

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 31757

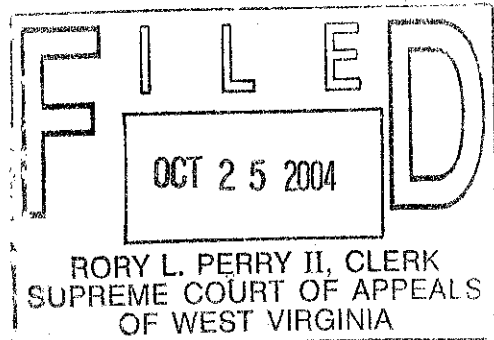
BERNARD BOGGS, as administrator of the  
Estate of HILDA BOGGS, deceased, as personal  
representative of the statutory beneficiaries of the  
wrongful death claim herein asserted and  
In his own right,

Appellants,

v.

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

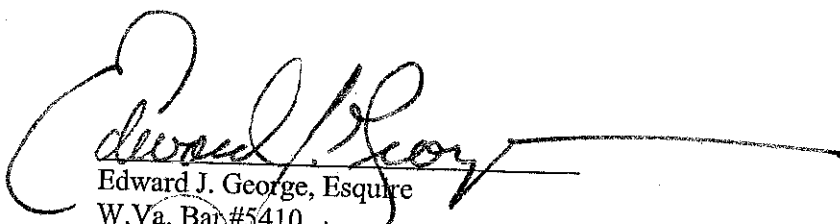
Appellees.



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AMICUS CURIAE BRIEF  
OF CHARLESTON HEALTH ASSOCIATES, INC.  
d/b/a PHYSICIANS ALLIANCE OF WEST VIRGINIA

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## INTEREST OF AMICUS CURIAE

Charleston Health Associates, Inc., d/b/a Physicians Alliance of West Virginia ("Physicians Alliance") was incorporated in 1985 and was granted a True Name certificate by the Secretary of State on March 25, 1996, to do business as the "Physicians Alliance of West Virginia." It has some 285 members throughout West Virginia. Its purposes include formulating, developing, and putting into effect novel systems of health care delivery, so as to assure delivery of adequate medical services at reasonable cost to patients. The Physicians Alliance also strives to provide third-party payors with medical information and expertise. The Physicians Alliance members have a special interest in this matter in that they participated in advancing reforms to the Medical Professional Liability Act and are directly affected by this Court's decision.

### ARGUMENT

At this stage of the proceeding, the Physicians Alliance sees no need to reiterate the arguments of others or to go on record as endorsing the sound legal arguments of the Appellees or of the many *amici* which have filed briefs in support of the Appellees' position. What the Physicians Alliance does wish to discuss – in greater depth than it believes any party or *amicus* has done heretofore – is a single issue: the goal of West Virginia's medical malpractice reform legislation to attract and retain in West Virginia a sufficient number of qualified physicians. The Physicians Alliance regards this as one of the most important and fundamental objectives of the medical malpractice liability reforms adopted by the Legislature.

The medical malpractice reform bill enacted in 2003 expressly states a legislative finding as to the need to improve our ability to attract to, and retain in, this State qualified practicing physicians. See, Committee Substitute for H.B. 2122 as enacted on March 8, 2003 at page 93 and as codified at W.Va. Code §55-7B-1. The Physicians Alliance believes that this goal is central to ensuring the availability and provision of quality health care to the citizens of West Virginia, which is the very first legislative finding and declaration of H.B. 2122:

The Legislature hereby find and declares that the citizens of this state are entitled to the best medical care and facilities available and that health care providers offer an essential and basic service which requires that the public policy of this state encourage and facilitate the provision of such service to our citizens.

Id. Excellent facilities are simply a matter of money. Vast sums could be spent to construct, enlarge, and modernize hospitals and clinics; the latest and most expensive equipment for diagnosis and treatment could be purchased. But unless competent and caring physicians can be induced to settle here, to stay here, and to remain in practice here, every other endeavor may be for naught.

Physicians are not a commodity. They cannot be purchased and stored in inventory. They are not a natural resource guaranteed to us by our geography. They are individual human beings who are free to choose where to practice. It is imperative that we create a physician-friendly climate in order to persuade enough doctors in all essential areas of medicine – general practice, surgery, obstetrics, to mention just a few – that West Virginia is a satisfying place to live and a welcome place to practice.

West Virginia has many valuable assets, such as its location, its natural beauty, and the solid traditional values of its citizens. There is much to attract new residents and to persuade current residents not to move away. With respect to doctors, there are numerous factors that can affect where they choose to live and work, and many are likely to transcend purely monetary considerations. Where are their skills needed? What would be a pleasant and rewarding place to make a home? Where will their efforts be most fully appreciated? Where will they be esteemed as healers rather than looked upon as a lucrative pool of potential defendants, ready to fill the pockets of trial lawyers and their clients, often irrespective of whether or not they have been guilty of any negligence in treating their patients.

