

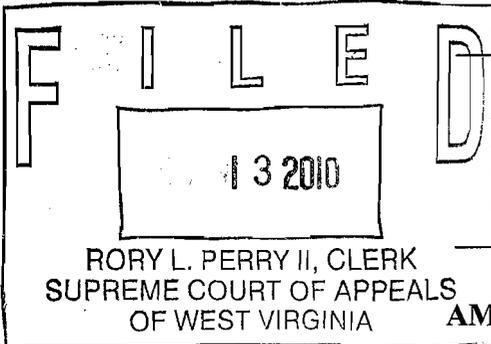
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35543

JAMES D. MacDONALD and DEBBIE MacDONALD
Plaintiff Below, Appellants,

vs.

CITY HOSPITAL, INC., and SAYEED AHMED, M.D.,
Defendants Below, Appellees



The Honorable Gray Silver, III, Judge
Circuit Court of Berkeley County
Civil Action No. 07-C-150

**AMICUS BRIEF OF THE WEST VIRGINIA
BOARD OF RISK & INSURANCE MANAGEMENT
IN SUPPORT OF DEFENDANTS/RESPONDENTS**

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I. INTEREST OF AMICUS CURIAE

The West Virginia Board of Risk & Insurance Management (hereinafter “BRIM”) has a substantial interest in the continuing applicability of West Virginia’s limit on noneconomic damages in medical malpractice claims. BRIM, an agency of the State created to purchase and manage the State’s insurance policies, is dependent upon the statutory limit on noneconomic damages in medical malpractice actions in not only reducing the losses associated with medical malpractice claims filed against physicians employed by it but also in allowing BRIM to reasonably predict, for actuarial purposes, the cumulative amount of losses that the State will incur as a result of medical negligence claims. By having this predictability, the medical malpractice insurance market remains viable for private insurers to offer coverage to private medical practitioners and concomitantly reduces the financial exposure to tax payers of West Virginia who ultimately pay the bill for medical malpractice coverage for physicians employed by state entities such as West Virginia University (“WVU”), Marshall University (“Marshall”) and the West Virginia School of Osteopathic Medicine (“WVSOM”). Voiding the limits on noneconomic damages will cause the market to become unstable, forcing private insurers to leave private practitioners uninsured and requiring (once again) the State, through BRIM, to insure private medical providers with public funds and increasing by orders the States exposure to claims of medical negligence.

II. STATEMENT OF FACTS

Amicus adopts the Defendants’/Respondents’ Statement of Facts.

III. SUMMARY OF THE ARGUMENT

BRIM was established, in part, to supervise and control the insurance of State property, activities and responsibilities, including, in part, the acquisition and cancellation of State

insurance as well as the determinations of the kind or kinds of coverage, the amount or limits for each kind of coverage, and the conditions, limitations, exclusions, endorsements, amendments and deductible forms of insurance coverage. Juries rendering extraordinary verdicts with high awards of noneconomic damages and large monetary settlements driven by the fear of runaway verdicts in cases where pain and suffering was the largest component of the damages caused several significant private medical malpractice insurers to either forego writing new insurance policies or to stop renewing the policies already in place. As a result, many private practitioners providing necessary medical services throughout the State were left with no insurance coverage, thus threatening the delivery of medical services available throughout the State as those practitioners looked at either retiring, reducing the high risk scope of their practice, or moving to other states with more affordable coverage. As this medical malpractice crisis escalated, and in order to preserve our citizens' access to adequate medical care throughout the State including its more rural parts, BRIM was compelled to extend coverage to private practitioners, as insurance coverage became unaffordable and unavailable for physicians and other medical professionals.

Following the Legislature's enactment of the Medical and Professional Liability Act of 2003 (MPLA), the medical malpractice insurance market stabilized, allowing insurers to return to West Virginia and provide medical malpractice insurance coverage to private practitioners. Furthermore, the stabilization of the market allows the State to project the potential losses for the upcoming year and State agencies-which employ physicians or contract for medical services-can predict the impact of the losses and secure, through appropriations, the funds to pay the assessment for professional liability insurance through the BRIM program.

