attached as Ex. 2 to Dr. Vaidya’s Reply.)

The Appellant asserts that this representation implies he is a drug abuser. Importantly, the Board of Medicine made no findings in criticism or support of this issue. (See Decision.) Considering that the person discussed in the statement is a licensed physician, it would certainly be necessary to put the statements Dr. Vaidya made into context, thereby requiring expert testimony to prove these claims. Importantly, the Board of Medicine has already determined that “*there was no evidence of a failure to practice medicine with that level of care, skill and treatment which is recognized by a reasonable, prudent physician engaged in the same specialty as being acceptable under similar conditions and circumstance, and determined that there is no reason to proceed against the license to practice medicine of Dr. Vaidya . . .*” (See Decision at 1-2, ¶ 6) (emphasis added).

Under these facts, the Appellant’s statutory and common law claims are specifically and inseparably related to the health care services Dr. Vaidya rendered, and the concerns addressed in *Boggs* are not present in this case. Therefore, all of the Appellant’s claims are governed by the MPLA.

**3. Even the Foreign Precedent to Which the Appellant Cites Supports the Proposition that the Entirety of His Claims are Governed by the MPLA.**

The Appellant asserts that his battery claim is separate and distinct from the malpractice claim, and therefore, the MPLA does not govern it. (Appeal at 33-41.) In alleged “support” of this proposition, he cites to an array of cases from various jurisdictions that address the issue of consent. The Appellant poses the question, “Is there really any substantive difference [between a patient never consenting to a medical procedure and a] Patient withdraw[ing] his consent to a medical procedure previously consented to?” (Appeal at 35.)

Incredibly, this question is clearly answered in the affirmative by the cases cited in Appellant's brief, in that a patient's right to *withhold* consent is absolute, whereas his right to *withdraw* consent in the midst of a procedure is not.

The foreign consent cases on which the Appellant relies can be placed into one of three categories: (1) the patient never consented to the procedure<sup>3</sup>; (2) the patient's consent was contingent upon certain factors<sup>4</sup>; and (3) the patient claims to have withdrawn consent during the course of the procedure.<sup>5</sup> Since the Appellant initially consented to the cystoscopy and he did not place any limitations on his consent, only the third category applies here. The first and second categories involving plaintiffs who either did not consent to the procedure at issue<sup>6</sup> or whose consent was limited by way of a contingency<sup>7</sup> are irrelevant to the determination of the issue in the instant case. Further, each and every case involving patients who claim to have

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<sup>3</sup> *Hoofnel v. Segal*, No. 2003-CA-000412-MR (Ky. 2004); *Washburn v. Klara*, 263 Va. 586, 561 S.E.2d 682 (2002); *Grant v. Petroff*, 291 Ill. App.3d 795, 684 N.E.2d 1020 (1997); *Woodbury v. C.B. Courtney*, 239 Wa. 651, 397 S.E.2d 293 (1990).

<sup>4</sup> *Vitale v. Henchey*, 24 S.W. 651 (Ky. 2000); *Cohen v. Smith*, 269 Ill.App. 3d 1087, 648 N.E. 329 (1995); *Pugsley v. Privette*, 220 Va. 892, 263 S.E.2d 69 (1980).

<sup>5</sup> *Schreiber v. Physicians Insurance Company of Wisconsin*, 217 Wis.2d 94, 579 N.W.2d 730 (1998); *Coutler v. Thomas*, 33 S.W. 522 (Ky. 2000); *Mack v. Mack*, 329 Md. 188, 618 A.2d 744 (1993); *Mims v. Boland*, 110 Ga.App. 477, 138 S.E.2d 902 (1964).

<sup>6</sup> *Hoofnel v. Segal*, No. 2003-CA-000412-MR (Ky. 2004) (plaintiff consented to an appendectomy, anterior resection of colon and possible removal of ovaries, and the physician performed a hysterectomy); *Washburn v. Klara*, 263 Va. 586, 561 S.E.2d 682 (2002) (plaintiff consented to surgery on C 6-7 area of the spine, but physician may have also performed surgery at the C7-T1 level); *Grant v. Petroff*, 291 Ill. App.3d 795, 684 N.E.2d 1020 (1997) (plaintiff consented to hysteroscopy, D & C, and pelviscopy, and the surgeon also performed a tubal ligation); and *Woodbury v. C.B. Courtney*, 239 Wa. 651, 397 S.E.2d 293 (1990) (plaintiff consented to biopsy of breast and physician performed partial mastectomy).

<sup>7</sup> *Vitale v. Henchey*, 24 S.W. 651 (Ky. 2000) (medical power of attorney consents to surgery by a specific surgeon for mother/patient and a different surgeon performs the procedure); *Cohen v. Smith*, 269 Ill.App. 3d 1087, 648 N.E. 329 (1995) (plaintiff consents to procedure so long as male medical providers do not see or touch her while naked due to religious beliefs and male RN sees and touches plaintiff during course of procedure); and *Pugsley v. Privette*, 220 Va. 892, 263 S.E.2d 69 (1980) (patient consents to surgery so long as a specific surgeon was present, and the procedure was performed in his absence).

revoked their consent during the course of the procedure holds that *the right to withdraw consent is not absolute and medical expert testimony is required to prove a battery alleged under these facts.*

Of all the cases the Appellant cites, *Mims v. Boland* contains the most thorough analysis of an alleged battery occurring during the course of a medical procedure. 110 Ga.App. 477, 138 S.E.2d 902 (1964). In *Mims*, plaintiff Jennie Mims filed suit against two physicians seeking damages related to a battery that allegedly occurred when the defendants continued to administer a barium enema after she withdrew her consent. *Id.* at 479, 904-05. The plaintiff had a colostomy bag and a tube attached to the enema had to be inserted into the bag in order for the enema to be administered. *Id.* at 480, 906.

The plaintiff testified at trial that the physicians “shoved” the tube into the colostomy bag so forcefully that it “nearly killed” her. *Id.* at 484, 908. She then began to experience an incredible amount of pain, stating “I was in such intense pain that I didn’t think I could stand it and I just kept begging both of them not to give me any more of it. ... Oh I just suffered terrible, I suffered torture, started into just rigors and just shaking, and they had to hold me on the table.” *Id.* Thereafter, the defendants determined that the colostomy bag had been punctured and the contents of the barium enema had entered the plaintiff’s abdominal cavity, causing permanent damage. *Mims*, 110 Ga.App. at 484, 138 S.E.2d at 908. After a three week trial, the jury returned a verdict in favor of the defendants, and the plaintiff appealed when the lower court denied her motion for a new trial.

The appellate court ruled that patients have a right to withdraw consent after a procedure has begun, provided “the physician’s withdrawal under the medical circumstances

then existing *would not endanger the life or health of the patient.*" *Id.* at 483, 907 (emphasis added). The court recognized that:

It is difficult to set a standard to govern the doctor's conduct where the patient protests in the midst of treatment or examination. *If the doctor should desist midstream, so to speak, it might forfeit the patient's life or well-being and might result in the doctor's liability for malpractice or indictment for some criminal offense or might bring upon him the reproach and condemnation of this own profession.* These possibilities of accusal should not be left to chance so a standard must be devised to regulate conduct in this scope of activity.

