

**MEDICAL MALPRACTICE LITIGATION IN WEST VIRGINIA**  
**Applicability of the Medical Professional Liability Act**  
**West Virginia Code § 55-7B-1 *et seq.***

by

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**Introduction**

Medical malpractice, or medical professional liability, litigation in West Virginia is controlled by the statutory scheme mandated by the state legislature in the Medical Professional Liability Act, W.Va. Code § 55-7B-1 *et seq.*, (“the Act”). Initially made effective in 1986, the Act underwent significant changes by amendments and new enactments which went into effect on December 1, 2001. In 2003, the Act was modified again, with the amendments applying to all actions filed after July 1, 2003.

This section of the Practice Handbook is meant to be a general guide alerting the practitioner to various considerations of a potential medical professional negligence claim, including procedural and substantive prerequisites, and pleading practice. It does contain all the seminal cases interpreting the Act at the time of publication. Because it is critically important to understand the various damages caps, pre-suit requirements and burdens of proof that are different from other tort cases, it is advisable to read the entire Act prior to handling a medical malpractice case.

**Background and Overview**

The legislative findings and declarations of purpose appear in W.Va. Code § 55-7B-1. The legislature’s stated objective is to provide “adequate and reasonable compensation to those persons who suffer from injury or death as a result of medical negligence” while balancing “the cost of liability insurance coverage . . . and retaining qualified physicians and other health care

providers.” The issue of insurance or liability coverage is no less significant today than it was in 1986, when the Act was originally enacted. In 1986, the rising costs of insurance coverage and the reduced availability of coverage options, by the Legislature’s own admission, resulted from “the historic inability of this state to effectively and fairly regulate the insurance industry . . .” Twenty-five years later, these same issues are equally relevant and important to West Virginia’s well-being.

### **§55-7B-2**

W.Va. Code § 55-7B-2 is essentially the definitions section of the statute. Health care, health care facilities, and health care providers are broadly defined in this section. These definitions encompass all acts relative to a patient’s care, treatment, or confinement, and include such facilities as nursing homes and extended care facilities, as well as state clinics and institutions. The Act also covers medical practitioners themselves, the definition of which includes, but is not limited to, physicians, nurses, dentists, and therapists, and their agents, officers, and employees. Likewise, emergency medical service providers are subject to the provisions of the Act. *See* W.Va. Code § 16-4C-1 *et seq.*, and *Short v. Appalachian OH-9, Inc.*, 203 W.Va. 246, 507 S.E.2d 124 (1998). Pharmacists, however, are not subject to the Act’s provisions. *Phillips v. Larry’s Drive-In Pharmacy*, 220 W. Va. 484, 647 S.E.2d 920 (2007).

Collateral sources are broadly defined and include nearly every type or source of benefits, whether private or government, and most insurances, including contractual reimbursement for health care services. Social Security benefits, however, are specifically excluded, with the exception of Social Security disability benefits directly attributable to the medical injury in question. In subsection (d), “Emergency Condition” is defined as any acute traumatic injury or condition involving a significant risk of death or significant complications or disabilities, impairment of bodily functions, or risk to a fetus. “Plaintiff” is narrowly defined in subsection (m) as a patient or representative of a patient.

The Act defines liability broadly. It is defined as any liability for damages resulting from any tort based upon health care services rendered, or which should have been rendered, or breach of contract actions. *Emphasis supplied*. The West Virginia Supreme Court of Appeals has recently clarified that this definition indeed encompasses *any* tort based on health care services rendered, or which should have been rendered. Syl. Pt. 3, *Blankenship v. Ethicon, Inc.*, 221 W. Va. 700, 656 S.E.2d 451 (2007). “Non-economic loss,” recovery of which is limited under the Act, includes pain, suffering, mental anguish and grief. W.VA. CODE § 55-7B-8.

It is important to note that failure by a plaintiff to plead his or her claim as governed by the Medical Professional Liability Act does not preclude application of the Act. *Blankenship*, 221 W. Va. at 707, 656 S.E.2d at 458. Where the allegedly negligent conduct was committed by a health care provider in the context of rendering “health care,” the Act applies regardless of whether the plaintiff identifies his or her claim as being under the Act. *Id.*

### **§55-7B-3**

W.Va. Code § 55-7B-3 deals with the elements of proof in a medical malpractice case. The necessary elements of proof appearing in W.Va. Code § 55-7B-3 effectively remove the “locality rule,” i.e., the rule that the standard of care is determined by the care ordinarily exercised in the same locality of the medical practitioner or provider. The Court in *Paintiff v. City of Parkersburg*, 176 W.Va. 469, 345 S.E.2d 564 (1986) also completely abolished the locality rule. The standard provided by the Act and the Court is the exercise of such degree of care, skill and learning required or expected of a reasonable, prudent health care provider in the profession or class to which the health care provider belongs, acting upon the same or similar circumstances. When testifying as to the national standard of care, an expert is not required to be familiar with the specific method of performing a procedure that is used locally. So long as the expert is otherwise qualified, unfamiliarity with a local practice goes to the weight, not the admissibility, of his testimony. *Walker v. Sharma*, 221 W.Va. 559, 655 S.E.2d 775, 781 (2007).

