

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DANNY RAY WESTMORELAND

COURT OF APPEALS No. 33459

PLAINTIFF/APPELLANT,

APPEAL FROM MASON COUNTY  
CIVIL ACTION No. 05-C-97

vs.

SHRIKANT K. VAIDYA, M.D.

MASON COUNTY CIRCUIT COURT  
JUDGE TOD J. KAUFMAN

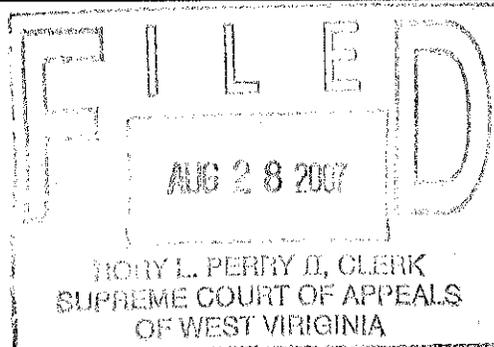
DEFENDANT/APPELLEE,

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**APPEAL REPLY BRIEF OF PLAINTIFF/APPELLANT**  
**DANNY RAY WESTMORELAND**

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LETTER FROM DR. DEBORD ATTACHED

## POINTS AND AUTHORITIES RELIED UPON

### STATUTES

*W.V. Code §55-7B-6;*

### WEST VIRGINIA CASE LAW

*City of Philippi v. Weaver* (2000), 540 S.E.2d 563; 208 W.Va. 346;  
*Hinchman v. Gillette, et al.*, 2005 W.Va. (31760); 618 S.E.2d 387;  
*Kessel v. Leavitt* (1998), 511 S.E.2d 720; 204 W.Va. 95;  
*Kominar v. Health Management Associates* (2007), No. 33215;  
*Price v. Charleston Area Medical Center*, (2005), 217 W.Va. 663, 619 S.E.2d 176;  
*State v. Shrewsbury* (2003), 582 S.E.2d 774, 213 W.Va. 327;  
*The State Road Commission v. Ferguson* (1964), 137 S.E.2d 206, 148 W.Va. 742.

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### DEFENDANT/APPELLEE VAIDYA'S OBJECTIONS TO APPELLANT WESTMORELAND'S STATEMENT OF THE FACTS OF THE CASE

According to Defendant/Appellee Vaidya, there is some dispute over what facts were actually before the Circuit Court prior to the dismissal of this matter by the Circuit Court. The Defendant/Appellee's tactical approach in his Response to Appeal Brief is primarily to attack Dr. Westmoreland's credibility as a witness by pointing to alleged inconsistencies in Westmoreland's statements and alleging that Westmoreland's brief refers to a very large number of factual allegations that are not in the record.

In footnote 1 on page two (2) of the Defendant's Response to Appeal Brief, Vaidya asserts that "... 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."

Defendant/Appellee Vaidya goes on to attach Appellant's statement of the facts and highlighted the various facts that were allegedly not before the circuit court. Defendant/Appellee Vaidya thereby

maintains that the underlying factual situation which caused Westmoreland's injury was never discussed in the Circuit Court in the extended period that the case was before the Circuit Court. The following are factual issues that Defendant/Appellee Vaidya asserts were not before the circuit court by highlighting the same in his attachment related to Footnote No. 1:

- 1: Westmoreland had a procedure in the ER on or about June 13, 2003 to remove a kidney stone in Westmoreland's ureter and during which procedure Vaidya placed a stent in Westmoreland's ureter (Note: Counsel for the Appellant was in error in regarding this date in the Appeal Brief. The initial procedure was done on June 11, 2003, NOT on June 13, 2003);
- 2: Westmoreland had a second procedure in Vaidya's office to remove the stent;
- 3: Vaidya told Westmoreland to "Quit being a baby" and allow him to do the treatment without anesthesia;
- 4: Westmoreland withdrew his consent to the cystoscopy and repeatedly strenuously objected to the procedure;
- 5: Vaidya refused to terminate the procedure and continued to cause severe pain and damage to Westmoreland's penis;
- 6: Vaidya's assistant held Westmoreland down on the table;
- 7: As a result of the botched procedure, Westmoreland lost 80 pounds and nearly died from renal failure.

By stating that such matters were not before the Circuit Court, Vaidya is certainly implying that Westmoreland is trying to "pull the wool over the eyes" of the Court of Appeals, here. As such, it is useful to look back at what was actually before the Circuit Court in this matter.

Appellant filed the statements of Martha Bias and Kim Westmoreland in the Mason County Circuit Court on April 10, 2006 and were also served upon the Attorneys for Vaidya. The vast majority of the factual allegations which make up the Appellant's statement of facts are taken directly from those statements and from the account of Dr. Westmoreland. While such statements were apparently not filed in brief form, they are certainly "before the circuit court". It is **HIGHLY** disingenuous on

Vaidya's part to assert that the underlying factual situation was not before the Circuit Court of Mason County, West Virginia.