*Id.* at 483, 907 (emphasis added).

Balancing both the patient's right to withdraw consent and the need to ensure that medical treatment is discontinued at a safe and appropriate interval, the court ruled that:

To constitute an effective withdrawal of consent as a matter of law after treatment or examination is in progress commensurate to subject medical practitioners to liability for assault and battery if treatment or examination is continued, two distinct things are required: (1) The patient must act or use language which can be subject to no other inference and which must be unquestioned responses from a clear and rational mind. *These actions and utterances of the patient must be such as to leave no room for doubt in the minds of reasonable men that in view of all the circumstances consent was actually withdrawn.* (2) When medical treatments or examinations occurring with the patient's consent are proceeding in a manner requiring bodily contact by the physician with the patient and consent to the contact is revoked, *it must be medically feasible for the doctor to desist in the treatment or examination at that point without the cessation being detrimental to the patient's health or life from a medical viewpoint.*

The burden of proving each of these essential conditions is upon the plaintiff and with regard to the second condition, *it can only be proved by medical evidence as medical questions are involved.*

*Id.* at 483-4, 907-8 (emphasis added).

Applying the test to the facts present in *Mims*, the court ruled that the plaintiff failed to meet the first prong of the test because she did not proffer testimony to establish that she

effectively communicated her decision to withdraw consent. With respect to the plaintiff's testimony that the procedure "nearly killed" her and that she "begged" the defendants to stop administering the enema, the court found that "[t]his testimony merely shows protestations by the plaintiff of pain and discomfort and disagreement with the defendants in the manner they administered the barium enema. That is not enough." *Mims*, 110 Ga.App. at 485, 138 S.E.2d at 908. The court also found that the plaintiff failed to meet the second prong of the test because she did not offer evidence from a licensed physician to establish that the defendants could have discontinued administering the enema at some point during the procedure. *Id.* at 485, 908.

Similar to the facts in *Mims*, the Appellant claims to have withdrawn consent to the cystoscopy while Dr. Vaidya was performing the procedure. Applying the test derived in *Mims*, the Appellant is required to proffer medical testimony regarding whether Dr. Vaidya could have stopped the procedure without harming the Appellant, and if so, when. In other words, the Appellant's malpractice and battery claims are inseparably intertwined under these facts, and expert medical testimony is required to prove both the battery and malpractice claims. Furthermore, another of the Appellant's cases sheds light as to how this Court should characterize his claims.

In *Andrew v. Begley*, the court found that the plaintiff's battery claim was, in fact, a medical malpractice claim because she was questioning the manner in which the physician/defendant performed the examination at issue. 203 S.W. 165 (Ky. 2006). Plaintiff Pamela Andrew filed suit against a physician for various claims, including malpractice and battery, after the physician conducted a medical evaluation to determine whether the plaintiff's social security benefits should be discontinued. The examination included range of motion and sensory testing, during which the plaintiff claims that the physician committed battery by forcing

her arms to extend beyond their capability, causing her to cry out in pain and ask the physician's assistant to stop the examination. *Id.* at 168-71. In addition, the plaintiff asserted that following the exam, she suffered from general pain and discomfort, bruising on her legs, swelling in her lower back, pain in her shoulders, and increased pain in her lower back and right hip. *Id.* at 168. The court found that although a doctor could commit battery in certain circumstances, the facts in *Andrew* gave rise to a malpractice claim, as opposed to a battery claim, *because the plaintiff was questioning the physician's "professional judgment" in how the examination was conducted.* *Id.* at 171-2 (emphasis added).

Analogous to *Andrew*, the Appellant is attacking Dr. Vaidya's professional judgment with respect to the manner in which he performed the cystoscopy. In the Complaint, the Appellant alleges that Dr. Vaidya's "forceful incertion [sic] of the scope" cut him, and that is the reason why he wanted to discontinue the procedure. (*See* Complaint.) Given this allegation, the Appellant is questioning the manner in which Dr. Vaidya was performing the cystoscopy. Ergo, in accordance with the holdings in *Andrew*, the Appellant has pled a malpractice claim because he is questioning Dr. Vaidya's professional judgment.<sup>8</sup>

In any event, the cases the Appellant cites make three things abundantly clear: (1) the right to withdraw consent after the commencement of a medical procedure is not absolute;

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<sup>8</sup> With respect to the other cases the Appellant relies upon that involve plaintiffs allegedly withdrawing their consent during the course of a procedure, those courts follow the same analysis established in *Mims*. *See Coulter v. Thomas*, 33 S.W. 522 (Ky, 2000) (adopting test in *Mims*); *Schreiber v. Physicians Insurance Company of Wisconsin*, 217 Wis.2d 94, 579 N.W.2d 730 (1998) (court reverses dismissal of suit where evidence on record establishes consent withdrawn and defendant/physician admits alternative treatment requested could have been performed at any time during initial procedure); *Mack v. Mack*, 329 Md. 188, 618 A.2d 744 (1993) (plaintiff files suit to obtain guardianship of family member in vegetative state to discontinue medical treatment and court qualifies right to withdraw consent "because the right is not absolute. It is subject to 'at least four countervailing State interests: (1) the preservation of life; (2) the protection of interests of innocent third parties; (3) the prevention of suicide; and (4) the maintenance of the ethical integrity of the medical profession.'") (*citing Brophy v. New England Sinai Hospital, Inc.*, 398 Mass. 417, 497 N.E.2d 626, 634 (1986)).

(2) proving a battery claim under these circumstances requires medical expert testimony to establish whether the procedure could have been stopped prior to completion, and if so, at what point; and (3) medical testimony is required because the battery claim and the medical procedure are so closely intertwined that it would be impossible for a jury to determine where one ends and the other begins. Hence, the MPLA governs all of the Appellant's claims.

**B. THE CIRCUIT COURT'S RULING SHOULD BE AFFIRMED BECAUSE THE APPELLANT'S CLAIMS ARE FRIVOLOUS.**

Under West Virginia law:

[i]n determining whether a notice of claim and certificate are legally sufficient, a reviewing court should apply *W. Va. Code, 55-7B-6 [2003]* in light of the statutory purposes of preventing the making and filing of frivolous medical malpractice claims and lawsuits; and promoting the pre-suit resolution of non-frivolous medical malpractice claims. Therefore, a principle consideration before a court reviewing a claim of insufficiency in a notice or certificate should be whether a party challenging or defending the sufficiency of a notice and certificate demonstrated a good faith and reasonable effort to further the statutory purposes.

Syl. pt. 6, *Hinchman, supra*.

In each case where this Court found a plaintiff acted in good faith, making a reasonable effort to comply with the pre-suit requirements, the following factors were present: (1) the plaintiff served both a Notice of Intent *and* Certificate of Merit; (2) the plaintiff was unaware of the deficiencies with the notice provided until *after* filing suit; and (3) there was no evidence on the record indicating the claim was frivolous. *See Roy v. D'Amato*, 218 W. Va. 692, 629 S.E.2d 751 (2006); *Elmore v. Triad Hospitals, Inc., supra*; *Hinchman, supra*. In other words, those plaintiffs went to great lengths to comply with the provisions of the MPLA, and although their compliance was not absolute, their efforts were sufficient to warrant reinstatement of their case. None of those factors are present here.

