

No. 35543

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JAMES D. MACDONALD and
DEBBIE MACDONALD,

Appellant,

v.

CITY HOSPITAL, INC. and
SAYEED AHMED, MD,

Appellees.

**AMICUS BRIEF OF THE WEST VIRGINIA ASSOCIATION FOR JUSTICE
ON BEHALF OF THE APPELLANT**

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I. INTRODUCTION OF AMICUS CURIAE WEST VIRGINIA ASSOCIATION FOR JUSTICE

This *amicus* brief is submitted on behalf of the West Virginia Association for Justice (hereinafter "WVAJ"), a private, non-profit organization consisting of attorneys licensed in the State of West Virginia who represent, among other clients, citizens of the State of West Virginia injured and/or harmed by the wrongful conduct of others.

The issue presented in the matter *sub judice* involves a constitutional challenge to the medical malpractice noneconomic cap on damages found at W. Va. Code § 55-7B-8 [2003]. The resolution of this constitutional issue impacts the rights of medical malpractice victims represented by members of the West Virginia Association for Justice.

The WVAJ submits this *amicus* brief in support of the Appellant/Plaintiff below.

II. OPERATIVE FACTS ON THE UNDERLYING MATTER

A recitation of the operative facts and procedural history is not necessary for purposes of this *amicus* brief. The West Virginia Association for Justice incorporates and references the operative facts as recited in the Brief of the Appellant.

III. DISCUSSION AND ARGUMENT

The means by which our Constitution may be impaired, even innocently, are at once subtle and not readily apparent. Artful in their form, their perceived immediate need can hide their ultimate potential for damage to our system of governance. These instruments for harm may be statutory, judicial, administrative or procedural. They may take the form of actions by one branch of government seeking to exercise an authority delegated by our Constitution to another branch of government. Consistent with this duty, it would be calamitous for us to ignore the unconstitutionality of a statute simply because of its endorsement by one group or another as a necessary remedy to a current problem of society. The administration of justice requires more of us than acquiescence to such partisanship. We must base our decisions on the soundness of legal principles and not simply on the expediencies of the day.

Louk v. Cormier, 218 W.Va. 81, 622 S.E.2d 788 (2005) (Benjamin, J., concurring).

The West Virginia Association for Justice respectfully submits the 2003 MPLA noneconomic cap is unconstitutional on two primary grounds: (1) the statute violates the right to trial by jury as guaranteed by the West Virginia Constitution and protected by the West Virginia Rules of Civil Procedure; (2) the statute can no longer survive “rational basis” review in light of the annual reports published by the office of the West Virginia Insurance Commissioner.

A. The 2003 Malpractice “caps” require a blind and arbitrary nullification of a jury’s decision in a case before the judicial branch. If West Virginia follows the better-reasoned and prevailing trend of guaranteeing its citizens a meaningful right to a jury trial and a certain remedy, the malpractice damage “caps” are unconstitutional.

The one-size-fits-all noneconomic damage cap is an encroachment on functions reserved to the jury (and occasionally, the judge) in our civil justice system. West Virginia juries are instructed they are the “sole judges of the facts” in the case. This Court has held that a jury’s decision on damages is virtually unreviewable, except where there is misconduct of a juror, or evidence of legal error in the trial, or passion or prejudice on the part of the jury. See Kesner v. Trenton, 158 W.Va. 997, 1007, 216 S.E.2d 880, 886 (1975) (holding that a jury decision that awarded only funeral expenses for the wrongful death of two young girls was nonetheless to be upheld as the “jury’s enlightened conscience is the sole measure of damages.”).

West Virginia Code § 55-7B-8 turns that bedrock principle, underlying our very form of government, upside down, making the legislature the judge of the damages in certain cases, in advance of trial, and without knowledge of, or regard for, any of the actual facts or proofs. The jury’s findings on damages are simply nullified after trial. The power of the trial judge to review the damages under this Court’s precedents in “cap cases” is likewise eliminated. The statute is therefore a major encroachment on the jury trial right as guaranteed in the Constitution, and this Court’s Civil Rules.

1. Courts around the country are increasingly and correctly determining that caps on damages infringe on the right to trial by jury.

In interpreting the several states' guarantees of the rights to jury trial, a certain remedy and separated powers, two basic lines of thought emerge. One line is exemplified by the Supreme Court of Ohio's decision in Arbino v. Johnson & Johnson, 116 Ohio St.3d 468, 880 N.E.2d 420 (2007). In Arbino, Ohio's court held that the jury trial right has no substance that can be enforced by a citizen against the legislature. The Arbino reasoning essentially holds that as long as a jury is allowed to return a verdict, it doesn't matter that the verdict won't count. Id. at ¶¶ 35-36; see also, Ethridge v. Medical Center Hosp., 237 Va. 87, 376 S.E.2d 525 (1989) ("although a party has the right to have a jury assess his damages, he has no right to have a jury dictate through an award the legal consequences of its assessment."). These courts take the view that the jury trial right is purely a matter of form and that once you get your jury trial, the legislature may bypass the constitutional guarantee simply by specifying that the jury's verdict need not be honored. In this way, the jury trial right is procedural in the barest possible sense – there must be a jury at some point and the decision of the jury is subject to plenary alteration by the exercise of legislative power.

Your amicus respectfully suggests that just the opposite should be true in West Virginia: our bill of rights is a list of the people's trump cards against over-reaching action by their government. If those trumps are not honored in our Courts, they will be swiftly eroded and eliminated by the political branches. As the Supreme Court of Washington put it in Sofie v. Fibreboard Corp., 112 Wash.2d 636, 771 P.2d 711 (1989):

The constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name . . . In other words, a constitutional protection cannot be bypassed by allowing it to exist in form but letting it have no effect in function. [This] principle is the undoing of Etheridge's reasoning.

Id. at 660, 724 (internal quotes and cites omitted, emphasis supplied); see also Louk, supra, (Benjamin, J. concurring) (West Virginian’s constitutional rights should not lightly be reasoned away).

Other states, including Washington, Alabama, Georgia, Illinois, Florida and Kansas have strongly disagreed with the “weak jury trial right” concept that prevailed in Ohio and Virginia. The “strong” states have found that the right to a jury trial and a certain remedy are meaningful rights the people have guaranteed to themselves as a bulwark against legislative encroachment. These states have therefore consistently held that the right to a jury trial includes the right to have the jury’s verdict respected and enforced and that the right cannot be trivialized in the manner of the Arbino court. The reasoning supporting their decisions is straightforward and plain, for example:

We next examine whether the noneconomic damages caps in OCGA § 51-13-1 unconstitutionally infringe on this right. By requiring the court to reduce a noneconomic damages award determined by a jury that exceeds the statutory limit, OCGA § 51-13-1 clearly nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function.

Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt, 286 Ga. 731, 691 S.E.2d 218 (2010).¹ Your amicus, WVAJ, respectfully suggests that West Virginia should be among the states in which the strong right to trial by jury and a certain remedy is preserved and defended by our Courts.

West Virginia’s constitution declares that “[i]n suits at common law, where the value in controversy exceeds twenty dollars exclusive of interests and costs, the right of trial by jury, if required by either party shall be preserved.” W.Va. Const. Art III, § 13. The West Virginia

¹ The Georgia decision has already been relied on by a justice of the Missouri Supreme Court who trenchantly observed that: “The true function of the jury is to determine the facts in a given case and reach a fair and just verdict including damages. It is a function that the people of this state in their constitution have retained for 12 of their number to perform without interference.” Klotz v. St. Anthony's Medical Center, ___ S.W.3d ___, 2010 WL 1049422 (Mo., 2010) (Wolff, J., concurring).

Rules of Civil Procedure likewise provide that “The right of trial by jury as declared by the Constitution or statutes of the State shall be preserved to the parties inviolate.” W.Va.R.Civ.Pro. 38(a). Legislative enactments that are inconsistent with the Constitution of our state or the Rules enacted by the Judicial Branch are invalid. See Louk v. Cormier, 218 W.Va. 81, 94 (2005). Since the statute at issue requires the judge to nullify the jury’s decision, it transgresses § 13 and Rule 38 and cannot survive. This reasoning has been the stronger trend around the country in the last ten years, and the better-reasoned view at all times.

