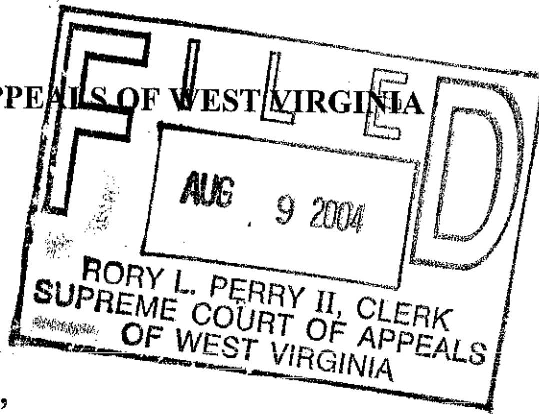
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



PAUL Z. HINCHMAN, by and through his next friend, CHARLOTTE HINCHMAN; CHARLOTTE HINCHMAN, individually,

Plaintiffs-below, Appellants,

v.

Appeal No. 31760

JULIE M. GILLETTE, R.N., C.R.N.A, individually, and as the Agent, Servant and/or Employee of MEDICAL DOCTOR ASSOCIATES, INC., and as the agent, servant, and/or employee of STONEWALL JACKSON MEMORIAL HOSPITAL COMPANY, et al.,

Defendants-below, Appellees.

BRIEF OF APPELLEE JULIE M. GILLETTE, R.N., C.R.N.A

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Appellee, Julie M. Gillette, R.N., C.R.N.A. ("Nurse Gillette"), by counsel, and pursuant to Rule 10(b) of the Rules of Appellate Procedure, hereby respectfully submits the Brief of Appellee Julie M. Gillette, R.N., C.R.N.A. Succinctly, the lower court properly dismissed Appellants' Complaint because Appellants failed to comply with the mandatory pre-filing requirements contained in the Medical Professional Liability Act, West Virginia Code § 55-7B-1, *et seq.* (the "MPLA"). Accordingly, as discussed further below, this Court should affirm the ruling of the Circuit Court of Lewis County, West Virginia.

II. THE KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

Appellants filed the instant Complaint in the Circuit Court of Lewis County on January 7, 2003, alleging that the Appellees, providers of health care as defined by the MPLA, "deviated from accepted standards of practice" (Record at 7 (hereinafter "Rec. at __")), and seeking various forms of damages as a result. Appellants' claims fall squarely within the MPLA.

Prior to bringing this action, Appellants served the same notice of claim and screening certificate of merit on each Appellee. Nurse Gillette responded to said notice of claim and screening certificate of merit, and informed Appellants that their screening certificate of merit was deficient. (See id. at 748-49). Moreover, in her Answer, Nurse Gillette again informed Appellants that their screening certificate of merit was defective, and that Nurse Gillette reserved the right to file a motion to dismiss on that issue. (See id at 126). Indeed, each of the Appellees, with the exception of Medical Doctor Associates, Inc. (hereinafter "Medical Doctor"), filed motions to dismiss on the basis that Appellants failed to comply with the pre-filing requirements of the MPLA set forth in West Virginia Code § 55-7B-6(b).

On June 19, 2003, Judge Thomas H. Keadle heard argument on Appellees' various motions to dismiss, and he properly dismissed Appellants' Complaint as to Nurse

Gillette, Roger K. Pons, M.D. and Stonewall Jackson Memorial Hospital Company (hereinafter "Stonewall Jackson"). Judge Keadle found that "the Plaintiffs' screening certificate of merit from Roberto C. Valenzuela, M.D. is deficient and does not comply with the foregoing statutory provisions . . ." (Id. at 716). Indeed, Judge Keadle found that the screening certificate of merit was deficient in four particulars: (1) Appellants failed to provide a separate screening certificate of merit for each provider; (2) the screening certificate of merit did not state with particularity the expert's familiarity the standard of care applicable to each provider; (3) the screening certificate of merit did not state with particularity the standard of care applicable to each provider and how the standard was breached; and (4) the screening certificate of merit did not state with particularity how each alleged breach of the standard of care resulted in injury to or the death of the Appellants' decedent. (See id. at 716-17).

The Circuit Court properly dismissed the Complaint. West Virginia law is clear. West Virginia Code § 55-7B-6 provides, *inter alia*, as follows:

> (b) 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) (Supp. 2001) (amended 2003) (emphasis added).[1]

The Circuit Court's decision was based upon a plain reading of the statutory language contained in West Virginia Code § 55-7B-6(b). Under such a plain reading, it is clear that Appellants failed to comply with the pre-filing requirements of the MPLA. Their screening certificate of merit states some of the required information generally, but not with the particularity required by the statute. Without such particularity, the screening certificate of merit is without value. Simply put, without a valid screening certificate of merit, Appellants were not entitled to bring their claims under the MPLA. See W. Va. Code § 55-7B-6(a) (Supp. 2001) (amended 2003). Appellants have attempted to obscure their failings by addressing on appeal issues that the lower court did not decide; namely, that the lower court held that their expert was not qualified to render an opinion. Moreover, Appellants' constitutional arguments and their arguments related to judicial notice are unavailing in the instant matter. The only purpose of including such arguments appears to be to detract attention from the only real issue in this case: Did Appellants comply with the pre-filing requirements of the MPLA? As demonstrated below, it is abundantly clear that Appellants did not comply. Accordingly, Nurse Gillette respectfully requests that this Honorable Court affirm the ruling of the circuit court.

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[1] The instant action was filed on January 7, 2003. (See Rec. at 4-48). The MPLA was amended to add the pre-filing requirements at issue in this case in 2001. These amendments controlled all cases filed after March 1, 2002. See W. Va. Code § 55-7B-10(a) (Supp. 2003). After this action was filed, the West Virginia Legislature further amended the MPLA in 2003. These amendments controlled actions filed after July 1, 2003. W. Va. Code § 55-7B-10(b) (Supp. 2003). Therefore, the 2001 amendments control the resolution of the instant action. The citations to the MPLA contained herein from the 2001 enactment are parenthetically indicated as "(Supp. 2001) (amended 2003)." The 2003 amendments are denoted parenthetically as "(Supp. 2003)."

III. STATEMENT OF THE CASE

To the extent that they are necessary to a determination of the question pending before this Court, Nurse Gillette provides the following relevant facts:[2] On October 2, 2001, Paul Z. Hinchman was scheduled to undergo a non-emergency medical procedure. (Rec. at 6). The procedure was to be performed by Dr. Pons at Stonewall Jackson. (Id.). Mr. Hinchman was taken to an operating room, whereupon Dr. Pons ordered anesthesia which was administered by Nurse Gillette. (Id.). Prior to the initiation of the planned surgical procedure, Mr. Hinchman was found to be in respiratory arrest. Mr. Hinchman was then resuscitated by Dr. Pons, Nurse Gillette and others. Eight months later, on June 17, 2002, Mr. Hinchman died. (Id. at 7). In their Petition, Appellants repeatedly claim that Mr. Hinchman "died . . . from complications associated with the brain injury he had sustained on October 2, 2001." (Brief of Appellant at 3). However, Appellants requested an autopsy of Mr. Hinchman. The autopsy disclosed that Mr. Hinchman's primary cause of death was "LYMPHOMA, DIFFUSE, WITH INVOLVEMENT OF CERVICAL, AXILLARY, MEDIASTINAL, BRONSHIAL, PARA-AORTIC, SPLANTIC, INGUINAL, MESENTERIC NODES WITH ENLARGEMENT UP TO 12 CM." (Autopsy Report, August 22, 2002, attached as an Addendum to Julie M Gillette, R.N., C.R.N.A.'s Response in Opposition to Petition for Appeal). This fact clearly was not shared with the screening physician who reviewed only five days of records from October 2001.

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[2] The underlying facts of this case are largely non-determinative of the procedural issues herein. Appellants spent a significant amount of their brief laying out the facts of Mr. Hinchman's surgery for a very specific purpose: to attempt to show that there was allegedly actionable conduct, and, therefore, the rules should not apply to them. In this regard, Appellants use pejorative descriptions of the events such as "after anesthesia was slammed into Mr. Hinchman's veins . . ." (Brief of Appellant at 2). However, as seen below, the entirety of Plaintiff's factual recitation is based on a faulty premise; namely, that Mr. Hinchman died as a result of his purported brain injuries. In reality, it is clear that Mr. Hinchman died as a result of the fact that he suffered from lymphoma.

On or about December 9, 2002, counsel for Nurse Gillette accepted service of a notice of claim and a purported screening certificate of merit on behalf of Nurse Gillette pursuant to a request from Appellants' counsel, Thomas G. Wilson. (See Rec. at 744-54). On January 8, 2003, Nurse Gillette responded to Appellants' notice of claim and screening certificate of merit, specifically pointing out that Appellants failed to comply with the requirements of W. Va. Code § 55-7B-6(b) by tendering a defective screening certificate of merit. (See id. at 755-56).

On March 31, 2003, Nurse Gillette filed her Answer to Appellants' Complaint, once again stating as a defense that Appellants failed to comply with the requirements of the MPLA relating to the Screening Certificate of Merit, and reserving that issue for a future motion to dismiss. (See id. at 126).