As further evidence of the disingenuous position of the Defendant/Appellee, Appellant refers the Court to the transcript of the hearing in this matter held on February 10, 2006. In that hearing, the following excerpts occurred:

**Transcript Page 10, Line 19 to Line 21**

Alexander (Vaidya's Counsel): Dr. Vaidya is a urologist. He removed the kidney stone, about six millimeters in size.

The above quote from the transcript of the February 10, 2006 hearing confirms that the above factual issue No. 1 as alleged by Westmoreland were before the Circuit Court in direct contravention of Vaidya's assertions in Defendant's Response to Appeal Brief.

**Transcript Page 11, Line 9 to Page 12, Line 13**

The Court: This Dr. Westmoreland went to this doctor for what?

Mr. Alexander: A kidney stone. What turned out to be a kidney stone, which was removed via ost-(inaudible) procedure, a scope placed up through the ureter and the stone was removed.

The Court: You had a kidney stone?

Dr. Westmoreland: Yes, sir.

Mr. Alexander: During the procedure part of the procedure is to place a stent in the ureter temporarily to all the ureter to feel [sic] from the irritation of the kidney stone, and a later date that stent is removed. The removal, the procedure to remove the stent is what the issue is here. And that involves, again, placing a scope or coming up into the ureter with a scope, getting the stent and taking it out. That was done. If I understand the complaint, that's the procedure –

The Court: And I mean, are you okay?

Dr. Westmoreland: He did it.

The Court: Are you okay?

Dr. Westmoreland: No.

The Court: You don't have the kidney stone?

Dr. Westmoreland: I have kidney failure now. He cut me the entire length of my penis, he went all the way up with the scope, he refused to stop. He restrained me, he held me down with me screaming for him to stop, and then he ran from me.

The above quote from the transcript of the February 10, 2006 hearing confirms that the above factual issues, 1, 2, 4, 5 and 6 as alleged by Westmoreland were all "before the Circuit Court" in direct contravention of Vaidya's assertions in Defendant's Response to Appeal Brief.

**Transcript Page 7, Line 24 to Page 8, Line 5**

Westmoreland: When Dr. Vaidya mechanically raped me and had me held down with a scope inside me, with me telling him no, ordering him to stop. He continued raping me, putting me into renal failure, almost killing me, causing me to lose 80 pounds, almost two years of death.

The above quote from the transcript of the February 10, 2006 hearing confirms that the above factual issues 4, 5, 6 and 7 were all "before the circuit court" in direct contravention of Vaidya's assertions in Defendant's Response to Appeal Brief.

**Transcript Page 13, Line 24 to Page 14, Line 5**

Dr. Westmoreland: I've gained 20 pounds since I've been under experimental treatment, down to 140 from 212 pounds. He just about killed me. And so during that time period when I was writing the letters I was extremely, extremely ill because what he had done to me.

The above quote from the transcript of the February 10, 2006 hearing confirms that the above factual issue No. 7 was "before the circuit court" in direct contravention of Vaidya's assertions in Defendant's Response to Appeal Brief.

Later in Defendant/Appellee Vaidya's Response Brief, Vaidya refers extensively to Westmoreland's Complaint before the West Virginia Board of Medicine. Two of the items that were submitted to the Board of Medicine in support of Westmoreland's Complaint were the notarized

statement of Kim Westmoreland and the statement of nurse Martha Bias. Both of these statements were also submitted to the Circuit Court by Dr. Westmoreland as evidence in support of his claims there. Counsel for the Appellant is unaware of any objection to those statements by Appellee's Counsel at the Circuit Court. Further, Counsel for the Appellee made no objection when the same statements were attached to Westmoreland's Petition for Appeal.

In the notarized statement of Kim Westmoreland, Mrs. Westmoreland stated the following (emphasis added):

- 1: "I arrived at the hospital on June 11<sup>th</sup> at 3:30-4:00. Danny was in the ICU Recovery room."
- 2: "Removal of the stent was done in Dr. Vaidya's Office. Martha, Danny's nurse was unable to get an IV started. I believe it was Dr. Vaidya who missed the second time. I was in the room when Dr. Vaidya began the cystoscopy. **In the beginning, Danny complained he felt like the instrument was cutting him.** At this time, Danny sent me out of the room. Martha and I were standing outside the door. **I could hear Danny scream, "It's cutting me! Get it out! Stop!."**
- 3: "I know Danny tried to contact Dr. Vaidya regarding his condition after the stent removal, but Dr. Vaidya would not acknowledge a problem existed. Three months after the removal, I called Dr. Vaidya regarding Danny's condition. **He was still having problems with urination, and more disturbing to Danny was he now had a physical bend in his penis which was not there before the stent removal.**"
- 4: "I can attest to the fact that there was no curvature of Danny's penis prior to the stent removal."