Over the past several years, state courts of last resort have increasingly found that medical malpractice damage caps are inconsistent with a variety of basic principles ensconced in their respective constitutions. In Illinois, also this year, the Supreme Court of Illinois found that a noneconomic cap on medical malpractice damages violated that State’s constitutional guarantee of separation of powers. Lebron v. Gottlieb Memorial Hosp., --- N.E.2d ---, 2010 WL 375190 (Ill., 2010); see also Best v. Taylor Mach. Works, 179 Ill.2d 367, 689 N.E.2d 1057 (1997). The Lebron court relied on the basic idea that the jury is the body to whom power to determine damages is allocated and that court review of a specific verdict for excessiveness was a function for the courts:

Under section 2-1706.5, the court is required to override the jury's deliberative process and reduce any noneconomic damages in excess of the statutory cap, irrespective of the particular facts and circumstances, and without the plaintiff's consent. Section 2-1706.5 thus violates the separation of powers clause because it “unduly encroaches upon the fundamentally judicial prerogative of determining whether a jury's assessment of damages is excessive within the meaning of the law.” . . . the encroachment upon the inherent power of the judiciary is the same in the instant case as it was in Best.

Id. at *10. The Best case had previously explained how fundamentally disrespectful to the jury, and the judicial process, an arbitrary legislative cap was:

In our view, section 2-1115.1 functions as a “legislative remittitur.” Unlike the traditional remittitur power of the judiciary, the legislative remittitur of section 2-

1115.1 disregards the jury's careful deliberative process in determining damages that will fairly compensate injured plaintiffs who have proven their causes of action. The cap on damages is mandatory and operates wholly apart from the specific circumstances of a particular plaintiff's noneconomic injuries. Therefore, section 2-1115.1 unduly encroaches upon the fundamentally judicial prerogative of determining whether a jury's assessment of damages is excessive within the meaning of the law.

Id. at 413-14, 1080 (emphasis supplied).

The strong jury trial right, recognized in Georgia and Illinois, has been, for many years, the law in Alabama. See Moore v. Mobile Infirmary, Ass'n, 592 So.2d 156 (1991). Alabama likewise disposed straightforwardly with the question, simply holding that the jury trial right is without meaning if the jury's verdict is without meaning:

Under the procedure mandated by § 6-5-544(b), a jury is empanelled and deliberates, with the expectation that its verdict will have efficacy, an issue of fact singularly within its authority. At the conclusion of deliberations, however, the trial judge is required summarily to disregard the jury's assessment of the amount of noneconomic loss, that species of damages lying most peculiarly within the jury's discretion. . . . To the extent that the assessment exceeds the predesignated ceiling, the statute allows no consideration for exigencies presented by each case. Such a requirement has no parallel in the jurisprudence of this state and is patently inconsistent with the doctrines of remittitur or new trial as we have applied them

Id. at 163 (internal cites omitted, emphasis supplied).

Texas constitutional law likewise respected the authority of the jury and the courts in this area as Lucas v. United States held in 1988: "Texas Constitution article I, section 13, guarantees meaningful access to the courts whether or not liability rates are high. As to the legislature's stated purpose to "assure that awards are rationally related to actual damages," section 1.02(b)(2), we simply note that this is a power properly attached to the judicial and not the legislative branch of government." 757 S.W.2d 687, 691 (1988). When Texas decided it wanted to cap damages in medical cases, it required a constitutional amendment to permit the elimination of the people's historic and judicially-defended right to a jury trial. See, Watters, Better to Kill than to Maim, 60 BAYLOR L.REV. 749,755.

Kansas has likewise upheld a strong right to trial by jury, stating eloquently:

The Bill of Rights of the Kansas Constitution and the Bill of Rights of the United States Constitution are there to protect every citizen, including a person who has no clout, and the little guy on the block. They are there to protect the rights of a brain-damaged baby, a quadriplegic farmer or business executive, and a horribly disfigured housewife who is a victim of medical malpractice. They are not there to see that the will of the majority is carried out, but to protect the rights of the minority

and holding that:

For a plaintiff who suffers any extreme pain and disfigurement, a limit of \$250,000 is imposed. When the trial judge enters judgment for less than the jury verdict (as H.B. 2661 directs him to do) and orders an annuity contract, he clearly invades the province of the jury. This is an infringement on the jury's determination of the facts, and, thus, is an infringement on the right to a jury trial.

Kansas Malpractice Victims Coalition v. Bell, 243 Kan. 333, 343, 757 P.2d 251, 258 (1988).²

Florida concurs and likewise, straightforwardly, and without sleight of hand, applies its constitution, stating:

Access to courts is granted for the purpose of redressing injuries. A plaintiff who receives a jury verdict for, e.g., \$1,000,000, has not received a constitutional redress of injuries if the legislature statutorily, and arbitrarily, caps the recovery at \$450,000. Nor, we add, because the jury verdict is being arbitrarily capped, is the plaintiff receiving the constitutional benefit of a jury trial as we have heretofore understood that right. Further, if the legislature may constitutionally cap recovery at \$450,000, there is no discernible reason why it could not cap the recovery at some other figure, perhaps \$50,000, or \$1,000, or even \$1. None of these caps, under the reasoning of appellees, would "totally" abolish the right of access to the courts.

Smith v. Department of Ins., 507 So.2d 1080, 1088-89 (1987).

- 2. This Court should follow its own precedents showing that West Virginia is a state with a strong and vital right to trial by jury and either clarify or overrule any past suggestions to the contrary.**

² Bell was distinguished, but not overruled, in Bair v. Peck, 248 Kan. 824, 811 P.2d 1176 (1991) (holding that certain changes to vicarious liability law in medical contexts did not violate the jury trial right).

This Court, in Robinson v. CAMC, in 1991, suggested that West Virginia might be in the “weak jury trial” camp. Id. at 731. However, the actual analysis of this state’s certain remedy and jury trial rights in Robinson is extremely thin. As to the jury trial right, the Robinson Court looked only at the “reexamination clause” and did not consider the jury trial right itself (or Rule 38). The primary authority relied on was a Maryland federal district court case, interpreting not our Constitution, but the federal seventh amendment which has never been seen as a true analog to state constitutional guarantees of jury trials – the Court in 1991 did not undertake to examine the history of the right or to compare the reasoning of courts around the country. Moreover, the Robinson decision, if it is construed to reach the jury trial right itself, would be in conflict with dozens of cases in this Court specifically committing to the jury the power to determine the facts regarding damages. These principles date back to the nineteenth century.³ Just last year, this Court reaffirmed that “[c]ourts must not set aside jury verdicts as excessive unless they are monstrous, enormous, at first blush beyond all measure, unreasonable, outrageous, and manifestly show jury passion, partiality, prejudice or corruption.” Peters v. Rivers Edge Min., Inc., 224 W.Va. 160, 680 S.E.2d 791 (2009), citing Addair v. Majestic Petroleum Co., Inc., 160 W.Va. 105, 232 S.E.2d 821 (1977). All of these protections against encroachment on the jury’s province are simply swept away if the statute at issue survives.

Your amicus respectfully suggests that this Court take the opportunity presented by this case to firmly place West Virginia in the camp of states that have strong and meaningful rights to trial by jury. The Etheridge opinion from Virginia, cited in Robinson, was analytically

³ See e.g. Legg v. Jones, 126 W.Va. 757, 30 S.E.2d 76 (1944); Hawkins v. Nuttallburg Coal & Coke Co., 66 W.Va. 415, 66 S.E. 520 (1909); Kelley v. Ohio River R. Co., 58 W.Va. 216, 52 S.E. 520 (1905); Sample v. Consolidated Light & Ry. Co., 50 W.Va. 472, 40 S.E. 597 (1901); Couch v. Chesapeake & O. Ry. Co., 45 W.Va. 51, 30 S.E. 147 (1898); Turner v. Norfolk & W.R. Co., 40 W.Va. 675, 22 S.E. 83 (1895).

demolished in Sofie, as relegating the constitutional rights of citizens to a mere matter of empty form. This Court should not make a decision of which the following could be said (as was said of Etheridge and its like):

This argument [in support of weak jury trial right] ignores the constitutional magnitude of the jury's fact-finding province, including its role to determine damages. Respondents essentially are saying that the right to trial by jury is not invaded if the jury is allowed to determine facts which go unheeded when the court issues its judgment. Such an argument pays lip service to the form of the jury but robs the institution of its function. This court will not construe constitutional rights in such a manner.