Unlike the plaintiffs in *Roy, Elmore* and *Hinchman*, the Appellant did not serve Dr. Vaidya with the requisite Certificate of Merit, and he was clearly aware of the Certificate of Merit requirement. (See Notice of Intent at 1, ¶ 5.) Perhaps most importantly, there is substantial evidence of record demonstrating the Appellant's claims are frivolous.

The Board of Medicine investigated the complaint and determined that "[t]he evidence fails to show that the license of Dr. Vaidya to practice medicine in this State should be restricted or limited because there is no evidence of a failure to practice medicine with that level of care, skill and treatment which is recognized by a reasonable, prudent physician engaged in the same specialty as being acceptable under similar conditions and circumstances." Decision, entered November 14, 2005, pg. 2-3, ¶3 (emphasis added). The Board of Medicine is tasked with investigating claims of medical malpractice and taking action against a physician's license if the allegations prove true. W. Va. Code § 30-3-14(a). By the Appellant's own admission, 10 urologists refused to support the allegations he has asserted against Dr. Vaidya. (See Westmoreland Affidavit.) Presumably, those urologists reached the same conclusion as the Board, and refused to support the Appellant's allegations because Dr. Vaidya did not breach the standard of care. The Board's findings, coupled with the overwhelming lack of support by other urologists, leads to only one conclusion---the Appellant's allegations are frivolous and the circuit court properly dismissed his lawsuit.

**C. THE APPELLANT'S CLAIMS THAT THE PRE-SUIT REQUIREMENTS ARE UNCONSTITUTIONAL LACK MERIT BECAUSE NO ADMISSIBLE EVIDENCE EXISTS PERMITTING AN ATTACK ON THE MPLA ON THOSE GROUNDS.**

The Appellant asserts that the pre-suit requirements contained in the MPLA are unconstitutional because he was unable to secure a Certificate of Merit without paying an allegedly "exorbitant" fee for an expert opinion. (See Appeal at 24-33.) He claims only two

urologists agreed to execute a Certificate of Merit and alleges one, then later both, required a fee of \$40,000. (See Mot. for Summ. J. at 1 ¶ 4. See also, Westmoreland Affidavit at 1, ¶¶ 4-5.)

Statutes enacted by the Legislature are presumed to be constitutional. *Hinchman*, 384, 393. In *Elmore v. Triad*, the Court suggested that the MPLA pre-suit notice requirements were constitutional, stating they are valid and outside the scope of the Court's constitutional authority to promulgate rules of procedure for trial courts. 220 W. Va. 154, 640 S.E.2d 217 (2006). Justice Benjamin echoed this point in his separate opinion, stating "I agree and concur with the majority's discussion regarding the legislature's authority with respect to pre-suit notice of claims as a pre-requisite to filing a medical malpractice action. The legislature is empowered to define common law causes of action, including prerequisites which must be satisfied before a court's jurisdiction to entertain the action is triggered." Moreover, this Court's "longstanding policy" has been not to address the constitutionality of statutes, unless it is necessary to determine the outcome of a case on appeal. *Davis v. Mound View Health Care, Inc.*, 220 W. Va. 28, 640 S.E.2d 91, 92-3 (2006) (declining to review whether the pre-suit requirements of the MPLA are constitutional).

The only "evidence" supporting the claim of inability to pay for a certificate is the *Appellant's* own assertions, which amount to nothing more than self-serving hearsay. See W. Va. R. Evid. 801-802. This characterization is especially true given that the Appellant has provided inconsistent versions to explain why he failed to serve Dr. Vaidya with a Certificate of Merit. Initially, the Appellant claimed that [a]ll urologists refused to sign" the Certificate. (See Notice of Intent at 1, ¶ 5.) Only after Dr. Vaidya filed the Motion to Dismiss did the \$40,000 claim come into play. (See Mot. for Summ. J.) If, in fact, one or two urologists agreed to execute a Certificate for an "exorbitant fee," why wasn't that included in the Notice of Intent? In

any event, there is absolutely no admissible evidence on the record substantiating these assertions, and the Appellant should not be permitted to attack the constitutionality of a statute using inadmissible hearsay as his vehicle.

Even if it is true that two urologists have demanded a \$40,000 fee, the simple fact is that no certificate was provided as required by the MPLA. W. Va. Code § 55-7B-6 is mandatory, and noncompliance cannot be excused because an expert could not be retained. Indeed, the whole point of the statute is to make sure there is a reasonable basis for a claim before a physician is dragged into court. Here, that reasonable basis is completely absent due to the failure to obey the mandate of § 55-7B-6.

Moreover, it is of concern that the naked allegation of an outrageous fee is sufficient to bypass the statute. Even accepting the Appellant's exorbitant fee claim, there is simply inadequate evidence before this Court to indicate how the fee was calculated and what it was for.<sup>9</sup> The fee could include services other than preparing and signing a Certificate, such as

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<sup>9</sup> The Appellant asserts that Dr. Vaidya believes \$40,000 is a "reasonable" fee and constitutes "little money" based upon a footnote contained in Dr. Vaidya's Response to the Appellant's Motion for Reconsideration. See Appeal at 24-5. This assertion is disingenuous, at best, as evidenced by the footnote, which is reproduced in its entirety below:

Plaintiff's assertion lacks merit because expenses are a natural part of the civil litigation process. Plaintiffs incur expenses compensating attorneys and expert witnesses, preparing for trial, performing investigations, and in many other tasks necessary to maintaining a lawsuit. Compensating a medical expert for his time is a reasonable expectation given the certificate of merit requirement and one which the legislature must have contemplated when they enacted the MPLA. It is similar to the expense one incurs compensating such an expert who testifies at trial. Not only is the expense associated with obtaining a certificate of merit reasonable, but it is also justified. The Supreme Court of Appeals has held that one of the purposes of the MPLA "pre-suit notice of claim and screening certificate of merit [is to] prevent the making and filing of frivolous medical malpractice claims and lawsuits." *Hinchman v. Gillette*, 217 W. Va. 378, 403, 618 S.E.2d 387, 394 (2005). By requiring plaintiffs to expend effort and possibly a little money, the statute helps prevent the filing of frivolous lawsuits by making plaintiffs think twice before filing frivolous lawsuits. Other courts agree that Certificates of Merit in medical professional liability cases are "designed to prevent the filing of baseless litigation." *Shands Teaching Hospital and Clinics, Inc. v. Barber*, 638 So.2d 570, 572 (Fla. App. 1994).

appearing as an expert in this case and rendering medical services to address the alleged injuries. It is impossible to evaluate the constitutionality of the pre-suit filing requirements based upon a scant bit of information, which has been taken out of context and is inadmissible for all intents and purposes.