The above quotes from the notarized statement of Kim Westmoreland - which was file stamped by the Circuit Clerk on April 10, 2006, confirms that the above factual issues 1, 2, 4, and 5 were all "before the circuit court" in direct contravention of Vaidya's assertions in Defendant's Response to Appeal Brief.

In the statement of Martha Bias, Ms. Bias spent the first two (2) pages of the statement documenting Westmoreland's suffering as a result of the kidney stone and the initial procedure by

Vaidya to remove the kidney stone and to insert the stent. Ms. Bias then stated (emphasis added):

- 1: "Dr. Vaidya instructed Kim to bring Dr. Westmoreland back on 6-15-03 to have the stent removed around 4:30 p.m. A day or so later I had asked Dr. Westmoreland why the procedure was set for late afternoon and I asked, **"Isn't he going to do the procedure in the O.R. Dr. Westmoreland he couldn't do this in his office that Dr. Westmoreland couldn't go through this procedure without anesthesia."**
- 2: "As we were preparing to leave, on the day of the stent removal, Dr. Westmoreland asked me to get supplies ready to take with us to Dr. Vaidya's. Again, that he could not go through the procedure without anesthesia and due to the scheduled time **he was afraid that Dr. Vaidya would try to do the procedure without anesthesia because it had not been discussed.**"  
I took a tray with 2x2s, alcohol, prep pads, 1 sealed vial of diazepam, 2 heparin flush and 2 butterfly IV's, tape and 2 syringes."
- 3: "When we arrived at Dr. Vaidya's office he had me wait in the reception area. A young man came out to get me and we went into the exam room with Dr. Westmoreland in a gown sitting on the exam table with Kim standing beside him, a tray was present with a scope on it and Dr. Vaidya and his assistant was *[sic]* there."
- 4: "When I got to the room I found that **Dr. Westmoreland had refused to go through the procedure without anesthesia.** Dr. Vaidya and his assistant said that it would be a painless procedure and only take about **15 seconds.** The doctors talked back and forth due to Dr. Westmoreland's fear of having this procedure without anesthesia. **Again, he informed Vaidya he was concerned with the thought of this being done without anesthesia. Dr. Vaidya stated that it was a simple procedure and there was nothing to worry about and Dr. Westmoreland was worrying over nothing."**
- 5: "Dr. Vaidya asked what I brought and I explained about the sealed vial of diazepam, 2 butterfly IV's and 2 Heparin flush. Dr. Vaidya asked me to start the butterfly IV. I attempted and got blood return, but the vein immediately blew. **It appeared that Dr. Vaidya was getting very frustrated and upset that we were taking the time."**
- 6: "Dr. Vaidya said he'd try and took the last butterfly IV and tried a couple sticks without success. **He told Dr. Westmoreland to quit being a baby and that he was starting the procedure, that it would only take a few seconds and be painless."**
- 7: "Dr. Westmoreland asked me to leave the room and I picked up my tray with the unbroken seal of diazepam and unused supplies leaving Dr. Westmoreland with no IV inserted. Kim stayed in the exam room. **It was clear that Dr. Westmoreland was very reluctant to have this procedure done without anesthesia. He questioned Dr. Vaidya [about] if you had to use anesthesia the first time, why wouldn't you have to use it the second time,** but I left the room as I was instructed with unused supplies in my possession."

- 8: "In a matter of minutes, Kim came running out of the room. I walked up to her. About that time we heard Dr. Westmoreland scream, "It's cutting me, get it out, stop it's cutting me." I couldn't hear what Dr. Vaidya was saying, but I could hear Dr. Westmoreland scream, "stop, it's cutting me" for what seemed to be an eternity. After about 15 minutes Dr. Vaidya came out and told Kim and I that the stent had been removed then he immediately left."
- 9: "Kim walked back into the exam room and I waited where I was. Dr. Westmoreland walked out fully dressed and very upset and in obvious pain. Dr. Westmoreland said it felt like he had cut him and that he can't believe he done this to him. Dr. Westmoreland had said the stent removal was so painful he couldn't hardly stand it."
- 10: "During the first week, Dr. Westmoreland asked that I contact Dr. Vaidya . . . so that he could inform him that he couldn't make water."
- 11: "By the second week of surgery, he [Westmoreland] still complained of dysuria, dribbling and bleeding."
- 12: "Approx 3<sup>rd</sup> week after stent removal, he [Westmoreland] asked that I get Dr. Vaidya on the phone because something horrible has happened. We tried getting ahold of Dr. Vaidya. About the 3<sup>rd</sup> or 4<sup>th</sup> call Dr. Westmoreland got to speak with him. I heard it could not have cause the peyronies [*sic*] because I do not have diabetes, like he told him before. I did not hear what Dr. Vaidya said. Dr. Westmoreland hung up frustrated. He informed me that Dr. Vaidya was denying any responsibility to causing his peyronies [*sic*]."
- 13: "Since I was involved I read Dr. Vaidya's statement [to the medical board] and they are grossly lies."

