MEDICAL MALPRACTICE LITIGATION IN WEST VIRGINIA
The Medical Professional Liability Act: A Guide for the Legal Practitioner
West Virginia Code § 55-7B-1 *et seq*.
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INTRODUCTION

Medical malpractice litigation in West Virginia is controlled by the statutory scheme mandated by the state Legislature in the Medical Professional Liability Act (the "MPLA" or the "Act").[1] The MPLA governs medical malpractice, or medical professional liability, actions against health care providers and provides the exclusive remedy for such actions. In the late 1990s and early 2000s, West Virginia was in a health care crisis brought on by frequent lawsuits that led to increased costs and a lack of available, affordable insurance for health care providers. This forced hospitals to cut back or close specialty care units as doctors left the state in droves. As a result, the Legislature enacted sweeping amendments to the MPLA in 2001 and 2003. Although originally effective, rising insurance costs, runaway jury verdicts, and loopholes created by the judiciary over the next decade rendered many of these amendments futile. In 2015, the Legislature enacted Senate Bill 6[2] ("SB6") to address these issues. SB6 preserved but limited the right to receive payment when injured by a health care provider, and it increased the amount recoverable from trauma situations.

In 2017, the Legislature again amended the MPLA by enacting Senate Bill 338[3] ("SB338") to provide additional protections to long-term care facilities. The 2017 Amendments defined an "occurrence" under the MPLA and changed the statute of limitations for malpractice claims against nursing homes, assisted living facilities, and their related entities. Prior to the 2017 amendments, claimants had two (2) years to bring such claims. Now, actions against long-term care facilities must be commenced within (1) year of the date of such injury, or within one year of the date when such person discovers or should have discovered such injury, whichever last occurs.[4]

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1 W. Va. Code § 55-7B-1, *et seq.*
2 S.B. 6, 82d Leg., Reg. Sess. (W. Va. 2015).
3 S.B. 338, 83d Leg., Reg. Sess. (W. Va. 2017).
4 W. Va. Code § 55-7B-4(b).

Most recently, the MPLA underwent minor amendments in 2019 regarding prerequisites for filing an action and the admissibility and use of certain evidence in actions alleging inappropriate staffing or inadequate supervision. Senate Bill 510 ("SB510") added the requirement that medical professional liability claims against agents, servants, employees, or officers of health care facilities shall identify each agent, servant, employee, or officer by area of professional practice or role in the health care at issue in the pre-suit notice of claim.[5] SB510 also added requirements for experts signing screening certificates of merit, including the requirement that the expert identify all medical records and other information reviewing in the execution of the certificate of merit.[6] With the passage of House Bill 133 ("HB133"), the Legislature added a provision stating that if staffing in a health care facility does not meet minimum requirements under state law, there is a rebuttable presumption that there was inadequate supervision of patients and that inadequate staffing or supervision was a contributing cause of the patient's fall and injuries or death arising therefrom, and the jury is instructed accordingly.[7]

This section of the Practice Handbook is intended 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. This section contains detailed information on provisions of the Act itself and how courts have interpreted its language. At the time of publication, this section examines seminal cases interpreting the Act. 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.

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5 S.B. 510, 84th Leg., Reg. Sess. (W. Va. 2019); W. Va. Code § 55-7B-6(b).
6 S.B. 510, 84th Leg., Reg. Sess. (W. Va. 2019); W. Va. Code § 55-7B-6(b).
7 H.B. 133, 84th Leg., Reg. Sess. (W. Va. 2019); W. Va. Code § 55-7B-7a(c).

Legislative Findings and Declaration of Purpose – § 55-7B-1

The legislative findings and declarations of purpose appear in W. Va. Code § 55-7B-1. The Legislature's stated objective was to provide "adequate and reasonable compensation to those persons who suffer from injury or death as a result of professional negligence" while balancing "the cost of liability insurance coverage . . . and retaining qualified physicians and other health care providers."[8] 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 . . . ."[9] Thirty-five years later, these same issues are equally relevant and important to West Virginia's well-being.

The expressed purpose of SB6 in 2015 was to control the increase in the cost of liability insurance and to maintain access to affordable health care services for West Virginians by providing a mechanism to increase the limitation on civil damages in medical malpractice cases to account for inflation by linking increases to the Consumer Price Index.[10] It also added provisions limiting the admissibility and use of certain information; and required adjustment of verdicts for past medical expenses.[11] SB6 was signed into law by Governor Earl Ray Tomblin on March 18, 2015.[12]

The expressed purpose of SB338 in 2017 was to amend the MPLA by adding a definition of "occurrence" in medical professional liability causes of action; providing for a statute of

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8 W. Va. Code § 55-7B-1.
9 *Id.*
10 *See* S.B. 6, 82d Leg., Reg. Sess. (W. Va. 2015).
11 *Id.*
12 *Id.*

limitations on certain actions for medical professional liability; establishing venue in claims against certain health care providers; addressing screening certificates of merit in certain medical professional liability causes of action; tolling the statute of limitations under certain circumstances; establishing the effective date; and providing for severability.[13] SB338 was signed into law by Governor Jim Justice on April 8, 2017 and went into effect ninety (90) days later.[14]

The expressed purpose of SB510 in 2019 was to provide requirements for a notice of claim, set out requirements for an expert who signs a certificate of merit, and provide for information to be included with the certificate of merit.[15] SB510 was signed into law by Governor Jim Justice on March 25, 2019 and went into effect on May 29, 2019.[16] The expressed purpose of HB133, also in 2019, was to provide that compliance with minimum staffing requirements under state law creates a rebuttable presumption that appropriate staffing and adequate supervision of patients to prevent accidents were provided; to require that if staffing is less than requirements dictated by state law, then there is a rebuttable presumption that there was inadequate supervision of patients and that inadequate staffing or supervision was a contributing cause of the patient's fall and resulting injuries or death; and to require the jury to be instructed accordingly.[17] HB133 was signed into law by Governor Jim Justice on May 28, 2019.[18]

Definitions - § 55-7B-2

W. Va. Code § 55-7B-2 defines key terms in the statute. Whereas health care, health care facilities, and health care providers were previously defined broadly, the 2015 amendments narrowed the scope of these definitions by providing express lists of what is included in each. By

13 *See* S.B. 338, 83d Leg., Reg. Sess. (W. Va. 2017).
14 *Id.*
15 S.B. 510, 84th Leg., Reg. Sess. (W. Va. 2019).
16 *Id.*
17 H.B. 133, 84th Leg., Reg. Sess. (W. Va. 2019).
18 *Id.*

the doctrine *expressio unius est exclusion alterius*, "the express mention of one thing implies the exclusion of another," the definition becomes limited to the expressly listed items.[19]

"Health care" includes actions, services, or treatment provided pursuant to physician's or health care facility's plan of care, medical diagnosis or treatment.[20] Further, "health care" includes actions taken by persons "supervised by or acting under the direction of a health care provider or licensed professional," specifically: staffing, medical transport, custodial care or basic care, infection control, positioning, hydration, nutrition and similar patient services.[21] Additionally, "health care" includes administrative actions such as "appointment, employment, contracting, credentialing, privileging and supervision."[22]

The Act also covers "health care providers," the definition of which includes:

- physicians,
- osteopathic physicians,
- physician's assistants,
- advanced practice registered nurses,
- hospitals,
- health care facilities,
- dentists,
- registered or licensed practical nurses,
- optometrists,
- podiatrists,
- chiropractors,
- physical therapists,
- speech-language pathologists,
- audiologists,[23]
- occupational therapists,
- psychologists,

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[19] Syl. pt. 3, *Manchin v. Dunfee*, 174 W. Va. 532, 533, 327 S.E.2d 710, 711 (1984); *see also State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 128, 464 S.E.2d 763, 770 (1995) ("If the Legislature explicitly limits application of a doctrine or rule to one specific factual situation and omits to apply doctrine to any other situation, courts should assume the omission was intentional; courts should infer the Legislature intended the limited rule would not apply to any other situation.").

[20] W. Va. Code § 55-7B-2(e)(1).

[21] *Id.* § 55-7B-2(e)(2).

[22] *Id.* § 55-7B-2(e)(3).

[23] HB 4735 clarified that speech-language pathologists and audiologists are two separate providers. H.B. 4735, 83d Leg., Reg. Sess. (W. Va. 2016).