**D. THE MPLA'S PRE-SUIT REQUIREMENTS ARE CONSTITUTIONAL AND IN NO WAY HINDER A PLAINTIFF'S ACCESS TO COURT.**

W. Va. Code § 55-7B-6(b) sets forth the mandatory procedure plaintiffs must follow before filing a medical malpractice action against a health care provider, including providing Notice of Claim and a Certificate of Merit prior to filing suit. Importantly, the MPLA's pre-suit requirements can be added to a laundry list of other requirements that plaintiffs are mandated to comply with in order to pursue their claims, including: (1) filing suit prior to the statute of limitations barring the claim (W. Va. Code ¶ 55-2-12); (2) accomplishing sufficient process (W. Va. R.Civ.Pro. 4(c)); (3) accomplishing sufficient service of process (W. Va. R.Civ.Pro. 4(d)); (4) serving the Complaint within 120 days of filing suit (W. Va. R.Civ.Pro. 4(k)); (5) filing suit before a court that has subject matter jurisdiction (W. Va. R.Civ.Pro. 12(b)(1)); (6) filing suit before a court that has personal jurisdiction (W. Va. R.Civ.Pro. 12(b)(2)); (7) establishing that the court has proper venue (W. Va. R.Civ.Pro. 12(b)(3)); and (8) pleading certain claims with the requisite specificity (W. Va. R.Civ.Pro. 9).<sup>10</sup>

Clearly, pre-suit requirements are not a new concept in West Virginia law. Furthermore, the pre-suit requirements found in the MPLA withstand constitutional muster because: (1) they were created by the Legislature in accordance with its authority to enact

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<sup>10</sup> Other pre-suit filing requirements that may apply include: (1) exhausting all administrative remedies (W. Va. Code ¶ 25-1A-2); and (2) complying with the statute of frauds (W. Va. Code ¶ 46B-2-1).

statutes; (2) they do not encroach upon the judiciary's rule-making authority; and (3) they pass the "rational basis" test in fulfilling a legitimate governmental objective.

**1. West Virginia Code § 55-7B-6(b) Does Not Violate the Separation of Powers and Rule Making Clauses of the West Virginia Constitution.**

The Separation of Powers Clause of the West Virginia Constitution states that "[t]he legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others[.]" W. Va. Const. art. V, § 1. The Rule Making Clause of the West Virginia Constitution gives this Court the "power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the state relating to writs, warrants, process, practice and procedure, which shall have the force and effect of law." W. Va. Const. art. VIII, § 3. "[A] statute governing procedural matters in [civil or] criminal cases which conflicts with a rule promulgated by the Supreme Court would be a legislative invasion of the court's rule-making powers." *Louk v. Cormier*, 218 W. Va. 81, 88, 622 S.E.2d 788, 795 (2005). However, "it is within the province of the legislature to enact statutes which abrogate the common law."<sup>11</sup> *Perry v. Twentieth St. Bank*, 157 W. Va. 963, 966, 206 S.E.2d 421, 423 (1974).

**a. The West Virginia Legislature Created the Pre-Suit Requirements of the MPLA in Accordance with Its Authority to Enact Statutes.**

In enacting the MPLA, the Legislature did not exceed its power to alter the common law in violation of the Separation of Powers Clause. The parameters around the rule making power are not absolute, nor do they preclude any legislative intrusion. This Court has

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<sup>11</sup> "[T]he indisputable fact [is] that the legislature has the power to change the common law of this State." *Gilman v. Choi*, 185 W. Va. 177, 186, 406 S.E.2d 200, 209 (1990), *overruled on other ground*; *Mayhorn v. Logan Med. Found.*, 193 W. Va. 42, 454 S.E.2d 87 (1994).

never treated its powers as completely separate and apart from the Legislature. Rather, recognizing the Legislature's authority, legislative efforts have been struck down only when they *directly contradict* a rule of court, such as requiring a 12-member jury<sup>12</sup> or changing the qualifications necessary for experts to testify.<sup>13</sup> To the contrary, legislative enactments that are compatible with the Court's rules are constitutional. *State ex. rel. Quelch v. Daugherty*, 172 W. Va. 422, 424, 306 S.E.2d 233, 235 (1983).

The Appellant argues that the Notice of Claim and Certificate of Merit requirements invade this Court's rule making authority, as outlined in Rule 11 of the West Virginia Rules of Civil Procedure. Justice Maynard has addressed the issue of whether, in his opinion, the MPLA infringed upon the Supreme Court's rule making authority in his dissent in *Hinchman*, stating:

I wish to make clear my firm conviction that W. Va. Code ¶ 55-7B-6 is constitutional. The statute does not infringe upon the rule-making power of this Court because it does not conflict with any of this Court's rules. Our Rules of Civil Procedure 'govern the procedure in all trial courts of record in all actions, suits, or other judicial proceedings of a civil nature.' W.Va.R.Civ.Pro.1. According to Rule of Civil Procedure 3(a), '[a] civil action is commenced by filing a complaint with the court.' Thus, this Court's Rules of Civil Procedure do not govern pre-filing certificates of merit because such a certificate is filed prior to the commencing of a civil action. Hence, W. Va. Code ¶ 55-7B-6 is a legitimate addition to the substantive law of this State.

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<sup>12</sup> This Court has held that *West Virginia Code* section 55-7B-6(d) requiring a non-unanimous verdict in medical malpractice actions violated constitutional separation of powers. *Louk*, 218 W. Va. at 94, 622 S.E.2d at 801. The Court has also held that requiring a 12-member jury was in direct conflict with Rule 47(b) of the West Virginia Rules of Civil Procedure, where a jury is limited to six members, unless in the court's discretion a greater number is imposed. *Id.* at 97, 804.

<sup>13</sup> *Mayhorn v. Logan Med. Found.*, 193 W. Va. 42, 454 S.E.2d 87 (1994).

*Hinchman*, 217 W. Va. at 399, 618 S.E.2d at 408. The Appellant asserts that the pre-suit requirements specifically conflict with Rule 11 of the West Virginia Rules of Civil Procedure; however, in actuality, the pre-suit requirements complement, rather than conflict with, Rule 11.

Rule 11 imposes pre-lawsuit investigatory duties and responsibilities on attorneys. Cleckley, et al., *Litigation Handbook* § 11(b), at 242 (quoted in *Hinchman*, 217 W. Va. at 392, 618 S.E.2d at 401). The signature of counsel on a Complaint confirms compliance with Rule 11. Obtaining a preliminary expert opinion regarding allegations of medical professional liability verifies that the plaintiff has conducted a reasonable inquiry prior to filing suit, in accordance with Rule 11. Furthermore, the requirement that an expert produce a Certificate of Merit before the Complaint is filed does not change the burden on a claimant in a medical professional liability action, because the claimant must produce an expert witness to prove his or her claim. W. Va. Code § 55-7B-7.<sup>14</sup> Section 55-7B-6 merely alters the timing as to when the expert disclosure is made, and therefore, is entirely consistent with Rule 11.