It is unclear why Defendant/Appellee Vaidya would mislead this Court regarding the facts that were before the Circuit Court when such matters so plainly WERE before the Court.

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### INCORRECT STATEMENTS OF FACT AND LAW IN APPELLEE VAIDYA'S STATEMENT OF PERTINENT FACTS

There are a variety of incorrect, misleading and disingenuous statements of fact and law in Defendant/Appellee Vaidya's Statement of Pertinent Facts in his Response to Appeal Brief - and as these statements have been refuted in previous pleadings by the Appellant Danny Westmoreland, it

becomes a tiresome process. Nevertheless, as long as Vaidya continues to assert disingenuous statements, Westmoreland will continue to highlight the error in such statements.

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#### APPELLEE VAIDYA'S INCORRECT STATEMENT OF FACT AND LAW NO. 1

On page 3 of Vaidya's Response to Appeal Brief, Vaidya stated,

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.

According to this Court's holding in *Hinchman v. Gillette, et al.*; 618 S.E.2d 387, 2005 W.Va. (31760), it was clearly Vaidya who made the most significant procedural errors in this case. This Court held in *Hinchman* that a Plaintiff has no duty to amend a complaint (or an insufficient pre-suit filing) until the Trial Court makes a determination that the complaint (or pre-suit filing) has an insufficiency - and further, that the Trial Court must allow the Plaintiff a reasonable time, not to exceed thirty (30) days, to remedy any insufficiency in the complaint (or pre-suit filing). The following quote from *Hinchman* highlights the error in Vaidya's allegations (emphasis added):

However, **after suit was filed**, three of the appellees, including two who had not responded to the notice or certificate, attacked the notice and certificate at length and on several distinct grounds. . .

. . . Ordinarily, in the case of a challenge to a complaint under Rule 12(b)(6), **if the court determines that there is an insufficiency in a complaint, a party is afforded the opportunity to amend the complaint before dismissal of a case, which opportunity should be liberally given.**

. . . **there would seem to be no sense or utility in allowing amendment of a pre-suit notice and certificate after suit is filed. For specific objections to a pre-suit notice and certificate to be made for the first time only after suit is filed is contrary to the purposes of the statute . . .**

We hold therefore that **before 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.** . . .

. . . when a healthcare provider receives a pre-suit notice of claim and screening certificate of merit that the healthcare provider believes to be legally defective or insufficient, the healthcare provider may reply within thirty days of the receipt of the notice and certificate with a written request to the claimant for a more definite statement of the notice of claim and screening certificate of merit. **The request for a more definite statement must identify with particularity each alleged insufficiency or defect in the notice and certificate and all specific details and information requested by the defendant.** . . .

Additionally, we hold that under W.Va. Code, 55-7B-6 [2003], the making of a request for a more definite statement in response to a notice of claim and screening certificate of merit preserves a party's objections to the legal sufficiency of the notice and certificate as to all matters specifically set forth in the request; **all objections to the notice or certificate's legal sufficiency not specifically set forth in the request are waived.**

Westmoreland was never given notice of the alleged insufficiency because Vaidya entirely and completely ignored his pre-suit filing until after the complaint was filed. Therefore, Vaidya's objections to Westmoreland's pre-suit filings are contrary to the purposes of the statute.

Vaidya had the resources of the largest law firm in the State of West Virginia at his disposal. Surely it would have not been asking too much for Dr. Vaidya to request that his attorneys spend half an hour preparing a request for a more definite statement.

Further, on page 11 of his **RESPONSE TO APPEAL BRIEF**, Vaidya refers to *Hinchman* and states that ". . . 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. . ." Vaidya is clearly implying that the requirements of *Hinchman* do not, therefore, apply to this case.

However, in *Kominar v. Health Management Associates* (2007), No. 33215, this Court applied this Court's holding in *Price v. Charleston Area Medical Center*, (2005), 217 W.Va. 663, 619

S.E.2d 176 - even though the *Price* opinion was issued about a month after the *Kominar* trial ended. Therefore, the Court's decision in *Hinchman* in further interpreting the MPLA is relevant to this case.