- pharmacists,[24]
- technicians,
- certified nursing assistants,
- emergency medical service personnel,
- emergency medical services authorities or agencies,
- any person supervised by or acting under the direction of a licensed professional,
- any person taking actions or providing service or treatment pursuant to or in furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis or treatment, or
- an officer, employee or agent of "a health care provider" acting in the course and scope of the officer's, employee's or agent's employment.[25]

The definition of "health care facility" includes such facilities as nursing homes and extended care facilities, as well as state clinics and institutions, but no longer includes personal care homes and residential board and care homes.[26] "Health care facility" also now expressly includes pharmacies.[27]

In 2017, SB338 added the definition of an "occurrence" under the Act, which means "any and all injuries to a patient arising from health care rendered by a health care facility or a health care provider and includes any continuing, additional or follow-up care provided to that patient for reasons relating to the original health care provided, ***regardless if the injuries arise during a single date or multiple dates of treatment, single or multiple patient encounters, or a single admission or series of admissions***."[28]

"Medical injury" is defined as ***injury or death*** to a patient arising or resulting from the rendering of or failure to render health care.[29] Importantly, the Supreme Court of Appeals of West Virginia (the "Court") has held that the MPLA is the exclusive remedy for "liability for damages

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[24] Pharmacists were previously not subject to the Act's provisions. *See Phillips v. Larry's Drive-In Pharmacy*, 220 W. Va. 484, 493, 647 S.E.2d 920, 929 (2007).
[25] W. Va. Code § 55-7B-2(g).
[26] *Id.* § 55-7B-2(f).
[27] *Id.*
[28] *Id.* § 55-7B-2(l) (emphasis added).
[29] *Id.* § 55-7B-2(h) (emphasis added).

resulting from the death or injury of a person for any tort based upon health care services rendered or which should have been rendered."[30]

Collateral sources are broadly defined and include nearly every type or source of benefits, whether private or government, and most insurance, including contractual reimbursement for health care services.[31] Social Security benefits, however, are specifically excluded, with the exception of Social Security disability benefits directly attributable to the medical injury in question.[32] Any agreed reductions, discounts, or write-offs of a medical bill are also now specifically excluded.[33] "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 an unborn child.[34] "Plaintiff" is narrowly defined as a patient or representative of a patient who brings an action for medical professional liability.[35]

The Act defines "medical professional liability" 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.[36] The West Virginia Supreme Court of Appeals has clarified that this definition indeed encompasses "*any* tort based on health care services rendered, or which should have been rendered."[37] The Act applies, even where the action was outside the realm of the provisions of medical services, to other claims "contemporaneous to tort or breach of contract provided in the

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30 *See Gray v. Mena*, 218 W. Va. 564, 625 S.E.2d 326 (2005).
31 *Id.* § 55-7B-2(b)(1)-(4).
32 *Id.* § 55-7B-2(b)(1).
33 *Id.* § 55-7B-2(b)(2).
34 *Id.* § 55-7B-2(d).
35 *Id.* § 55-7B-2(n).
36 *Id.* § 55-7B-2(i) (emphasis added).
37 Syl. pt. 3, *Blankenship v. Ethicon, Inc.*, 221 W. Va. 700, 702, 656 S.E.2d 451, 453 (2007) (emphasis in original); *see also* Syl. pt. 2, *Manor Care, Inc. v. Douglas*, 763 S.E.2d 73, 90-91 (W.Va. 2014) (noting that "corporate negligence" claims arising from the alleged failure to allocate a proper budget and appropriate staffing levels fell outside the application of the MPLA).

context of health care services."[38] These may include institutional risk of infection or understaffing.[39] Damage for "noneconomic loss" includes "but is not limited to, pain, suffering, mental anguish and grief."[40]

It is important to note that failure by a plaintiff to plead his or her claim as governed by the MPLA does not preclude application of the Act.[41] As the Supreme Court of Appeals of West Virginia recently explained, "[w]here . . . alleged tortious acts or omissions are committed by a health care provider within the context of the rendering of 'health care' as defined by W. Va. Code § 55-7B-2(e) . . . , the Act applies regardless of how the claims have been pled."[42]

Elements of Proof - § 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 § 55-7B-3 effectively remove the "locality rule," the rule that the standard of care is determined by the care ordinarily exercised in the same locality of the medical practitioner or provider.[43] The Court in *Plaintiff v. City of Parkersburg* also completely abolished the locality rule.[44] 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

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38 W. Va. Code § 55-7B-2(i) (defining "medical professional liability" to include "other claims contemporaneous to tort or breach of contract provided in the context of health care services"). This appears to overrule existing case law stating the opposite. *See, e.g., Gray v. Mena*, 218 W. Va. at 570, 625 S.E.2d at 332 (stating that the Act "applies only to claims resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient" and that "[i]t does not apply to other claims that may be contemporaneous to or related to the alleged act of medical professional liability"); *Boggs v. Camden-Clark Mem'l Hosp. Corp.*, 216 W. Va. 656, 662-63, 609 S.E.2d 917, 923-24 (2004) (stating that some claims may be brought against health care providers that do not involve health care services and, therefore, are not subject to the MPLA).

39 W. Va. Code § 55-7B-2(i); *see Manor Care*, 763 S.E.2d at 90-91; *Riggs v. West Virginia Univ. Hosps., Inc.*, 221 W. Va. 646, 666, 656 S.E.2d 91, 111 (2007) (Davis, J., concurring).

40 W. Va. Code §§ 55-7B-8, -2(k).

41 *See Blankenship*, 221 W. Va. at 707, 656 S.E.2d at 458.

42 Syl. Pt. 3, *State ex rel. PrimeCare Medical of West Virginia, Inc. v. Faircloth*, 242 W. Va. 335, 835 S.E.2d 579 (2019) (citations omitted).

43 *See Plaintiff v. City of Parkersburg*, 176 W. Va. 469, 471, 345 S.E.2d 564, 566 (1986) (quoting *Hundley v. Martinez*, 151 W. Va. 977, 984-92, 158 S.E.2d 159, 166-68 (1967)).

44 *See id.* at 472, 345 S.E.2d at 567.

provider in the profession or class to which the health care provider belongs, acting upon the same or similar circumstances."[45] 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.[46] So long as the expert is otherwise qualified, unfamiliarity with a local practice goes to the weight, not the admissibility, of his testimony.[47]

The failure to meet the standard of care must be the proximate cause of the injury or death.[48] "'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."[49] "The proximate cause of an injury is the last negligent act contributing to the injury and without which the injury would not have occurred."[50] Proximate cause may be proven by inference through expert testimony.[51]

The most critical portion of § 55-7B-3 is the addition made by the Legislature to "loss of chance" theory cases. The Act only requires that a plaintiff establish, to a reasonable degree of medical probability, that had the accepted standard of care been afforded the patient, there was greater than a twenty-five percent chance of improvement, recovery, or survival.[52]

Causes of Action, Exceptions to the Statute of Limitations, and Venue - § 55-7B-4

Causes of action arise as of the date of the injury, and medical malpractice actions must be commenced within two years against health care providers, other than long-term care facilities.[53] In 2017, the MPLA was amended to afford certain additional protections to long-term care

45 W. Va. Code § 55-7B-3(a)(1).
46 *See Walker v. Sharma*, 221 W. Va. 559, 565, 655 S.E.2d 775, 781 (2007).
47 *See id.*
48 W. Va. Code § 55-7B-3(a)(2).
49 Syl. pt. 4, *Stewart v. George*, 216 W. Va. 288, 289, 607 S.E.2d 394, 395 (2004).
50 *Id.* at syl. pt. 5.
51 *See Sexton v. Greico*, 216 W. Va. 714, 719-20, 613 S.E.2d 81, 86-87 (2005).
52 W. Va. Code § 55-7B-3(b).
53 *Id.* § 55-7B-4(a).

facilities. Specifically, malpractice actions against nursing homes and assisted living facilities must be commenced within one year:

> A cause of action for injury to a person alleging medical professional liability against a nursing home, assisted living facility, their related entities or employees or a distinct part of an acute care hospital providing intermediate care or skilled nursing care or its employees arises as of the date of injury . . . and must be commenced within one year of the date of such injury, or within one year of the date when such person discovers, or with the exercise of reasonable diligence, should have discovered such injury, whichever last occurs: *Provided*, That in no event shall any such action be commenced more than ten years after the date of injury.[54]

The 2017 amendments also added a provision stating that claimants must bring malpractice actions against long-term care facilities in the circuit court of the county in which the facility where the alleged malpractice occurred is located, unless another location is agreed upon by the parties.[55] However, nothing in the statute prohibits a party from removing the action to federal court.[56]

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.[57] "Where a plaintiff knows of his injury, and the facts surrounding that injury place him on notice of the possible breach of a duty of care, that plaintiff has an affirmative duty to further and fully investigate the facts surrounding that potential breach."[58] The Court has reaffirmed that the discovery rule applies to actions arising under the wrongful death act.[59]

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54 *Id.* § 55-7B-4(b).