Furthermore, statutes that are consistent with court rules are enforceable, as this Court has held in other cases where provisions of the MPLA were at issue. In *Daniel v. Charleston Area Med. Ctr., Inc.*, this Court reviewed MPLA provisions found at W. Va. Code § 55-7B-6 (1986) which required mandatory status conferences. See *Daniel*, 209 W. Va. 203, 544

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<sup>14</sup>See *Goundry v. Wetzel-Saffle*, 211 W. Va. 698, 568 S.E.2d 5 (2002) (upholding the dismissal of plaintiff's case because she failed to produce the required expert testimony); *Banfi v. American Hosp. for Rehab.*, 207 W. Va. 135, 529 S.E.2d 600 (2000) (affirming summary judgment for defendants, in part, when plaintiff failed to present expert testimony in support of its claims that defendants were negligent by failing to restrain patient and by allegedly misdiagnosing her injuries after her fall); *Moats v. Preston County Comm'n*, 206 W. Va. 8, 521 S.E.2d 180 (1999) (requiring plaintiff to utilize a medical expert witness to establish that defendant deviated from the standard of care with regard to its actions during an involuntary commitment proceeding); *Hapchuck v. Pierson*, 201 W. Va. 216, 495 S.E.2d 854 (1997) (per curiam) (affirming summary judgment when plaintiff failed to produce medical expert testimony on the issue of a physician's duty to warn); *Neary v. Charleston Area Med. Ctr., Inc.*, 194 W. Va. 329, 460 S.E.2d 464 (1995) (affirming summary judgment for defendant when plaintiff failed to submit medical expert testimony in support of his failure to warn claim).

S.E.2d 905 (2001); *State ex rel. Weirton Med. Ctr. v. Mazzone*, 214 W. Va. 146, 587 S.E.2d 122 (2002). Rule 16(b) of the West Virginia Rules of Civil Procedure provides that trial courts may enter scheduling orders *at their discretion* and a question arose as to whether a deadline to disclose experts had passed before the mandatory status conference took place. After recognizing that the provisions of the MPLA “govern actions falling within its parameters, subject to this Court’s power to promulgate rules for all cases and proceedings,” this Court ruled that “with respect to identification of expert witnesses in medical malpractice cases, the provisions of W. Va. Code ¶ 55-7B-6 *take precedence over a Rule 16 scheduling order.*” *Mazzone*, 214 W. Va. at 151, 587 S.E.2d at 127 (emphasis added).

Similar to the mandatory status conference addressed in *Daniel*, the MPLA’s pre-suit requirements are constitutional because they are commensurate with the burden the plaintiff bore in proving his or her claim against a healthcare provider prior to the MPLA’s enactment. The pre-suit requirements merely alter the timing as to when the plaintiff must produce expert opinions to establish the validity of his or her claim. Accordingly, the pre-suit requirements do not violate the Separate Powers and Rule-Making Clauses, but instead were created in accordance with the Legislature’s authority to enact statutes, and therefore, are constitutional.

**b. Other Courts Have Held That Medical Negligence Liability Statutes Do Not Violate the Separation of Powers Clause or Infringe Upon Court’s Rule-Making Authority.**

In *DeLuna v. St. Elizabeth’s Hosp.*, the Illinois Supreme Court found that Illinois’ medical negligence statute requiring a Certificate of Merit did not violate the Separation of Powers Clause of the Illinois Constitution. 147 Ill.2d 57, 69, 588 N.E.2d 1139, 1144 (1992). Specifically, the *DeLuna* court held that: (1) statutory provisions governing procedure are not uncommon, even if they may act as a condition precedent to maintaining a particular cause of

action (e.g., pleading requirements, statutes of limitations); (2) the function of the health care professional is essentially no different from the function he will later be called upon to perform at trial; (3) the requirements do not create a new court, nor is the process operated as an infringement on the constitutional authority of the courts; and (4) this is an area in which the separate spheres of governmental authority overlap, and in which certain functions are shared. *Id.* at 1144.<sup>15</sup>

Also, commensurate with Justice Maynard's comments in *Hinchman v. Gillette*, the court in *McAlister v. Schick* holds that a statutory requirement affecting procedure prior to attachment of the court's jurisdiction does not intrude upon the inherent power of the court to adjudge, determine, and render judgment. 147 Ill.2d 84, 95, 588 N.E.2d 1151, 1155 (1992). The court goes on to note that the doctrine of separation of powers does not contemplate that there should be "rigidly separated compartments" or "a complete divorce among the three branches of government." *Id.* (citing *Strukoff v. Strukoff*, 76 Ill.2d 53, 58, 389 N.E.2d 1170 (1979), quoting *In re Estate of Barker*, 63 Ill.2d 113, 119, 345 N.E.2d 484, 488 (1976)).<sup>16</sup>

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<sup>15</sup> In *DeLuna*, the court found the merit certification requirement in Illinois' statute to be distinguishable from prior cases which found statutory provisions to be unconstitutional because they created a new court or operated as an infringement on the constitutional authority of the courts. *DeLuna*, 147 Ill.2d at 70, 588 N.E.2d at 1145. See *Bernier v. Burris*, 113 Ill.2d 219, 497 N.E.2d 763 (1986) (medical malpractice review panel violates separation of powers); *In re Contest of the Election for the Office of Governor & Lieutenant Governor*, 93 Ill.2d 463, 444 N.E.2d 170 (1983) (three-judge election contest panel violates separation of powers); *Wright v. Central Du Page Hosp. Ass'n*, 63 Ill.2d 313, 347 N.E.2d 736 (1976) (medical malpractice review panel violates separation of powers); *People ex rel. Rice v. Cunningham*, 61 Ill.2d 353, 336 N.E.2d 1 (1975) (three-judge death penalty panel violates separation of powers).

<sup>16</sup> See also *People v. Farr*, 63 Ill.2d 209, 213, 347 N.E.2d 146, 148 (1976), citing *City of Waukegan v. Pollution Control Board*, 57 Ill.2d 170, 174-75, 311 N.E.2d 146, 149 (1976) ("Nor does the constitution forbid every exercise by one branch of government of functions which are usually exercised by another branch"); *County of Kane v. Carlson*, 116 Ill.2d 186, 208, 507 N.E.2d 482, 491 (1987) ("The separate spheres of governmental authority may overlap"); *O'Connell v. St. Francis Hospital*, 112 Ill.2d 273, 281, 492 N.E.2d 1322, 1326 (1986) ("Legislative enactments may regulate the court's practice so long as they do not dictate to the court how it must adjudicate and apply the law or conflict with the court's right to control its procedures"); *Buzz Barton & Associates, Inc. v. Giannone*, 108 Ill.2d 373, 383, 483 N.E.2d 1271, 1276 (1985) ("This court has repeatedly recognized that the legislature may impose reasonable limitations and conditions upon access to courts.").

More importantly, the *McAlister* court contends that pre-filing requirements like § 55-7B-6(b) which require medical experts or doctors to opine as to whether claims are meritorious do not confer judicial authority upon them. The court states that these endorsements “do not direct the judge to accept or dismiss a medical malpractice complaint to which the required medical report and affidavit have been attached. The judge must still examine the facts as laid out in the complaint and determine whether the allegations are sufficient to state a cause of action.” *Id.*

*McAlister* goes on to explain that certificates or affidavits of merit serve to inform the judge, who cannot be expected to have the medical knowledge of a professional in that field, of the learned opinion of a health care professional with training and experience in a specialized area; although the judge could recognize the elements of breach of contract on the face of a complaint, a judge without medical training might well be unable to determine that a “right pneumothorax” could be related to an improper “jugular catheterization.” *Id.* Rather than limiting the power of the judge, the statute aims to help him or her understand the facts. Therefore, the court held it did not encroach upon judicial power.