Id. at 655, 721 (emphasis supplied).

Moreover, the weak jury trial right alluded to in Robinson would be at odds with the longstanding honor given in this Court's prior decisions relating to the standing of the jury in our jurisprudence. Recently in Hartley Hill Hunt Club v. County Com'n, 220 W.Va. 382, 390, 647 S.E.2d 818, 826 (2007), this Court cited with approval the long-honored statement of the United States Supreme Court that "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." Surely the jury trial is a valuable enough right to be protected from plenary erosion by statutes like the one at bar.

In Mikesinovich v. Reynolds, this Court approvingly cited Thomas Jefferson's characterization of the jury as among those principles forming "the bright constellation which has gone before us, and guided our steps through an age of revolution and reformation." 220 W.Va. 210, 640 S.E.2d 50 (2006). The crippled jury trial right Respondents would leave our citizens with would amount to tearing a star from the constellation Jefferson saw formed in the earliest days of our Republic.

It is simply beyond dispute that the caps on damages, which admittedly enjoyed a period of political popularity, are what they are: a wholesale attempt by the legislature to emasculate the jury and to benefit certain interests by substituting an arbitrary, pre-judged decision for the jury's decision. If the jury trial right does not protect the citizens against such an incursion into the jury right we might as well say simply that they have no such right at all, as Ohio and Virginia have under cover of legal sleight of hand.

B. The damage caps lack a rational basis because there is no longer a “medical malpractice crisis” to which the caps could be considered a rational response.

If this Honorable Court determines the West Virginia Legislature has the authority to enact a cap on noneconomic damages, then a review is appropriate to determine whether the 2003 reforms pose a rational basis to a serious problem.

The 1986 MPLA noneconomic cap (\$1 million) survived two constitutional challenges. Verba v. Ghaphery, 210 W.Va. 30, 552 S.E.2d 406 (2001); Robinson v. Charleston Area Medical Center, Inc., 186 W.Va. 720, 414 S.E.2d 877 (1991). The matter *sub judice* is a matter of first impression of the 2003 MPLA noneconomic cap (\$250,000/\$500,000).

West Virginia applies the rational basis test to constitutional questions where economic rights are concerned:

Where economic rights are concerned, we look to see whether the classification is a rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally. Where such classification is rational and bears the requisite reasonable relationship, the statute does not violate Section 10 of Article III of the West Virginia Constitution, which is our equal protection clause.

Marcus v. Holley, 217 W.Va. 508, 618 S.E.2d 517, Syl. Pt 12 (2005); State ex rel. Boan v. Richardson, 198 W.Va. 545, 482 S.E.2d 162, Syl. Pt. 1 (1996); Lewis v. Canaan Valley Resorts, Inc., 185 W. Va. 684, 408 S.E.2d 634, Syl. Pt. 2 (1991).

However, both Verba and Robinson departed from West Virginia precedent by applying a “toothless” rational basis for the first, and only, time in West Virginia jurisprudence. Verba and Robinson refused to “reexamine independently the factual basis for the legislative justification for [the] statute.” Instead, the inquiry focused on “whether the legislature reasonably could conceive to be true the facts on which the challenged statute was based.” Verba v. Ghaphery, 210 W.Va. at 35, 552 S.E.2d at 411; Robinson v. Charleston Area Medical Center, Inc., 186 W.Va. at 730, 414 S.E.2d at 887 (citing Carson v. Maurer, 120 N.H. 925,933, 424 A.2d 825, 831 (1980)⁴). Verba declined to consider the “copious statistics” submitted to the Court defending or refuting the legislative findings. Verba v. Ghaphery, 210 W.Va. at 34, 552 S.E.2d at 410. Robinson declined to consider whether the statutory cap was a “reasonable method of eliminating or curtailing the problem.” Robinson v. Charleston Area Medical Center, Inc., 186 W.Va. at 730, 414 S.E.2d at 887.

Your *amicus* respectfully requests this Honorable Court to reject the “toothless” rational

⁴ In Carson v. Maurer, 120 N.H. 925, 424 A.2d 825, 831 (1980), the Supreme Court of New Hampshire considered the constitutionality of medical malpractice reforms. The Carson Court did not “independently examine the factual basis for the legislative justification for the statute” in part because it applied a **heightened** level of scrutiny. New Hampshire applied an intermediate level of scrutiny to determine whether the reforms had a “fair and substantial relation to this legitimate legislative objective and whether it imposes unreasonable restrictions on private rights.” Carson v. Maurer, 120 N.H. at 933, 424 A.2d at 832. The Supreme Court of New Hampshire STRUCK DOWN the medical malpractice reforms after applying a heightened scrutiny on the grounds that it is “simply unfair and unreasonable to impose the burden of supporting the medical care industry solely upon those persons who are most severely injured and therefore most in need of compensation.” Carson v. Maurer, 120 N.H. at 942, 424 A.2d at 837. Moreover, New Hampshire struck down a SECOND series of medical malpractice reforms in Brannigan v. Usitalo, 134 N.H. 50, 587 A.2d 1232 (1991) holding the enhanced reforms are “even more unfair and unreasonable.” Brannigan v. Usitalo, 134 N.H. at 58, 587 A.2d at 1236. Verba and Robinson cited Carson but declined to follow its standard of review, reasoning and/or holding.

basis test⁵ set forth in Verba and Robinson. As noted by the Supreme Court of Wisconsin:

[J]udicial deference to the legislature and the presumption of constitutionality of statutes do not require a court to acquiesce in the constitutionality of every statute. A court need not, and should not, blindly accept the claims of the legislature. For judicial review under rational basis to have any meaning, there must be a meaningful level of scrutiny, a thoughtful examination of not only the legislative purpose, but also the relationship between the legislation and the purpose. The court must “probe beneath the claims of the government to determine if the constitutional ‘requirement of some rationality in the nature of the class singled out’ has been met.”

Ferdon ex rel. Petrucelli v. Wisconsin Patients Comp. Fund, 284 Wis.2d 573, 613, 701 N.W.2d 440, 460 (2005) (holding the Wisconsin cap on noneconomic damages is unconstitutional on equal protection grounds). The Ferdon Court refused to apply a “judicial rubber stamp” to the reforms and examined its underpinnings in an 83 page opinion (the same was summarily resolved in Robinson and Verba in one paragraph).

1. Legislative findings and declaration of purpose for the 2003 MPLA reforms.

The 2003 West Virginia Legislature enacted H.B. 2122 which amended the MPLA noneconomic cap. In doing so, the Legislature amended the preamble of W. Va. Code § 55-7B-1 [originally enacted in 1986] to reflect its “legislative findings and declaration of purpose.” The substantive changes to the preamble (emphasized below in bold) are a clear declaration of the purported “rational basis” for the 2003 reforms:

The Legislature hereby finds and declares that the citizens of this state are entitled to the best medical care and facilities available and that health care providers offer

⁵ The rational basis test is not a “toothless” one. Schweiker v. Wilson, 450 U.S. 221, 234-35, 101 S.Ct. 1074, 1082-83 (1981). Rational basis with teeth, sometimes referred to as “rational basis with bite,” focuses on the legislative means used to achieve the ends. This standard simply requires the court to conduct an inquiry to determine whether the legislation has more than a speculative tendency as the means for furthering a valid legislative purpose. The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. Ferdon ex rel. Petrucelli v. Wisconsin Patients Comp. Fund, 284 Wis.2d 573, 613-14, 701 N.W.2d 440, 460 (2005) (citations omitted).