The failure to meet the standard of care must be the proximate cause of the injury or death. “‘Proximate cause’ must be understood to be that cause which in actual sequence, unbroken by any independent cause, produced the wrong complained of, without which the wrong would not have occurred.” Syl. Pt. 4 *Steward v. George*, 216 W.Va. 288, 607 S.E.2d 394 (2004). “‘Proximate cause’ of an injury is the last negligent act contributing to the injury and without which the injury would not have occurred.” *Id.* at Syl. Pt. 5. Proximate cause may be proven by inference through expert testimony. *Sexton v. Greico*, 216 W.Va. 714, 613 S.E.2d 81 (2005).

The most critical portion of § 55-7B-3 is the addition by the Legislature in “loss of chance” theory cases. The Act only requires that a plaintiff must establish, to a reasonable degree of medical probability, that had the accepted standard of care been afforded the patient, there was greater than a 25% chance of improvement, recovery, or survival.

#### **§55-7B-4**

Causes of action arise as of the date of the injury, and actions must be commenced within two years. The statute of limitations may be extended by the discovery rule, which holds that the cause of action is not deemed to arise until the injury is discovered, or should have been discovered by the exercise of reasonable diligence. *See Gaither v. City Hosp.*, 199 W.Va. 706, 487 S.E.2d 901 (1997), for a complete analysis of the discovery rule. *See also, McCoy v. Miller*, 213 W.Va. 161, 578 S.E.2d 355 (2003) (holding that a patient’s second malpractice action, alleging that he had been newly informed that surgery which was the basis of his first malpractice action was unnecessary, was barred by the statute of limitations because the discovery rule did not prevent the limitations period from running). The Court found that the patient had an affirmative duty in the first action to discover all relevant facts, including those regarding the necessity of surgery. Recently, in *Mack-Evans v. Hilltop Healthcare Ctr.*, the Court noted that the discovery rule applies to actions arising under the wrongful death act. Syl. Pt. 3,

*Mack-Evans v. Hilltop Healthcare Ctr.*, 226 W.Va. 257, 700 S.E.2d 317 (2010) (citing Syl. Pt. 7, *Bradshaw v. Soulsby*, 210 W.Va. 682, 558 S.E.2d 681 (2001)).

Where the adverse results of the medical treatment are so extraordinary that the patient is immediately aware that something went wrong, the statute of limitations begins to run even though the plaintiff may not be aware of the specific act of malpractice. *Harrison v. Seltzer*, 165 W.Va. 366, 371, 268 S.E.2d 312, 315 (1980). This is true even where the plaintiff does not necessarily realize that there has been negligent conduct. *Gaither*, 199 W.Va. at 714, 487 S.E.2d at 909. In such cases, the statute begins to run as soon as the patient knows or should know that treatment by a particular party has caused personal injury. *Id.* For instance, where a patient undergoing eye surgery realizes immediately that his or her vision has been greatly diminished by the surgery, the statute begins to run as soon as the patient realizes that his or her vision has been damaged. *Legg v. Rashid*, 222 W.Va. 169, 663 S.E.2d 623, 630 (2008). However, the statute of limitations does not begin to run for so long as it is reasonable for the patient not to connect the undesirable result with the treatment received. *Gaither*, 199 W.Va. at 714.

The West Virginia Supreme Court has held that the continuous medical treatment doctrine should apply to determine the date of an injury where an injury occurs during a continuous course of medical treatment, and the date of the actual injury is not identifiable due to the type of medical treatment received. *Forshey v. Jackson*, 222 W.Va. 743, 753, 671 S.E.2d 748, 758 (2008). However, the Court found that where a patient sustains an injury on a certain date, the fact that the provider continues to treat that patient does not invoke the continuous medical treatment doctrine. *Id.* at 753, 671 S.E.2d at 758. Similarly, the fact that a patient continues to receive treatment from a provider or continues to suffer ill effects from malpractice does not invoke the continuing tort doctrine; rather, repetitious wrongful conduct must occur for a patient to enjoy the benefit of the doctrine. *Id.* at 755, 671 S.E.2d at 760.

The Court has also recently clarified the application of the statute of limitations as it pertains to injuries sustained from surgical procedures occurring outside the state, but which resulted in further surgical procedures that were subsequently performed in West Virginia.

Where the procedures performed in West Virginia were a direct result of negligence which occurred in the first procedure (performed outside the state), but damages are sought for both procedures, the court applies the West Virginia statute of limitations. Syl. Pt. 3, *Willey v. Bracken*, 228 W.Va. 244, 719 S.E.2d 714 (W. Va. 2010). The Court ruled that in order to initiate a cause of action in West Virginia for such injuries, the West Virginia statute of limitations must apply, and the West Virginia borrowing statute is not applicable. *Id.*, see W. VA. CODE § 55-2A-2 for more information on the West Virginia borrowing statute.