The *McAlister* court further discusses how the health care professional’s opinion as to whether a claim has merit does not infringe upon judicial power, noting that:

the health care professional is to make a factual determination concerning the quality of healthcare given the plaintiff. If the health professional believes that the plaintiff was not given proper care, he states his opinion that there is a “reasonable and meritorious cause” for filing suit. The health care professional offers that opinion from the point of view of a layman with a specialty in the same medical field as that of the defendant, rather than from the standpoint of a legal professional. The statute does not require that the health professional base his opinion upon legal principles. Nor must the health professional make the ultimate decision on any facts. He simply states, based upon the assumption that the information supplied by the plaintiff is true,

that, in his view, the plaintiff's cause is reasonable and has merit. Whether the information is indeed true is a matter to be decided by the court. The health professional is not asked to give his views concerning the outcome of the suit. Rather, he is to base his determination on a "review of the medical record and other relevant material involved in the particular action." Thus, the health professional certifies the underlying claim rather than the cause of action. It is the court's responsibility then, to judge the legal sufficiency of the complaint. Consequently, we find that the health care professional does not exercise that judicial power.

*Id.* at 97-98, 1156-1157.

Similar to the findings outlined above, the MPLA at issue has been crafted so as not to infringe upon this Court's authority to govern the West Virginia court system, while simultaneously preserving the role that expert testimony has always played in medical liability cases. The only true "change" that can be attributed to the Certificate of Merit pre-requisite is that it modifies when certain medical testimony must be proffered---nothing more, nothing less. And just as the MPLA does not violate the Separation of Powers and Rule-Making Clauses, it likewise does not violate the Certain Remedy Clause.

**2. The MPLA Does Not Infringe Upon the Rights Guaranteed by the Certain Remedy Clause.**

The Certain Remedy Clause states that "[t]he Courts of this state shall be open, and every person, for an injury done to him, his person, property or reputation, shall have remedy by due course of law and justice shall be administered without sale, denial or delay." W. Va. Const. art. III, § 17. Legislation is presumed constitutional,<sup>17</sup> but if it substantially impairs vested rights or severely limits existing procedural remedies permitting court adjudication of

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<sup>17</sup> In *Hinchman*, this Court stated that although that particular case did not address the constitutionality of section 55-7B-6, they would "assume *arguendo* that the statute is constitutional." *Hinchman*, 217 W. Va. at 384, 618 S.E.2d at 393. The Illinois Supreme Court has noted that legislation is presumed to be valid, and that the party challenging the constitutionality of a statute has the burden of establishing its invalidity. *DeLuna*, 147 Ill.2d at 67, 588 N.E.2d at 1143.

cases, then the Certain Remedy Clause is implicated. Syl. pt. 6, *Gibson v. W. Va. Dep't of Highways*, 185 W. Va. 214, 406 S.E.2d 440 (1991). Where the Certain Remedy clause is implicated, this Court has adopted a two-part test which provides that the legislation will be upheld if:

a reasonably effective alternative remedy is provided by the legislation or, ... if no such alternative remedy is provided, the purpose of the alteration or repeal of the existing cause of action or remedy is to eliminate or curtail a clear social or economic problem, and the alteration or repeal of the existing cause of action or remedy is a reasonable method of achieving such purpose.

*Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 695, 408 S.E.2d 634, 645 (1991).

**a. The Legislature Crafted the Pre-Suit Requirements to Ensure that They Do Not Impair a Plaintiffs' Access to West Virginia Courts.**

Section 55-7B-6 does not trigger the Certain Remedy Clause because it neither impairs a vested right, nor severely limits existing procedural remedies. The Notice of Claim and Certificate of Merit provisions simply affect the method in which plaintiffs obtain redress and enforce their rights. It does not affect their right to bring a lawsuit. *Hinchman*, 217 W. Va. at 403, 618 S.E.2d at 394.<sup>18</sup>

Even if § 55-7B-6 triggered the Certain Remedy Clause, it would pass the *Lewis* test because the purpose of the statute is to eliminate or curtail a clear social or economic problem and the statute is a reasonable method of achieving that purpose. *Robinson v. Charleston Area Med. Ctr.*, 186 W. Va. 720, 729, 414 S.E.2d 881, 886 (1991). The Legislature enacted the MPLA because of a medical crisis that was created by West Virginia citizens filing vast numbers of medical malpractice claims, often of a frivolous nature, which resulted in

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<sup>18</sup> This Court held that "[t]he requirement of a pre-suit notice of claim and screening certificate of merit is not intended to restrict or deny citizens' access to the courts." *Hinchman*, 217 W. Va. at 403, 618 S.E.2d at 394.

soaring insurance premiums and doctors leaving the State in droves. In response, the Legislature carefully crafted the MPLA to balance the rights of those injured by medical negligence with its goal of retaining health care providers and making liability insurance affordable and available. The Legislature recognized it had a “duty and responsibility ... to balance the rights of our individual citizens to adequate and reasonable compensation with the broad public interest in the provision of services by qualified health care providers who can themselves obtain the protection of reasonably priced and extensive liability coverage.” W. Va. Code § 55-7B-1.

The Appellant’s main contention is that § 55-7B-6(b) restricts or denies access to courts by requiring plaintiffs to pay exorbitant costs to obtain a Certificate of Merit. However, as mentioned above, the interests of litigants, health care professionals, and citizens in the community must be balanced with the burden of shifting costs from medical malpractice litigation. As a recent editorial from the West Virginia Record demonstrates, the costs to obtain a Certificate of Merit requirement hardly seems unreasonable given the dire state of affairs due to the flood of medical malpractice claims that were being filed.<sup>19</sup>

Without the procedural safeguard that § 55-7B-6(b) provides, citizens in our State are without remedy to ensure that illegitimate claims are ferreted out; thus, they are unable to preserve the integrity of the judicial process and the quality and affordability of healthcare in West Virginia. Furthermore, the costs of obtaining a Certificate of Merit are far from “exorbitant.” Traditionally, doctors and other health care providers charge a reasonable hourly rate to review a potential plaintiff’s case and render their opinion. As noted beforehand, this cost

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<sup>19</sup> “In 2001 the flood of medical malpractice lawsuits had “driven liability insurance rates so high that Wheeling was without neurosurgeons and ambulances were being rerouted to Pittsburgh. Beckley had no obstetricians, and specialists were hard to find even in places like Charleston or Huntington. One national magazine dubbed West Virginia “Tort Hell”—or “Tort Heaven,” depending upon where you sat.” *Leave it alone*, The West Virginia Record, Vol. II, No. XXIX, Pg. 7 (June 18, 2007).

is usually minimal as compared to litigation expenses that will be incurred if the case proceeds to trial.

Weeding out cases that have no merit will save not only the plaintiff the gross amount of time and money spent on litigation, but ultimately benefit all parties involved in the process. Furthermore, it can't be emphasized enough that *a plaintiff bringing a medical liability action will incur the exact same costs at issue here at some point during the litigation because medical expert testimony is required to prove a medical liability claim. The real issue is not if, but when these costs will be incurred.* And if incurring the costs sooner enables huge savings in time, effort, and expense, by not only the plaintiff, but also by the defendants, counsel, court staff, and judges, then all the more reason to enforce the Certificate of Merit pre-requisite to the benefit of all involved.