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;

That as in every human endeavor the possibility of injury or death from negligent conduct commands that protection of the public served by health care providers be recognized as an important state interest;

That our system of litigation is an essential component of this state's interest in providing adequate and reasonable compensation to those persons who suffer from injury or death as a result of professional negligence, **and any limitation placed on this system must be balanced with and considerate of the need to fairly compensate patients who have been injured as a result of negligent and incompetent acts by health care providers;**

That liability insurance is a key part of our system of litigation, affording compensation to the injured while fulfilling the need and fairness of spreading the cost of the risks of injury;

That a further important component of these protections is the capacity and willingness of health care providers to monitor and effectively control their professional competency, so as to protect the public and insure to the extent possible the highest quality of care;

That it is the duty and responsibility of the Legislature to balance the rights of our individual citizens to adequate and reasonable compensation with the broad public interest in the provision of services by qualified health care providers **and health care facilities** who can themselves obtain the protection of reasonably priced and extensive liability coverage;

That in recent years, the cost of insurance coverage has risen dramatically while the nature and extent of coverage has diminished, leaving the health care providers, **the health care facilities** and the injured without the full benefit of professional liability insurance coverage;

That many of the factors and reasons contributing to the increased cost and diminished availability of professional liability insurance arise from the historic inability of this state to effectively and fairly regulate the insurance industry so as to guarantee our citizens that rates are appropriate, that purchasers of insurance coverage are not treated arbitrarily and that rates reflect the competency and experience of the insured health care providers **and health care facilities;**

That the unpredictable nature of traumatic injury health care services often result in a greater likelihood of unsatisfactory patient outcomes, a higher degree of patient and patient family dissatisfaction and frequent malpractice claims, creating a financial strain on the trauma care system of our state, increasing costs for all users of the trauma care system and impacting the

availability of these services, requires appropriate and balanced limitations on the rights of persons asserting claims against trauma care health care providers, this balance must guarantee availability of trauma care services while mandating that these services meet all national standards of care, to assure that our health care resources are being directed towards providing the best trauma care available; and

That the 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.

The Legislature further finds that medical liability issues have reached critical proportions for the state's long-term health care facilities, as: (1) Medical liability insurance premiums for nursing homes in West Virginia continue to increase and the number of claims per bed has increased significantly; (2) the cost to the state medicaid program as a result of such higher premiums has grown considerably in this period; (3) current medical liability premium costs for some nursing homes constitute a significant percentage of the amount of coverage; (4) these high costs are leading some facilities to consider dropping medical liability insurance coverage altogether; and (5) the medical liability insurance crisis for nursing homes may soon result in a reduction of the number of beds available to citizens in need of long-term care.

Therefore, the purpose of this article is to provide for a comprehensive resolution of the matters and factors which the Legislature finds must be addressed to accomplish the goals set forth in this section. In so doing, the Legislature has determined that reforms in the common law and statutory rights of our citizens must be enacted together as necessary and mutual ingredients of the appropriate legislative response relating to:

- (1) Compensation for injury and death;
- (2) The regulation of rate making and other practices by the liability insurance industry, **including the formation of a physicians' mutual insurance company and establishment of a fund to assure adequate compensation to victims of malpractice;** and
- (3) The authority of medical licensing boards to effectively regulate and discipline the health care providers under such board.

The declared purpose of the 2003 MPLA reforms address: (1) trauma services; (2) the cost of insurance premiums and decline in the number of physicians; and (3) long term health

care facilities. It should be noted that nothing in the original 1986 “legislative findings and declaration of purpose”, nor the 2003 amendments thereto, indicate that victim compensation is a cause of the so-called “medical malpractice crisis.”

2. The West Virginia Insurance Commissioner has published annual reports on medical malpractice insurance and medical malpractice claim frequency and severity which should be considered in a rational basis analysis.

In 2001, the West Virginia Legislature responded to the widely reported “medical malpractice crisis” by enacting a series of reforms including, *inter alia*, House Bill 601 codified in W. Va. Code § 55-7B-6 [2001] (relating to the screening certificate of merit). The reforms also demanded the West Virginia Insurance Commissioner report annually to the joint standing judiciary committee on the market conditions for medical professional liability insurance. W. Va. Code § 33-20B-6 and -7 [2001].⁶

The first such report was published in 2002 (examining the 2001 fiscal year) and each annual report through 2009 is available online at www.wvinsurance.gov. The data contained therein should be considered to determine whether the 2003 MPLA noneconomic cap “bears a reasonable relationship” to ameliorating the factors giving rise to the medical malpractice crisis.

Marcus v. Holley, 217 W.Va. 508, 618 S.E.2d 517, Syl. Pt 12 (2005); State ex rel. Boan v.

⁶ The WVIC report includes information submitted by each insurer providing five percent or more of the malpractice coverage in the state annually including: (1) The number of claims filed per category; (2) The number of civil actions filed; (3) The number of civil actions compromised or settled; (4) The number of verdicts in civil actions; (5) The number of civil actions appealed; (6) The number of civil actions dismissed; (7) The total dollar amount paid in claims compromised or settled; (8) The total dollar amount paid pursuant to verdicts in civil actions; (9) The number of claims closed without payment and the amount held in reserve for all such claims; (10) The total dollar amount expended for loss adjustment expenses, commissions and brokerage expenses; (11) The total dollar amount expended in defense and litigation of claims; (12) The total dollar amount held in reserve for anticipated claims; (13) Net profit or loss; (14) Investment and other income on net realized capital gains and loss reserves and unearned premiums; and (15) The number of malpractice insurance policies canceled for reasons other than nonpayment of premiums. W. Va. Code § 33-20B-6(b) and (c)(4) [2001].

Richardson, 198 W.Va. 545, 482 S.E.2d 162, Syl. Pt. 1 (1996); Lewis v. Canaan Valley Resorts, Inc., 185 W. Va. 684, 408 S.E.2d 634, Syl. Pt. 2 (1991).

3. The West Virginia Insurance Commissioner has declared the end of the so-called medical malpractice crisis.

In 2006, the West Virginia Insurance Commissioner officially declared the “end of the medical malpractice crisis.” See Jane Cline, *Medical Malpractice Report on Insurers with over 5% Market Share*, OFFICE OF THE WEST VIRGINIA INSURANCE COMMISSIONER, p. 11 (November 2006). The end of the medical malpractice crisis should end the “governmental purpose” of the 2003 MPLA noneconomic cap.

In 2009, the West Virginia Insurance Commissioner summarized the state of the medical malpractice insurance market as follows:

West Virginia’s medical malpractice insurance results have displayed continuous improvement compared to that of the years subsequent to the recent “hard” market period. Rate level changes which have been approved over the last few years, the passage of H.B. 601 and H.B. 2122 creating the policyholder owned West Virginia Mutual Insurance Company have all contributed to the change in the Medical Malpractice Liability results in West Virginia. In 2008, we experienced a continued overall general stabilization in rate (i.e. little to no change) from the major admitted writers in West Virginia.