Additionally, W.Va. Code § 55-7B-4 provides that an action shall not be commenced beyond ten years after the date of injury. Actions on behalf of minors under the age of ten shall be commenced within two years of the date of the injury or within two years of the minor's twelfth birthday, whichever provides the longer period. If the health care provider commits fraud, collusion or concealment, or misrepresentation, the limitation period is tolled.

#### **§55-7B-5**

In actions against healthcare providers, a prayer for a specific dollar amount may not be included in a complaint. At the request of a party defendant, however, a written statement setting forth the nature and amount of damages being sought must be set forth within thirty days. Plaintiffs who file medical professional liability actions in absence of privity of contract may not file independent actions against an insurer alleging violations of the settlement practices provisions of the Unfair Trade Practices Act, W.Va. Code §§ 33-11-3 and 4. This section effectively abolishes third party bad faith causes of action in medical malpractice cases. However, a medical professional may file a first party bad faith action once there is “a verdict rendered in the underlying medical professional liability action, or the case has otherwise been dismissed, resolved or disposed of.”

## **§55-7B-6**

The 2001 amendments to this section completely restructured the original statute. The prior statutory provision was simply titled “pretrial procedures.” Now, this section is styled “prerequisites for filing an action against a healthcare provider; procedures; sanctions.” Most notably, certain pre-filing procedures must be completed prior to the filing of a complaint alleging medical professional liability.

Prior to filing an action, a “notice of claim” or “thirty day letter” must be served by certified mail upon the health care provider(s) intended to be named. This notice letter must include a statement of the theories of liability and a screening certificate of merit. The certificate of merit must be executed under oath by a health care provider who qualifies as an expert under the West Virginia Rules of Evidence, and must state with particularity the following:

(1) Familiarity with the applicable standard of care at issue; (2) qualifications of the expert; (3) the opinion of how the standard of care was breached; and (4) opinions as to causation. Each health care provider against whom a claim is asserted must receive the notice and certificate of merit. For instance, if a claim involving orthopedics and pulmonology is asserted, then an expert’s certificate for each area of medical practice must be provided. The experts providing the certificate must not have a financial interest in the litigation, but may participate as an expert in judicial proceedings.

The purpose of requiring a pre-suit notice of claim and screening certificate of merit is to prevent the filing of frivolous medical malpractice suits, and to promote the pre-suit resolution of non-frivolous medical malpractice claims. “The 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.” Syl. Pt. 2, *Hinchman v. Gillette*, 217 W.Va. 378, 618 S.E.2d 387 (2005). Because most experienced plaintiff attorneys routinely obtain expert review prior to filing a medical malpractice case, this procedure does not dramatically affect how many attorneys prepare to file suit. Instead, it merely ensures that only cases with some degree of merit will be filed.

In the 2005 *Hinchman* decision, the West Virginia Supreme Court of Appeals interpreted W.Va. Code § 55-7B-6, and laid out how healthcare providers must respond to notices of claims and certificates of merit if they are defective and/or insufficient. In *Hinchman*, the Court held that before a defendant in a lawsuit against a healthcare provider can challenge the legal sufficiency of a claimant's pre-suit notice of claim or screening certificate of merit under W.Va. Code § 55-7B-6 (2003), the claimant must be given written and specific notice of, and an opportunity to address and correct, the alleged defects and insufficiencies. *Hinchman* at Syl. Pt. 3. See also *Cline v. Kresa-Reahl*, No. 11-0351, 2012 WL 1987137 (W. Va. May 29, 2012) for a discussion on the claimant's responsibility. Additionally, the Court held that 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 requested by the defendant. A claimant must be given a reasonable period of time, not to exceed thirty days, to reply to a healthcare provider's request for a more definite statement, and all applicable periods of limitation shall be extended to include such periods of time.

It is important for those who defend healthcare providers to know that failure to object to the legal sufficiency of the notice and certificate within thirty days waives these objections. See *Hinchman* at Syl. Pt. 5. Additionally, a defendant waives any objection that is not specifically asserted. *Id.*

The reviewing courts will determine whether a notice of claim and certificate are legally sufficient, in light of the statutory purposes of preventing the making and filing of frivolous medical malpractice claims, versus promoting the pre-suit resolution of non-frivolous medical malpractice claims. *Id.* at Syl. Pt. 6. "A principal 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 has demonstrated a good faith and reasonable effort to further the statutory purpose.” *Id.*; see also *Cline*, No. 11-0351, 2012 WL 1987137 (holding that the claimant’s continued refusal to provide a certificate of merit does not demonstrate a reasonable good faith or reasonable effort to comply with the MPLA). This standard will undoubtedly make it more difficult for a healthcare provider to dismiss cases where poorly drafted notices and certificate(s) are filed.