55 *Id.* § 55-7B-4(e).

56 *Id.*

57 *See id.* § 55-7B-4(a); *see also McCoy v. Miller*, 213 W. Va. 161, 167, 578 S.E.2d 355, 361 (2003) (holding that a patient's second malpractice action, alleging that he had been newly informed that surgery, 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). *See generally Gaither v. City Hosp.*, 199 W. Va. 706, 487 S.E.2d 901 (1997) (discussing the discovery rule).

58 *McCoy*, 213 W. Va. at 165, 578 S.E.2d at 359.

59 *See* Syl. pt. 3, *Mack-Evans v. Hilltop Healthcare Ctr.*, 226 W. Va. 257, 259, 700 S.E.2d 317, 319 (2010).

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.[60] This is true even where the plaintiff does not necessarily realize that there has been negligent conduct.[61] 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.[62] 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.[63] In *Parsons v. Herbert J. Thomas Memorial Hospital Ass'n*, the Court held that the two-year statute of limitations in an action against a hospital began to run just a few weeks after the patient's surgery when a second physician diagnosed the patient with a post-operative infection and fistula, and therefore, the patient's claim was time-barred.[64] The patient and her husband argued that the statute of limitations did not start running until they first met with their attorney to discuss potential claims, but the Court expressly rejected this argument:

> In those instances where the "patient is immediately aware that something went wrong," the statute of limitations begins to run upon the plaintiff's awareness of "adverse results of medical treatment." In such cases, as we observed in *Gaither*, the statute of limitations starts running with the plaintiff's knowledge of the fact that something went wrong and not his awareness of "the precise act of malpractice."[65]

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60 *See Goodwin v. Bayer Corp.*, 218 W. Va. 215, 221, 624 S.E.2d 562, 568 (2005) ("This Court has repeatedly stated that the statute of limitations begins to run when a plaintiff has knowledge of the fact that something is wrong and not when he or she knows of the *particular nature* of the injury."); *Harrison v. Seltzer*, 165 W. Va. 366, 371, 268 S.E.2d 312, 315 (1980).

61 *See Gaither*, 199 W. Va. at 714, 487 S.E.2d at 909.

62 *See id.*

63 *See, e.g.*, *Legg v. Rashid*, 222 W. Va. 169, 176, 663 S.E.2d 623, 630 (2008).

64 *Parsons v. Herbert J. Thomas Memorial Hospital Ass'n*, No. 16-1178, 2017 WL 5513620 at *4 (W. Va. Nov. 17, 2017).

65 *Id.* at *4 (citing *McCoy*, 213 W. Va. at 166, 578 S.E.2d at 360).

However, the statute of limitations does not begin to run for so long as it is reasonable for the patient to not connect the undesirable result with the treatment received.[66] The Court has held that:

> Under the continuous medical treatment doctrine, when a patient is injured due to negligence that occurred during a continuous course of medical treatment, and due to the continuous nature of the treatment is unable to ascertain the precise date of the injury, the statute of limitations will begin to run on the last date of treatment."[67]

However, the Court has found that where a patient sustains an injury on a certain date, the fact that the provider continues to treat that patient does not postpone the start of the limitation period.[68] 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.[69]

The Court has also 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 subsequently performed in West Virginia. Where procedures performed in West Virginia are a direct result of negligence during a procedure performed outside the state and damages are sought for both procedures, the West Virginia statute of limitations applies.[70] In *Willey v. Bracken*, 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.[71]

Additionally, W. Va. Code § 55-7B-4(a)-(b) provides that an action shall not be commenced beyond ten years after the date of injury. Actions on behalf of minors under the age

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66 *Gaither*, 199 W. Va. at 714, 487 S.E.2d at 909.
67 Syl. pt. 4, *Forshey v. Jackson*, 222 W. Va. 743, 745, 671 S.E.2d 748, 750 (2008).
68 *See id.*
69 *See id.* at 755, 671 S.E.2d at 760.
70 *See* Syl. pt. 3, *Willey v. Bracken*, 228 W. Va. 244, 245, 719 S.E.2d 714, 715 (2010).
71 *Id. See generally* West Virginia Borrowing Statute, W. Va. Code § 55-2A-2.

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.[72] If the health care provider commits fraud, collusion by concealment, or misrepresentation, the limitation period is tolled.[73]

Amount of Damages and Limitations on Bad Faith Claims - §55-7B-5

In actions against health care providers, a prayer for a specific dollar amount may not be included in a complaint.[74] 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.[75] 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, -4.[76] This section effectively abolishes third party bad faith causes of action in medical malpractice cases. However, a health care provider may file a first party bad faith action once "the jury has rendered a verdict in the underlying medical professional liability action or the case has otherwise been dismissed, resolved or disposed of."[77]

In 2016, Senate Bill 7 ("SB7") added a bar to recovery against health care providers by or on behalf of a person whose damages arise as a proximate result of the commission, attempted commission, or immediate flight from the commission or attempted commission of a felony or a violent crime which is a misdemeanor or as a result of a violation of the Uniform Controlled Substances Act, as set forth in §60A, so long as the health care provider has not illegally dispensed or prescribed a controlled substance or substances to that person.[78] The burden of alleging and

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72 W. Va. Code § 55-7B-4(c).
73 *Id.* § 55-7B-4(d).
74 *Id.* § 55-7B-5(a).
75 *Id.*
76 *Id.* § 55-7B-5(b).
77 *Id.* § 55-7B-5(c).
78 *Id.*§ 55-7B-5(d); S.B. 7, 83d Leg., Reg. Sess. (W. Va. 2016).

proving that the health care provider acted illegally shall be upon the person who seeks to file the claim.[79]

Notice of Claim and Screening Certificate of Merit - § 55-7B-6

The 2001 amendments to W. Va. Code, § 55-7B-6 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 health care provider; procedures; sanctions." Most notably, certain pre-filing procedures must be completed prior to the filing of a complaint alleging medical professional liability.[80]

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.[81] This notice letter must include a statement of the theories of liability and a screening certificate of merit.[82] 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. In 2019, the Legislature amended W. Va. Code § 55-7B-6 to include more stringent requirements for experts signing screening certificates of merit:

> The screening certificate of merit shall be executed under oath by a health care provider who: (1) Is qualified as an expert under the West Virginia rules of evidence; (2) Meets the requirements of § 55-7B-7(a)(5) and § 55-7B-7(a)(6) of this code; and (3) Devoted, as the time of medical injury, 60 percent of his or her professional time annually to the active clinical practice in his or her medical field or specialty, or to teaching in his or her medical field or specialty in an accredited university.
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> If the health care provider executing the screening certificate of merit meets the qualifications of subdivisions (1), (2), and (3) of this subsection, there shall be a presumption that the health care provider is qualified as an expert for the purpose of executing a screening certificate of merit.[83]

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79 *Id.*
80 *Id.* § 55-7B-6.
81 *Id.* § 55-7B-6(b).
82 *Id.*
83 *Id.*

Additionally, the certificate of merit must state with particularity the following: (A) the basis for the expert's familiarity with the applicable standard of care at issue; (B) the expert's qualifications; (C) the expert's opinion as to how the applicable standard of care was breached; (D) the expert's opinion as to how the breach of the applicable standard of care resulted in injury or death; and (E) a list of all medical records and other information reviewed by the expert executing the screening certificate of merit.[84] The screening certificate of merit must be accompanied by the list of medical records and other information otherwise required to be provided pursuant to subsection (b).[85]

The 2019 amendment also added a requirement that medical professional liability claims against agents, servants, employees, or officers of health care facilities shall identify each agent, servant, employee, or officer by area of professional practice or role in the health care at issue in the pre-suit notice of claim.[86]

Each health care provider against whom a claim is asserted must receive the notice and certificate of merit.[87] 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.[88]

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.[89] "The requirement of a pre-suit notice of claim and