Medical Malpractice Report, p. 2 (2009). She made the following observations:

- There has been a “continued decline in total West Virginia premiums since 2004.” *Medical Malpractice Report*, p. 11 (2009);
- Medical malpractice has continued to show improvement since the adverse 10 year high level which occurred in 2001, and is now performing well below the total combined industry results. *Medical Malpractice Report*, p. 9 (2009);
- Medical malpractice produced an *operating profit* in West Virginia from 2004 to 2006 and once again in 2008⁷, and that it remains profitable and notably more

⁷ “Note that the 2007 West Virginia results appear to be somewhat of an anomaly, and upon detailed review were shown to be largely driven by the exit of just two companies from our market during that year. Specifically, Health Care Indemnity Incorporated (a hospital policy

profitable overall than that of the countrywide average over the period [2000 to 2008]. *Medical Malpractice Report*, p. 14 (2009);

- General overall decline in Loss Ratio since 2002. *Medical Malpractice Report*, p. 14 (2009);
- West Virginia now averages 280 malpractice claims per year (down from 285 in 2007, and from a high of 327 in 2001). Over the past sixteen years, 31% of malpractice claims have been dismissed (the same figure was achieved for 2007). In 2001, H.B. 601 was passed. One of its key elements was §55-7B-6, requiring that a “certificate of merit” be obtained prior to the filing of a medical professional liability action against a health care provider. **We believe that this new screening process explains in part the increase in the percentage of dismissals seen beginning in 2002.** *Medical Malpractice Report*, p. 20 (2009);
- In general, the number of claims filed has dropped significantly since the passage of the 2001 legislation. Specifically, the 2008 claim count is about 52% of the 2001 total. *Medical Malpractice Report*, p. 21 (2009);
- On average, only about 9% of malpractice claims go to court. Of the claims that do go to court, roughly 70% receive a judgment of \$0. In other words, only about 30% of the claims that are adjudicated actually receive a judgment with payment. *Medical Malpractice Report*, p. 21 (2009);
- There is no clear pattern of either an increasing number of judgments or a consistent increase in total paid judgments. Rather, the small number of judgments restricts credible inferences. *Medical Malpractice Report*, p. 22 (2009);
- “It should be noted that the number of judgments in each year is very small and that actual paid amounts can vary significantly from year to year.” *Medical*

writer, included in the 2006 report with 5.26% market share) did not renew their single hospital policy for 2007 and posted a Direct Defense Cost Containment and Expense Incurred figure of \$19.3M for the year. Note that this amount (\$19.3M) is 4.7 times larger than their entire earned premium for that same exposure (\$4.1M) in 2006, and that the same heavily influenced the LAE ratio noted above as it was more than half of all incurred LAE (\$30.6M). Secondly, NCRIC, Inc. (the 9th largest admitted writer in West Virginia by market share in 2006, and 4th largest in 2004) fully exited the West Virginia market during 2007, posting negative earned premium figures for 2007, and a direct incurred DCCE figure (\$1.7M) that were more than 50% of their last positive earned premium (\$3.3M) amounts for 2006. Were it not for the two companies mentioned above leaving our market during 2007, the State-wide results would have been significantly different.” *Medical Malpractice Report*, p. 12 (2009).

Malpractice Report, p. 24 (2009). For example, in 2007, there were 15 jury trials (14 defense verdicts and 1 plaintiff verdict).

- Over the last 15 years, there have been a total of 23 judgments in excess of \$1,000,000; or an average of 1.5 per year. *Medical Malpractice Report*, p. 24 (2009);
- Settlements comprise the most common resolution for claim payments. Over the last 15 years, 51 settlements have exceeded \$1,000,000, or about 3.4 per year on average. *Medical Malpractice Report*, p. 25 (2009);
- A general escalation in the average settlement paid can be observed. For example, for the years of 1993-2000 combined the average paid settlement was \$186,586. For 2001-2008 combined, the average paid settlement was \$235,801. As with judgments, the small number of settlements restricts the credibility of the data. The actual number of settlements occurring since 2001 indicates a general decline in the frequency of paid settlements. *Medical Malpractice Report*, p. 26 (2009);
- The key volume writer in the state, West Virginia Mutual Insurance Company which holds 83.7% of the admitted market and 56.5% of the entire West Virginia market, again experienced a favorable year in 2008, posting a pure direct loss ratio of only 21.14%. *Medical Malpractice Report*, p. 53 (2009). “[H]aving fully repaid their original surplus note (\$26.1M start-up loan⁸) back to the State of West Virginia before the end of 2008, they have begun to explore opportunities for expansion into neighboring states. *Medical Malpractice Report*, p. 35 (2009);
- Looking at only actively licensed physicians that are reported to actually practice in West Virginia, an overall favorable increase can be observed for the State [from 1997 through 2008]. *Medical Malpractice Report*, p. 50 (2009);
- **“In 2008, medical malpractice insurance in West Virginia continued to demonstrate highly favorable results, culminating in the lowest overall loss ratio on record!”** *Medical Malpractice Report*, p. 53 (2009);
- **During 2008 medical malpractice rates in West Virginia remained stable.** *Medical Malpractice Report*, p. 53 (2009); and
- **Examination of the 5% market share companies data as required by §114CSR22, §114CSR23, and §33-20B-6 found no areas of material concern.** *Medical Malpractice Report*, p. 54 (2009).

⁸ The West Virginia Mutual Insurance Company repaid the entire \$24 million loaned by the State of West Virginia twenty-six years early. See WVMIC 2008 Annual Statement attached hereto as Appendix A (emphasis added).

The 2009 Medical Malpractice Report by the West Virginia Insurance Commissioner contains the wisdom of a retrospective review of the history of the medical malpractice crisis. The facts depict a reality much different than the media reported in 2003. As demonstrated below, the factors giving rise to the onset, and abatement, of the 2003 medical malpractice reform are not related to claim frequency and/or severity. Rather, the medical malpractice crisis was caused by the “underwriting cycle” and unusually high defense costs charged by West Virginia defense lawyers.

4. The West Virginia Insurance Commissioner has defined the origins and duration of the medical malpractice crisis.

The WVIC *Medical Malpractice Reports* (spanning from 2002 through 2009) provide keen insight into the market conditions before and after the 2003 MPLA reforms. Your *amicus* respectfully submits that close scrutiny will reveal several fundamental defects in the “rational basis” for the 2003 medical malpractice noneconomic cap.

The first endeavor should be to identify and define the origin and duration of the so-called medical malpractice crisis. To do so, we should start with the most recent WVIC Medical Malpractice Report and work our way backward in time to determine the starting point.

2009: The 2009 WVIC *Medical Malpractice Report* found “no areas of material concern” in 2008. Jane Cline, *Medical Malpractice Report on Insurers with over 5% Market Share*, OFFICE OF THE WEST VIRGINIA INSURANCE COMMISSIONER, p. 54 (November 2009).

2008: The 2008 WVIC *Medical Malpractice Report* found “no areas of concern” in 2007. Jane Cline, *Medical Malpractice Report on Insurers with over 5% Market Share*, OFFICE OF THE WEST VIRGINIA INSURANCE COMMISSIONER, p. 55 (November 2008).

2007: The 2007 WVIC *Medical Malpractice Report* found “West Virginia again experienced significant and exceptional results for medical malpractice” in 2006. Jane Cline, *Medical Malpractice Report on Insurers with over 5% Market Share*, OFFICE OF THE WEST VIRGINIA INSURANCE COMMISSIONER, p. 51 (November 2007).

2006: The 2006 WVIC *Medical Malpractice Report* found “West Virginia experienced outstanding results for medical malpractice” in 2005. Jane Cline, *Medical Malpractice Report on Insurers with over 5% Market Share*, OFFICE OF THE WEST VIRGINIA INSURANCE COMMISSIONER, p. 35 (November 2006).

2005: The 2005 WVIC *Medical Malpractice Report* found “West Virginia experienced outstanding results for medical malpractice” in 2004. Jane Cline, *Medical Malpractice Report on Insurers with over 5% Market Share*, OFFICE OF THE WEST VIRGINIA INSURANCE COMMISSIONER, p. 36 (November 2005).

2004: The 2004 WVIC *Medical Malpractice Report* found “West Virginia posted an excellent Loss & Loss Adjustment Expense ratio” in 2003. Jane Cline, *Medical Malpractice Report on Insurers with over 5% Market Share*, OFFICE OF THE WEST VIRGINIA INSURANCE COMMISSIONER, p. 34 (November 2004).

2003: The 2003 WVIC *Medical Malpractice Report* noted a “strong recovery” of the medical malpractice insurance market in fiscal year 2002. Jane Cline, *Medical Malpractice Report on Insurers with over 5% Market Share*, OFFICE OF THE WEST VIRGINIA INSURANCE COMMISSIONER, p. 10 (November 2003).