The claimant’s counsel may allege that a screening certificate is not necessary if 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.” Even then, the claimant or claimant’s counsel must file a statement specifically setting forth the alleged basis of liability in lieu of a certificate of merit. To the extent that the plaintiff believes that no certificate of merit is necessary, and is relying on the exception contained in W.Va. Code § 55-7B-6(c), the plaintiff is to be afforded an opportunity to obtain a certificate of merit, if one is, in fact, required.

*Westmoreland v. Vaidya*, 222 W.Va. 205, 664 S.E.2d 90 (2008). Further, in a recent case, the Court confirmed the importance of the requirements in W.Va. Code § 55-7B-6(c). *Cline*, No. 11-0351, 2012 WL 1987137. The claimant asserted that the defendant physician failed to provide informed consent and therefore, the claimant did not need to file a certificate of merit. *Id.* The Court held that informed consent claims require expert testimony, and thus necessitate a pre-suit certificate of merit. *Id.* Despite an opportunity to redress the deficiency, the claimant failed to do so. *Id.* Thirty days is a reasonable period of time for the plaintiff to be afforded to address and correct such a deficiency. *Westmoreland*, 222 W.Va. 205, 664 S.E.2d 90. Good cautionary advice, however, would be to secure the more formal certificates because the claimant’s counsel should expect defense motions relative to the merits of the claim, even with experts.

If there is insufficient time to secure certificates of merit prior to the expiration of the applicable statute of limitations, compliance with the notice and certificate of merit provision is still necessary, and the health care provider against whom the claim is made shall be furnished with a statement of intent to comply with those provisions within sixty days of the receipt by the

provider of the notice of claim. Once the notice of claim and certificates are received by the health care provider, a written response must be provided to the claimant or claimant's counsel within thirty days with any objections articulated pursuant to *Hinchman*.

Pre-litigation mediation before a qualified mediator may be requested by the health care provider upon written demand to the claimant. When mediation is requested, mediation shall be concluded within forty-five days of the date of the written demand. Mediation is conducted pursuant to Rule 25 of the West Virginia Trial Court Rules. The health care provider's deposition may be taken either before or during the mediation. Failure of the health care provider to timely respond to the notice of claim constitutes a waiver of the right to request mediation. Applicable statutes of limitations are tolled from: (1) the date of mailing of a notice of claims to thirty days following the receipt of a response to the notice of claim; (2) thirty days from the date on which a response to the notice of claims would be due; (3) thirty days from the receipt by the claimant of written notice from the mediator that the mediation did not result in resolution or settlement, and that the mediation has concluded, whichever occurs last.

The tolling provisions are only applicable as to health care providers to whom the claimant sent a notice of claim within thirty days from claimant's receipt of written notice from the mediator that the mediation was not successful and has been concluded. Since its inception, this pre-litigation mediation option is very rarely requested by health care providers because there is often very little or no benefit to a healthcare provider for doing so.

The notice and certificate of merit of the claimant, responses by the provider, and results of any mediation are not admissible as evidence in any court proceeding unless the court determines only upon hearing that the failure to disclose the contents would result in a miscarriage of justice. Such materials are deemed confidential.

#### **§55-7B-6a**

This 2001 enactment provides for the obligatory and mutual exchange of all medical records pertaining to the alleged act(s) of medical professional liability. Within thirty days of the

filing of the last Answer to the complaint, the plaintiff and defendant *shall* provide access to all records just as if a request had been made pursuant to Rule 34 of the Rules of Civil Procedure. The records must be reasonably related to the plaintiff's claims and be within the party's control. Appropriate releases shall be provided by the plaintiff when other medical records are known to the plaintiff, but are not within or under his or her control. Requests may be made of other parties to the litigation by any party so long as the records are reasonably related to the claimant's claim and are within the party's control. This request must be accompanied by a brief statement of relevance or necessity. An objection is appropriate only if the requested records are not reasonably related to the claim. The objection must be written and a hearing shall be held to determine whether access should be permitted.

Should a party have reasonable cause to believe records reasonably related to the claim exist and have not been provided or exchanged, or an appropriate release has not been provided, the requesting party shall provide written notice to the party from whom the records are requested, and if the records have not been received within fourteen days of the notice, the requesting party may seek a hearing from the court.

If the issue concerning records results in a hearing, the court shall make a finding as to the reasonableness of the request and of the refusal to provide the requested records. Costs may be assessed pursuant to the Rules of Civil Procedure.

#### **§55-7B-6b**

This 2001 enactment includes some familiar language, formerly appearing in the original W.Va. Code § 55-7B-6, with some noteworthy changes primarily involving applicable time-frames and scheduling considerations. Now, in actions against health care providers, a mandatory status conference must be held within sixty days of the appearance of the last appearing defendant. It is incumbent upon the defendant to schedule the conference upon proper notice.