**b. Courts in Other States Have Held That Pre-suit Requirements Neither Impair Vested Rights, nor Severely Limit Existing Procedural Remedies.**

On at least two occasions, this Court has looked to the Florida Supreme Court's opinions interpreting that State's medical liability pre-suit requirements when analyzing issues pertaining to our MPLA. *See Hinchman, Gray, supra.* Florida courts have reviewed that State's Medical Malpractice Act and determined that it does not unduly restrict its citizen's constitutionally guaranteed access to the courts, while at the same time carrying out the legislative policy of screening out frivolous lawsuits and defenses. *Russo Associates, Inc. v. City of Dania Beach Code Enforcement Bd.*, 920 So.2d 716, 718 (Fla. Dist. Ct. App. 2006). Florida courts have held that the purpose of the pre-suit Notice and Certificate of Merit requirements is to demonstrate that the claim is legitimate. *Decristo v. Columbia Hosp. Palm Beaches, Ltd.*, 896 So.2d 909, 911 (Fla. Dist. Ct. App. 2005).

The Illinois Supreme Court also addressed whether the Certificate of Merit provision violated the Certain Remedy Clause of the Illinois Constitution in *DeLuna*. 147 Ill.2d at 57, 588 N.E.2d at 1139. The court found no violation and held that the legislature may, consistent with the separation of powers principle, impose requirements governing matters of procedure and the presentation of claims. *Id.* at 72, 1146. Further, the court noted that “[i]t is well established that the legislature may impose reasonable limitations and conditions upon access to the courts” and that “the provision is essentially no different from the parallel requirement generally applicable in malpractice cases that the plaintiff in such an action present expert testimony to demonstrate the applicable standard of care and its breach.” *DeLuna*, 147 Ill.2d at 72, 588 N.E.2d at 1146.

Clearly, the MPLA at issue does not prevent a plaintiff from accessing the court to seek redress for “an injury done to him.” Rather it merely requires plaintiffs to provide proof as to the validity of their claim, which is a prerequisite to recovery in the first place.

### **3. The MPLA Does Not Qualify as “Special Legislation.”**

The Appellant also contends that § 55-7B-6(b) is special legislation, and therefore violates art. VI, § 39 of the West Virginia Constitution because it relegates a specific, small group of negligence plaintiffs into a special class and imposes different requirements on those plaintiffs than on other plaintiffs pleading negligence actions. The Appellant paints his description of the “class” with a broad brush.

In actuality, § 55-7B-6(b) does not implicate a suspect or quasi-suspect classification because the pre-suit requirements apply to all plaintiffs asserting medical liability claims. Furthermore, the classification is reasonable because the pre-suit requirements do not alter the “requirements” the plaintiffs had to meet prior to the enactment of the MPLA. Rather,

the pre-suit requirements merely alter the timing as to when certain disclosures must be made. See *Gallant v. County Com'n of Jefferson County*, 212 W. Va. 612, 575 S.E.2d 222 (2002) (holding “[c]ourts are bound by a presumption that legislative classifications are reasonable, proper, and based on a sound exercise of legislative prerogative. If a statute enacted by the legislature applies throughout the state and to all persons, entities or things within a class, and if such classification is not arbitrary and unreasonable, the statute must be regarded as general rather than special.”). Accordingly the MPLA does not create a “special class” and the appropriate standard for determining the plaintiff’s challenge under the West Virginia and Federal Constitutions is whether the legislation bears a rational relationship to a legitimate government interest; which, of course, it does. See *Atchinson v. Erwin*, 172 W. Va. 8, 302 S.E.2d 78 (1983); *Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co.*, 174 W. Va. 538, 328 S.E.2d 144 (1984); *Gallant v. County Com'n of Jefferson County*, 212 W. Va. 612, 575 S.E.2d 222 (2002).<sup>20</sup>

Although this Court has not evaluated the MPLA to determine whether it can withstand “rational-basis” scrutiny, many other courts have. For example, when testing a similar pre-filing requirement in Illinois, the court in *DeLuna* found:

[t]esting the challenged measure against the rational relationship test, we have no difficulty in concluding that section 2-622 is rationally related to a legitimate government interest. Applying that test to the provision, it is at once apparent that the statute is sufficiently tailored to serve the legislative purpose it was designed to fulfill. As we have noted, the statute is intended to reduce the number of frivolous actions that may otherwise be filed. By requiring litigants to obtain, at an early point, the opinion of an expert who agrees that a meritorious cause of action exists, the statute will help ensure that only claims with some merit are presented.

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<sup>20</sup> This standard also applies to Equal Protection challenges.

*DeLuna*, 147 Ill.2d at 73, 588 S.E.2d at 1146 (1992).

In Louisiana, the court in *Cooper v. Sams* also held that pre-filing requirements did not violate the Equal Protection Clause or constitute special legislation. The court notes, “[t]he physical condition of a person with a medical malpractice claim has no bearing whatsoever on whether his or her claim is reviewed by a Medical Review Panel... This statute applies to all plaintiffs, regardless of their physical condition or amount of damages.” The court goes on to reiterate that “whether or not an individual is treated by a qualified health care provider is not a classification which is based upon any specific categories enumerated... such as race, religion, age, sex, etc.... As such, ... the Medical Malpractice Act must further only an appropriate state interest... the Act was found to satisfy this standard of review as the Act has value in weeding out frivolous claims and encouraging settlements, thereby leading to substantial savings in litigation expenses to defendants and their insurers.” *Cooper v. Sams*, 628 So.2d 181 (1993).

Similarly, the MPLA bears a rational relationship to a legitimate government interest--that being “to encourage and facilitate the provision of quality health care services to the citizens of this state.” *Robinson*, 186 W. Va. at 720, 414 S.E.2d at 881; *see also*, W. Va. Code § 55-7B-1 (1986). In enacting this statute, the Legislature recognized a social and economic problem in West Virginia related to rising insurance premiums, insurers leaving the State, doctors not being able to obtain insurance, and doctors leaving the State. Section 55-7B-6 was enacted by the Legislature to curtail the problems that many associate with the filing of frivolous medical professional liability actions. This Court recognized this legitimate concern and noted in *Robinson* that the MPLA “is an integral part of the comprehensive resolution of the clear social and economic problem reasonably perceived by the legislature in enacting the Act.” *Robinson*, 186 W. Va. at 729, 414 S.E.2d at 886.

As has been demonstrated, West Virginia Code § 55-7B-6's pre-suit requirements are constitutionally permissible. The Legislature has the power to change the common law and it properly exercised this power in enacting § 55-7B-6, which neither severely limits, nor substantially impairs a claimant's access to courts. Before the medical malpractice plaintiff is entitled to a remedy, he must show the existence of a wrong. Section 55-7B-6(b)'s requirements are simply a means of ensuring the factual validity of the plaintiff's medically based allegations. Thus, § 55-7B-6(b) does not deprive the plaintiff of a guaranteed remedy and is constitutionally sound as drafted.