The hunt for the origins of the “medical malpractice crisis” lead us back to the 2002 inaugural report by the West Virginia Insurance Commissioner to the joint standing judiciary committee. In 2002, the West Virginia Insurance Commissioner described the “hard” insurance market across the country and noted that “[m]edical malpractice results in West Virginia have been (and continue to be) worse than the national averages.” *Medical Malpractice Report*, p. 13 (2002). Why was West Virginia worse than the national average? The answer is surprising.

The 2002 report indicates that “[t]he countrywide direct loss ratio in 2001 rose to its *worse level in the past six years* (98.8%), while the West Virginia loss ratio in 2001 was 15 points *better* than countrywide (83.7%). However, *West Virginia’s 2001 operating ratio was still worse than the industry due to very high claim defense costs.*”⁹ *Medical Malpractice Report*, p.

⁹ This notion was reiterated in the most recent WVIC *Medical Malpractice Report*: “[O]ne of the key elements underlying the historical adverse results for West Virginia had been a very **high level of defense costs**. Loss adjustment expenses in West Virginia had fallen from a high of 68.4% in 1999 to be more in line with (or better) than the industry countrywide ratios by 2006.

11 (2002). The direct loss ratio (the ratio of incurred losses to earned premium) in West Virginia was **BETTER** than then national average. However, West Virginia paid nearly \$.47 for every premium dollar to defense lawyers for legal fees. The comparable countrywide figure was about \$.26 for every premium dollar earned.

The report also concludes that doctors were paying “artificially lower” premiums in 2001:

It should be noted that while the exit of St. Paul from the medical malpractice market certainly helped precipitate the present medical malpractice crisis, the drive to increase medical malpractice rates would have occurred in any event. This is a natural result of the underwriting cycle. After the last crisis in 1985, rates rose to a level considered profitable by insurers and capital again flowed into the medical malpractice market. In the intervening years, companies wishing to participate in the medical malpractice marketplace did not file for rate revisions to maintain adequate rate levels. Instead, companies competed for the business and, for the last dozen years, the medical community enjoyed the benefit of this competition in the form of artificially lower rates. Now medical malpractice insurers are once again working to get rates to an acceptable level. And this will, at some point, happen. Then the cycle will start again. Thus, simply allowing rates to rise to an adequate level will not offer a permanent solution; it will simply buy time until the cycle repeats itself. Recommendations on how to break the underwriting cycle are made in Section III.”

Medical Malpractice Report, p. 13 (2002). Section III contains the following summary observations and conclusions:

The insurance industry is cyclical and necessarily competitive. We have witnessed these cycles in the Medical Malpractice line in the mid-‘70’s, the mid-80’s and the present situation. This particular cycle is, perhaps, worse than previous cycles as it was delayed by a booming economy in the ‘90’s and is now experiencing not just a shortfall in rates due to competition, but a subdued economy, lower interest rates and investment yields, the withdrawal of a major medical malpractice writer and a strong hardening of the reinsurance market. Rates will, at some point, reach an acceptable level to insurers and capital will once again flow into the Medical Malpractice market.

However, this favorable change did not continue in 2007 as Loss Adjustment Expense grew to 50.8% of premium (up from only 11.7% in 2006), and only improved slightly over that level for 2008 with 39.42%. Again examining the company level data, a degree of this adverse experience appears to be related to companies exiting the West Virginia market. However, this also remains an item of concern for the future.” *Medical Malpractice Report*, p. 53 (2009).

West Virginia results have been worse than the industry over the last six years. One of the key elements in these results has been the very high defense costs. These higher defense costs have been driven by Medical Assurance of West Virginia. A closer look at Allocated Loss Adjustment Expenses (ALAE)¹⁰ by company shows the following figures for 2001:

ALAE
St Paul Companies 39.3%
HCI 16.5%
National Union Fire 30.3%
Medical Assurance 88.0%¹¹

If we remove MAWV's ALAE from the West Virginia Medical Malpractice figures, the ALAE for the state drops to 28%. MAWV had approached claims with a vigorous defense stance. According to company management they are in the midst of changing that strategy and looking to settle more claims without the vigorous defense. MAWV's paid claim figures for 2001 do show that this strategy is occurring. This may account for the smaller average paid claim and the increased number of paid claims shown on page 9. It should also be pointed out that House Bill 601, passed in December, 2001, attempts to fix this problem for the future. These changes were not effective during 2001 and therefore not reflected in this report. The effectiveness of the changes will be measurable as legal proceedings governed by the new law are resolved.

On Exhibit VII, a sample comparison of rates is provided for MAWV, National Union, St Paul, Commonwealth, and ISO. The comparison shows that MAWV rates presently are the highest and in many cases, significantly more than the rates of their competitors. The comparison shows the considerable diversity in base rate levels amongst the various specialties. ISO (Insurance Services Office) has been included as ISO estimates that its subscribers write 28% of the of the Medical Malpractice premium written in West Virginia.

Exhibit VII¹² provides a comparison of Medical Services Inflation vs. Medical Malpractice premium growth. Using the assumption that the growth in medical

¹⁰ Cost on the part of the insurance company to cover expenses incurred in settling claims. This expense can be divided into two types: allocated (ALAE), those expenses such as court fees which can be directly tied to a specific claim, and unallocated (ULAE), such as insurance company claims department expenses, which are not directly allocated to a particular claim. *Medical Malpractice Report*, p. 25 (2002).

¹¹ The ALAE for Medical Assurance is truly remarkable given the national industry average for 2001 was only 28.6%. *Medical Malpractice Report*, p. 8 (2002). Medical Assurance was spending almost four times (4x) more in defense costs in West Virginia than the national average.

malpractice premiums should generally keep pace with the inflation costs of medical services, this exhibit provides further insight into the underwriting cycle. Since 1987, the last year of the mid-'80's medical malpractice crisis, medical services inflation has risen 113.4%. Over the same time period, written premiums have risen only 51.7%. At the bottom of the exhibit, the mid-'80's medical malpractice figures are provided. Note that between 1983 and 1987, medical malpractice premiums rose 155.4%. Such is the nature of the underwriting cycle.

Regarding the filed information, it is the Agency Actuary's opinion that the information was not completed to the level of detail expected. It is suggested that the requirements and guidelines for filed information be re-visited to clarify expectations and make the filed information of greater value in future reports.

The current rates on file meet the rating standard of not being excessive or unfairly discriminatory. However, it appears that for some companies and areas of malpractice, rates may not be adequate.

Based on this analysis, the state of West Virginia should anticipate companies to seek additional rate increases in the forthcoming year. However, approval of any additional rate increases will continue to be based on sound actuarial pricing presented by the insurer.

It is the Agency Actuary's opinion that for the state of West Virginia to avoid future 'crises' in medical malpractice coverage, the underwriting cycle needs to be

Year	7/1 CPI-U Index*	Annual Percent Change	Cumulative Percent Change	Industry	Annual Percent Change	Exhibit IX
				MedMal Net Written Premium (000's)**		Cumulative Percent Change
1987	130.4	--	--	4,004,185	--	--
1988	139.0	6.6%	6.6%	4,027,825	0.6%	0.6%
1989	147.9	6.4%	13.4%	4,278,009	6.2%	6.8%
1990	161.5	9.2%	23.8%	4,014,622	-6.2%	0.3%
1991	176.1	9.0%	35.0%	4,067,803	1.3%	1.6%
1992	189.7	7.7%	45.5%	4,133,567	1.6%	3.2%
1993	202.6	6.8%	55.4%	4,370,812	5.7%	9.2%
1994	212.6	4.9%	63.0%	4,780,537	9.4%	19.4%
1995	223.5	5.1%	71.4%	4,800,552	0.4%	19.9%
1996	231.9	3.8%	77.8%	4,875,486	1.6%	21.8%
1997	238.7	2.9%	83.1%	4,892,496	0.3%	22.2%
1998	246.5	3.3%	89.0%	5,145,066	5.2%	28.5%
1999	254.6	3.3%	95.2%	5,104,093	-0.8%	27.5%
2000	265.6	4.3%	103.7%	5,586,584	9.5%	39.5%
2001	278.3	4.8%	113.4%	6,072,468	8.7%	51.7%
2002	291.7	4.8%	123.7%	--	--	--

broken. Two approaches, which probably would work best in tandem, towards accomplishing this are:

1. Require companies writing medical malpractice in the state to provide yearly filings. This will allow the Insurance Commissioner to be certain that rates are being maintained at an adequate level. This approach is likely to require a rule change. It should also be noted that intervention by the Insurance Commission to maintain rate adequacy by companies in this market of business would interfere with competitive aspect of this line of business.

