

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**No. 31757**

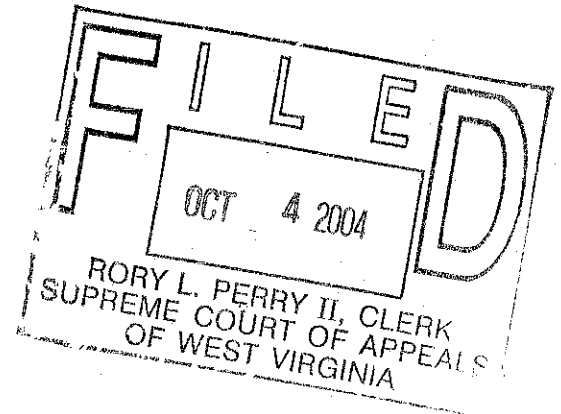
BERNARD BOGGS, as administrator of the  
Estate of HILDA BOGGS, deceased, as personal  
representative of the statutory beneficiaries of the  
wrongful death claim herein asserted and  
in his own right,

Appellants,

v.

CAMDEN-CLARK MEMORIAL HOSPITAL, CORP.,  
UNITED ANESTHESIA, INC. and  
MANISH I. KOYAWALA, M.D.,

Appellees.



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From the Circuit Court of Wood County  
Honorable Robert A. Waters, Chief Judge  
Civil Action No. 03-C-296

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**BRIEF OF AMICUS CURIAE DEFENSE TRIAL COUNSEL OF WEST VIRGINIA**

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## **I. Introduction**

The Defense Trial Counsel of West Virginia ("DTCWV") submits this amicus brief in support of the circuit court's correct application of West Virginia Code § 55-7B-6. DTCWV submits that the reforms promulgated in House Bill 601 were constitutional exercises of the legislature's power in response to the significant problem of the affordability and availability of insurance coverage for hospitals, physicians and other health care providers in West Virginia and should be upheld by this court.

## **II. Interest of Amicus**

DTCWV is a private, not for profit voluntary association of attorneys licensed to practice in West Virginia whose practices involve the defense of civil actions including those brought under the West Virginia Medical Professional Liability Act, West Virginia Code § 55-7B-1, *et seq.* DTCWV's members represent clients including doctors in private and public practices, physician practice groups, hospitals, nursing homes and other medical providers against medical malpractice claims and actions, as well as other clients against claims and actions involving the broad range of other legal matters. DTCWV is, therefore, in a unique position to add to the dialogue before this Court regarding the statute which is challenged here.

## **III. Facts**

DTCWV acknowledges that the facts below are set forth in detail in the briefs of the parties. In terms of analyzing whether the plaintiff complied with West Virginia Code § 55-7B-6, the circuit court found his attorneys last attempted compliance on June 2, 2003, when they sent, by Federal Express, signed certificates of merit to the defendants. (While notices of claim were served earlier, they were accompanied by unsigned certificates.) In

response, Camden Clark Memorial Hospital requested early mediation. The plaintiff filed suit on June 29, 2003, without responding to the mediation demand or waiting for the thirty days prescribed in § 55-7B-6(b).

Both defendants moved to dismiss the action because the plaintiff did not comply with § 55-7B-6(b) in several ways, and the Circuit Court granted the motion on October 20, 2003. In addition to filing a series of motions in an attempt to change the October 20 order, the plaintiff also re-sent notices of claim and certificates of merit, and filed another suit against the defendants, which is currently proceeding in the Circuit Court of Wood County.

#### **IV. Argument**

- A. The Circuit Court correctly dismissed plaintiff's action below for failure to comply with the Notice of Claim and Certificate of Merit requirements of West Virginia Code §55-7B-6**

In 2001, the West Virginia Legislature, in special session, amended the Medical Professional Liability Act with House Bill 601, which was effective on March 1, 2002, and applied to all cases filed after that date. Included in the amendment, and at issue here, are the Notice of Claim and Certificate of Merit provisions designed to require plaintiffs to demonstrate expert support for MPLA actions before filing suit. Section 55-7B-6(b) provides:

*At least thirty days prior to the filing of a medical professional liability action against a health care provider, the claimant shall serve by certified mail, return receipt requested, a Notice of Claim. The Notice of Claim shall include a statement of the theory or theories of liability upon which a cause of action may be based, together with a screening Certificate of Merit. The Certificate of Merit shall be executed under oath by a health care*

provider qualified as an expert under the West Virginia rules of evidence and shall state with particularity: (1) the expert's familiarity with the applicable standard of care in issue; (2) the expert's qualifications; (3) the expert's opinion as to how the applicable standard of care was breached; and (4) the expert's opinion as to how the breach of the applicable standard of care resulted in injury or death. A separate screening Certificate of Merit must be provided for each health care provider against whom a claim is asserted. The person signing the screening certificate shall have no financial interest in the underlying claim, but may participate as an expert witness in any judicial proceeding. Nothing in this subsection may be construed to limit the application of rule fifteen of the rules of civil procedure.