The status conference is not merely a scheduling conference and (depending on the judge) can resemble, in some respects, a pretrial conference. *But see Royal v. Rebound LLC*, 2012 U.S. Dist. LEXIS 32571 (S.D. W. Va. Mar. 12, 2012) (discussing that the Federal Rules of Civil Procedure preempt this provision because it conflicts with the federal court's ability to control experts and discovery). The court shall be informed by the parties as to the status of the action, identification of contested issues of fact and law, and progress or issues concerning discovery. Importantly, issues concerning experts are addressed. That is, the existence and intention of proceeding with experts must be reported to the court, and time-frames for expert disclosures will be established. A well-drafted order regarding the necessity of experts will narrow and clarify many potential issues as discovery proceeds. Mediation may also be ordered at this time.

Trial dates are ordered within twenty-four months from the date of the appearance of the last appearing defendant. This time period may be extended upon good cause shown or in the interests of justice.

Also, at the initial status conference, a summary jury trial of the case may be ordered. The summary jury trial provisions, appearing in the 2001 enactments are more specifically addressed below. As noted below, a summary jury trial will almost never be requested because of the considerable amount of effort required, compared with the relative benefit.

Although these status conferences vary dramatically from county to county, many judges take them very seriously. Counsel and parties are subject to sanctions for failures and/or lack of participation and preparation. Sanctions may include payment of reasonable attorney fees and expenses for failure to participate in good faith in the development and implementation of the discovery plan. However, other judges will have no idea why the lawyer requests such a conference. Sanctions are authorized if the court determines that either party is presenting or relying upon a frivolous or dilatory claim or defense, without a reasonable basis in law or fact. The prevailing party may be awarded reasonable litigation expenses, with the exception of attorney fees and expenses.

**§55-7B-6c**

This section outlines a new and unique procedure under West Virginia law known as a “summary jury trial.” If a summary jury trial is ordered, when each party has represented that the action is in a posture for trial and made a joint motion for the same under W.Va. Code § 55-7B-6b (d), the court determines (1) the date, (2) the length of presentations by counsel, and (3) length of deliberations by jurors. The optimistic anticipation is that the summary jury trial can be completed within a single day. Unless otherwise ordered, presentations are limited to one hour per party.

A six-member jury, with no alternates, is selected from the regular juror list with limited *voir dire*. The evidence shall be presented by the attorneys for the parties. A great deal of latitude is afforded the attorneys who may summarize, quote from and comment upon pleadings, depositions and other discovery; and quote from, comment upon, or refer to exhibits and statements of potential witnesses. However, no potential testimony of a witness may be referred to unless the reference is based on (1) the product of discovery, (2) a written sworn statement, or (3) an affidavit of counsel stating that an affidavit or sworn statement of the witness is (a) not available, and cannot be obtained through reasonable diligence, (b) the witness will be called at trial, and (c) the witness’s testimony is included in the attorney’s affidavit. Objections during the presentations by counsel are appropriate if the presentation violates the provisions above, or if the presentation exceeds the limits of propriety in statements as to evidence or other comments.

The jury is given an abbreviated set of instructions on the applicable law. This is where the 2001 enactments really get interesting. The jury is encouraged to return a unanimous verdict. However, if after a reasonable time a unanimous verdict cannot be reached, the jury will then be instructed to return a special verdict consisting of an anonymous statement of each juror’s findings on liability and damages. The jurors may be invited, but not ordered, to informally discuss the verdict with the attorneys and the parties.

These proceedings are not recorded, although recordings may be arranged at a party's own expense. However, as with the notice of claim, certificate of merit, and responses by defendants, the statements in briefs or summaries submitted in connection with the summary proceeding, as well as the statements by counsel, are not admissible in any evidentiary proceeding.

Within thirty days following the summary jury trial, each party must file a notice setting forth whether the party intends to accept the summary trial verdict, or whether the verdict is rejected and an election to proceed with trial is made. If all of the parties accept the verdict, it will be deemed a final determination on the merits of the action, and judgment may be entered accordingly.

If at a subsequent trial, the verdict returned is not more than twenty percent more favorable to the party who rejected the summary trial verdict, the rejecting party is liable for the costs incurred by the other party or parties subsequent to the summary trial. This is somewhat similar to a West Virginia Civil Procedure Rule 68 offer of judgment and also provides for attorney fees. This option, like the pre-suit mediation, is rarely agreed to by health care providers.