**E. THE CIRCUIT COURT'S RULING SHOULD BE AFFIRMED BECAUSE THE APPELLANT IS NOT ENTITLED TO RELIEF PURSUANT TO RULE 60(b) OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE.**

"[N]o provision in the [West Virginia Rules of Civil Procedure] allows a motion for reconsideration to be filed." *Rowan v. McKnight*, 184 W. Va. 763, 764, 403 S.E.2d 780, 781, n.2 (1991). Furthermore, the Appellant is unable to satisfy the stringent requirements of Rule 60(b) under these facts.

Rule 60(b) provides, in part:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.<sup>21</sup>

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<sup>21</sup> Plaintiff carries the burden to show that an error has been committed warranting a motion for reconsideration. *Ross v. Ross*, 187 W. Va. 68, 415 S.E.2d 614, 617 (1992).

The Appellant claims he is entitled to “reconsideration” on two grounds: (1) he made procedural errors constituting mistake and excusable neglect; and (2) “any other reason justifying relief from the operation of the judgment.” *See* W. Va. R. Civ. P. 60(b).

The Appellant has failed to show excusable neglect and mistake warranting reconsideration. This Court describes excusable neglect and mistake as “requiring a demonstration of good faith on the part of the party seeking an enlargement and some reasonable basis for noncompliance within the [ ] rules.” *Delapp v. Delapp*, 213 W. Va. 757, 584 S.E.2d 899, 904-05 (2003) (citations omitted). As demonstrated throughout this Response, the Appellant has failed to show good faith and a reasonable basis for not complying with the pre-suit requirements of the MPLA. The Appellant knew of the Certificate of Merit requirement when he filed his claim and he was reminded of his noncompliance when Dr. Vaidya filed the Motion to Dismiss on June 30, 2005. Yet, he has made no attempt to address these deficiencies nor offer a reasonable basis for his failure to comply with the pre-suit requirements.

The Appellant has also failed to show “any other reason” warranting reconsideration. Out of respect for judicial finality, courts only grant reconsideration as a remedy in the most exceptional circumstances. The Court has held that “[r]arely is relief granted under [Rule 60(b)] because it provides a remedy that is extraordinary and is only invoked upon a showing of exceptional circumstances. Because of the judiciary's adherence to the finality doctrine, relief under this provision is not to be liberally granted.” *Coffman v. West Virginia Div. of Motor Vehicles*, 109 W. Va. 736, 551 S.E.2d 658, 662 (2001) (citations omitted). The Appellant failed to offer any basis warranting reconsideration, and the circuit court properly denied his motion for reconsideration.

**F. THE CIRCUIT COURT'S RULING SHOULD BE AFFIRMED BECAUSE DR. VAIDYA RESPONDED TO THE APPELLANT'S COMPLAINT IN A TIMELY FASHION AND THE APPELLANT IS NOT ENTITLED TO DEFAULT JUDGMENT UNDER THESE FACTS.**

“Rule 12(b) [of the West Virginia Rules of Civil Procedure] ‘permits a party to raise certain defenses and objections by motion *filed before serving an answer.*’” *Pritt v. Vickers*, 214 W. Va. 221, 588 S.E.2d 210 (2003) (citing 2 Moore’s Federal Practice, § 12.12 (2003) (emphasis added). *See also*, Rule 12(a)(3)(A). On June 10, 2005, the Appellant filed a Complaint against Dr. Vaidya. In accordance with Rule 12(a), Dr. Vaidya’s response to the Complaint was due on or before June 30, 2005. *See* W. Va. R. Civ. P. 12(a).

Dr. Vaidya responded to the Appellant’s Complaint by filing a Motion to Dismiss, pursuant to Rule 12(b)(6), asserting that the Complaint “fails to state a claim upon which relief may be granted by not complying with the prefiling requirements” of the MPLA. (*See* Mot. to Dismiss at 1.) Dr. Vaidya filed the motion on June 30, 2005, and he was not under any duty to file an Answer until the circuit court rendered its ruling. In this instance, the circuit court dismissed the Appellant’s lawsuit, thereby negating the need for Dr. Vaidya to file an Answer. Therefore, the Appellant is not entitled to default judgment because Dr. Vaidya’s Motion to Dismiss was timely filed.

**G. THE CIRCUIT COURT'S RULING SHOULD BE AFFIRMED BECAUSE THE APPELLANT'S DECISION TO REPRESENT HIMSELF *PRO SE* DOES NOT ENTITLE HIM TO APPELLATE RELIEF UNDER THESE FACTS.**

The Appellant asserts that the circuit court abused its discretion by dismissing his lawsuit on procedural grounds because he was representing himself when the dismissal occurred. (*See* Appeal at 10-11.) As support for this proposition, the Appellant cites *Cottrill v. Cottrill* wherein this Court held with respect to *pro se* parties that “the trial court ‘must strive to insure that no person’s cause or defense is defeated solely by reason of their *unfamiliarity with*

*procedural or evidentiary rules*” and “[t]he trial court should strive, however, to ensure that the diligent pro se party does not forfeit any substantial rights by *inadvertent omission or mistake*.” 219 W. Va. 51, 631 S.E.2d 609 (2006) (citing *Blair v. Maynard*, 174 W. Va. 247, 252-53, 324 S.E.2d 391, 395-96 (1984)) (emphasis added).

The evidence on the record proves that the Appellant was not suffering from a lack of familiarity with the applicable law, nor that he made an inadvertent omission or mistake in failing to serve Dr. Vaidya a Certificate of Merit. Rather, he was intimately familiar with the pre-suit requirements of the MPLA and he knowingly and intentionally served notice of his claims without the requisite Certificate. The Appellant is a sophisticated and educated medical doctor who is more than capable of reviewing the applicable statute and proceeding accordingly. Furthermore, he has known since *June 30, 2005* that his case may be dismissed for failing to acquire a Certificate of Merit. For 18 months, the Appellant was free to contact other potential experts and produce a Certificate of Merit, yet elected not to do so. Therefore, the Appellant is not entitled to have the circuit court’s decision overturned on the grounds that he represented himself during much of the time this action was pending before the circuit court, and the circuit court’s decision should be affirmed.

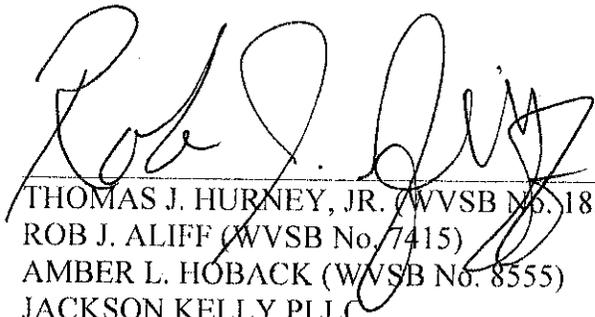
### III. CONCLUSION

For the foregoing reasons, Dr. Vaidya respectfully requests that this Honorable Court affirm the circuit court's decision to dismiss the Appellant's claims in their entirety.

Respectfully Submitted,

**SHRIKANT K. VAIDYA, M.D.**

**By Counsel**



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