W. Va. Code § 55-7B-6(b) (emphasis added).

The MPLA amendments make it clear that compliance with § 55-7B-6(b) is a mandatory prerequisite to filing suit. Section 55-7B-6(a) states "no person may file a medical professional liability action against any health care provider without complying with the provisions of this section."

While many states require a pre-suit notice of claim and certificate or merit, West Virginia's statute is unique in providing for mandatory mediation at the request of the defendants, a provision designed to allow an early opportunity at resolution before litigation. W. Va. Code § 55-7B-6(f). To ensure early mediation is not requested in every case, the requesting party must submit to deposition, either at or before mediation. W. Va. Code § 55-7B-6(g).

There is no dispute here that the plaintiff did not comply with West Virginia Code § 55-7B-6. The statute is simple, and requires service of the Notice of Claim and Certificate of Merit by United States mail at least thirty days before suit is filed. Here, the plaintiff's non-compliance included sending the notice of claim and certificate of merit separately, sending an unsigned certificate of merit, using Federal Express instead of United

States mail, and filing suit without waiting thirty days and despite a request for mediation.

Because the plaintiff did not comply with the plain language of § 55-7B-6(b), the circuit court correctly dismissed the action. The language of § 55-7B-6 that plaintiff shall comply is mandatory. In West Virginia, "shall" means "shall." *Retail Designs, Inc. v. West Virginia Div. of Highways*, 583 S.E.2d 449, 455 (W. Va. 2003) ("Shall" is mandatory); Syl. Pt.1, *Nelson v. West Virginia Pub. Empl. Ins. Bd.*, 300 S.E.2d 86 (W. Va. 1982). Section 55-7B-6(b) dictates plaintiff "shall" comply with the notice of claim/certificate of merit provisions, and those who do not may not file suit. W. Va. § 55-7B-6(a). Noncompliance in the face of this language therefore requires dismissal. *Stanley v. United States*, 2004 WV Lexis1385522 (N.D.W.Va. 2004).<sup>1</sup>

The appellant and the trial lawyer amici seem to argue that "technical"

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<sup>1</sup> See, e.g., Chapman v. Cabell-Huntington Hosp., Inc. et. al., Kanawha County, Slip Op. No. 02-C-857 (11/20/02, Jennifer Bailey Walker); Matthewson v. Health Plus Professionals, et al., Kanawha County, Slip Op. No. 02-C-2980 (5/30/03 Irene C. Berger); Allen v. Pendleton County Bd. Of Educ., et al., (12/10/03 N.D.W. Va. Robert E. Maxwell); LeMasters v. W. Va. Regional Jail Auth. And Corrections Facility Auth., Kanawha County, Slip Op. No. 02-C-1948 (11/21/03 James C. Stuckey). Other Circuit Courts in WV have implicitly found the threshold requirements to be jurisdictional and have dismissed actions for failing to comply with the same. See, e.g. Donald Ray Adams, Plaintiff v. Montgomery General Hospital, Gary Rubin, M.D. and Anesthesiologist, John Doe, Defendants, Fayette County, WV, Slip Op. No. 02-C-254(H), (Dismissal Order: Dismissal of Defendant, Anesthesiologist, John Doe); Pamela J. Hicks and Frederick E. Hicks, Jr., Plaintiffs, v. Ted Jackson, M.D. and Charleston Area Medical Center, Inc., Kanawha County, WV, Slip Op. No. 02-C-647, (Order: Dismissal of Defendants, Ted Jackson, M.D. and Charleston Area Medical Center); James Eberhardt, Plaintiff v. Raleigh General Hospital, Inc. and Barry A. Levine, M.D., Raleigh County, WV, Slip Op. No. 03-C-197-B and 03-C-207-B; (Order Granting Defendant Raleigh General Hospital's Motion to Dismiss for plaintiff's failure to provide a notice of claim and/or screening certificate of merit.); Betty Tindell, as Administratrix of the Estate of Estelle Gay v. Holbrook Nursing Home Inc., William J. Sembello, Jr., M.D., Lewis County, West Virginia, Slip Op. No. 03-C-59 (Order of Dismissal for failure to comply with W. Va. Code § 55-7B-6 by filing the Complaint prior to the expiration of the 30 day period after filing the Certificate of Merit.)