Not every physician will be drawn to the most lucrative specialty or to some distant metropolis where fees and other compensation are the highest. Many doctors have specific attachments or attractions to West Virginia in terms of heritage, ancestors, family, or friends.

Some may be prepared to make real sacrifices and forgo attractive opportunities to live here. But how many doctors, however wedded to their homes, however devoted to their callings, and however altruistic in their motives, would willingly subject themselves to a legal jurisdiction where fundamental fairness is in doubt and where disturbing legal uncertainty prevails.

A sound medical malpractice system is an important mechanism. It is needed to protect patients and their families in those, hopefully rare, instances of incompetence or carelessness on the part of those to whom they have entrusted the health and lives of themselves and their loved ones. But, like any part of a structure of justice, the medical malpractice system needs to be fair and balanced. It must exonerate the innocent just as surely as it punishes the guilty. It must dash the hopes of the greedy and rapacious just as certainly as it compensates the genuinely injured and aggrieved. It cannot operate to transform the science and art of medicine into a no-risk, no fault system where ideal results are guaranteed or, in their absence, compensation is awarded, regardless of responsibility. Or, if it does, there should be no surprise if few physicians in a position to practice elsewhere choose to subject themselves to it.

High-risk medical specialties are an especially sensitive interest. With a smaller patient population to serve than such specialists would have in more densely populated locales, and with a higher incidence of adverse medical results, not because of any deficiency of care or skill, but simply because of the nature of their specialties, these practitioners are harder to attract and retain. And their presence in the State is crucial to assuring high quality medical care to our citizens – unless we are prepared to resign ourselves to crossing state lines whenever we need the care of a neurologist, an orthopedic surgeon, or an obstetrician. It is a serious loss to a community whenever a practitioner in a high-risk specialty decides to move or retire. It is tragic when the prime impetus for the decision is an unfair and unbalanced medical malpractice system.

The Legislature has a clear appreciation of the need for this fairness and balance. W.Va. Code §55-7B-1. The representatives elected by the people to make their laws have labored tirelessly to craft laws governing medical malpractice that (in addition to rectifying many other

matters) will serve to stem the flow of physician departures and premature retirements and to attract new physicians to West Virginia. In order to achieve this goal, it is imperative that the carefully balanced system devised by the Legislature be respected as clear and settled law. It may not be a system to everyone's liking. It may include features that some individuals or groups with strong viewpoints might wish to change. But it is the system of law which our elected lawmakers devised to accommodate all competing interests and to meet the pressing need to attract and retain physicians. It should be respected as such. Already it is starting to achieve some promising results, but unless it persists as settled law and is upheld against the challenges of those who hold different views than our legislative lawmakers, these stirrings of improvement can all too easily be crushed.

It is probably impossible to overstate the benefits that would accrue from the maintenance of a physician-friendly atmosphere in West Virginia – anchored in a fair, balanced, and settled medical malpractice system. To start with the most obvious result, we would have a high quality system of medical practitioners on which our citizens could rely – locally to a large extent, but in any event within West Virginia. But beyond this we would have the myriad advantages that come with a vibrant medical culture: doctors consulting with fellow doctors on a collegial basis, sharing their knowledge, experience, and innovations; the genuine advances in medical science that physicians can achieve when they are neither isolated nor beleaguered; role models and advisors for young people who will be encouraged by example to embrace medicine as a career. All of this and more is possible if we respect the Legislature's objective of implementing a fair and balanced system that recognizes and protects the rights of both patients and physicians and that can be relied on by all concerned as settled law.

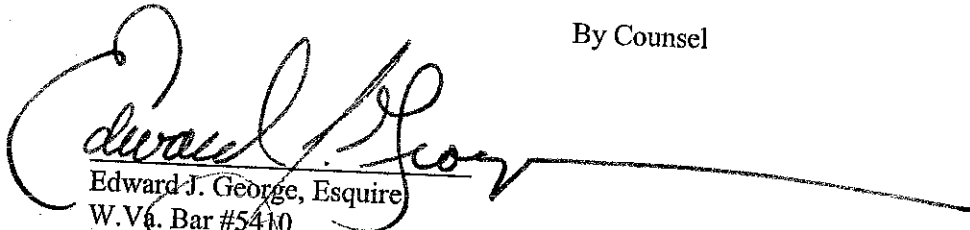
#### CONCLUSION

For the foregoing reason, the Physicians Alliance respectfully urges this Court to uphold the judgment of the Legislature which crafted H.B. 2122 and of the Governor who signed it into

law, and to reject the contentions that the statute has any constitutional infirmities or any ambiguities in need of interpretation.

CHARLESTON HEALTH ASSOCIATES, INC.  
d/b/a PHYSICIANS ALIANCE OF WEST VIRGINIA

By Counsel

A handwritten signature in black ink, appearing to read "Edward J. George", is written over a horizontal line. The signature is stylized and cursive.

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