#### **§55-7B-6d**

W.Va. Code § 55-7B-6d provides that in the event of a jury trial pursuant to the Act, the panel shall consist of twelve jurors, who should “endeavor to reach a unanimous verdict,” but a majority of at least nine of the twelve juror members may be returned, signed by the jurors who have concurred in the verdict, who, prior to discharge, may be polled upon request of a party or upon the court's own motion. **It is important to note that W.Va. Code § 55-7b-6d has been found unconstitutional by the West Virginia Supreme Court.** In *Louk v. Cormier*, 218 W.Va. 81, 622 S.E.2d 788, (2005), the Court held that Rule 48 of the West Virginia Rules of Civil Procedure is the authority on the unanimity of juries. Therefore, “the non-unanimous verdict provision in W.Va. Code § 55-7B-6d has stripped litigants of a right granted to them by this

Court under our constitutional authority” i.e., Rule 48. The Court found that the Legislature cannot remove that which was not in its power to give. *Id.* “Accordingly, we hold that the provisions contained in W.Va. Code § 55-7B-6d (2001) (Supp. 2004) were enacted in violation of the Separation of Powers Clause, Article V, § 1 of the West Virginia Constitution, insofar as the statute addresses procedural litigation matters that are regulated exclusively by this Court pursuant to the West Virginia Constitution.” Consequently, W.Va. Code § 55-7B-6d, in its entirety, is unconstitutional and unenforceable. The Court went on to hold in *Richmond v. Levin*, 219 W.Va. 512, 637 S.E.2d 610 (2006) that the unanimous verdict requirement under *Louk* may be retroactively applied to cases pending in circuit court or on appeal when *Louk* was decided.

#### **§55-7B-7**

Expert witnesses in medical professional liability cases must maintain current licenses in any state and must not have had any revocations/suspensions during the past year in any state. Also at the time of the medical injury, as alleged in the action, the expert must have devoted at least 60% of his or her practice to active clinical practice or to teaching in that medical field. As a significant practice note, it is important to note that the West Virginia Supreme Court of Appeals has long held that it is within its province, through the promulgation of the Rules of Evidence, to determine which witnesses qualify, and in what capacity they qualify, to testify within judicial proceedings in West Virginia. This requirement could possibly be challenged as usurping the authority of the judicial branch to determine who may testify and in what capacity. *See e.g., Mayhorn v. Logan Medical Foundation*, 193 W.Va. 42, 454 S.E. 2d 87 (1994).

Financial records of the expert are not discoverable unless good cause can be shown to the court.

Regarding the testimony of expert witnesses on the applicable standard of care, the West Virginia Code requires that the plaintiff in a medical malpractice liability action produce evidence of the applicable standard of care and the defendant’s failure to meet that standard. The evidence must be established by competent expert witnesses, and the necessary foundation is as

follows: (1) the opinion is actually that of the expert; (2) the opinion is to a reasonable medical probability; (3) the expert witness possesses professional knowledge and expertise coupled with knowledge of the applicable standard of care to which his or her expert opinion testimony is addressed; (4) the expert witness maintains a current license to practice medicine with the appropriate licensing authority of any state of the United States, provided that it has not been revoked in the past year in any state; and (5) the expert witness is engaged or qualified in a medical field in which the practitioner has experience and/or training in diagnosing or treating injuries or conditions similar to those of the patient. W.VA. CODE § 55-7B-7. The foundational requirements of this section are more stringent than the applicable rules of evidence concerning expert testimony.

Rule 601 of the West Virginia Rules of Evidence provides that every person is competent to be a witness except as otherwise provided for by statute or another applicable rule of evidence. Rules 702 and 703 regarding the testimony of experts are broader and more liberal than the more restrictive provisions of W.Va. Code § 55-7B-7. Rule 702 provides that a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in opinion form. The Court in *Mayhorn* held that “**Rule 702 of the *West Virginia Rules of Evidence* is the paramount authority for determining whether or not an expert is qualified to give an opinion.**” *Emphasis supplied.* In so holding, *Gilman v. Choi*, 185 W.Va. 177, 406 S.E.2d 200 (1990), was overruled. *Gilman* indicated that the Legislature may by statute determine when an expert is qualified to state an opinion.

Per W.Va. Code § 55-7B-7 (2003), “the applicable standard of care and a defendant’s failure to meet said standard, if at issue, shall be established in medical professional liability cases by the plaintiff by testimony of one or more knowledgeable, competent expert witnesses if required by the court . . . .” In medical malpractice cases, it is a well-established rule that negligence or want of professional skill can be proven only by expert witnesses. Syl. Pt. 2, *Roberts v. Gale*, 149 W.Va. 166, 139 S.E.2d 272 (1964); Syl. Pt. 1, *Farley v. Meadows*, 185 W.Va. 48, 404 S.E.2d 537 (1991). In rare cases, a plaintiff may be permitted to use lay witnesses