IV. SUMMARY OF ISSUES PRESENTED

Based on the Appellants' Brief, there are essentially five issues before the Court. The first issue is whether Appellants properly followed the requirements of West Virginia Code § 55-7B-6(b) in tendering their screening certificate of merit. This issue is easily resolved. Appellants failed to provide a separate screening certificate of merit for each Appellee. Appellants' expert failed to state with particularity his familiarity with the standards of care applicable to each provider. Appellants' expert failed to state with particularity the standard of care applicable to each provider and how the standard was breached. Finally, Appellants' expert failed to state with particularity how the alleged breach of the standard of care resulted in injury to or the death of the Appellants' decedent. Simply put, Appellants' screening certificate of merit wholly failed to comply with West Virginia Code § 55-7B-6(b).

The second issue is whether the lower court's Order violated the "open access" provision of Article III, § 17 of the West Virginia Constitution. The "open access" provision is

inapplicable to the instant case because there is no allegation that the public or the litigants were denied a public hearing.

The third issue is whether Appellees have a right to challenge the sufficiency of Appellants' screening certificate of merit. Appellees clearly have the right to challenge the screening certificate of merit because it is a necessary prerequisite to bring a cause of action under the MPLA. See W. Va. Code § 55-7B-6(a) (Supp. 2001) (amended 2003). Moreover, if Appellants' argument is correct, than the result would be that no one has the ability to challenge a screening certificate of merit. If Appellees cannot challenge Appellants' screening certificate of merit, than the pre-suit requirements of the MPLA are hollow. Regardless, Appellants have not cited any statutory provision or case that indicates that Appellees cannot challenge Appellants' screening certificate of merit. In addition, Nurse Gillette timely responded to Appellants' notice of claim.

The fourth issue is whether the West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure conflict with the MPLA in terms of governing practice and procedure before the courts, and the qualifications of an expert. Succinctly, there can be no conflict between the MPLA pre-filing requirements and either set of court rules because the former control the duties and responsibilities of parties pre-suit, while the latter control the duties and responsibilities after a suit has been filed. Moreover, the lower court did not decide that Appellants' expert was unqualified, or that the bases of his opinions were defective. This argument is baseless. Appellants also have not established that the MPLA impermissibly conflicts with either set of rules.

The final issue before the Court is whether the lower court erred in taking judicial notice of the fact that "doctors are leaving this state and we've got to do something about that."

Assuming, *arguendo*, that the lower court indeed took judicial notice of this fact, it is clear that the lower court was merely summarizing the legislative intent of the MPLA. This language is stated in similar form in the legislative intent section of the MPLA, which states that "the cost of liability insurance coverage has continued to rise dramatically, resulting in the state's loss and threatened loss of physicians." W. Va. Code § 55-7B-1 (Supp. 2003). Thus, the alleged adjudicative fact is contained in a public statute, and, therefore, generally known within the territorial jurisdiction of the trial court. W. Va. R. Evid. 201(b). The lower court took discretionary notice of a fact contained in the laws of the State of West Virginia. This is entirely proper under the West Virginia Rules of Evidence.

V. POINTS AND AUTHORITIES RELIED UPON

A. STANDARD OF REVIEW.

State *ex rel.* McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 461 S.E.2d 516 (1995); Chrystal R.M. v. Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415 (1995).

B. APPELLANTS' COMPLAINT WAS PROPERLY DISMISSED BECAUSE APPELLANTS' CERTIFICATE OF MERIT FAILED TO STATE WITH PARTICULARITY THE INFORMATION REQUIRED BY WEST VIRGINIA CODE § 55-7B-6(B).

State v. Elder, 152 W. Va. 571, 165 S.E.2d 108 (1968); In re Stephen Tyler R, 213 W. Va. 725, 584 S.E.2d 581 (2003); State v. Jarvis, 199 W. Va. 635, 487 S.E.2d 293 (1997); State *ex rel.* Roy Allen S. v. Stone, 196 W. Va. 624, 474 S.E.2d 554 (1996); W. Va. Code § 55-7B-1; W. Va. Code § 55-7B-6.

1. **Appellants failed to provide separate certificates of merit for each Appellee.**
   W. Va. Code § 55-7B-6(b).

2. **Appellants' screening certificate of merit does not state the information required by the MPLA with particularity.**
   In re Urcarco Sec. Litig., 148 F.R.D. 561 (N.D. Tex. 1993); Shields v. Amoskeag Bank Shares, Inc., 766 F. Supp. 32 (D.N.H. 1991); State *ex rel.* Cohen v. Manchin, 175 W. Va. 525, 336 S.E.2d 171 (1984); W. Va. Code § 55-7B-6; W. Va. R. Civ. P. 9

3. **The instant case was properly dismissed.**
   E.E.O.C. v. W.H. Braum, Inc., 347 F.3d 1192 (10th Cir. 2003); In Town Hotels Ltd. P'ship v. Marriott Int'l, Inc., 246 F. Supp. 2d 469 (S.D.W.Va. 2003); Clark v.

Sarasota County Pub. Hosp., 65 F. Supp. 2d 1308 (M.D. Fla. 1998); Bryan v. Acorn Hotel, Inc., 931 F. Supp. 394 (E.D. Pa. 1996); United Parcel Serv., Inc. v. Int'l Bhd. of Teamsters, 859 F. Supp. 590 (D.D.C. 1994); Burton v. Reed City Hosp. Corp., 673 N.W.2d 135 (Mich. Ct. App. 2003); Dorris v. Detroit Osteopathic Hosp. Corp., 594 N.W.2d 455 (Mich. 1999); Harrison v. Davis, 197 W. Va. 651, 478 S.E.2d 104 (1996); Copley v. Mingo County Bd. of Educ., 195 W. Va. 480, 466 S.E.2d 139 (1995); Hosp. Corp. of Am. v. Lindberg, 571 So.2d 446, 449 (Fla. 1990); W. Va. R. Civ. P. 10, 12 and 56.

4. **The MPLA requires something different than a showing of "probable cause."**
State *ex rel.* Johnson v. Robinson, 162 W. Va. 579, 251 S.E.2d 505 (1979); W. Va. Code § 5-11-10; W. Va. Code § 55-7B-6; Fl. Stat. Ann. § 766.203; W. Va. R. Crim. P. 5.1.

5. **The "open access" provision of the West Virginia Constitution is inapplicable to the case at bar.**
Gibson v. West Virginia Dept. of Highways, 185 W. Va. 214, 406 S.E.2d 440 (1991); State *ex rel.* Herald Mail Co. v. Hamilton, 165 W. Va. 103, 267 S.E.2d 544 (1980); W. Va. Const. art. III, § 17.

C. APPELLEES HAD A RIGHT TO CHALLENGE THE SUFFICIENCY OF APPELLANTS' NOTICE OF CLAIM AND SCREENING CERTIFICATE OF MERIT BECAUSE THESE DOCUMENTS ARE NECESSARY PREREQUISITES TO BRING A CAUSE OF ACTION UNDER THE MEDICAL PROFESSIONAL LIABILITY ACT, AND, IN ANY EVENT, NURSE GILLETTE TIMELY RESPONDED TO APPELLANTS' NOTICE OF CLAIM.

1. **Nurse Gillette timely responded to Appellants' notice of claim.**

2. **The notice of claim and screening certificate of merit are necessary prerequisites to filing an action under the MPLA, and there is no provision in the MPLA that indicates that failure to timely respond results in a waiver of any right, other than the right to pre-litigation mediation.**
W. Va. Code § 55-7B-6.

D. APPELLANTS HAVE NOT ESTABLISHED THAT THE MEDICAL PROFESSIONAL LIABILITY ACT IMPERMISSIBLY CONFLICTS WITH THE WEST VIRGINIA RULES OF CIVIL PROCEDURE OR THE WEST VIRGINIA RULES OF EVIDENCE.
State *ex rel.* Weirton Med. Ctr. v. Mazzone, 214 W. Va. 146, 587 S.E.2d 122 (2002); Games-Neely *ex rel.* West Virginia State Police v. 1175 Sam Mason Rd., 211 W. Va. 236, 565 S.E.2d 358 (2002); Bennett v. Commonwealth Land Title Ins. Co., 179 W. Va. 742, 372 S.E.2d 920 (1988); W. Va. Const. art. VIII, § 3; W. Va. Code § 55-1-4.

1. **The pre-filing requirements contained in the MPLA cannot conflict with the West Virginia Rules of Civil Procedure or the West Virginia Rules of**

Evidence because the former govern the procedure prior to filing a suit, and the latter govern the procedure after an action is filed.
Erie R.R. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938); Stanley v. United States, No. 1:03CV187, 2004 WL 1385522 (N.D.W.Va. June 18, 2004); W. Va. R. Civ. P. 1; W. Va. R. Evid. 101.

2. **The lower court did not decide that Appellants' expert was not qualified to render an opinion, or that the bases of Appellants' expert's opinion were improper, but rather that that the screening certificate of merit did not contain the information required by the MPLA; nonetheless, there is no conflict between the West Virginia Rules of Evidence and the pre-filing requirements of the MPLA.**
State *ex rel.* Clark v. Blue Cross Blue Shield of W. Va., Inc., 203 W. Va. 690, 510 S.E.2d 764 (1998); Tiernan v. Charleston Area Med. Ctr., Inc., 203 W. Va. 135, 506 S.E.2d 578 (1998); Trent v. Cook, 198 W. Va. 601, 482 S.E.2d 218 (1996); Voelker v. Frederick Bus. Props. Co., 195 W. Va. 246, 465 S.E.2d 246 (1995); Hall's Park Motel, Inc. v. Rover Constr., Inc., 194 W. Va. 309, 460 S.E.2d 444 (1995); State *ex rel.* State Line Sparkler of WV, Ltd. v. Teach, 187 W. Va. 271, 418 S.E.2d 585 (1992); W. Va. Code § 55-7B-6; W. Va. R. Evid. 702 -705.