From the very beginning Westmoreland has maintained that he was not required to file a Certificate of Merit because of the exception found in *W.V. Code § 55-7B-6(c)*. At no time has Vaidya ever alleged that the exception found in *W.V. Code § 55-7B-6(c)* does not exist - he has merely objected that the exception does not apply to Westmoreland's claim while Westmoreland has asserted that the exception is applicable.

The relevant statutory and case law required that Vaidya make his objection and request for a more definite statement to Westmoreland's position prior within thirty (30) days of the filing of the **NOTICE OF CLAIM**. Vaidya chose not to object and thereby waived any objection to Westmoreland's pre-suit filings.

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#### APPELLEE VAIDYA'S INCORRECT STATEMENT OF FACT AND LAW NO. 2

In reviewing Appellee Vaidya's brief, it appears that Vaidya makes a habit of failing to timely object to certain matters and then attempting to raise objection to those matters later. This Court has previously held on numerous occasions that, "Where objections were not shown to have been made in the trial court, and the matters concerned were not jurisdictional in character, such objections will not be considered on appeal." *The State Road Commission v. Ferguson* (1964), 137 S.E.2d 206, 148 W.Va. 742. See also *State v. Shrewsbury* (2003); 582 S.E.2d 774, 213 W.Va. 327; *City of Philippi v. Weaver* (2000), 540 S.E.2d 563; 208 W.Va. 346; *Kessel v. Leavitt* (1998), 511 S.E.2d 720; 204 W.Va. 95.

Yet, this is precisely what Vaidya does on page 25 of his **RESPONSE TO APPEAL BRIEF**. At the start of the second paragraph, Vaidya stated (emphasis added):

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 Motion 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. . .**

Moreover, it is of concern that the naked allegations 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.** The fee could include services other than preparing and signing a Certificate, such as 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.**

It is truly interesting that Vaidya is now claiming that Westmoreland's statements and claims are inadmissible hearsay. Unfortunately for Vaidya, there is no evidence that any of his several attorneys issued an objection to Westmoreland's statements and claims at the February 10, 2006 hearings. When one examines the entire transcript of that hearing, there is much discussion of the \$40,000.00 fee requirement for a Certificate of Merit on Westmoreland's behalf, but there is not a single objection from Vaidya's Counsel to such statements by Westmoreland.

Neither is there any objection to Westmoreland's claims of a \$40,000.00 fee requirement found in the **DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR RECONSIDERATION AND RELIEF.**

As Vaidya made no objection in writing or at the hearing to Westmoreland's statements and claims regarding the \$40,000.00 fee required to obtain a Certificate of Merit, any and all objections by

Vaidya concerning the admissibility of all evidence concerning the \$40,000.00 fee requirement for a Certificate of Merit should not be considered by this Court on appeal.

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### APPELLEE'S VAIDYA'S INCORRECT STATEMENT OF FACT AND LAW NO. 3

On page 16 of his **RESPONSE TO APPEAL BRIEF**, Vaidya discusses his theory that Westmoreland's fraud and slander claims are inseparable from Westmoreland's medical malpractice and battery claims and therefore require expert testimony to prove. A portion of Vaidya's argument states,

... 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. V. Code ¶ 30-3C-3.**

However, on page 24 of his **RESPONSE TO APPEAL BRIEF**, Vaidya argues that Westmoreland's case is frivolous and was rightly dismissed by the Circuit Court. Vaidya's basis for the alleged frivolous nature of Westmoreland's claims is - **unbelievably** - **THE ALLEGEDLY INADMISSIBLE FINDINGS OF THE WEST VIRGINIA BOARD OF MEDICINE!** Vaidya stated:

Perhaps most importantly, there is substantial evidence in the record demonstrating that 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 under acceptable under similar conditions and circumstances." ...

The Board's findings. . . lead to only one conclusion — the Appellant's allegations are frivolous and the circuit court properly dismissed his lawsuit.

Leaving aside the bald fact that Westmoreland's claims were NOT dismissed for being frivolous, but rather, because of an alleged failure to comply with a statutory requirement, the fact remains that

Vaidya wants to have it both ways. On the one hand, he wants Westmoreland to be prohibited from making reference to the proceedings before the Board of Medicine, and on the other hand, Vaidya wants to make use of the same proceedings.

*W.V. Code § 30-3-5* states the purpose of the West Virginia Board of Medicine:

The board shall be the sole authority for the issuance of licenses to practice medicine and surgery and to practice podiatry and certificates for physician assistants in this state and shall be a regulatory and disciplinary body for the practice of medicine and surgery and the practice of podiatry and for physician assistants in this state.