to establish a breach of the standard of care where the negligence or want of professional skill is so egregious that it would be apparent to jurors from their common knowledge and experience, or where the breach in the standard of care relates to noncomplex matters of diagnosis and treatment that would be within the understanding of lay jurors, resorting to their common knowledge and experience. *Totten v. Adongay*, 175 W.Va. 634, 638-39, 337 S.E.2d 2, 7 (1985). In order for the “common knowledge” exception to apply, “the medical negligence [must be] as blatant as ‘a fly floating in a bowl of buttermilk’ so that all mankind knows that such things are not done absent negligence.” *Banfi v. American Hospital for Rehabilitation*, 207 W.Va. 135, 141, 529 S.E.2d 600, 606 (2000) (citing *Murphy v. Schwartz*, 739 S.W.2d 777, 778 (Tenn. Ct. App. 1986)). Requiring expert testimony prevents juries from relying on mere conjecture, and is consistent with the rule that there is no presumption or inference of negligence in medical malpractice cases simply because medical care is followed by an unsatisfactory or unfortunate result. *Schroeder v. Adkins*, 149 W.Va. 400, 410 (1965). The burden is on plaintiffs to establish that negligence and lack of skill caused the injury suffered. *Farley v. Shook*, 218 W.Va. 680, 686, 629 S.E.2d 739, 745 (2006). In other words, always get an expert witness when litigating a medical malpractice case.

### **§55-7B-8**

Arguably the most significant section of the Act, §55-7b-8 places a limit on recovery of non-economic losses. Although previously capped at \$1,000,000, the 2003 amendment reduced the amount recoverable to \$250,000, or \$500,000 if the injury involved death, permanent and substantial physical deformity, loss of use of a limb or bodily organ system, or permanent physical or mental injury preventing an individual from independently caring for himself or performing life sustaining activities. These caps were recently upheld in *MacDonald v. City Hospital, Inc.*, where the Court found that such caps did not violate, “the state constitutional right to a jury trial, separation of powers, equal protection, special legislation or the ‘certain remedy’ provisions . . .” Syl. Pt. 6, *MacDonald v. City Hospital, Inc.*, 227 W. Va. 707, 715 S.E.2d 405

(2011). The Court notes in its landmark ruling that West Virginia is now, “squarely with the majority of jurisdictions in holding that caps on noneconomic damages in medical malpractice cases are constitutional.” *Id.* at 724, 715 S.E.2d at 422. The caps are adjusted annually based on consumer price indexing. Currently, the adjusted caps are just over \$300,000 and \$600,000. However, the caps may not be increased in excess of 50%. See also W.VA. CODE § 55-7B-9c discussed below for damages caps involving health care services or assistance rendered in good faith and necessitated by an emergency condition for which the patient enters a trauma facility, or for services rendered by an EMS agency.

It is generally the responsibility of the defendant to request a verdict form or special interrogatory separately stating economic and non-economic damages awarded. Failure to request such separation, or object to economic and non-economic damages being lumped together, can result in forfeiture of the statutory limits. *Gerver v. Benavides*, 207 W.Va. 228, 530 S.E.2d 702 (1999). This can potentially result in a jury award exceeding the applicable limit for non-economic damages because the two categories cannot be identified. Where economic damages were not presented to the jury, however, and only non-economic damages were proven, a defendant is excused from requesting a separate statement of non-economic damages. In such a situation, the entire verdict is presumed to represent only non-economic damages, and the statutory cap is applied. *Karpacs-Brown v. Murthy*, 224 W. Va. 516, 686 S.E.2d 746 (2009).

### **§55-7B-9**

Joint and several liability is eliminated. Juries, or the court in absence of a jury, are instructed to answer special interrogatories as to the total amount of damages recoverable by the plaintiff, what portion is attributed to non-economic damages, what portion is attributed to each category of economic loss, what percentage of fault is attributable to the plaintiff, and what apportionment of fault is attributable to each defendant. The fault of settling parties is not taken into account; only the fault of the parties remaining in litigation at the time of the verdict is considered. Paragraph (c) indicates that defendants shall be severally, not jointly, liable for

judgments entered against them. Provisions for the calculation of the amount of judgment (referencing § 55-7B-9a) are included in the 2003 amendments.

For cases filed prior to March 8, 2003, the joint and several liability provisions found in the 1986 Act apply. Defendants who bear twenty-five percent (25%) or more of the negligence attributable to all defendants are jointly and severally liable. Defendants who bear less than twenty-five percent (25%) of the negligence attributable to all defendants shall be severally liable, but not jointly liable. The provisions of this section have been ruled by the Court to apply only to parties to a medical professional liability action, and not to non-party tortfeasors. For an extensive analysis of comparative/contributory negligence issues, see *Rowe v. Sisters of the Pallottine Missionary*, 211 W.Va. 16, 560 S.E.2d 491 (2001). For cases filed under the previous Act, each defendant against whom joint and several liability has been entered is liable to each plaintiff for all or any part of the total monetary award to the plaintiff. The right of contribution between defendants is limited to the amount paid by a defendant to the plaintiff in excess of the percentage of the total amount attributed to that defendant by the Court. “Good faith” settlements prior to a jury finding or court finding cut off the right of contribution against settling defendants. See *Board of Education v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 390 S.E.2d 796 (1990).