shortcomings in compliance should be overlooked, and in any event, dismissal is not appropriate where there is non compliance.<sup>2</sup> If this position is correct, then West Virginia Code § 55-7B-6 is essentially meaningless. Rather than the mandatory and important reform intended by the legislature, compliance becomes merely optional, and non compliance should simply be ignored by circuit courts. To the contrary, the notice of claim and certificate of merit reforms should be enforced as mandatory by this court, as they have been by circuit courts around West Virginia.<sup>3</sup> Here, the plaintiff's failure to comply was not just technical - plaintiff did not comply at all with the statute, and seeks here to have the noncompliance rewarded. The Circuit Court of Wood County got it right, and the dismissal of this action should be affirmed.

**B. The Pre-litigation Requirements of West Virginia Code**

**§ 55-7B-6 Are Constitutional**

The plaintiff and their amici ( the American and West Virginia Trial Lawyers) use the dispute here to attack all of the reforms passed by the legislature in House Bills 601 and 2122, asserting that if applied to cases filed after their activation dates, the statutes are unconstitutional, or, at the least, unconstitutional as applied to this plaintiff.

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<sup>2</sup> "Technical" shortcomings apparently include unsigned affidavits and use of private couriers instead of the U.S. mail. These issues are well briefed by appellees. Put simply, an unsigned affidavit is not an affidavit, and FedEx is not the U.S. mail.

<sup>3</sup> It bears mention here that the notice of claim and certificate of merit provisions were originally proposed by Governor Wise at the Sixth Special Session of legislature called in late 2001 to consider medical liability reform. These provisions were drafted by a panel of three defense and three plaintiffs attorneys working together at the request of the governor to propose workable solutions. The remaining history of H.B. 601 is well set forth in the brief submitted by the health care provider amici, led by the West Virginia State Medical and Hospital Associations.

Since the plaintiff has a pending action (filed after the dismissal of this action), DTCWV agrees with the position of the appellees and the health care provider amici that the constitutionality of the reforms of H.B. 2122 should be dealt with in that case, and not here. DTCWV joins in the request that this court not address a constitutional issue not before it. The Court should simply uphold the dismissal of plaintiff's cause of action for non compliance with § 55-7B-6.

If the court decides to address constitutionality, the only issue properly before this court is whether the pre-suit requirements of the MPLA, as amended in 2001, can be constitutionally applied where the cause of action (the injury or death) accrued before the statute's enactment, but suit was filed afterwards. This issue is exhaustively briefed by both sides, and DTCWV will not repeat the arguments presented. DTCWV agrees with the appellants and the health care amici that the MPLA reforms, applied to cases filed after the respective enactment dates, are constitutional even if they have retroactive effect in some cases.

In West Virginia, the legislature has the power to alter, amend, change, repudiate, or abrogate the common law. This Court has recognized that “[b]y virtue of the authority of Article 8, Section [13] of the Constitution of West Virginia and of Code, 1931, 2-1-1 it is within the province of the legislature to enact statutes which abrogate the common law.” Syllabus, *Perry v. Twentieth St. Bank*, 157 W.Va. 963, 206 S.E.2d 421 (1974) (footnote added). “[T]he indisputable fact [is] that the legislature has the power to change the common law of this State.” *Gilman v. Choi*, 185 W.Va. 177, 186, 406 S.E.2d 200, 209 (1990), *overruled on other grounds, Mayhorn v. Logan Medical Foundation.*, 454 S.E.2d 87 (W. Va. 1994). Moreover in West Virginia, retroactive effect is permitted where the Legislature

clearly expresses its intent to have retroactive application. *Public Citizen, Inc. v. First National Bank in Fairmont*, 198 W.Va. 329, 334, 480, S.E.2d 538, 543 (1996).<sup>4</sup>

In the MPLA amendments of 2001, the legislature expressed its intent that the provisions of § 55-7B-1, *et seq.*, to the extent amended by HB 601, would apply retroactively to those causes of action that accrued prior to March 1, 2002, but which were not filed until that date or after.