Further, *W.V. Code § 30-3-7* states the powers and duties of the West Virginia Board of Medicine:

In carrying out its functions, the board may:

- (1) Adopt such regulations as are necessary to carry out the purposes of this article;
- (2) Hold hearings and conduct investigations, subpoena witnesses and documents and administer oaths;
- (3) Institute proceedings in the courts of this state to enforce its subpoenas for the production of witnesses and documents and its orders and to restrain and enjoin violations of this article and of any regulations promulgated under it;
- (4) Employ investigators, attorneys, hearing examiners, consultants and such other employees as may be necessary;
- (5) Enter into contracts and receive and disburse funds according to law;
- (6) Establish and certify standards for the supervision and certification of physician assistants;
- (7) Authorize medical and podiatry corporations in accordance with the provisions and subject to the limitations of section fifteen of this article to practice medicine and surgery or podiatry through duly licensed physicians or podiatrists;
- (8) Establish a fee, not to exceed fifty dollars, for a reciprocal endorsement; and

(9) Perform such other duties as are set forth in this article or otherwise provided for in this code.

Neither the purpose nor the powers and duties of the West Virginia Board of Medicine include any jurisdiction over making determinations of civil liability in medical malpractice claims. Further, collateral estoppel does not apply to any decision of the Board of Medicine to preclude a claim for damages in a medical malpractice case in the Courts of the State of West Virginia.

As Vaidya is attempting to persuade this Court to affirm the dismissal of all of Westmoreland's claims based on the finding of the Board of Medicine, the Court should be aware that the Board of Medicine retained a certain urologist, Joseph M. Debord, M.D. to review Dr. Westmoreland's Complaint. Apparently the Board of Medicine's decision was primarily based on Dr. Debord's investigation.

In Dr. Debord's letter (attached) to the West Virginia Board of Medicine dated November 9, 2005, Dr. Debord stated (emphasis added),

I have reviewed in detail the complaint filed by Danny R. Westmoreland, D.O. against Shrikant K. Vaidya, M.D. including the original complaint, Dr. Vaidya's response, as well as accompanying hospital and office records. I have also reviewed attestations by Dr. Westmoreland's wife, office nurse, and additional correspondence from the complainant to the Board of Medicine. . .

**. . . I will not pretend to know the actual events, but it would be useful to have a report from Dr. Vaidya's assistant. . .**

**. . . I think it would be worthwhile to have a statement from Dr. Vaidya's assistant, Tom, who was present at the stent removal. If Dr. Westmoreland was, restrained, this would indeed, be grounds for disciplinary action. . .**

The Board of Medicine did not take Dr. Debord's advice and interview Vaidya's assistant. Thus, neither the Board of Medicine nor Dr. Debord interviewed a single witness. The entire review of Westmoreland's Complaint was done on paper.

Nevertheless, Appellee Vaidya asserts that the finding of the Board of Medicine is sufficient for this Court to affirm the Circuit Court's dismissal of all of Westmoreland's claims because such claims were frivolous - even though the Circuit Court did not make such a finding.

What if the West Virginia Board of Medicine had made a finding that Dr. Vaidya had egregiously breached the standard of care and the Board had removed Dr. Vaidya's license?

Would Vaidya then argue that the Board's finding against him automatically subjected him to liability for civil damages? No - if the Board had made a finding against Dr. Vaidya, there is no doubt that Vaidya would make no reference to the Board's finding and would strenuously object to any reference to the same.

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#### APPELLEE VAIDYA'S INCORRECT STATEMENT OF FACT AND LAW NO. 4

Vaidya spends a significant amount of time discussing the allegation that "You need a scorecard to keep up with the different versions of events being asserted." [by Westmoreland concerning the reasons he could not obtain a certificate of merit].

It has been more than four (4) years since the initial events giving rise to Westmoreland's **COMPLAINT**. Westmoreland admits that it is certainly possible that his memory of those events is not perfect. Certainly, in reviewing Westmoreland's several **MOTIONS FOR SUMMARY JUDGMENT**, it is evident that he argued the following consistently:

All urologists did not refuse to sign certificate of merit due to lack of breach of standard of care, but because they stated no due to having to socialize with Shrikant Vaidya. One agreed to sign out of this area on the acts of the Defendant. Second agreed to sign all points for \$40,000.00 I refused.

Further, on July 11, 2005, Dr. Westmoreland submitted a letter to Court and Counsel from Attorney Thomas H. Peyton dated April 19, 2005 (almost a month before Westmoreland's **NOTICE OF CLAIM** was filed) which stated in part:

After reviewing your file, including medical records and speaking to Dr. Copeland on the phone, I regret to inform you that our law firm will not be handling your medical malpractice case. Dr. Copeland does believe that Dr. Vaidya may not have conducted the removal of the stint within the standard of care. . .

Unfortunately, in West Virginia, the costs and time necessary to effectively prosecute a medical malpractice claim make it impossible for our law firm to handle your case. I can guarantee that Dr. Vaidya's medical malpractice carrier will put on a "scorched earth" defense if a lawsuit is filed which will require our office to dedicate hundreds and hundreds of hours to your case . . .