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84 *Id.*
85 *Id.*
86 W. Va. Code § 55-7B-6(b).
87 *Id.*
88 *Id.*
89 *See* Syl. pt. 2, *Hinchman v. Gillette*, 217 W. Va. 378, 379, 618 S.E.2d 387, 388 (2005) (citing W. Va. Code § 55-7B-6).

screening certificate of merit is not intended to restrict or deny citizens' access to the courts."[90] 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 *Hinchman*, the Court interpreted W. Va. Code § 55-7B-6 and laid out how health care providers must respond to notices of claims and certificates of merit if they are defective and/or insufficient. The Court held that "before a defendant in a lawsuit against a health care provider can challenge the legal sufficiency of a plaintiff's pre-suit notice of claim or screening certificate of merit" . . . " the plaintiff must be given written and specific notice of, and an opportunity to address and correct, the alleged defects and insufficiencies."[91] Additionally, the Court held that:

> [U]nder W. Va. Code § 55-7B-6, 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.[92]

It is important for those who defend health care providers to know that failure to object to the legal sufficiency of the notice and certificate within thirty days constitutes waiver.[93] Additionally, a defendant waives any objection that is not specifically asserted.[94]

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90 *Id.*

91 *Id.* at syl. pt. 3; *see also Cline v. Kresa-Reahl*, 229 W. Va. 203, 728 S.E.2d 87 (2012) (detailing claimant's responsibility).

92 Syl. pt. 4, *Hinchman*, 217 W. Va. at 380, 618 S.E.2d at 389.

93 *See id.* at syl. pt. 5.

94 *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.[95] "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 purposes."[96] This standard makes it more difficult for a health care provider to dismiss cases where poorly drafted notices and certificate(s) are filed.

The claimant's counsel may allege that a screening certificate of merit 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."[97] 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.[98] The statement shall be accompanied by the list of medical records and other information otherwise required to be provided pursuant to subsection (b) of the statute.[99] 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.[100] In 2012, the Court confirmed the importance of the requirements set forth in W. Va. Code § 55-7B-6(c). In *Cline*, the claimant asserted that the defendant physician failed to provide informed consent and therefore, the claimant

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95 *Id.* at syl. pt. 6.

96 *Id.*; *see also Cline*, 229 W. Va. at 211, 728 S.E.2d at 95 (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).

97 W. Va. Code § 55-7B-6(c).

98 *Id.*

99 *Id.*

100 *See Westmoreland v. Vaidya*, 222 W. Va. 205, 212, 664 S.E.2d 90, 97 (2008).

did not need to file a certificate of merit.[101] The Court held that informed consent claims require expert testimony and thus necessitate a pre-suit certificate of merit.[102] Despite an opportunity to redress the deficiency, the claimant failed to do so.[103] Thirty days is a reasonable period of time for the plaintiff to be afforded to address and correct such a deficiency.[104] 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—other than long-term care providers—against whom the claim is made must 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.[105] Once the notice of claim and certificates are received by the health care provider, a written response may be provided to the claimant or claimant's counsel within thirty days with any objections articulated pursuant to *Hinchman*.[106]

With respect to the two-year statute of limitations pertaining to health care providers ***other than long-term care facilities***, statutes of limitations are tolled from:

> (1) the date of mail of a notice of claims to thirty days following 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; or (3) thirty days from the receipt by the claimant of written notice from the mediator that the mediation has not resulted in settlement of the alleged claim and that the mediation is concluded, whichever last occurs.[107]

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101 *See Cline*, 229 W. Va. at 206, 728 S.E.2d at 90.
102 *See id.* at 210, 728 S.E.2d at 94.
103 *See id.*
104 *See Westmoreland*, 222 W. Va. at 212, 664 S.E.2d at 97.
105 W. Va. Code § 55-7B-6(d).
106 W. Va. Code § 55-7B-6(f); *see Hinchman*, 217 W. Va. at 387, 618 S.E.2d at 395.
107 W. Va. Code § 55-7B-6(i)(1).

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.[108]

In 2017, when SB338 was amended to provide a one-year statute of limitations for long-term care facilities, new tolling provisions were added to the pre-suit MPLA filing requirements pertaining to actions against nursing homes, assisted living facilities, and their related entities. Two new sections were added to W. Va. Code § 55-7B-6. The first, W. Va. W. Va. Code § 55-7B-6(e), provides claimants with one hundred eighty (180) days from the date a long-term care provider receives the notice of claim to provide a statement of intent to furnish a screening certificate of merit.[109] This is three times longer than the sixty-day period claimants have to comply with the certificate of merit requirements for other health care providers, likely due to the fact that the statute of limitations for claims against long-term care facilities is shorter.

The Legislature also added a tolling provision for the statute of limitations as it pertains to notices of claim with respect to long-term care facilities:

> In medical professional liability actions against a nursing home, assisted living facility, their related entities or employees or a distinct part of an acute care hospital providing intermediate care or skilled nursing or its employees, except as otherwise provided in this subsection, any statute of limitations applicable to a cause of action against a health care provider upon whom such notice was served for alleged medical professional liability shall be tolled ***one hundred eighty days from the date of mail of a notice of claim to thirty days following receipt of a response to the notice of claim, thirty days from the date a response to the notice of claim would be due, or thirty days from the receipt by the claimant of written notice from the mediator that the mediation has not resulted in a settlement of the alleged claim and that mediation is concluded, whichever last occurs.***[110]

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108 *Id.* § 55-7B-6(i)(3).
109 *Id.* § 55-7B-6(e).
110 *Id.* § 55-7B-6(i)(2) (emphasis added).

Again, this is much longer than the periods prescribed for the tolling of the limitations period for other health care providers found in W. Va. Code § 55-7B-6(i)(1).

Pre-litigation mediation before a qualified mediator may be requested by the health care provider upon written demand to the claimant.[111] When mediation is requested, mediation must be concluded within forty-five days of the date of the written demand and is conducted pursuant to Rule 25 of the West Virginia Trial Court Rules.[112] The health care provider's deposition may be taken either before or during the mediation.[113] Failure of the health care provider to timely respond to the notice of claim constitutes a waiver of the right to request mediation.[114] Since its inception, this pre-litigation mediation option is very rarely requested by health care providers because there is often little or no benefit to a health care 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.[115] Such materials are deemed confidential.[116]

Exchange of Medical Records - § 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.[117] 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.[118]

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111 W. Va. Code § 55-7B-6(h).
112 *Id.* § 55-7B-6(h).
113 *Id.*
114 *Id.*
115 *Id.* § 55-7B-6(j).
116 *Id.*
117 *Id.* § 55-7B-6a(a).
118 *See id.*; W. VA. R. CIV. P. 34.

The records must be reasonably related to the plaintiff's claims and be within the party's control.[119] The plaintiff must provide appropriate releases when other medical records are known to the plaintiff but are not within or under his or her control.[120] 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.[121] This request must be accompanied by a brief statement of relevance or necessity.[122] An objection is appropriate only if the requested records are not reasonably related to the claim.[123] The objection must be written and a hearing shall be held to determine whether access should be permitted.[124]

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.[125]

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.[126] Costs may be assessed pursuant to the Rules of Civil Procedure.[127]

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119 W. Va. Code § 55-7B-6a(a).
120 *Id.*
121 *Id.* § 55-7B-6a(b).
122 *Id.*
123 *Id.*
124 *Id.* § 55-7B-6a(c).
125 *Id.* § 55-7B-6a(d).
126 *Id.* § 55-7B-6a(e).
127 *Id.*

Pretrial Procedures Designed to Expedite Cases - § 55-7B-6b

This 2001 enactment requires that, in actions against health care providers, a mandatory status conference must be held within sixty days of the appearance of the last appearing defendant.[128] It is incumbent upon the defendant to schedule the conference upon proper notice.[129]

The status conference is not merely a scheduling conference and—depending on the judge—may resemble a pretrial conference in some respects.[130] The parties must inform the court as to the status of the action, the contested issues of fact and law, and progress or issues concerning discovery.[131] Importantly, issues concerning experts are addressed. That is, the parties must report to the court the existence and intention of proceeding with experts, and time-frames for expert disclosures will be established.[132] 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.[133]

Trial dates are ordered within twenty-four months from the date of the appearance of the last appearing defendant.[134] This time period may be extended upon good cause shown or in the interests of justice.[135]

Additionally, at the initial status conference, a summary jury trial of the case may be ordered.[136] The summary jury trial provisions appearing in the 2001 enactments are more

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128 *Id.* § 55-7B-6b(a).