3. **The West Virginia Rules of Civil Procedure do not conflict with the MPLA's pre-filing requirements.**
W. Va. Code § 55-7B-6; W. Va. R. Civ. P. 8, 12, 26 and 56.

F. THE COURT BELOW PROPERLY TOOK JUDICIAL NOTICE OF THE LEGISLATIVE HISTORY OF THE MEDICAL PROFESSIONAL LIABILITY ACT WITH REGARD TO THE NOTION THAT THE PURPOSE OF THE ACT, IN PART, IS TO CURTAIL THE EXODUS OF PHYSICIANS FROM THE STATE.
Smith v. State Workmen's Comp. Comm'r, 159 W. Va. 108, 219 S.E.2d 361 (1975); W. Va. Code § 55-7B-1; W. Va. Code § 55-7B-10; W. Va. R. Evid. 201.

VI. DISCUSSION OF LAW

A. STANDARD OF REVIEW.

This action is before the Court on an order granting a motion to dismiss. Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo.* Syl. pt. 2, State *ex rel.* McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 461 S.E.2d 516 (1995). Similarly, since this case involves the interpretation of statutory law—in this case, the MPLA—the Court applies a *de novo* standard of review. Syl. pt. 1, Chrystal

R.M. v. Charlie A.L., 194 W. Va. 138, 459 S.E.2d 415 (1995). Therefore, *de novo* review is the appropriate standard in this case.

B. APPELLANTS' COMPLAINT WAS PROPERLY DISMISSED BECAUSE APPELLANTS' CERTIFICATE OF MERIT FAILED TO STATE WITH PARTICULARITY THE INFORMATION REQUIRED BY WEST VIRGINIA CODE § 55-7B-6(B).

The primary issue in this case, and, indeed, the issue on which this entire appeal turns, is whether Appellants properly complied with the pre-filing requirements contained in West Virginia Code § 55-7B-6(b), and specifically whether their screening certificate of merit was sufficient under the MPLA. The MPLA represents "a comprehensive resolution of the matters and factors which the Legislature finds must be addressed to accomplish the goals set forth in [the declaration of purpose]." W. Va. Code § 55-7B-1 (Supp. 2003). One of the statutory components of the Legislature's comprehensive reform of medical malpractice actions is a set of prerequisites that a plaintiff must follow in order to file a claim against a medical provider. See W. Va. Code § 55-7B-6. Indeed, the MPLA provides that "no person may file a medical professional liability action against any health care provider without complying with the provisions of this section." W. Va. Code § 55-7B-6(a) (Supp. 2001) (amended 2003). Section 55-7B-6 provides, *inter alia*, as follows:

> (b) 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) (Supp. 2001) (amended 2003) (emphasis added). The clear purpose of this provision is to "weed out" unmeritorious claims. The screening certificate of merit is designed to require that a plaintiff obtains the opinion of an expert pre-suit in order to avoid the possibility of baseless litigation. Indeed, even Appellants appear to concede this point. (Brief of Appellant at 10). Thus, the notice of claim and screening certificate of merit are the devices created by the Legislature to further this end.

West Virginia Code § 55-7B-6(b) is not ambiguous; it contains a clear set of requirements that a potential plaintiff must follow pre-suit. This Court has observed that "[w]here the language of a statute is clear and without ambiguity the plain meaning is to be accepted without resorting to the rules of interpretation." Syl. pt. 2, State v. Elder, 152 W. Va. 571, 165 S.E.2d 108 (1968). See also In re Stephen Tyler R, 213 W. Va. 725, 740, 584 S.E.2d 581, 596 (2003); Syl. pt. 1, State v. Jarvis, 199 W. Va. 635, 487 S.E.2d 293 (1997); State *ex rel.* Roy Allen S. v. Stone, 196 W. Va. 624, 630, 474 S.E.2d 554, 560 (1996). As demonstrated below, under the plain language of the MPLA, Appellants failed to satisfy the prerequisites relating to the screening certificate of merit.

1. Appellants failed to provide separate certificates of merit for each Appellee.

The MPLA is clear. A plaintiff must provide a separate screening certificate of merit to each provider against whom a claim is asserted. W. Va. Code § 55-7B-6(b). Appellants' screening certificate of merit is simply a letter addressed to Appellants' counsel from

R.C. Valenzuela, M.D. The obvious import of this provision is to compel a plaintiff to set out, with particularity, certain elements listed above for each provider a plaintiff seeks to sue. Thus, a plain reading of this provision indicates that to comply with the MPLA, Appellants should have produced a screening certificate of merit that is tailored to Nurse Gillette's actions in this case. Moreover, the certificate should have set forth the information required by statute relative to her actions. In turn, Appellants should have produced similar documents for each of the other providers that were similarly tailored to each person or entity's actions in this case.

Instead, Appellants' screening certificate of merit in this case simply groups all of the providers together, and generally alleges that each provider breached the applicable standard of care. In pertinent part, Dr. Valenzuela states:

> I have been practicing anesthesiology in West Virginia since 1991, and have had the good fortune to participate in 5 years of academic practice as well as 6 years of private practice. I am a board certified anesthesiologist and have been appointed to the American Society of Anesthesiologists Committee on Surgical and Perioperative Anesthesia since October 2001. Therefore, I feel that I am familiar with the applicable standard of care in issue.
>
> As a board certified anesthesiologist as well as with my participation in peer review, medical executive, and clinical competency committees I feel that I am qualified to render an opinion on the case of Mr. Hinchman. I have enclosed a copy of my *curriculum vitae* for your review.
>
> After careful review of the records furnished me from Stonewall Jackson Memorial Hospital, Weston, WV, dated October 2, 2001 through October 7, 2001 pertaining to the treatment provided to Paul Z. Hinchman by Roger K. Pons, M.D., Julie M. Gillette, R.N., C.R.N.A., and various employees of Stonewall Jackson Memorial Hospital I conclude that the applicable standard of care was breached by the above entities in numerous ways.
>
> First, Mr. Paul Hinchman was excessively sedated for his physical condition, medical illness, and operative position. Second, the patient was inadequately monitored. Third, there was inadequate vigilance on the part of Nurse Gillette, Dr. Pons, and the other

> members of the OR Staff. Fourth, there was inadequate airway control. Fifth, there was a lack of recognition as to the underlying etiology of the patient's bradycardia resulting in delay of resuscitative efforts. And sixth, there was delayed airway securement once the patient was noted to be cyanotic.
>
> The above deviations resulted in prolonged hypoxia, and subsequent respiratory and cardiac arrest.

(Rec. at 9-10). It is impossible to differentiate the conduct of one Appellee from another in the screening certificate of merit served by Appellants. Accordingly, the lower court's dismissal of the instant case should be upheld on this ground alone.

2. Appellants' screening certificate of merit does not state the information required by the MPLA with particularity.

The MPLA requires that a plaintiff state certain information in his or her screening certificate of merit. Indeed, the MPLA provides that the screening certificate of merit must 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." W. Va. Code § 55-7B-6(b) (Supp. 2001) (amended 2003).

The MPLA does not define the term "particularity." This Court has consistently held that "[e]ach word of a statute should be given some effect and a statute must be construed in accordance with the import of its language. Undefined words and terms used in a legislative enactment will be given their common, ordinary and accepted meaning." Syl. pt. 6, in part, State *ex rel.* Cohen v. Manchin, 175 W. Va. 525, 336 S.E.2d 171 (1984). Rule 9(b) of the West Virginia Rules of Civil Procedure, which contains a similar particularity requirement, states that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." (emphasis added). The United States District Court for the Northern

District of Texas has stated in the context of the federal version of Rule 9(b) that "[p]leading with particularity means stating circumstances in detail. 'This means the who, what, when, where, and how: the first paragraph of any newspaper story.'" In re Urcarco Sec. Litig., 148 F.R.D. 561, 566 (N.D. Tex. 1993) (citing DiLeo v. Ernst & Young, 901 F.2d 624, 627 (7th Cir. 1990)), aff'd Melder v. Morris, 127 F.3d 1097 (5th Cir. 1994). Importantly, the court also held that "general allegations, which lump all defendants together failing to segregate the alleged wrongdoing of one from those of another do not meet the requirements of Rule 9(b)." Id. at 569. (citations omitted). Indeed, in addressing the federal counterpart of Rule 9(b), the United States District Court for the District of New Hampshire has stated that "[a]llegations in the form of mere conclusions, accusations, or speculation are not sufficient to meet Rule 9(b)'s particularity requirement without supporting facts." Shields v. Amoskeag Bank Shares, Inc., 766 F. Supp. 32, 38 (D.N.H. 1991). Simply put, Appellants' certificate of merit only states general allegations that "lump" all of the Appellees together.

Appellants make much of legislative intent and the interplay between the Rules of Civil Procedure and the MPLA. Appellants argue that it is not necessary to "set forth in protracted detail the plaintiff's theory of the case . . ." (Brief of Appellant at 22). This is not accurate. If this statement was accurate, then the Legislature would not have required that a plaintiff's medical expert set forth the elements of a certificate of merit with particularity. Thus, a showing of particularity requires Appellants to provide details. Indeed, this is the very purpose of the MPLA. If a plaintiff's expert could simply make general statements about a group of defendants, then there would be no need for the particularity requirement. This is not the proper interpretation. Appellants' expert must provide particular allegations against each defendant. Nurse Gillette will address the deficiencies in Appellants' screening certificate of merit in turn.