It is clear from the above letter that at least one (1) urologist did acknowledge the possibility or probability that Dr. Vaidya did breach the standard of care in his treatment of Dr. Westmoreland. It is clear that Dr. Westmoreland's assertions about a \$40,000.00 fee requirement to obtain a Certificate of Merit has remained consistent throughout these proceedings. There is an inconsistency on the issue of whether there was one (1) or two (2) urologists who demanded \$40,000.00 - such inconsistency most likely caused by the time since Westmoreland's injuries caused by Dr. Vaidya.

Finally, as previously discussed, the fact remains that Vaidya did not object verbally or in writing to the admissibility of Westmoreland's statements and assertions regarding his attempts to obtain a Certificate of Merit.

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#### **APPELLEE VAIDYA'S INCORRECT STATEMENT OF FACT AND LAW NO. 5**

On page 18 of his **RESPONSE TO APPEAL BRIEF**, Vaidya stated, "Since the Appellant initially consented to the cystoscopy and he did not place any limitations on his consent . . ."

Further, Vaidya quoted from the *Mims* case out of Georgia concerning withdrawal of consent after a procedure has begun:

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 or condemnation of his own profession. . .

. . . 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.

It should be noted that the stent would eventually have needed to be removed and Dr. Westmoreland went to Dr. Vaidya (who had inserted the stent) in order to have it removed. If one believes the accounts of Dr. Westmoreland and Martha Bias regarding the events that day, Dr. Vaidya was, in essence, holding Westmoreland hostage.

For example, in the account of Martha Bias, she stated in part:

When I got to the room I found that **Dr. Westmoreland had refused to go through the procedure without anesthesia. . .** The doctors talked back and forth due to Dr. Westmoreland's fear of having this procedure without anesthesia. **Again, he informed Vaidya he was concerned with the thought of this being done without anesthesia. Dr. Vaidya stated that it was a simple procedure and there was nothing to worry about and Dr. Westmoreland was worrying over nothing. . .**

. . . Dr. Vaidya said he'd try and took the last butterfly IV and tried a couple sticks without success. **He told Dr. Westmoreland to quit being a baby and that he was starting the procedure, that it would only take a few seconds and be painless. . .**

. . . **It was clear that Dr. Westmoreland was very reluctant to have this procedure done without anesthesia. He questioned Dr. Vaidya [about] if you had to use anesthesia the first time, why wouldn't you have to use it the second time. . .**

Based on the statement of Ms. Bias and the position of Dr. Westmoreland from the start of this case, it is unclear whether or not Westmoreland even consented to begin the procedure at all. Westmoreland had to be cajoled and belittled into allowing Dr. Vaidya to begin the removal of the stent.

Given the fact that the stent removal was necessary at some point in time, Dr. Westmoreland had only two (2) options: either (1) allow Vaidya to do the removal of the stent on Vaidya's terms and assurances or (2) leave and find another urologist.

Under pressure (and several assurances) from Vaidya that it would be a simple, painless procedure and over in less than a minute, it appears that Dr. Westmoreland did allow Vaidya to begin the procedure. However, Dr. Westmoreland, Kim Westmoreland and Martha Bias all confirm that Dr. Westmoreland withdrew his consent to the procedure immediately after the procedure began.

Vaidya asserts that Westmoreland's ability to withdraw his consent to the procedure is limited if terminating the procedure would be detrimental to the patient's health or life.

Certainly, the continuation of the procedure itself proved to be highly detrimental to Westmoreland's health and life as Westmoreland suffered renal failure, lost 80 pounds and nearly died as a direct result of the procedure. However, Westmoreland asserts that it is clear that the procedure could have been stopped and continued in a different method by Dr. Vaidya or continued at a later time by another urologist. While the removal of the stent was medically necessary, it was not necessary at that moment in time. Leaving the stent in Westmoreland's ureter for another day or week would not have endangered Westmoreland's life or well being.

As such, Vaidya's argument that Westmoreland's ability to withdraw consent to the procedure was limited is baseless. There would have been no long term serious health effects resulting from a delay of the removal of the stent. The only possible damage to Westmoreland that could have occurred prior to his withdrawal of consent after the procedure began would have been caused by Vaidya.

**APPELLEE VAIDYA'S ARGUMENT THAT THE CERTIFICATE OF MERIT REQUIREMENT DOES NOT RESTRICT PLAINTIFFS' ACCESS TO THE COURTS**

On page 36 of his **RESPONSE TO APPEAL BRIEF**, Vaidya refers to an editorial from the West Virginia Record Newspaper in support of his argument that the Certificate of Merit requirement does not restrict Plaintiffs' access to the Courts. Westmoreland asserts that such an editorial article from a legal newspaper is irrelevant to this Appeal.