129 *Id.*

130 *But see Royal v. Rebound LLC*, No. 3:11-0508, 2012 WL 844604, at *3 (S.D. W. Va. Mar. 12, 2012) (discussing how the Federal Rules of Civil Procedure preempt this provision because it directly conflicts with the federal court's ability to control experts and discovery).

131 W. Va. Code § 55-7B-6b(b).

132 *Id.*

133 *Id.*

134 *Id.* § 55-7B-6b(c).

135 *Id.*

136 *Id.* § 55-7B-6b(d).

specifically addressed below.[137] 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 failure to comply with the requirements outlined herein and/or lack of participation and preparation.[138] 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.[139] However, other judges may not be as familiar with this process and ask why the parties request such a conference in lieu of a particular judge's routine scheduling conference procedures. 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.[140] The prevailing party may be awarded reasonable litigation expenses, with the exception of attorney fees and expenses.[141]

Summary Jury Trials - § 55-7B-6c

This section outlines a 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.[142] The optimistic anticipation is that the summary jury trial can be completed within a

137 *See generally id.* § 55-7B-6c (discussing summary jury trial provisions).
138 *Id.* § 55-7B-6b(e).
139 *Id.*
140 *Id.* § 55-7B-6b(f).
141 *Id.*
142 *Id.* § 55-7B-6c(a).

single day,[143] and unless otherwise ordered, presentations are limited to one hour per party.[144] Parties and their representatives must attend the summary jury trial.[145]

A six-member jury, with no alternates, is selected from the regular juror list with limited *voir dire*.[146] The evidence must be presented by the attorneys for the parties.[147] 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.[148] 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 would be called at trial and counsel has been told the substance of the witness's testimony, and (c) the witness's testimony is included in the attorney's affidavit.[149] 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.[150]

Following the presentations by counsel, the jury is given an abbreviated set of instructions on the applicable law.[151] This is where the 2001 enactments really get interesting. The jury is encouraged to return a unanimous verdict.[152] 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

143 *Id.*
144 *Id.* § 55-7B-6c(e).
145 *Id.* § 55-7B-6c(b).
146 *Id.* § 55-7B-6c(c).
147 *Id.* § 55-7B-6c(d).
148 *Id.*
149 *Id.*
150 *Id.* § 55-7B-6c(f).
151 *Id.* § 55-7B-6c(g).
152 *Id.*

an anonymous statement of each juror's findings on liability and damages.[153] The jurors may be invited, but not ordered, to informally discuss the verdict with the attorneys and the parties.[154]

These proceedings are not recorded, although recordings may be arranged at a party's own expense.[155] 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.[156]

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.[157] 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.[158]

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, and indicated a desire to proceed to trial, the rejecting party is liable for the costs incurred by the other party or parties subsequent to the summary trial."[159] 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.

153 *Id.*
154 *Id.*
155 *Id.* § 55-7B-6c(h).
156 *Id.*
157 *Id.* § 55-7B-6c(i).
158 *Id.*
159 *Id.*

Expert Witness Testimony on Standard of Care - § 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.[160] 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.[161] As a significant practice note, the Court 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. Thus, the requirements contained in § 55-7B-7 could possibly be challenged as usurping the authority of the judicial branch to determine who may testify and in what capacity.[162] Financial records of the expert to prove the amount of time the witness spends in active practice or teaching in his or her field are not discoverable unless good cause can be shown to the court.[163]

Regarding the testimony of expert witnesses on the applicable standard of care, the MPLA 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.[164] The evidence must be established by competent expert witnesses, and the necessary foundation is as follows:

> (1) the opinion is actually held by the expert witness; (2) the opinion can be testified to with 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's opinion is grounded on scientifically valid peer-reviewed studies if available; (5) the expert witness maintains a current license to practice medicine with the appropriate licensing authority of any state of the United States: Provided, That the expert witness's license has not been revoked or suspended in the past year

160 *Id.* § 55-7B-7(a).

161 *Id.*

162 *See e.g.*, *Mayhorn v. Logan Med. Found.*, 193 W. Va. 42, 454 S.E.2d 87 (1994).

163 W. Va. Code. § 55-7B-7(a).

164 *Id.*; *See also Lawyer v. Morgan Cnty. War Mem'l Hosp.*, No. 12-1449, 2013 WL 6152078, at *3 (W. Va. Nov. 22, 2013) (holding that *Mayhorn* is the paramount authority for determining whether an expert is qualified to give an opinion since the statute is silent on the qualifications required of a defense standard of care expert).

> in any state; and (6) 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.[165]

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.[166] 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 qualifies "as an expert by knowledge, skill, experience, training, or education may testify" in opinion form.[167] 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."[168] In so holding, the Court overruled *Gilman v. Choi*, which had indicated that the Legislature may, by statute, determine when an expert is qualified to state an opinion.[169]

Per W. Va. Code § 55-7B-7(a), "the applicable standard of care and a defendant's failure to meet said standard of care, 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.[170] In rare cases, a plaintiff may

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165 W. Va. Code. § 55-7B-7(a) (requirement (4) added by 2015 amendments).

166 W. Va. R. Evid. 601.

167 W. Va. R. Evid. 702.

168 Syl. pt. 6, *Mayhorn v. Logan Med. Found.*, 193 W. Va. 42, 44, 454 S.E.2d 87, 89 (1994) (emphasis added).

169 *Id.* (citing *Gilman v. Choi*, 185 W. Va. 177, 406 S.E.2d 200 (1990)). In *Gilman* the Court relied on a portion of the statute, which authorized the trial court to require "the testimony of one or more knowledgeable, competent expert witnesses" to concluded that the Legislature's "paramount concern was with the competency of the proffered expert testimony." *Gilman*,185 W. Va. at 179, 406 S.E.2d at 202.

170 Syl. pt. 1, *Farley v. Meadows*, 185 W. Va. 48, 49, 404 S.E.2d 537, 538 (1991) (citing Syl. pt. 2, *Roberts v. Gale*, 149 W. Va. 166, 166, 139 S.E.2d 272, 272 (1964)).

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.[171] 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."[172] Requiring expert testimony prevents juries from relying on mere conjecture, and it 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.[173] The burden is on the plaintiff to establish that negligence and lack of skill caused the injury suffered.[174] In other words, always retain an expert witness when litigating a medical malpractice case.

Admissibility and Use of Certain Information - § 55-7B-7a

In the 2015 amendments, the Legislature created § 55-7B-7a, which established a rebuttable presumption that the following information *may not* be introduced as evidence unless it (i) applies specifically to the injured person, or (ii) it involved substantially similar conduct that occurred within one year of the particular incident involved:

> (1) A state or federal survey, audit, review or other report of a health care provider or health care facility; (2) Disciplinary actions against a health care provider's license, registration or certification; (3) An accreditation report of a health care provider or health care facility; and (4) An assessment of a civil or criminal penalty.[175]

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171 *See* Syl. pt. 4, *Totten v. Adongay*, 175 W. Va. 634, 635, 337 S.E.2d 2, 3 (1985).

172 *Banfi v. Am. Hosp. for Rehab.*, 207 W. Va. 135, 141, 529 S.E.2d 600, 606 (2000) (quoting *Murphy v. Schwartz*, 739 S.W.2d 777, 778 (Tenn. Ct. App. 1986)).

173 *See Schroeder v. Adkins*, 149 W. Va. 400, 410, 141 S.E.2d 352, 358 (1965).

174 *See Farley v. Shook*, 218 W. Va. 680, 686, 629 S.E.2d 739, 745 (2006).

175 W. Va. Code § 55-7B-7a.

In 2019, the Legislature amended W. Va. Code § 55-7B-7a(b) to include additional provisions regarding actions alleging inappropriate staffing or inadequate supervision. Under W. Va. Code § 55-7B-7a(b), "[i]n any action brought alleging inappropriate staffing or inadequate supervision, if the health care facility or health care provider demonstrates compliance with the minimum staffing requirements under state law, the health care facility or health care provider is entitled to a rebuttable presumption that appropriate staffing and adequate supervision of patients to prevent accidents were provided, and the jury shall be instructed accordingly."[176] Additionally, the 2019 amendments added a new subsection to § 55-7B-7a(b):

> In any action brought alleging inappropriate staffing or inadequate supervision, if staffing is less than the minimum staffing requirements under state law, then there is a rebuttable presumption that there was inadequate supervision of patients and that inadequate staffing or inadequate supervision was a contributing cause of the patient's fall and injuries or death arising therefrom, and the jury shall be instructed accordingly.[177]

Of course, the provisions of this section are subject to the West Virginia Rules of Evidence.