First, the expert must state his familiarity with the standard of care at issue in this case. See W. Va. Code § 55-7B-6(b) (Supp. 2001) (amended 2003). Dr. Valenzuela states that "I feel that I am familiar with the applicable standard of care in issue." (Rec. at 9-17). The problem with this assertion is that Dr. Valenzuela never states what constitutes the standard of care at issue in this case. According to the certificate, Dr. Valenzuela is an anesthesiologist. However, he never addresses whether he is applying the standard of care applicable to an anesthesiologist, a surgeon, a certified registered nurse anesthetist, a hospital, or a member of the operating room staff (all of whom are providers mentioned in the certificate of merit). While Dr. Valenzuela may be qualified to render an opinion in this case—and Nurse Gillette does not concede this point—he has not specified what constitutes the applicable standard of care for Nurse Gillette, or any other Appellee. Appellants argue that the standard of care in this case is a "no-brainer." If that is true, then it should have been simple for Dr. Valenzuela to state the standard of care with particularity. He did not do so. In addition, Appellants contend that in order to argue that Dr. Valenzuela did not adequately state the standard of care, Appellees must counter Dr. Valenzuela's opinion with an expert opinion. This assertion is entirely misplaced. Appellants' duty was to provide an expert to state his familiarity with the standard of care with particularity. Appellants did not do so. It does not take a medical expert to read Appellants' certificate of merit and concluded that it does not even state a standard of care. Therefore, Dr. Valenzuela has entirely failed to state with particularity whether he is familiar with the applicable standard of care because he has not stated what constitutes that standard. Moreover, the contours of any such standard will differ for each Appellee. A simple reformulation of the statutory language is insufficient to set forth a particularized statement.

Dr. Valenzuela also did not provide a particularized statement of how the applicable standard of care was breached. As noted above, Dr. Valenzuela never states the applicable standard of care, so it is impossible to determine how any Appellee breached such a standard. Dr. Valenzuela states:

> I conclude that the applicable standard of care was breached by the above entities in numerous ways . . . First, Mr. Paul Hinchman was excessively sedated for his physical condition, medical illness, and operative position. Second, the patient was inadequately monitored. Third, there was inadequate vigilance on the part of Nurse Gillette, Dr. Pons, and the other members of the OR Staff. Fourth, there was inadequate airway control. Fifth, there was a lack of recognition as to the underlying etiology of the patient's bradycardia resulting in delay of resuscitative efforts. And sixth, there was delayed airway securement once the patient was noted to be cyanotic.

(Rec. at 9). The most glaring omission in this section of the certificate of merit is the absence of names. Dr. Valenzuela does not assign any particular "breach" of the standard of care to any particular Appellee. Indeed, the only time Dr. Valenzuela mentions a particular person, he refers to every Appellee in this case. Nurse Gillette is only mentioned by name once in Appellants' expert's discussion of the standard of care. Appellants' expert states that "[t]hird, there was inadequate vigilance on the part of Nurse Gillette. . ." (Id.). In short, Dr. Valenzuela does not provide any of the particular details necessary to comply with the MPLA.

Dr. Valenzuela's conclusions—and that is all Dr. Valenzuela provides—are unsubstantiated and vague. Dr. Valenzuela was required to state his opinion, with particularity, as to how the breach of the applicable standard of care resulted in injury or death. The certificate of merit merely states that "[t]he above deviations resulted in prolonged hypoxia, and subsequent respiratory and cardiac arrest." (Id. at 10). It is important to note that Dr. Valenzuela never opines that any of the conduct he discusses caused Mr. Hinchman's death. Without such an

opinion, the certificate of merit is defective on its face. (Id. at 9-10). Moreover, Dr. Valenzuela makes clear that he only reviewed records from "October 2, 2001 through October 7, 2001." (Id. at 9). As noted above, the autopsy performed on Mr. Hinchman disclosed that his primary cause of death on June 17, 2002 was lymphoma. (See Autopsy Report, attached as an Addendum to Julie M Gillette, R.N., C.R.N.A.'s Response in Opposition to Petition for Appeal). It is entirely unclear to Nurse Gillette how Dr. Valenzuela can render a causation opinion when Appellants failed to provide him with information already in their possession that indicates that the cause of death had nothing to do with the purported injuries Mr. Hinchman suffered on October 2, 2001. Regardless, since the certificate of merit "lumps" all of the Appellees together, it is not a particularized statement tailored to each individual provider.

There is no causal link between the purported breaches of the standard of care and the conditions Appellants' decedent allegedly developed. That is what the MPLA requires: A particularized statement of the standard of care, how a provider breached the standard, and how that breach resulted in injury and death. Appellants did not provide any of this information with anywhere near the amount of specificity clearly envisioned by the MPLA. As a result, since service of a valid certificate of merit is a necessary prerequisite to filing an action under the MPLA, and Appellants failed to serve a valid certificate, the Court should affirm the dismissal of the instant case.

Appellants make much of their argument that under the circuit court's analysis of West Virginia Code § 55-7B-6 requires greater proof pre-suit than would be required at trial. This argument is wholly misplaced. The pre-filing requirements do not require proof of anything. All the MPLA requires is that a plaintiff must state certain elements with particularity. The operative word is "state." Appellants cannot point to any language in the circuit court's

order requiring them to prove anything. The simple fact is that Appellants did not properly set out the information they were required to set out. There is no mechanism in West Virginia Code § 55-7B-6 to challenge the conclusions of an expert; rather, it is an issue of knowledge and opinion. In the final analysis, Appellants did not state this information and, as a result, their certificate of merit is defective.

3. The instant case was properly dismissed.

On an appeal of a circuit court order granting a motion to dismiss a complaint, this Court accepts all the well-pleaded allegations in the complaint as true and draws all reasonable inferences in favor of the plaintiff. See Harrison v. Davis, 197 W. Va. 651, 656, 478 S.E.2d 104, 109 (1996).[3] Indeed, "[d]ismissal is proper pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure only where 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Id. (quoting Syl. pt. 3, in part, Chapman v. Kane Transfer Co., Inc., 160 W. Va. 530, 236 S.E.2d 207 (1977)

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[3] Appellants have intimated to this Court in their briefs and at the argument on their Petition that their Complaint could not be dismissed for failure to state a claim because Appellees each filed an Answer before moving to dismiss. Appellants are simply wrong. The West Virginia Rules of Civil Procedure expressly provide that a motion may be brought after the close of the pleadings to challenge a complaint on the basis that it fails to state a claim on which relief can be granted, and it is not waived by failing to bring on a motion to dismiss prior to the close of the pleadings. See Rules 12(c) and 12(h)(2). While Appellees' motions might be construed alternatively as motions for judgment on the pleadings, the standards governing a motion to dismiss and a motion for judgment on the pleadings are nearly identical.

In fact, this Court has stated that "[a] motion for judgment on the pleadings presents a challenge to the legal effect of given facts rather than on proof of the facts themselves. In this respect it is essentially a delayed demurrer or a motion to dismiss." Copley v. Mingo County Bd. of Educ., 195 W. Va. 480, 485, 466 S.E.2d 139, 144 (1995). This Court further stated that "[c]onsistent with modern procedure, the West Virginia Rules of Civil Procedure approach the motion essentially as a motion to dismiss for failure to state a claim." Id. (citation omitted). Courts have the discretion to treat a motion to dismiss under Rule 12(b)(6) as a motion for judgment on the pleadings because the standards for both motions are virtually identical. See United Parcel Serv., Inc. v. Int'l Bhd. of Teamsters, 859 F. Supp. 590, 592, n. 1 (D.D.C. 1994). This same proposition remains valid on the appellate level. See E.E.O.C. v. W.H. Braum, Inc., 347 F.3d 1192, 1195 (10th Cir. 2003) ("Defendant's motion to dismiss is more properly characterized as a motion for judgment on the pleadings because the motion was made after the pleadings had been closed."). Therefore, the standards for both motions are nearly identical.

(citing Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L.Ed.2d 80, 84 (1957)). In this case, as discussed above, there is no set of facts that would make Appellants' screening certificate of merit valid. Even if the allegations in the Complaint are taken as true and the Complaint is viewed in the light most favorable to Appellants, nothing alleged in the Complaint ameliorates the Appellants' failure to comply with West Virginia Code § 55-7B-6(b). The dismissal was proper.