2. As has been discussed and is allowed by H.B. 601, the state could work towards the establishment of a mutual insurance company set up to provide physicians and hospitals with medical malpractice insurance. While beyond the scope of this report, such a company could provide the state with greater rate stability and break the underwriting cycle of the commercial marketplace especially if incorporated with suggestion (1) above.

Medical Malpractice Report, p. 22-24 (2002). Notably absent is any mention of frivolous¹³ lawsuits, runaway jury verdicts or the need for tort reform.

By the very words of the West Virginia Insurance Commissioner, the so-called medical malpractice crisis originated from market conditions brought on by the insurance industry as described in the 2002 *Medical Malpractice Report* and began to abate with the “strong recovery” noted in the 2003 *Medical Malpractice Report*. ***This “strong recovery” pre-dates the 2003 MPLA reforms.*** There is no evidentiary link between the 2003 medical malpractice crisis and insurance claim frequency and/or severity.

In 2001, West Virginia was not experiencing a medical malpractice crisis. We were experiencing a medical malpractice insurance crisis: a crisis not likely to reappear after the creation of the West Virginia Physicians Mutual Insurance Company in 2004 (which now claims

¹³ The New England Journal of Medicine published a 2006 article which addresses tort reform and concludes the “portraits of a malpractice system that is stricken with frivolous litigation are overblown.” David M. Studdert,, *Claims, Errors, and Compensation Payments in Medical Malpractice Litigation*, NEJM, Vol. 354:2024-2033 (2006) .

an 83.69% market share). *Medical Malpractice Report*, p. 35 (2009). The WVPMIC guarantees both availability and affordability of medical malpractice insurance in the State of West Virginia.

5. The West Virginia Insurance Commissioner has declared “[t]here does not appear to be a pattern of escalating jury awards or claims going to court.”

In 2009, the West Virginia Insurance Commissioner researched the frequency and severity of judgments (under the 1986 MPLA \$1million noneconomic cap) over the past fifteen (15) years and published the following table:

West Virginia Board of Medicine			
Judgments with payments capped at \$1,000,000			
Year	#	Amount	Average
1993	6	\$785,547	\$130,925
1994	10	\$3,946,419	\$394,642
1995	14	\$4,055,745	\$289,696
1996	5	\$2,585,837	\$517,167
1997	9	\$3,951,907	\$439,101
1998	9	\$5,409,154	\$601,017
1999	15	\$6,566,669	\$437,778
2000	7	\$4,767,554	\$681,079
2001	9	\$3,179,290	\$353,254
2002	7	\$2,855,223	\$407,889
2003	4	\$1,355,000	\$338,750
2004	6	\$3,456,244	\$576,041
2005	5	\$3,524,909	\$704,982
2006	3	\$1,830,989	\$610,330
2007	1	\$1,000,000	\$1,000,000
2008	8	\$4,325,596	\$540,700
15 Years	118	\$53,596,083	\$454,204

Medical Malpractice Report, p. 22 (2009). The WVIC concluded: “This table shows that even after limiting large awards to reduce volatility, there is no clear pattern of either an increasing number of judgments or a consistent increase in total paid judgments. Rather, the small number of judgments restricts credible inferences.” *Medical Malpractice Report*, p. 22 (2009).

This message is a common and recurrent conclusion from the WVIC. *Medical Malpractice Report*, p. 55 (2008) (“There does not appear to be any clear and credible pattern of escalating jury awards, as the small number of awards yields little in the way of credible data upon which to draw sound conclusions.”); *Medical Malpractice Report*, p. 53 (2007) (“There

does not appear to be any clear pattern of escalating jury awards; however, the small number of awards yields little in the way of credible data for drawing conclusions.”); *Medical Malpractice Report*, p. 37 (2006) (“There does not appear to be a pattern of escalating jury awards; however, the small number of jury awards yields little credible data for drawing conclusions.”); *Medical Malpractice Report*, p. 38 (2005) (“There does not appear to be a pattern of escalating jury awards; however, the small number of jury awards yields little credible data for drawing conclusions.”); *Medical Malpractice Report*, p. 34 (2004) (“There does not appear to be a pattern of escalating jury awards or claims going to court.”); *Medical Malpractice Report*, p. 39 (2003) (“There does not appear to be a pattern of escalating jury awards or claims going to court.”); *Medical Malpractice Report*, p. 12 (2003) (“It is encouraging to see that the average claim paid in 2001 is less than the average in previous years.”).

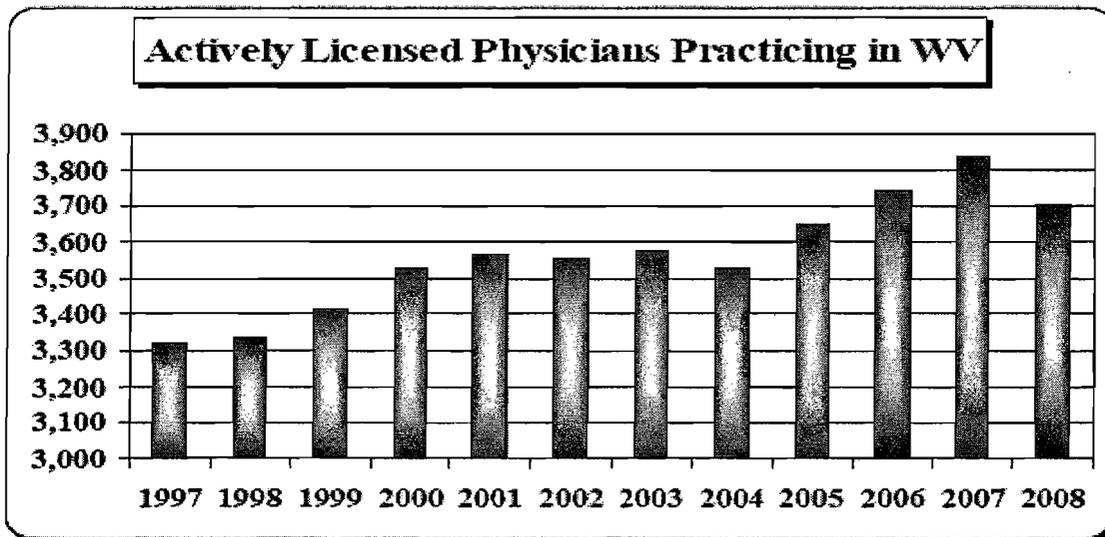
6. The West Virginia Insurance Commissioner has determined that doctors are not leaving the state.

The preamble to the 2003 MPLA reforms states: “That the 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 [2003]. The facts simply do not support this contention.

The 2009 *Medical Malpractice Report* dispels the myth of the emigrating doctor with the following data obtained from the West Virginia Board of Medicine relating to the number of actively licensed physicians practicing in West Virginia from 1997-2008¹⁴:

<u>Year</u>	<u>MDs</u>
1997	3,317
1998	3,339
1999	3,415
2000	3,525
2001	3,570
2002	3,552
2003	3,575
2004	3,532
2005	3,650
2006	3,743
2007	3,837
2008	3,708 ¹⁵

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¹⁵ Curiously, the largest departure of doctors in recorded history occurred between 2007 and 2008 (129); however, the West Virginia Physicians Mutual Insurance Company 2008 Annual Report states “[p]hysicians our moving to our State from other areas and many of our West Virginia trained and educated medical school graduates are choosing to remain here as opposed to moving elsewhere to provide healthcare.”

2009 *Medical Malpractice Report* p. 50. The data reveals that in 2003 – the year of the reforms – there were **MORE** doctors in West Virginia than in any year dating back to 1997. In fact, West Virginia actually lost 40 doctors the year **AFTER** the reforms were passed.