The Court must defer to the legislature in its decision to institute these reforms in response to the problems of available and affordable insurance for health care providers. The Notice of Claim and Certificate of Merit requirements are but a part of a larger, multi-year solution that has progressed through the creation of a state insurer (BRIM II) to the newly formed Physician's Mutual. The legislature plainly determined that reforms were necessary, and needed to go into effect as soon as possible to allow the entire statutory scheme to succeed. Thus, it chose to apply its reforms in relation to when cases were filed instead of the dates of injury or death (in contrast to the original MPLA which was entirely prospective). Absent this legislative directive, the reforms deemed necessary by the legislature would not have seen fruition until the various statutes of limitation, including the application of tolling doctrines, expired. The legislature made a determination reform could not wait, and this court should respect it.

In this regard, DTCWV urges this court to afford the legislature the same

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<sup>4</sup> The appellant and his amici challenge the retroactive effect of the amendments, clinging to the disfavored status of retroactivity suggested in *Landgraf v. USI Film Products*. They fail to note that *Landgraf*, while stating "retroactivity is not favored in the law" continues with "unless the legislature has made clear its intention that it shall apply." *Landgraf v. USI Film Products*, 511 U.S. 244, 114 S. Ct, 1483, 128 L.Ed.2d 229 (1994)(emphasis added).

deference seen in its prior consideration of the constitutionality of the limits on non-economic loss in the MPLA in *Robinson v. Charleston Area Med. Ctr., Inc.*, 186 W. Va. 720, 414 S.E.2d 877 (1991), and *Verba v. Ghaphery*, 210 W.Va. 30, 552 S.E.2d 406 (2001).

In this regard, there are excellent recitations of the conflicting views about the need for civil justice reform are contained in the briefs of the trial lawyer amici and the health care provider amici. These discussions help this Court to understand the important debate that occurred in the West Virginia legislature over medical liability reform. Indeed, both the trial lawyers and the health care providers were involved and integral participants in the democratic debate held in our legislature, and most certainly advanced these arguments there. However, when faced with conflicting facts and statistics about the need for reform (much like those seen in the various briefs submitted here), this Court in both *Robinson* and *Verba* deferred to the legislature as the appropriate body to sort through the facts and issues and address the problem. In *Robinson*, the court stated we “ordinarily will not reexamine independently the factual basis for the legislative justification for a statute. Instead, the inquiry is whether the legislature reasonably could conceive to be true the facts on which the challenged statute was based.” *Robinson*, 186 W.Va. at 730, 414 S.E.2d at 887 (citation omitted). In *Verba*, the court recognized:

“Notwithstanding the apparent conflict of positions on this issue of whether the objectives sought to be achieved through the enactment of the Medical Professional Liability Act can be met, it is up to the Legislature, and not this Court, to consider and resolve these arguments which concern the wisdom of medical malpractice reform. As we stated in *Robinson*, ““W. Va. Code, 55-7B-8, as amended, . . . is an integral part of the comprehensive resolution of the clear social and economic problem reasonably perceived by the legislature in enacting the Act.”” 186 W.Va. at 729, 414 S.E.2d at 886.”


Such deference is also due here. The simple Notice of Claim and Certificate of Merit provisions should be upheld by this court, and the dismissal of the plaintiff's cause of action affirmed.

V. Conclusion

For these reasons, DTCWV submits that the circuit court's dismissal of plaintiffs' action for noncompliance with West Virginia Code § 55-7B-6(b) should be upheld, and those provisions should be held constitutional.

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CERTIFICATE OF SERVICE

I, Thomas J. Hurney, Jr., do hereby certify that I have served the foregoing Brief of Amicus Curiae, Defense Trial Counsel of West Virginia upon the following counsel of record by depositing a true and accurate copy thereof in the United States Mail, postage prepaid, this 1<sup>st</sup> day of October, 2004, addressed as follows.

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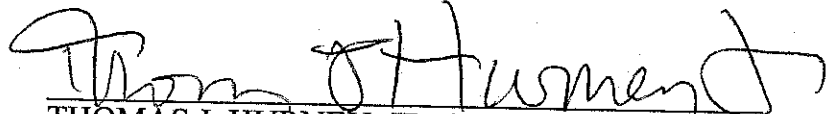
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