Appellants seem to argue that they were denied their day in court. However, the circuit court dismissed Appellants' case without prejudice.[4] All Appellants needed to do was serve an appropriate notice of claim and screening certificate of merit. They did not do so, but, instead, appealed this case. All of the ramifications of the circuit court's ruling are entirely of Appellants' own making. Appellants argue that their case should not be dismissed for failing to comply with what they characterize as "technicalities." It is abundantly clear that dismissal without prejudice is the proper remedy for failing to comply with the MPLA's pre-filing requirements, unless the statute of limitations has run when a plaintiff brings his or her complaint, in which case the complaint should be dismissed with prejudice. In fact, other courts, including a decision from the Supreme Court of Florida cited by Appellants, have held that dismissal without prejudice is the proper remedy for a plaintiff's failure to comply with analogous pre-filing requirements. See Clark v. Sarasota County Pub. Hosp., 65 F. Supp. 2d 1308, 1310 (M.D. Fla. 1998) ("[i]f a court finds that a claimant has not complied with presuit

[4] Appellants also argue that the MPLA was designed to allow for liberal amendments to the pleadings pursuant to Rule 15 of the West Virginia Rules of Civil Procedure. This fact is not disputed. In fact, West Virginia Code § 55-7B-6(b) (Supp. 2001) (amended 2003) expressly states that the pre-filing requirements do not limit the application of Rule 15. It should be noted, however, that an amendment to Appellants' Complaint would not change the fact that they did not meet the pre-filing requirements. The intent of this provision is that a plaintiff can amend his or her complaint to conform to the evidence adduced during discovery or trial, not to overcome failure to follow the law pre-suit.

procedures prior to filing his complaint, § 766.206(2), Florida Statutes directs the court to dismiss the action."); Burton v. Reed City Hosp. Corp., 673 N.W.2d 135, 140 (Mich. Ct. App. 2003) ("[d]ismissal without prejudice is the appropriate remedy for noncompliance with either the notice provisions . . . or the affidavit of merit requirements . . . ."); Dorris v. Detroit Osteopathic Hosp. Corp., 594 N.W.2d 455, 466 (Mich. 1999) ("[a]s to the appropriate sanction for failure to file an affidavit of merit, we find in the present case that dismissal without prejudice is . . . appropriate."); Hosp. Corp. of Am. v. Lindberg, 571 So. 2d 446, 449 (Fla. 1990) ("[w]e therefore hold that, in medical malpractice actions, if a presuit notice is served at the same time as a complaint is filed, the complaint is subject to dismissal with leave to amend."). Thus, dismissal without prejudice was the proper remedy in this case for Appellants' failure to comply with the MPLA.

Appellants contend that the Court erred in considering evidence outside the Complaint in reaching its conclusion that Appellants' Complaint should be dismissed. It should be noted, however, that a great deal of this evidence was attached to Appellants' own brief. (See Rec. at 514-32). However, it is clear from the record in this case that the only documents the court considered in dismissing this case were the notice of claim and screening certificate of merit. The notice of claim and screening certificate of merit were both attached to Appellants' Complaint. (See id. at 9). Rule 10(c) of the West Virginia Rules of Civil Procedure expressly states that "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." Accordingly, the lower court properly considered these documents.

Indeed, the United States District Court for the Eastern District of Pennsylvania has stated that "[i]n considering a Rule 12(b)(6) motion, a court must primarily consider the allegations contained in the complaint, although matters of public record, orders, items appearing

in the record of the case and exhibits attached to the complaint may . . . be taken into account." Bryan v. Acorn Hotel, Inc., 931 F. Supp. 394, 395 (E.D. Pa. 1996), aff'd 162 F.3d 1150 (3d Cir. 1998) (citations omitted). See also In Town Hotels Limited Partnership v. Marriott Int'l, Inc., 246 F. Supp. 2d 469, 487 n.14 (S.D.W.Va. 2003) ("[w]hen, as here, the plaintiff relies on a contract in its complaint, and indeed includes a copy of that contract as an attachment to the complaint, 'it [is] proper for the district court to consider it in ruling on [a] motion to dismiss.'") (citation omitted). Thus, since Appellants attached a copy of the notice of claim and screening certificate of merit to their Complaint, it was not error for the lower court to consider those documents.

Nonetheless, even if the lower court considered matters outside the pleadings, it is not necessarily a reversible error. Indeed, this Court has held that "even if the circuit court inappropriately relied on matters outside the pleadings, we will affirm the dismissal if the Rule 12(b)(6) standards are met without reference to the extrinsic materials." Harrison, 197 W. Va. at 657, 478 S.E.2d at 110. The only materials the trial court utilized to decide the instant case were the notice of claim and screening certificate of merit. The other medical records and documents did not bear on this issue. Since the notice of claim and screening certificate of merit were attached to the Appellants' Complaint, the lower court properly considered these documents. See Bryan, *supra*. Therefore, it is apparent that the lower court could have made its determination without the other extrinsic materials attached to the Appellants and Appellees' briefs, and there is no evidence that the circuit court relied on these extrinsic materials in reaching its conclusion. Accordingly, the dismissal was proper.[5]

[5] It should be noted that even if the summary judgment standard was applicable to this case, Appellants' Complaint should still be dismissed. There is no genuine issue of material fact as to whether Appellants complied with the MPLA. See W. Va. R. Civ. P. 56(c). As discussed above, Appellants screening certificate of merit fails as a matter of law.

4. The MPLA requires something different than a showing of "probable cause."

Appellants contend that a probable cause showing is all that is necessary for a screening certificate of merit to pass muster under the MPLA. This contention is not borne out by the plain language of the MPLA. The MPLA requires a particularized showing of the elements contained in the screening certificate of merit. Under Appellants' analysis, the word "particularity" as it is used in West Virginia Code § 55-7B-6(b) has no meaning. Indeed, Appellants' have characterized the failure to provide the elements required to be contained in a screening certificate as "technicalities." Appellants strive to strip the meaning from the plain language of the MPLA in the hope that this Court will overlook the determinative factor in this case: Appellants did not tender an effective screening certificate of merit.

This Court has stated that "[i]t is a well known rule of statutory construction that the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning." State *ex rel.* Johnson v. Robinson, 162 W. Va. 579, 582, 251 S.E.2d 505, 508 (1979). Appellants implicitly urge the Court to disregard the term "particularity" because it is evident that their screening certificate of merit is wholly general, and it fails to set forth the required elements with the requisite amount of detail. However, this term has a specific purpose and meaning; namely, to require a plaintiff to provide detailed grounds for each and every breach of the applicable standard of care he or she seeks to assert against each and every health care provider. Instead, Appellants argue that only a showing of "probable cause" is necessary under the MPLA. However, Appellants' interpretation is incorrect, and it is based on other laws that explicitly call for a showing of "probable cause."

In support of this erroneous contention, Appellants attempt to draw an analogy between proceedings before the West Virginia Human Rights Commission and criminal

proceedings. This analogy is incomplete, at best. As an initial matter, the statute cited by Appellants states that:

> If it shall be determined after such investigation that no probable cause exists for substantiating the allegations of the complaint, the commission shall, within ten days from such determination, cause to be issued and served upon the complainant written notice of such determination, and the said complainant or his attorney may, within ten days after such service, file with the commission a written request for a meeting with the commission to show probable cause for substantiating the allegations of the complaint.

W. Va. Code § 5-11-10. Thus, it is apparent that the phrase "probable cause" is explicitly set forth in the statute regulating proceedings before the West Virginia Human Rights Commission. Similarly, Rule 5.1 of the West Virginia Rules of Criminal Procedure expressly states that "[i]f from the evidence it appears that there is probable cause to believe that an offense has been committed and that the defendant committed it, the magistrate shall forthwith hold the defendant to answer in circuit court." W. Va. R. Crim. P. 5.1(a). Again, Rule 5.1 explicitly requires a showing of probable cause. West Virginia Code § 55-7B-6(b) requires something different. West Virginia Code § 55-7B-6(b) requires a particularized showing of "(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." W. Va. Code § 55-7B-6(b) (Supp. 2001) (amended 2003). Accordingly, Appellants' claim that they must only show "probable cause" to comply with the MPLA's pre-filing requirements is simply erroneous.

Appellants also attempt to bolster their assertion that the MPLA does not require that certain elements must be shown with particularity with Florida law. Succinctly, Florida law requires a different showing than West Virginia law. Indeed, Florida law states that:

> Corroboration of reasonable grounds to initiate medical negligence litigation shall be provided by the claimant's submission of a verified written medical expert opinion from a medical expert . . . at the time the notice of intent to initiate litigation is mailed, which statement shall corroborate reasonable grounds to support the claim of medical negligence.

Fl. Stat. Ann. § 766.203(2). The crucial language in this statute is "reasonable grounds." By way of contrast, West Virginia law requires a particularized statement of the elements listed in West Virginia Code 55-7B-6(b). Thus, whether or not a certificate of merit is valid under Florida law has no bearing on this case because West Virginia law requires a plaintiff's expert to set forth the elements contained in W. Va. Code § 55-7B-6 with particularity. While Nurse Gillette does agree with the Appellants that the MPLA should not be read so as to unduly burden a plaintiff's right to litigate his or her case, the Legislature has established a mandatory mechanism with which a plaintiff must abide prior to filing suit. The fact that other states have different procedures, or that different procedures are used in other areas of West Virginia law, does not change the fact that certain requirements must be met before a plaintiff can bring a valid medical malpractice action.

5. The "open access" provision of the West Virginia Constitution is inapplicable to the case at bar.

Appellants contend that Judge Keadle's ruling unconstitutionally restricts Appellants' access to the court. (Brief of Appellant at 8-9). In support of this argument, Appellants cite Article III, § 17 of the West Virginia Constitution, which provides that "[t]he courts of this State shall be open, and every person, for an injury done to him, in his person, property, or reputation, shall have remedy by due process of law; and justice shall be administered without sale, denial, or delay." This constitutional provision actually embodies

three separate rights. See Gibson v. West Virginia Dept. of Highways, 185 W. Va. 214, 221, 406 S.E.2d 440, 447 (1991). Indeed, this Court has observed that

> The first right provides that "courts of this State shall be open[.]" For convenience, we term this the "open court" provision. The second right is embodied in the language "every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law[.]" For simplicity, we term this the "certain remedy" provision. The third right is that "justice shall be administered without sale, denial or delay."

Id. (quoting W. Va. Const. art. III, § 17) (footnotes omitted). Appellants seek relief pursuant to the open court provision. However, as seen below, the open court provision is entirely inapplicable to the case at bar.