Footnote 18 of Vaidya's **RESPONSE TO APPEAL BRIEF** quotes *Hinchman* and states, "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."

There is no question that this Court was correct in its holding in *Hinchman* - Westmoreland is quite certain that when the legislature was crafting *W.V. Code § 55-7B-6*, the legislature did not intend to restrict or deny citizens' access to the Courts. However, "the road to hell is paved with good intentions." Further, legislatures across the country enact statutes and laws that have unintended consequences - the bootlegging that accompanied prohibition of alcohol comes to mind - and in many cases, wise legislatures and courts overturn statutes for that very reason.

The issue here is not whether or not the *W.V. Code § 55-7B-6* was **INTENDED** to restrict access to the Courts. The issue is whether or not *W.V. Code § 55-7B-6* **DOES** restrict access to the Courts. Westmoreland asserts that *W.V. Code § 55-7B-6* does restrict citizens' access to the Courts for the same reasons stated in **ASSIGNMENT OF ERROR NO. 6** in his **APPEAL BRIEF**.

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**APPELLEE VAIDYA'S STATEMENT THAT *GRAY V. MENA* IS DISTINGUISHABLE FROM THIS CASE**

On page 9 of Vaidya's **RESPONSE TO APPEAL BRIEF**, he claims that the facts in *Gray* are clearly distinguishable because of a physical and/or sexual assault/battery which allegedly occurred

during a medical examination - during the exam, the physician allegedly inserted a non-gloved finger into the Plaintiff's vagina. Vaidya claims that the fact that the Plaintiff if **Gray** did not assert a medical malpractice action is a substantial distinguishing factor which prevents the application of **Gray** to this case.

Westmoreland reminds the Court that he filed several claims in his **COMPLAINT**, including medical malpractice, civil battery, slander and fraud. Nevertheless, the Circuit Court summarily dismissed all of Westmoreland's claims. Westmoreland would ask Vaidya to more fully clarify the distinction between the following:

- 1: battery involving the unwanted insertion of a physician's finger in a patient's vagina during a medical exam as in **Gray**, and
- 2: battery involving holding the patient down on the table while the physician continues a physically damaging procedure from which the patient had withdrawn his consent as there was here.

There is no difference. Both situations involve a battery that occurred during a medical procedure. We can quibble over whether a battery that occurs during a medical procedure is a medical malpractice claim, a claim for civil battery or both, but it is clear that Westmoreland plead **BOTH CLAIMS** in his **COMPLAINT**. Therefore, the holding in **Gray** applies to this case.

Furthermore, by Vaidya's reasoning on the bottom of page 11 of his **RESPONSE TO APPEAL BRIEF** regarding **Hinchman**, the **Gray** Court's "warning" to future litigants (see top of page 11 of Vaidya's **RESPONSE TO APPEAL BRIEF**) should not be applicable to this case because **Gray** was decided after Westmoreland filed his pre-suit **NOTICE** in this case. Again, Vaidya wants to "have his cake and eat it too" and this Court should disregard both sides of Vaidya's numerous instances of contradictory reasoning found in his **RESPONSE TO APPEAL BRIEF**.

**CONCLUSION**

For all of the above reasons, the Plaintiff/Appellant Danny Westmoreland PRAYS that the Supreme Court of Appeals of West Virginia consider the **APPEAL BRIEF** and **APPEAL REPLY BRIEF OF PLAINTIFF/APPELLANT DANNY RAY WESTMORELAND**, and reverse the decision of the Trial Court on all of Appellant Danny Ray Westmoreland's assignments of error.

**Danny Ray Westmoreland**

**By Counsel**



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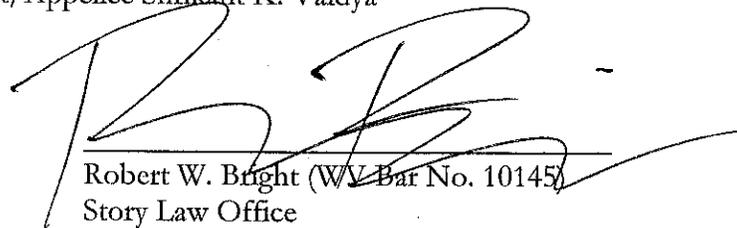
**CERTIFICATE OF SERVICE**

I, Robert W. Bright, as counsel for Dr. Danny Ray Westmoreland, hereby certify that the following document:

1: **APPEAL REPLY BRIEF OF PLAINTIFF/APPELLANT DANNY RAY WESTMORELAND**

was served upon the following persons by depositing a true and accurate copy thereof in the regular United States Mail, first class postage pre-paid, addressed to their last known addresses as follows on the 27<sup>th</sup> day of August, 2007.

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