Damages Cap on Noneconomic Loss - § 55-7B-8

Arguably the most significant section of the Act, W. Va. Code § 55-7B-8 places a limit on recovery of non-economic losses. Although previously capped at $1,000,000, the 2015 amendment reduced the amount recoverable for each occurrence to $250,000, or $500,000 in the case of (1) wrongful death; (2) permanent and substantial physical deformity, loss of use of a limb or loss of a bodily organ system; or (3) permanent physical or mental functional injury that permanently prevents the injured person from being able to independently care for himself or herself and perform life-sustaining activities.[178]

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176 *Id.* § 55-7B-7a(b).
177 *Id.* § 55-7B-7a(c).
178 W. Va. Code §§ 55-7B-8(a), -8(b).

In *MacDonald v. City Hospital, Inc.*, 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 . . ."[179] The Court noted 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."[180] The caps are adjusted annually based on consumer price indexing but may not exceed 150% of $250,000 ($375,000) or 150% of $500,000 ($750,000).[181] By current calculations, the adjustments are quickly approaching these new statutory ceilings. Noneconomic damages limits do not apply to any defendant that does not have medical professional liability insurance *in the aggregate amount* of at least $1,000,000 for each occurrence.[182]

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.[183] 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.[184]

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179 Syl. pt. 6, *MacDonald v. City Hosp., Inc.*, 227 W. Va. 707, 711, 715 S.E.2d 405, 409 (2011).

180 *Id*. at 724, 715 S.E.2d at 422.

181 W. Va. Code § 55-7B-8(c).

182 *Id.* § 55-7B-8(d).

183 *See Gerver v. Benavides*, 207 W. Va. 228, 235, 530 S.E.2d 702, 708 (1999) (*overruled on other grounds by Phillips v. Stear*, 236 W. Va. 702, 783 S.E.2d 567 (W. Va. 2016).

184 *See Karpacs-Brown v. Murthy*, 224 W. Va. 516, 524, 686 S.E.2d 746, 754 (2009).

Several Liability - § 55-7B-9

W. Va. Code § 55-7B-9 eliminates joint and several liability. 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.[185] In assessing percentages of fault, the trier of fact will consider the fault of all alleged parties, including the fault of any person who has settled a claim with the plaintiff arising out of the same medical injury.[186] Defendants shall be severally, not jointly, liable for judgments entered against them.[187]

In order to determine the amount of judgment against each defendant, after adjusting the verdict as provided in § 55-7B-9a, the court shall reduce the adjusted verdict by the amount of any pre-verdict settlement arising out of the same medical injury.[188] Then, multiply the total amount of damages remaining, with prejudgment interest recoverable by the plaintiff, by the percentage of fault attributed to each defendant by the trier of fact.[189] The resulting amount of damages, together with any post-judgment interest accrued, shall be the maximum recoverable against the defendant.[190] When any defendant's percentage of the verdict exceeds the remaining amounts due the plaintiff after the mandatory reductions, each defendant shall be liable only for the defendant's pro rata share of the remainder of the verdict as calculated by the court from the remaining

185 W. Va. Code § 55-7B-9(a)(1-5).
186 *Id.* § 55-7B-9(b).
187 *Id.* § 55-7B-9(c).
188 *Id.* § 55-7B-9(d).
189 *Id.*
190 *Id.*

defendants to the action.[191] The plaintiff's total award may never exceed the jury's verdict less any statutory or court-ordered reductions.[192]

A health care provider cannot be held liable for acts of a nonemployee under the theory of ostensible agency unless the alleged agent does not maintain professional liability insurance in the aggregate amount of $1,000,000 *for each occurrence*.[193] Notably however, in *Cartwright v. McComas*, the Court 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 2015 amendment.[194]

Evidence of Payments Received from Collateral Sources - § 55-7B-9a

This provision provides for the reduction in compensatory damages for economic losses for payments from collateral sources for the same injury.[195] 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.[196] Entitlement to such future payments must be shown to a reasonable degree of certainty and readily reducible to a sum certain.[197] The plaintiff may present evidence of payments or contribution made to secure these benefits.[198] Paragraphs (d) – (f) are the calculation provisions and require the court to make the following findings of fact:

- The total amount of damages for economic loss found by the trier of fact;
- The total amount of damages for each category of economic loss found by the trier of fact;
- The total amount of allowable collateral source payments received or to be received by the plaintiff for the medical injury which was the subject of the verdict in each category of economic loss; and

191 *Id.* § 55-7B-9(e).
192 *Id.*
193 W. Va. Code § 55-7B-9(g).
194 *See Cartwright v. McComas*, 223 W. Va. 161, 167, 672 S.E.2d 297, 303 (2008).
195 W. Va. Code § 55-7B-9a(a).
196 *Id.*
197 *Id.* § 55-7B-9a(b).
198 *Id.* § 55-7B-9a(c).

- The total amount of any premiums or contributions paid by the plaintiff in exchange for the collateral source payments in each category of economic loss found by the trier of fact.[199]

The Court shall then subtract both the total premiums paid in each category of economic loss from the total collateral source benefits the plaintiff received with regard to that category of loss to determine the net amount of collateral source payments.[200] The Court shall then subtract the net amount of collateral source payments in each category of economic loss from the total amount of damages awarded to the plaintiff for that category of loss to arrive at the adjusted verdict.[201] Paragraph (g) excludes from reduction of the verdict certain amounts and proceeds involving collateral sources with respect to categories of economic loss.[202]

Limitations on Third-Party Claims - § 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.[203] This section does not prevent a personal representative from maintaining a wrongful death action, a derivative claim, or a claim for loss of consortium.[204]

Trauma Damage Limitations - § 55-7B-9c

For health care services rendered in "good faith" at a "trauma center," there is a $500,000 cap for each occurrence, exclusive of the interest computed from the date of judgment.[205] This cap is materially different from that which is outlined in § 55-7B-8 because § 55-7B-9c limits the *total recovery* for non-economic *and* economic damages to $500,000 for each occurrence regardless of

199 *Id.* § 55-7B-9a(d)(1-4).
200 *Id.* § 55-7B-9a(e).
201 *Id.* § 55-7B-9a(f).
202 *Id.* § 55-7B-9a(g).
203 *Id.* § 55-7B-9b.
204 *Id.*
205 *Id.* § 55-7B-9c(a).

the number of plaintiffs, defendants, or distributees.[206] The cap does not apply when the condition has stabilized and the patient is no longer receiving care as an "emergency" patient, or when the care rendered is unrelated to the original emergency condition.[207] 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.[208]

The limitation on the total amount of civil damages contained in subsection (a) of this section is increased each year to account for inflation, as determined by the Consumer Price Index published by the United States Department of Labor, provided that increases on the limitation of damages shall not exceed 150% of $500,000.[209] In 2016, Senate Bill 602 added the provision that beginning July 1, 2016, a plaintiff who suffers economic damages, as determined by the trier of fact or the agreement of the parties, in excess of the limitation of liability in section (a) and for whom recovery from the Patient Injury Compensation Fund is precluded pursuant to W. Va. Code § 29-12D-1 may recover additional economic damages of up to $1 million.[210] This amount is not subject to the adjustment for inflation set forth in subsection (b).[211] The Court has yet to interpret the applicability of the trauma care provisions. Therefore, the practitioner must look to the statute itself for guidance.

Adjustment of Verdict for Past Medical Expenses - § 55-7B-9d

In the 2015 amendments, the Legislature created § 55-7B-9d. Under this new subsection, a verdict for past medical expenses is limited to: (1) total amount of medical expenses paid by or

206 *Id.*
207 *Id.* § 55-7B-9c(e).
208 *Id.* § 55-7B-9c(h).
209 *Id.* § 55-7B-9c(b).
210 *Id.* § 55-7B-9c(c); S.B. 602, 83d Leg., Reg. Sess. (W. Va. 2016).
211 *Id.* § 55-7B-9c(c).

on behalf of the plaintiff, and (2) total amount of medical expenses incurred but not paid for which the plaintiff or another is obligated to pay.