In cases arising after the 2003 amendment to the Act, health care providers can no longer be held vicariously liable for the acts of non-employees based on the theory of ostensible agency, so long as the agent has insurance coverage of \$1,000,000 or more. In *Cartwright v. McComas*, 223 W.Va. 161, 672 S.E.2d 297 (2008), however, the West Virginia Supreme Court of Appeals determined that the plaintiff’s amended complaint related back to the date of the original complaint, and it was therefore plain error for the trial court to dismiss a minor child’s ostensible agency claim where the original claim was filed prior to the Act’s amendment.

### **§55-7B-9a**

This provision provides for the reduction in compensatory damages for economic losses for payments from collateral sources for the same injury. After the return of the verdict, but prior to the entry of judgment, a hearing may be held where the defendant may offer evidence of future payments from collateral sources. Entitlement to such future payments must be shown to a reasonable degree of certainty, and the plaintiff may present evidence of payments or contribution made to secure these benefits. Paragraphs (d) - (f) are the calculation provisions. Paragraph (g) excludes from reduction of the verdict certain amounts and proceeds involving collateral sources with respect to categories of economic loss.

### **§55-7B-9b**

This provision eliminates third-party claims unless the injured party can show that the health care provider acted willfully or in wanton disregard of foreseeable risks of harm to the third party. This section does not prevent a personal representative from maintaining a wrongful death action, a derivative claim, or a claim for loss of consortium.

### **§55-7B-9c**

For health care rendered in “good faith” at a “trauma center,” there is a \$500,000 cap. This cap is materially different from that which is outlined in W.Va. Code § 55-7B-8 because § 55-7B-9c limits the total recovery for non-economic and economic damages to \$500,000. This covers “emergency medical service agencies” and surgeries required as a result of the emergency condition. The cap does not apply when the condition has stabilized and the patient is no longer receiving care as an “emergency” patient. Moreover, the \$500,000 total recovery cap does not apply where there is willful, wanton or reckless conduct, or where there is a clear violation of

triage protocol or emergency health care standards. To date, it appears no defendant has ever obtained the benefit of this cap in a published opinion.

### **Arbitration Agreements**

The West Virginia Supreme Court of Appeals recently ruled that many arbitration agreements in nursing home contracts are unenforceable for public policy reasons. *Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250 (W. Va. 2011), *vacated*, *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012). The opinion combined three cases in which an ill patient was placed in a nursing home and a family member signed an admission contract with the nursing home which contained an arbitration agreement. *Id.* The Plaintiffs argued that a provision of the West Virginia Nursing Home Act voided the arbitration agreement. *Id.* The provision, at W. Va. Code §16-5C-15(c), states that, “[a]ny waiver by a resident or his or her legal representative of the right to commence an action under this section, whether oral or in writing, shall be null and void as contrary to public policy.” The Court found that the Federal Arbitration Act, 9 U.S.C. § 2, which regulates arbitration agreements in transactions involving interstate commerce, preempts that portion of the West Virginia Nursing Home Act. However, the Court went on to rule that, “Congress did not intend for arbitration agreements, adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, and which require questions about the negligence be submitted to arbitration, to be governed by the Federal Arbitration Act.” *Id.* *But see* discussion *infra* in *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam). Therefore, the Court found the standard arbitration agreement in a nursing home contract signed by incoming new residents in the often stressful and confusing admission process, and before any negligence has occurred, was found to be unenforceable given

the policy rationale behind the Federal Arbitration Act. The Court noted that in the rare case a nursing home resident enters into an arbitration agreement with a nursing home after negligence has occurred and when the parameters of risk are better defined, such an agreement is enforceable.

However, the United States Supreme Court vacated and remanded this decision. *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam). The Court held that the Federal Arbitration Act provides that no exceptions exist for personal injury or wrongful death claims, and the courts are to “enforce the bargain of the parties to arbitrate.” *Id.* (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U. S. 213 (1985)). In particular, the Court held that “[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.” *Id.* (citing *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011)). The Court ordered the state court to consider whether, absent public policy, the arbitration clauses are unenforceable under state common law. *Id.* at 1204. On remand, the West Virginia Supreme Court reversed and remanded the cases to the trial courts. *Brown v. Genesis Healthcare Corp.*, 2012 W. Va. LEXIS 311, at \*9-10 (W. Va. June 13, 2012). The Court noticed the parties to argue the arbitration agreements under the common law doctrine of unconscionability. *Id.* at \*19-20.

## **Conclusion**

Medical malpractice litigation has been one of the most hotly-debated areas of law in the West Virginia legal system for the past 25 years. There will always be those that do not approve of making special rules designed to protect doctors and hospitals. Likewise there will always be those that feel it is necessary to protect our health care providers and prevent doctors from

leaving our state due to high insurance premiums. The designated purpose of the Act is today as it was in 1986 when it was originally passed, that the most vital purpose of the Medical Professional Liability Act is to ensure that the citizens of West Virginia receive the basic services essential for their health and well-being, and the best medical care and facilities available. The most recent amendments to the Act seem to work in that since their enactment, malpractice claims have decreased substantially, medical professional liability insurance rates have decreased, and physicians are once again returning to West Virginia.