This Court has had occasion to interpret the open court provision of Article III, § 17 in the past. This Court has stated that:

> The uniform interpretation of the mandate that the courts "shall be open" by those state courts called upon to construe the provision in their constitutions is that this language confers an independent right on the public to attend civil and criminal trials, and not simply a right in favor of the litigants to demand a public proceeding.

State *ex rel.* Herald Mail Co. v. Hamilton, 165 W. Va. 103, 110, 267 S.E.2d 544, 548 (1980). Thus, this court held that Article III, § 17—coupled with Article III, § 4 of the West Virginia Constitution— provides a "clear basis for finding an independent right in the public and press to attend criminal proceedings." Id. at syl. pt. 1. Simply put, there is no issue in this case that either the public or the litigants were denied an open hearing before the lower court. Such allegations are entirely absent from the Appellants' Brief, and such allegations are completely unsupported by the record below. Accordingly, this point of appeal is meritless.

C. APPELLEES HAD A RIGHT TO CHALLENGE THE SUFFICIENCY OF APPELLANTS' NOTICE OF CLAIM AND SCREENING CERTIFICATE OF MERIT BECAUSE THESE DOCUMENTS ARE NECESSARY PREREQUISITES TO BRING A CAUSE OF ACTION UNDER THE MEDICAL PROFESSIONAL LIABILITY ACT, AND, IN ANY EVENT, NURSE GILLETTE TIMELY RESPONDED TO APPELLANTS' NOTICE OF CLAIM.

Appellants claim that Appellees are not entitled to challenge the sufficiency of their screening certificate of merit for two reasons: (1) certain Appellees failed to respond to the notice of claim in a timely fashion; and (2) Appellees waived pre-litigation mediation. Both of these arguments are flawed and must fail.

1. Nurse Gillette timely responded to Appellants' Notice of Claim.

Appellants state that "[i]t is **undisputed** that Appellees, Pons and Gillette, **did not respond** to the notice of claim or the certificate of merit within thirty days of receipt . . ." (Brief of Appellant at 29) (emphasis in original). This statement is erroneous; these facts are certainly disputed. On or about December 9, 2002, counsel for Nurse Gillette accepted service of a notice of claim and a purported screening certificate of merit on behalf of Defendant Gillette pursuant to a request from Appellants' counsel. (See Rec. at 744-54). On January 8, 2003—within 30 days of the December 10, 2002 letter in which Nurse Gillette's counsel agreed to accept service—Nurse Gillette responded to Appellants' notice of claim and screening certificate of merit, specifically pointing out that Appellants failed to comply with the requirements of W. Va. Code § 55-7B-6(b) by tendering a defective screening certificate of merit (See id. at 755-56).

Regardless, Appellants apparently sought to serve Nurse Gillette directly, but did not so indicate to counsel for Nurse Gillette. (See id. at 581-82). The fact is that Appellants requested a courtesy from Nurse Gillette's counsel. In turn, Nurse Gillette's counsel extended the courtesy that Appellants' counsel requested; namely, that Defendant Gillette's counsel accepted service of the Notice of Claim effective December 9, 2003. After the Appellees in this

case pointed out Appellants' failure to comply with the MPLA, Appellants now seek to penalize Nurse Gillette because her counsel did as Appellants' counsel requested. Appellants' assertions in this regard are not well taken. If Appellants intended to serve Nurse Gillette with the Notice of Claim personally, they should have served Nurse Gillette alone. Instead, Appellants served both Nurse Gillette and her counsel, and Nurse Gillette's counsel accepted service on the request of Appellants' counsel. Therefore, Appellants are estopped by their own conduct from arguing that Nurse Gillette's response to the Notice of Claim was untimely.

2. The notice of claim and screening certificate of merit are necessary prerequisites to filing an action under the MPLA, and there is no provision in the MPLA that indicates that failure to timely respond results in a waiver of any right, other than the right to pre-litigation mediation.

Even if Nurse Gillette did not timely respond to Appellants' notice of claim, she still has the right to challenge the sufficiency of Appellants' pre-filing documents. It should be noted that Appellants' obligation to tender a compliant notice of claim and screening certificate of merit is mandatory. Indeed, the MPLA provides that "no person may file a medical professional liability action against any health care provider without complying with the provisions of this section." W. Va. Code § 55-7B-6(a) (Supp. 2001) (amended 2003). The MPLA does not contain any language—either express or implied—that indicates that Appellees would ever lose their right to challenge the sufficiency of Appellants' pre-filing documents, nor have Appellants brought any such authority to the attention of the Court. The MPLA is clear: No person may bring a cause of action under the MPLA unless he or she complies with the requirements of West Virginia Code § 55-7B-6. As discussed above, Appellants failed to tender a compliant screening certificate of merit, and their claims fail as a result.

Appellants appear to take the position that because Appellees did not request pre-litigation mediation, they cannot challenge Appellants' certificate of merit. Thus, Appellants

assert they can serve a wholly defective certificate of merit and it is only if a defendant agrees to attempt to settle the matter that a defendant can challenge the defective certificate of merit. The MPLA provides that any failure of a health care provider to respond to the notice of claim and screening certificate of merit only "constitutes a waiver of the right to request pre-litigation mediation." W. Va. Code § 55-7B-6(h) (Supp. 2001) (amended 2003). In fact, as the following colloquy makes clear, Appellants' own counsel conceded this premise in the hearing below. The hearing transcript states that:

> MS. MCQUAIN: Judge, I disagree with that, because the statute also provides that the Defendant file – or, respond to the Notice and Certificate of Merit within 30 days of receipt of that, and there were only two defendants that actually responded to the Notice and Certificate of Merit within the 30 days after receiving those.
>
> BY THE COURT: And what happens if they don't respond?
>
> MS. MCQUAIN: They waive their – any rights under the statute to pre-litigation mediation.

(Rec. at 712). This is the proper analysis of the MPLA's pre-filing requirements. If the Legislature intended a failure to respond timely to a notice of claim and screening certificate of merit to constitute a waiver of any right to challenge the sufficiency of said documents, the Legislature would have included language to this effect. Indeed, the Legislature removed the above-cited language relating to waiver from the 2003 version of the MPLA. See W. Va. Code § 55-7B-6(h) (Supp. 2003). Accordingly, it is clear that the failure to respond to a notice of claim constitutes, at most, waiver of pre-litigation mediation. Appellants' arguments to the contrary are unavailing.

D. APPELLANTS HAVE NOT ESTABLISHED THAT THE MEDICAL PROFESSIONAL LIABILITY ACT IMPERMISSIBLY CONFLICTS WITH THE WEST VIRGINIA RULES OF CIVIL PROCEDURE OR THE WEST VIRGINIA RULES OF EVIDENCE.

Appellants contend that the West Virginia Rules of Civil Procedure and the West Virginia Rules of Evidence supersede the MPLA. For this proposition, Appellants cite Article VIII, § 3 of the West Virginia Constitution, which states that "[t]he court shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process, practice and procedure, which shall have the force and effect of law." Based on this language, this Court has held that:

> "Under Article VIII, Section 8 [and Section 3] of the Constitution of West Virginia (commonly known as the Judicial Reorganization Amendment), administrative rules promulgated by the Supreme Court of Appeals of West Virginia have the force and effect of statutory law and operate to supersede any law that is in conflict with them." Syl.Pt. 1, *Stern Brothers, Inc. v. McClure*, 160 W. Va. 567, 236 S.E.2d 222 (1977).

Syl pt. 2, Bennett v. Commonwealth Land Title Ins. Co., 179 W. Va. 742, 372 S.E.2d 920 (1988). Similarly, West Virginia Code § 51-1-4 states that:

> The supreme court of appeals may, from time to time, make and promulgate general rules and regulations governing pleading, practice and procedure in such court and in all other courts of record of this State. All statutes relating to pleading, practice and procedure shall have force and effect only as rules of court and shall remain in effect unless and until modified, suspended or annulled by rules promulgated pursuant to the provisions of this section.

In interpreting this section and the Constitutional provision cited above, this Court has held that "rules promulgated under authority of the state constitution and under West Virginia Code § 51-1-4 prevail whenever there is a conflict, real or perceived, between such rules and legislative provisions involving court procedures." Games-Neely *ex rel.* West Virginia State Police v. 1175

Sam Mason Rd., 211 W. Va. 236, 244, 565 S.E.2d 358, 366 (2002) (emphasis added). Indeed, this Court recently held that the provisions of the MPLA "govern actions falling within its parameters, subject to this Court's power to promulgate rules for all cases and proceedings, including rules of practice and procedure, pursuant to Article VIII, Section 3 of the West Virginia Constitution." State *ex rel.* Weirton Med. Ctr. v. Mazzone, 214 W. Va. 146, 152, 587 S.E.2d 122, 128 (2002). Therefore, in order for the West Virginia Rules of Civil Procedure or the West Virginia Rules of Evidence to supersede the MPLA, Appellants must establish a conflict between the MPLA and the rules as to court procedures. As discussed below, Appellants have not—and cannot—establish such a conflict.

1. The pre-filing requirements contained in the MPLA cannot conflict with the West Virginia Rules of Civil Procedure or the West Virginia Rules of Evidence because the former govern the procedure prior to filing a suit, and the latter govern the procedure after an action is filed.