7. The creation and enormous success of the WVMIC has abated the governmental purpose of the 2003 MPLA reforms.

“Since its inception in July, 1, 2004, WVMIC [West Virginia Mutual Insurance Company] has dominated the Physicians & Surgeons market in West Virginia.” *Medical Malpractice Report*, p. 35 (2009). “The company’s results continue to be favorable and subsequent changes made to their rating plan establish their current rates below those that were utilized upon inception.” *Id.*

The WVMIC 2008 Annual Report contains the following message from the chairman:

It is with great pride that I present to you this 2008 annual report. Your mutual has experienced another outstanding year and has accomplished a major milestone. I am pleased to report that your Company is financially strong and the premier source of medical professional liability for West Virginia physicians. Your Board of Directors, comprised of six physicians, all representing different specialties and geographic regions, and five business leaders with extensive insurance background, has worked diligently over the past four years to secure the financial integrity of your Company while providing West Virginia physicians with significant, unprecedented premium relief. In addition, we have now repaid the entire \$24 million loaned to your Mutual by the State of West Virginia that served as our initial capital. This loan repayment occurred twenty-six years early! We physicians now own a financially sound insurance company that is debt free.

See WVMIC 2008 Annual Statement attached hereto as Appendix A (emphasis added).

The financial success of the WVMIC cannot be understated. In 2008, the insurance company generated \$44 million in direct premiums written¹⁶ with only \$9 million in direct losses incurred¹⁷ for a pure direct loss ratio¹⁸ of 21 percent (%). *Medical Malpractice Report*, p. 32 (2009). In layman's terms, 21 cents of every premium dollar is used to pay victims of medical malpractice. The nationwide industry average in 2008 was 34 percent (%). *Medical Malpractice Report*, p. 32 (2009).

Incredibly, the remainder of the West Virginia medical malpractice insurance market performed better than WVMIC. The West Virginia market generated \$53 million in direct premiums written while incurring negative \$4 million (\$-4,569,756.00) in incurred losses for a pure direct loss ratio of -8.35 percent (%). *Medical Malpractice Report*, p. 32 (2009). This is not a misprint. The insurance companies over-reported losses in the years before and had to account for the discrepancy which absorbed all losses incurred in 2008.

Finally, the 2009 WVIC *Medical Malpractice Report* notes the national direct combined ratio for 2008 was 75.30% while the West Virginia direct combined ratio¹⁹ was 42.96%. *Medical Malpractice Report*, p. 11 (2009). Around the country, the medical malpractice insurance industry averaged paying out 75 cents of every premium dollar in claims and expenses. In West Virginia, our insurance companies only averaged 43 cents of every premium dollar. The historical data dating back to 1999 is set forth below:

¹⁶ "Written premium" is defined as the total premium from all policies with effective dates within a given time period."

¹⁷ "Incurred loss" is defined as "a monetary payment and/or reserve on the part of the insurance company to cover claims of the insureds which are payable by terms of the insurance contract." *Medical Malpractice Report*, p. 56 (2009).

¹⁸ "Direct loss ratio" is defined as the ratio of incurred losses to earned premium. *Medical Malpractice Report*, p. 56 (2009).

¹⁹ The "direct combined ratio" is the sum of expenses and incurred losses combined versus earned premiums. *Medical Malpractice Report*, p. 56 (2009).

Industry vs. West Virginia Medical Malpractice Results
(000's)

INDUSTRY (Best's Aggregates & Averages)						
Year	Direct Written Premium	Direct Earned Premium	Direct Loss Ratio	Loss Adjustment Expense	Underwriting Expense	Direct Combined Ratio
1999	\$6,027,964	\$6,013,442	74.60%	32.10%	20.10%	126.80%
2000	\$6,376,040	\$6,329,556	81.00%	32.10%	19.20%	132.30%
2001	\$7,457,325	\$6,928,413	99.60%	34.30%	18.50%	152.40%
2002	\$9,308,354	\$8,796,700	92.10%	31.70%	17.40%	141.20%
2003	\$10,755,416	\$10,268,287	81.60%	31.00%	15.20%	127.80%
2004	\$10,622,900	\$10,291,731	64.50%	27.40%	14.20%	106.10%
2005	\$10,938,999	\$10,747,388	51.20%	27.80%	15.40%	94.40%
2006	\$11,406,472	\$11,310,607	43.90%	26.90%	15.80%	86.60%
2007	\$10,602,092	\$10,716,344	40.70%	23.40%	17.40%	81.50%
2008	\$10,207,718	\$10,397,198	34.20%	23.20%	17.90%	75.30%
Total	\$93,703,280	\$91,799,666	63.20%	28.40%	16.80%	108.40%

WEST VIRGINIA (NAIC Annual Statement Data)						
Year	Direct Written Premium	Direct Earned Premium	Direct Loss Ratio	Loss Adjustment Expense	Underwriting Expense	Direct Combined Ratio
1999	\$44,387	\$42,565	93.82%	69.48%	15.23%	178.53%
2000	\$67,635	\$57,081	76.51%	59.91%	13.54%	149.96%
2001	\$67,248	\$67,451	89.68%	51.23%	13.61%	154.51%
2002	\$71,909	\$86,550	97.76%	22.56%	9.41%	129.73%
2003	\$50,312	\$52,792	70.17%	18.27%	9.01%	97.44%
2004	\$113,237	\$94,994	38.23%	20.99%	8.00%	67.22%
2005	\$83,680	\$79,774	26.59%	1.25%	14.21%	42.05%
2006	\$78,739	\$77,969	15.72%	11.86%	14.00%	41.58%
2007	\$60,323	\$60,264	59.39%	50.76%	14.32%	124.47%
2008	\$53,272	\$54,743	-8.35%	39.42%	11.88%	42.96%
Total	\$690,742	\$674,183	54.40%	31.13%	12.05%	97.58%

Medical Malpractice Report, p. 56 (2009) (the 2007 anomaly is discussed supra n.4). The WVIC summarized the data noting a “continued decline in total West Virginia premiums since 2004; greater volatility in direct West Virginia loss ratios and loss adjustment expenses (likely because of our relatively small market size), and a quicker return to overall profitability than that which was experienced on a countrywide basis (*A less than 100% combined ratio occurred in*

WV in 2003. It did not occur countrywide until 2005). Medical Malpractice Report, p. 14 (2009).

CONCLUSION

A tidal wave of public opinion, fueled by special interest groups, is not a sufficient rational basis to infringe upon the rights of those citizens most in need of justice. The dangers of such were addressed by our founding fathers:

But it is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed, but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments, than but few may be aware of. The benefits of the integrity and moderation of the judiciary have already been felt in more States than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts: as no man can be sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day. And every man must now feel, that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress.

FEDERALIST Paper No. 78. The pendulum of reform swung too far with the unjust laws of the 2003 MPLA noneconomic cap. This Honorable Court should uphold the inviolable rights of the citizens of West Virginia and remind the Legislature of its constitutional limitations.

Your *amicus*, the West Virginia Association of Justice, respectfully requests this Honorable Court to perform an important governmental function. Performing a meaningful

rational basis review of the 2003 MPLA amendments will separate fact from fiction and serve as a “check and balance” to sensational politics.

It is unjust to cap noneconomic damages because of runaway jury verdicts...when the evidence conclusively reveals: “[T]here is no clear pattern of either an increasing number of judgments or a consistent increase in total paid judgments. Rather, the small number of judgments restricts credible inferences.” *Medical Malpractice Report*, p. 22 (2009).

It is unjust to cap noneconomic damages because of doctors are leaving the state...when the evidence conclusively reveals there is an overall increase in the number of practicing physicians since 1997. *Medical Malpractice Report*, p. 50 (2009).

Fear mongering cannot swallow our constitutional rights. Holding the legislature accountable to the wisdom of a retrospective and rational review is a necessary and important democratic function. Otherwise, there is no limitation to the passions of the few when sponsored by the power of the privileged.

WEST VIRGINIA
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EXHIBITS

ON

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