Effective date; applicability of provisions - § 55-7B-10

This section provides the effective dates for the statute, including the amendments. First enacted in 1986, the 2001 amendments to the MPLA apply to all medical professional liability causes of action filed on or after March 1, 2002.[212] The 2003 amendments apply to all causes of action filed on or after July 1, 2003.[213] The 2015 amendments apply to all causes of action filed on or after July 1, 2015.[214] The 2017 amendments apply to all causes of action ***which arise or accrue after*** July 1, 2017. This is a change in the language from the past amendments, which made the amendments effective based on the action's filing date.

Severability - § 55-7B-11

This section should be referenced by the practitioner to determine when there are amendments to the MPLA which provisions of this article are declared to be severable and which provisions shall be deemed invalid.

Self-funding program; requirements; minimum standards - § 55-7B-12

Finally, this section explains that physicians may establish irrevocable trusts funded by conveyance to the trustee the sum of not less than $1,000,000 for asset protection purposes if they are sued for medical malpractice.[215] These are known as self-funding insurance programs. Physicians may subsequently terminate the trust and elect to acquire coverage from a commercial medical professional liability insurance carrier.[216] The assets of the trust may not be distributed

212 W. Va. Code § 55-7B-10(a).
213 *Id.*
214 *Id.* § 55-7b-10(b).
215 W. Va. Code § 55-7B-12(a).
216 *Id.* § 55-7B-12(b).

until the costs associated with the administration of the trust have been satisfied and the trustee receives certification that the physician has acquired medical professional liability insurance tail coverage or prior acts coverage, whichever is applicable.[217] Physicians interested in setting up an irrevocable trust for asset protection should consult the requirements of the this article.

SEMINAL CASES

In addition to the cases discussed *supra*, below are seminal decisions handed down by the West Virginia Supreme Court of Appeals interpreting the MPLA and its recent amendments. The cases discussed herein are not exhaustive but represent the issues that will continue to arise for practitioners over the next few years.

i. Arbitration Agreements

The Court held a decade ago that many arbitration agreements in nursing home contracts are unenforceable for public policy reasons.[218] 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.[219] The Plaintiffs argued that a provision of the West Virginia Nursing Home Act voided the arbitration agreement.[220] The provision 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."[221] 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.[222] However, the Court went on to rule that, Congress did not

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217 *Id.*

218 *Brown v. Genesis Healthcare Corp.*, 228 W. Va. 646, 724 S.E.2d 250 (2011), *vacated*, *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012).

219 *Id.* at 658, 724 S.E.2d at 262.

220 *Id.* at 659, 724 S.E.2d at 263.

221 *Id.* at 660, 724 S.E.2d at 264.

222 *Id.* at 677, 724 S.E.2d at 281.

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.[223] 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, to be unenforceable given the policy rationale behind the Federal Arbitration Act.[224] 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.[225]

However, the United States Supreme Court vacated and remanded this decision.[226] 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."[227] 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."[228] The Court ordered the state court to consider whether, absent public policy, the arbitration clauses are unenforceable under state common law.[229] On remand, the West Virginia Supreme Court of Appeals reversed their original decision and remanded the cases to the trial courts.[230] The Court

223 *Id.* at 687, 724 S.E.2d at 291. *But see infra* notes 189-194 and accompanying text.
224 *Genesis*, 228 W. Va. at 687, 724 S.E.2d at 291.
225 *Id.*
226 *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam).
227 *Id.* at 1203 (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U. S. 213 (1985)).
228 *Id.* (quoting *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011)).
229 *Id.* at 1204.
230 *Genesis*, 228 W. Va. at 693, 729 S.E.2d at 297.

noticed the parties to argue the arbitration agreement under the common law doctrine of unconscionability. [231]

In 2018, the Court enforced an arbitration provision in a nursing home admission agreement signed by a durable power of attorney.[232] In *AMFM v. Shanklin*, a nursing home resident's daughter—her durable power of attorney—signed all admission documents for her mother to be admitted to Hillcrest Nursing Home, including an arbitration agreement.[233] The nursing home moved to dismiss the case and compel arbitration based on the agreement, but the lower court denied the motion. The nursing home appealed, and the Court reversed and remanded the decision, holding that the arbitration agreement was enforceable:

> In sum, the record clearly establishes that Kimberly [resident's daughter] exercised her rights and duties under the DPOA 1) for two years prior to the nursing home admission, 2) during the nursing home admission process, 3) throughout Mother Nelson's residency at the nursing home, and 4) after Mother Nelson left Hillcrest and moved into Montgomery General Elderly Care. . . . [B]ecause Kimberly acted as her mother's DPOA from 2011 through 2016, we conclude that Kimberly had the authority to enter into the arbitration agreement with the nursing home. Based on this conclusion, we find that when Kimberly signed the arbitration agreement, her authority was not "void, invalid or terminated," nor was she "exceeding or improperly exercising her authority." Therefore, under the plain language of W. Va. Code § 39B-1-119(c), the nursing home was permitted to rely on Kimberly's authority as Mother Nelson's DPOA when Kimberly signed the arbitration agreement on her mother's behalf.[234]

ii. Fiduciary Duty

In 2014, in *Manor Care, Inc. v. Douglas,* the Court considered whether a fiduciary duty exists between a nursing home and its patients.[235] Included in this decision was a discussion

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231 "The doctrine of unconscionability means that, because of an overall and gross imbalance, one-sidedness or lop-sidedness in a contract, a court may be justified in refusing to enforce the contract as written. The concept of unconscionability must be applied in a flexible manner, taking into consideration all of the facts and circumstances of a particular case." Syl. pt. 12, *Genesis*, 228 W. Va. at 657, 724 S.E.2d at 261.

232 *AMFM v. Shanklin on behalf of Estate of Nelson*, 241 W. Va. 56, 818 S.E.2d 882 (2018).

233 *Id.* at 58, 818 S.E.2d at 884.

234 *Id.* at 65, 818 S.E.2d at 891.

235 *See Manor Care Inc. v. Douglas*, 234 W.Va. 57, 65, 763 S.E.2d 73, 81 (2014).

regarding the application of the MPLA to causes of action asserting negligence.[236] In the fiduciary duty context, the trial court found that the plaintiff was a vulnerable adult, who had trusted and depended on the defendant nursing home, such that a fiduciary relationship existed.[237] On appeal, the defendants urged the Court to reject the "invitation to adopt new groundbreaking law establishing that nursing homes owe a fiduciary duty to provide adequate healthcare."[238] Plaintiff responded, explaining that the Court should examine the relationship present to determine whether a fiduciary duty existed.[239] The Court acknowledged that it had not previously recognized a cause of action for a breach of fiduciary duty against a nursing home and that the number of jurisdictions that did was small.[240] The Court disagreed with the plaintiff and reasoned that establishing a fiduciary duty between the nursing home administration and a patient could present a slippery slope to creating a fiduciary duty stemming from virtually every employee of the nursing facility.[241]

iii. Procedural Deficiencies in Pleadings

In 2017, the Court o held in *Minnich v. MedExpress Urgent Care, Inc.—West Virginia* that the failure to plead a claim as governed by the MPLA does not preclude application of the Act.[242] The plaintiff appealed the circuit court's order denying her motion for reconsideration of an adverse summary judgment ruling after she attempted to disguise her medical professional liability cause of action as a premises liability claim.[243] While waiting in an examination room at MedExpress, the plaintiff's husband fell off of the examination table, causing both Mr. and Mrs.

236 *See id.* at 87-91, 763 S.E.2d at 71-75.
237 *See id.* at 92, 763 S.E.2d at 76.
238 *Id.*
239 *Id.*
240 *Id.*
241 *Id.*
242 *Minnich v. MedExpress Urgent Care, Inc.—West Virginia*, 238 W. Va. 533, 796 S.E.2d 642 (2017).
243 *Id.* at 534, 796 S.E.2d at 643.