The major fallacy with Appellants' argument that the pre-filing requirements conflict with the West Virginia Rules of Civil Procedure and the West Virginia Rules of Evidence is that the MPLA pre-filing requirements, by their own terms, control a party's duties and responsibilities before a suit is filed. By contrast, the Rules of Civil Procedure and the Rules of Evidence control a party's duties and responsibilities after filing. In fact, the Rules of Civil Procedure provide that "[t]hese rules govern the procedure in all trial courts of record in all actions, suits, or other judicial proceedings of a civil nature whether cognizable as cases at law or in equity." W. Va. R. Civ. P. 1. Similarly, the Rules of Evidence state that "[t]hese rules govern proceedings in the courts of this State to the extent and with the exceptions stated in Rule 1101." W. Va. R. Evid. 101. By way of contrast, the MPLA provides that "no person may file a medical professional liability action against any health care provider without complying with the provisions of this section." W. Va. Code § 55-7B-6(a) (Supp. 2001) (amended 2003). As the

foregoing authority makes abundantly clear, in order for a legislative enactment to conflict with the rules promulgated by this Court, the legislative enactment must involve court procedures. The MPLA pre-filing requirements obviously do not involve court procedures.

This point is made explicit by a recent decision from the United States District Court for the Northern District of West Virginia, styled Stanley v. United States, No. 1:03CV187, 2004 WL 1385522 (N.D.W.Va. June 18, 2004) (Keeley, C.J.). In that case, Chief Judge Keeley dismissed a plaintiff's medical malpractice claim pursuant to Rule 12(b)(6) for failing to comply with the pre-filing requirements of the MPLA. Id. at *1. In that case, the plaintiff claimed that the MPLA's pre-filing requirements were "procedural" rather than "substantive" for the purposes of an analysis under Erie R.R. v. Tompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L.Ed.2d 1188 (1938). Chief Judge Keeley roundly rejected this assertion, and held that the pre-filing requirements are "substantive" in nature. Id. at *2. Importantly, in considering the same argument advanced here—namely, that Rule 26 of the Federal Rules of Civil Procedure conflicts with West Virginia Code § 55-7B-6—the court held that "[t]he statute at issue in this case imposes requirements that must be met *before* a suit can be filed. Because Rule 26 only applies after an action is filed, there is no conflict between Rule 26 and § 55-7B-6." Id. at *3 (emphasis in original). This point is devastating to Appellants' position on appeal. Simply put, there can be no conflict because the pre-filing requirements do not seek to impose conditions after a suit has been filed. Nonetheless, as discussed below, even if this were not the case, Appellants have still not established an impermissible conflict between the rules and the MPLA.

2. **The lower court did not decide that Appellants' expert was not qualified to render an opinion, or that the bases of Appellants' expert's opinion were improper, but rather that that the screening certificate of merit did not contain the information required by the MPLA; nonetheless, there is no conflict between the West Virginia Rules of Evidence and the pre-filing requirements of the MPLA.**

In addressing Appellants' points on appeal, it is important to set forth exactly what the lower court actually held. In his Order, Judge Keadle stated that:

> The Court finds that the Plaintiffs' screening certificate of merit does not comply with the foregoing provisions in the following particulars:
>
> 1. The Plaintiffs provided one screening certificate of merit from Roberto C. Valenzuela, M.D., an anesthesiologist, for all of the defendant health care providers, rather than the required separate screening certificate of merit for each health care provider against whom a claim was asserted.
>
> 2. Dr. Valenzuela's discussion of his qualifications, and his curriculum vitae, which was attached to his screening certificate of merit, generally documented his qualifications to comment on the standard of care applicable to an anesthesiologist. However, Dr. Valenzuela did not expressly state with particularity his familiarity with any specific standard of care. Rather, he stated in a conclusory fashion, "I feel that I am familiar with the applicable standard of care in issue." Therefore, the certificate of merit is deficient in failing to state with particularity Dr. Valenzuela's familiarity with the standard of care applicable to Dr. Pons, a surgeon; Ms. Gillette, a Certified Registered Nurse Anesthetist; or any of the unnamed "various employees of Stonewall Jackson Memorial Hospital."
>
> 3. Dr. Valenzuela failed to state with particularity the standard of care applicable to each health care provider against whom a claim was asserted and how that standard of care was breached.
>
> 4. Finally, the screening certificate of merit did not state with particularity how each alleged breach of the standard of care resulted in injury to or the death of the Plaintiffs' decedent.
>
> Therefore, considering the notice of claim and screening certificate of merit in the light most favorable to the Plaintiffs, the

Court finds that the Plaintiffs have failed to comply with the requirements of W.Va. Code § 55-7B-6(b) (2001).

(Rec. at 716-17). Judge Keadle's remarks in the record are also invaluable in demonstrating that the Court did not dismiss Appellants' claim because their expert was not qualified. In the hearing, Judge Keadle stated as follows:

> But 55-7B-6 requires, "Prior to filing a lawsuit, in a medical malpractice case, that a Certificate of Merit must be filed, or a Screening 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 the expert's familiarity with the applicable standard of care in issue. The expert's qualifications, the expert opinion as to how the applicable standard of care was breached, and the expert's opinion as to how the breach of the applicable standard of care resulted in injury or death."
>
> This – as I read Dr. Valenzuela's Screening Certificate or Certificate of Merit, is pretty general. It doesn't set forth what the standard of care is, and whether or not that standard of care was breached. He says, "I concluded the applicable standard of care was breached by the above entities in numerous ways." Well, that's not with particularity, that's generally. He goes further to say, "He was excessively sedated, medical illness and operative position. The patient was inadequately monitored. Third, there was inadequate vigilance on the part of Nurse Gillette, Dr. Pons and the other members of the OR staff. Fourth, there was inadequate airway control. Fifth, there was a lack of recognition as to the underlying ecology [sic] of the patient's bradicardia resulting in delay of resurrective - resuscitative efforts. And sixth, there was delayed airway securement once the patient was noted to be cyanotic." Rather general statements. He says he's qualified to render an opinion on the case of Mr. Hinchman. He doesn't say he's familiar with the standard of care and what the standard of care is, and how it was breached. It's just a very general Certificate of Merit and Certificate of Screening. It certainly doesn't comply with the statute with regard to Stonewall Jackson Hospital. I don't think it complies with the statute with regard to Nurse Julie Gillette, nor with the requirements of the statute with regard to Roger Pons, M.D. I think that the purpose of this statute was to require Plaintiffs, before bringing medical malpractice suits, to, with particularity, comply with this statute, and I don't believe this Certificate of Merit - Screening Certificate of Merit, is

> sufficient. I think that if you have to have someone that says, "I know what the standard of care for Stonewall Jackson Hospital is, this is the standard of care, and this is the way it's breached." I think there has to be another Certificate of Merit for Nurse Julie Gillette, saying that, "I know what the standard of care is for a Registered Nurse in these situations, this is the standard of care, and this is how it was breached", with particularity. I think it must state that, "I'm familiar with the standard of care for a surgeon, this is the standard of care, and this is how Dr. Pons breached that standard of care." I don't believe that a general Certificate of Merit, Screening Certificate of Merit, is sufficient, in particular, the one that is in this case.
>
> So I find that the intent of the statute was to dismiss lawsuits that did not comply with the statutory requirements, these pre-suit requirements, and I find that this one did not, and therefore, I'm going to grant these Defendant's [sic] motions to dismiss, under 12-B. That's how you bring it on in these types of cases.

(Id. at 712).

There is no reference in the lower court's findings in the record or contained in the Order that indicate that the lower court ever held that Appellants' expert was not qualified to render an opinion, or that the bases of his opinions were flawed. It is true that various Appellees argued this position, but it is also true that the lower court did not decide this issue. The fact that the lower court did not decide the issue proves that it is not ripe for appeal. This Court has consistently held that "we have steadfastly held to the rule that we will not address a nonjurisdictional issue that has not been determined by the lower court." State *ex rel.* Clark v. Blue Cross Blue Shield of West Virginia, Inc., 203 W.Va. 690, 699, 510 S.E.2d 764, 773 (1998) (citation omitted). See also Tiernan v. Charleston Area Med. Ctr., Inc., 203 W.Va. 135, 150 n. 27, 506 S.E.2d 578, 593 n. 27 (1998) (""This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance.'" (citation omitted)); Syl. pt. 2, Trent v. Cook, 198 W.Va. 601, 607, 482 S.E.2d 218, 224 (1996) ("'[T]he Supreme Court of

Appeals is limited in its authority to resolve assignments of nonjurisdictional errors to a consideration of those matters passed upon by the court below and fairly arising upon the portions of the record designated for appellate review.'" (citations omitted)); Syl. pt. 3, Voelker v. Frederick Bus. Properties Co., 195 W.Va. 246, 465 S.E.2d 246 (1995) ("'"In the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which were not considered and decided by the court from which the appeal has been taken."'" (citations omitted)); Syl. pt. 3, Hall's Park Motel, Inc. v. Rover Constr., Inc., 194 W.Va. 309, 460 S.E.2d 444 (1995) ("'In the exercise of its appellate jurisdiction, this Court will not decide nonjurisdictional questions which have not been decided by the court from which the case has been appealed.'" (citation omitted)); Syl. pt. 4, State *ex rel.* State Line Sparkler of WV, Ltd. v. Teach, 187 W.Va. 271, 418 S.E.2d 585 (1992) ("'"This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance."'" (citations omitted)). Therefore, because the issue of whether Appellants' expert was qualified to render an opinion and whether the bases of his opinion were defective were not decided by the lower court, this Court should ignore this point on appeal.