Minnich to sustain injuries.[244] Mr. Minnich died ninety days later.[245] The plaintiff filed her Complaint on behalf of her husband, alleging negligence based on premises liability, loss of consortium, and wrongful death. The Court affirmed the lower court's decision that summary judgment was appropriate in favor of MedExpress due to the plaintiff's failure to meet the pleading requirements of the MPLA:

> The critical inquiry is whether the subject conduct that forms the basis of the lawsuit is conduct related to the provision of medical care. . . . We simply cannot accept the petitioner's attempt to frame the injuries Mr. Minnich sustained in this case as being unrelated to the provision of health care services.
>
> As support for this conclusion, we rely upon the following allegation set forth in the complaint: "Despite the fact that the employee was instructed that Mr. Minnich was feeling weak and had just stopped using a walker to get around because of hip surgery, the MedExpress South Charleston staff member did not assist Mr. Minnich onto the exam table or examine the table to make certain that it was in good working order." From the record in this case, it is abundantly clear that Mr. Minnich was physically in the examination room at the time of the fall after having completed the necessary disclosure of his condition and concerns to a "health care provider." This fall occurred while attempting to comply with the directive of that "health care provider" to sit on the examination table—a piece of medical equipment routinely used to examine a patient. Thus, the injuries sustained by Mr. Minnich as a result of the fall were sustained in the course of his evaluation at MedExpress. That evaluation, an essential aspect of Mr. Minnich's medical diagnosis and/or treatment which involved usage of the examination table as medical equipment, was necessarily part of the health care services MedExpress undertook to provide Mr. Minnich.[246]

Based on this analysis, the Court concluded that in the absence of expert testimony to address whether Mr. Minnich should have been permitted to climb onto the examination table, the jury would be unable to determine whether the defendant breached the duty of care owed as a "health care provider" to Mr. Minnich in accordance with the MPLA.[247]

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244 *Id.* at 535, 796 S.E.2d at 644.
245 *Id.*
246 *Id.* at 538, 796 S.E.2d at 647 (internal citations omitted).
247 *Id.* at 539, 796 S.E.2d at 648.

With respect to the notice of claim requirements pursuant to W. Va. Code § 55-7B-6, the Court held in 2019 in *State ex rel. PrimeCare Medical of West Virginia, Inc. v. Faircloth* that failure to serve a notice of claim upon a newly added health care provider before filing an amended complaint warrants dismissal of the newly added defendant.[248] In *Faircloth*, the estate of an inmate sued the Eastern Regional Jail after the inmate committed suicide in jail, alleging deprivation of the inmate's state constitutional rights, negligent supervision, negligent training and retention, negligent and intentional infliction of emotional distress, general negligence, and wrongful death.[249] After filing the Complaint, the plaintiff amended the complaint to add PrimeCare Medical, a health care provider, as a defendant.[250] PrimeCare immediately moved to dismiss the complaint based on the plaintiff's failure to serve a notice of claim upon PrimeCare within the two-year statute of limitations as required by the MPLA.[251] Thereafter, the plaintiff filed a notice of claim on July 17, 2018, over two and a half years after the inmate's death.[252] The lower court denied PrimeCare's motion to dismiss on the basis that defendant suffered no harm from the late filing of the plaintiff's notice of claim.[253] The lower court also agreed with the plaintiff's argument that no screening certificate of merit was necessary because the plaintiff's theory of liability was based on a nonmedical, routine care issue that was not complex.[254]

PrimeCare filed a writ of prohibition challenging the lower court's denial of its motion to dismiss. The West Virginia Supreme Court of Appeals first held that the MPLA applied to plaintiff's claims against PrimeCare:

> Upon review of the amended complaint, we find that all of the Estate's claims against PrimeCare are subject to the MPLA. A fair reading of the amended

248 *State ex rel. PrimeCare Medical of West Virginia, Inc. v. Faircloth*, 242 W. Va. 335, 835 S.E.2d 579 (2019).
249 *Id.* at 339, 835 S.E.2d at 583.
250 *Id.*
251 *Id.* at 340, 835 S.E.2d at 584.
252 *Id.*
253 *Id.*
254 *Id.*

> complaint reveals that the Estate blames PrimeCare for (a) failing to properly assess Mr. Grove's potential for suicide, (b) failing to properly house and monitor Mr. Grove in light of his (allegedly) known potential for suicide, and (c) failing to properly train, monitor, and discipline Officer Zombro, whom the Estate blames, in particular, for failing to properly monitor Mr. Grove. Applying the definitions set forth in Section 2 of the MPLA, these allegations state a claim for "medical professional liability" because the acts or omissions in question were "*health care services* rendered, or which should have been rendered, by a *health care provider* or *health care facility* to a patient." W. Va. Code § 55-7B-2(i) (emphasis added).
>
> This conclusion becomes particularly clear when we note that "health care" includes (a) "[a]ny act, service or treatment provided under, pursuant to or in furtherance of ... a health care facility's plan of care, medical diagnosis or treatment"; (b) "[a]ny act, service or treatment ... which should have been performed or furnished"; (c) acts performed or omitted "by any ... person supervised by or acting under the direction of a health care provider"; (d) acts performed or omitted "during the patient's ... confinement"; (e) decisions about "staffing, ... custodial care ... and similar patient services"; and (f) the "employment ... and supervision of health care providers[.]" W. Va. Code § 55-7B-2(e). This conclusion is further strengthened when we consider that "health care provider" includes "any person taking actions or providing service or treatment pursuant to or in furtherance of a ... health care facility's plan of care, medical diagnosis or treatment[.]" W. Va. Code § 55-7B-2(g).[255]

While the Court disagreed with the plaintiff's claim that no screening certificate of merit was necessary, it did not analyze that claim further because the plaintiff's failure to file a pre-suit notice of claim upon PrimeCare within the two-year statute of limitations was dispositive.[256] As such, the Court granted the writ of prohibition and vacated the circuit court's order denying PrimeCare's motion to dismiss.[257]

Although not yet a reported decision, it is worth mentioning on a final procedural note that in late 2020, a writ of prohibition was filed by Morgantown Health and Rehabilitation Center regarding which statute of limitations applies to nursing homes in medical professional liability

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255 *Id.* at 343, 835 S.E.2d at 587.
256 *Id.* at 344, 835 S.E.2d at 588.
257 *Id.* at 345, 835 S.E.2d at 589.

cases.[258] On May 15, 2020, Kimberly Degler, administrator of the Estate of Jacqulin Lee Cowell, filed a wrongful death action against Morgantown Health and Rehab ("MHR") alleging that Ms. Cowell died as a result of MHR's medical negligence.[259] MHR filed a motion to dismiss, arguing that plaintiff's complaint was not filed within the one-year statute of limitations for claims against nursing home established by W. Va. Code § 55-7B-4(b).[260] In response, the plaintiff argued that the statute of limitations found in W. Va. Code § 55-7B-4(b) does not include wrongful death claims, which are subject to a two-year statute of limitations.[261] After a hearing, the lower court denied MHR's motion to dismiss and entered an order holding that the one-year statute of limitations for medical professional liability actions against nursing homes found in W. Va. Code § 55-7B-4(b) does not apply to wrongful death actions.[262]

MHR filed a writ of prohibition on November 25, 2020, arguing that the circuit court erred in failing to dismiss plaintiff's complaint for failure to comply with the applicable one-year statute of limitations found in W. Va. Code § 55-7B-4(b).[263] Specifically, MHR argued that the MPLA applies to wrongful death actions against nursing homes because the Act defines "medical injury" as "injury ***or death*** to a patient arising or resulting from the rendering or failure to render health care"; and it defines "medical professional liability" as "any liability for damages resulting from ***the death*** or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient."[264] MHR also argued that the MPLA is the exclusive remedy for "liability and damages

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258 *See State ex rel. Morgantown Op. Co. LLC d/b/a Morgantown Health and Rehab. Ctr. v. Gaujot*, No. 20-0940 (W. Va. filed Nov. 25, 2020).
259 *Id.*
260 *Id.*
261 *Id.*
262 *Id.*
263 *Id.*
264 *Id.*

resulting from the death or injury of a person for any tort based upon health care services rendered or which should have been rendered" as explained in *Gray v. Mena*.[265] It will be interesting to see where the Court comes out on this issue of first impression. If the lower court's decision is not overturned, W. Va. Code § 55-7B-4(b) will take on a new meaning and perhaps render portions of the 2017 Amendments to the MPLA virtually meaningless.

CONCLUSION

Medical malpractice litigation has been one of the most hotly-debated areas of law in the West Virginia legal system for the past thirty-five years. While some object to special statutory protections for doctors, hospitals, and long-term care facilities, others believe it is imperative to afford these protections to health care providers to keep them from leaving our state due to high insurance premiums. The designated purpose of the Act is the same today as when it was originally passed in 1986: 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 Act and its recent amendments will go a long way in accomplishing this goal.

265 *Id.*