Regardless, there is no conflict between the MPLA and the Rules of Evidence and the Rules of Civil Procedure with regard to the qualifications of an expert, or the basis of an expert's opinion. Rule 702 of the West Virginia Rules of Evidence states that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." The MPLA requires that the expert must state his qualifications with particularity. W. Va. Code § 55-7B-6(b) (Supp. 2001) (amended 2003). The court did not conclude that Appellants' expert's

recitation of his qualifications was improper under the MPLA. The lower court concluded that Dr. Valenzuela failed to state the standard of care with particularity, among other failings. The pre-filing requirements of the MPLA state that "[t]he screening certificate of merit shall be executed under oath by a health care provider qualified as an expert under the West Virginia rules of evidence." W. Va. Code § 55-7B-6(b) (Supp. 2001) (amended 2003). Thus, the MPLA clearly does not place a burden on the expert to be more qualified than an expert must be under Rule 702. In fact, the burden under the MPLA for a physician to qualify as an expert is identical to the requirements under Rule 702 of the West Virginia Rules of Evidence. There is simply no conflict.

The analysis regarding Rules 703, 704 and 705 of the West Virginia Rules of Civil Procedure is similar. The pre-filing requirements of the MPLA do not address the bases of an expert's opinion. The pre-filing requirements also do not address whether an expert may offer an opinion on an ultimate issue. Moreover, the pre-filing requirements do not require that an expert disclose the facts or data upon which an expert relies. These rules are separate and distinct from the MPLA's pre-filing requirements. The Rules of Evidence are designed to address the admissibility of evidence. Plaintiff has not—and cannot—demonstrate any conflict between the MPLA and this Court's rules. Accordingly, as the Court held in Mazzone, the MPLA controls and Appellants' certificate of merit is defective as a matter of law.

3. The West Virginia Rules of Civil Procedure do not conflict with the MPLA's pre-filing requirements.

Appellants argue that the MPLA's pre-filing requirements conflict with Rules of Civil Procedure. However, they are unable to point to a single conflicting provision. In support of this argument, Appellants cite Rule 8 of the West Virginia Rules of Civil Procedure. Rule 8 requires that "a pleading which sets forth a claim for relief . . . contain . . . a short plain statement

of the claim showing that the pleader is entitled to relief." W. Va. R. Civ. P. 8(a). Succinctly, the lower court did not dismiss this action because Appellants failed to properly plead a cause of action in their Complaint. Instead, the lower court held that the Appellants' Complaint must be dismissed due to a failure to follow the pre-filing requirements in the MPLA. There is no conflict between the MPLA and Rule 8 of the West Virginia Rules of Civil Procedure.

Appellants also argue that the MPLA conflicts with Rules 12 and 56 of the West Virginia Rules of Civil Procedure relating to the dismissal of complaints and summary judgment. As an initial matter, Rule 56 does not apply here because the court did not rely on extrinsic materials, as discussed above. Moreover, West Virginia Code § 55-7B-6 does not establish a different standard for dismissal or summary judgment. Rule 12 and Rule 56 are simply the mechanisms to test a party's compliance with the pre-suit requirements contained in West Virginia Code § 55-7B-6 after a suit has been filed. See W. Va. Code § 55-7B-6(a) (Supp. 2001) (amended 2003); see also Stanley, 2004 WL 1385522, at *1. In addition, as discussed above, the lower court properly dismissed the complaint. There is no conflict.

Finally, Appellants rely on Rule 26 of the West Virginia Rules of Civil Procedure for their argument that the MPLA impermissibility conflicts with this Court's Rules. Rule 26 provides that:

> A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

W. Va. R. Civ. P. 26(b)(4)(a)(i). The MPLA pre-filing requirements do not mention any disclosure of expert materials during discovery. Indeed, West Virginia Code § 55-7B-6(b) does not even address the type of information that a party must disclose during the pendency of the

lawsuit. Indeed, this is the principal problem with all of the Appellants' arguments regarding conflicting provisions in the rules. The Rules of Civil Procedure and the Rules of Evidence govern procedure after a lawsuit has been filed. See Stanley, 2004 WL 1385522, at *3. The pre-suit requirements address the conduct of litigation before it is filed. Under this paradigm, there is inherently no conflict between the rules and the pre-filing requirements of the MPLA. In short, Appellants have entirely failed to identify any conflict between the rules and the pre-filing requirements of the MPLA. Therefore, Appellants' argument in this regard must fail.

E. THE COURT BELOW PROPERLY TOOK JUDICIAL NOTICE OF THE LEGISLATIVE HISTORY OF THE MEDICAL PROFESSIONAL LIABILITY ACT WITH REGARD TO THE NOTION THAT THE PURPOSE OF THE ACT, IN PART, IS TO CURTAIL THE EXODUS OF PHYSICIANS FROM THE STATE.

Appellants' contend that the lower court erred by taking judicial notice of the alleged adjudicative fact that "doctors are leaving the state and we've got to do something about that." In context, this statement is clearly a reference to the legislative history and/or intent of the amendments to the MPLA. At the June 19, 2003 hearing, Judge Keadle stated that:

> We're all very familiar, of all the political maneuvering, back and forth, which is normal in getting legislation passed. I'm not saying that's wrong, I'm just saying that happens. We're all very familiar with the publicity that went throughout the State, the Legislature was involved, in reforming medical malpractice, the doctors are leaving the state and we've got to do something about that. The Legislature in response to that passed this statute, setting forth certain requirements before you can bring a medical malpractice case. What was the intent of the Legislature when they did that? That's my -- I guess the ultimate question. What was their purpose in setting up this criteria before you can bring a medical malpractice action?

(Rec. at 712). It is clear that Judge Keadle was merely summarizing the legislative intent behind the amendments to the MPLA. Undoubtedly, this Court has consistently held that "[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl.

pt. 1, Smith v. State Workmen's Comp. Comm'r, 159 W. Va. 108, 219 S.E.2d 361 (1975). It is obvious that Judge Keadle was attempting to ascertain the Legislature's intent. Appellants appear to take issue with this statement because they claim it is incorrect. Regardless of whether it is incorrect, it is an accurate representation of the Legislature's intent as discussed below.

Assuming, *arguendo*, that this is an adjudicative fact, it is apparent that a court may take judicial notice of facts generally known within the jurisdiction of the court. The West Virginia Rules of Evidence address instances in which a court may take discretionary judicial notice of an adjudicative fact, whether requested or not. W. Va. R. Evid. 201(c). Indeed, the West Virginia Rules of Evidence state that "[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." W. Va. R. Evid. 201(b). The fact of which Judge Keadle purportedly took judicial notice is generally known within the territorial jurisdiction of the lower court; indeed, the disputed fact is contained in the legislative history of the MPLA. The MPLA states that:

> [T]he cost of liability insurance coverage has continued to rise dramatically, resulting in the state's loss and threatened loss of physicians, which, together with other costs and taxation incurred by health care providers in this state, have created a competitive disadvantage in attracting and retaining qualified physicians and other health care providers.

W. Va. Code § 55-7B-1 (Supp. 2003). It is perfectly apparent that this fact would be well known considering the fact that it was contained in public statutes at the time the lower court ruled on the instant case. In fact, this statement was incorporated into the law of the State of West Virginia by virtue of the 2003 amendments to the MPLA, which occurred before the hearing in this matter. Indeed, the amendments went into effect a scant two weeks after the hearing.

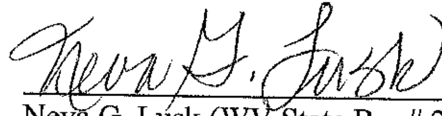
W. Va. Code § 55-7B-10(a) (Supp. 2003) (amendments apply to cases filed after July 1, 2003). Appellants' contention that the lower court erred in taking judicial notice of this fact is groundless.[6]

VII. CONCLUSION

For all of the foregoing reasons, Appellee Julie M. Gillette, R.N., C.R.N.A., respectfully requests that this Honorable Court affirm the Order of the Circuit Court of Lewis County, West Virginia because Appellants failed to comply with the pre-suit requirements of the MPLA.

JULIE M. GILLETTE, R.N., C.R.N.A.

SPILMAN THOMAS & BATTLE, PLLC



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[6] Amazingly, at the same time that Appellants are complaining that the lower court relied on information that was not properly before it, the Appellants provided this Court with the GAO Report on "Medical Malpractice, Implications of Rising Premiums on Access to Health Care" (August 2003). This document was clearly not presented to the lower court for its consideration, and was not even published by the date of the lower court's order.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

PAUL Z. HINCHMAN, by and through his next friend, CHARLOTTE HINCHMAN; CHARLOTTE HINCHMAN, individually,

Plaintiffs-below, Appellants,

v.

Appeal No. 31760

JULIE M. GILLETTE, R.N., C.R.N.A, individually, and as the Agent, Servant and/or Employee of MEDICAL DOCTOR ASSOCIATES, INC., and as the agent, servant, and/or employee of STONEWALL JACKSON MEMORIAL HOSPITAL COMPANY, et al.,

Defendants-below, Appellees.

CERTIFICATE OF SERVICE

I, Neva G. Lusk, counsel for Defendant Julie M. Gillette, do hereby certify that I have served the foregoing **Brief of Appellee Julie M. Gillette, R.N., C.R.N.A.** upon the parties herein to their counsel of record by United States Mail, postage prepaid, as reflected in the Certificate of Service on this 9th day of August, 2004.

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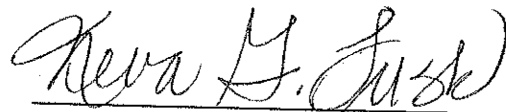

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