To find the MPLA limits on noneconomic damages unconstitutional would have the effect of finding the State once again at a cross-roads regarding medical care for its citizens. In order to maintain quality medical care throughout the State, BRIM would likely once again be forced, at the cost to the taxpayers, to underwrite insurance coverage for private practitioners. Furthermore, the State will be forced to raise the charges on state-insured entities such as WVU, Marshall, WVSOM and other state funded medical providers in order to cover potential losses and expenses. This will not only increase the financial burden upon the taxpayers of the State, but may once again require BRIM to re-administer the preferred medical liability program and the high-risk medical liability program that provided coverage to private medical practitioners who lost private insurance coverage beginning 11 years ago when private carriers began to quit providing medical malpractice insurance and refused to renew existing policies. See *W. Va. Code* § 29-12-5(a)(2)(A). The limits on noneconomic damages must remain intact in order to ensure that BRIM can continue to deliver medical malpractice coverage through the trust created to pay indemnity, costs and expenses of medical negligence claims filed against the State, her agencies and its employees.

IV. ARGUMENT

To address the medical malpractice crisis, the Legislature enacted limits on the amount of recoverable noneconomic damages in medical malpractice lawsuits. *W. Va. Code* § 55-7B-8. The Legislature specifically stated “[t]hat 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.” *W. Va. Code* § 55-7B-1. The Legislature went on to clarify:

[t]hat 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.

Id.

Without the noneconomic damage limitations on medical malpractice actions, two things are likely to occur: First, the West Virginia Physicians' Mutual Fund, funded by participating physicians, will likely fail, as extraordinary claims would deplete the funds in the mutual account while physicians balk at paying significantly higher premiums to fund the mutual account; and second, BRIM would be forced back into the business of providing insurance to private practitioners who would otherwise be uninsured in order to maintain the health care system. Physicians will either forego the practices of surgery, obstetrics or other high-risk medical services, thereby leaving those practices underserved in this State or, alternatively, retire or leave the State in search of other states where medical malpractice insurance is more affordable.

To alleviate the effect on the most rural areas regarding the adequacy of health care, the State and, more particularly, BRIM, would be thrust back into the private insurance business, much as it was prior the enactment of the MPLA. There can be no doubt that the State does not wish to be in the business of providing insurance coverage to private physicians nor should it be.

A. The limits on noneconomic damages allow the state to provide affordable premiums to its insured doctors, as the stabilized market allows BRIM to project the potential losses for the upcoming year and provide affordable premiums to the State based upon those projections.

Removal of the statutory limits to recovery of noneconomic damages in medical malpractice cases will likely cause the State to regress into another healthcare crisis, thereby

increasing the cost of health care to each and every taxpayer of the State and/or diminishing or possibly eliminating access to health care to a significant portion of the State's population.

BRIM is a statutorily mandated state run agency created to provide insurance coverage to the State and its employees. According to the Legislature:

Recognition is given to the fact that the State of West Virginia owns extensive properties of varied types and descriptions representing the investment of vast sums of money; that the State and its officials, agents and employees engage in many governmental activities and services and incur and undertake numerous governmental responsibilities and obligations; that such properties are subject to losses, damage, destruction, risks and hazards and such activities and responsibilities are subject to liabilities which can and should be covered by a sound and adequate insurance program; and that good business and insurance practices and principles necessitate the centralization of responsibility for the purchase, control and supervision of insurance coverage on all state properties, activities and responsibilities and the cooperation and coordination of all state officials, departments and employees in the development and success of such a centralized state insurance program. Wherefore, in order to accomplish these desired ends and objectives, the provisions of this article are hereby enacted into law in response to manifest needs and requirements therefore and in the interest of the establishment and development of an adequate, economical and sound state insurance and bonding service on all state property, activities and responsibilities.

W. Va. Code § 29-12-1. The Legislature established BRIM to carry out this task. *W. Va. Code* § 23-12-3.

BRIM is essentially a State-funded insurer that operates as a "fronting program" that funds a trust with tax payer dollars provided it by the State. In order to estimate the amount of the current year's premium, the State relies on actuaries to project the amount necessary to pay all losses during a fiscal year. BRIM puts that amount of money, received by it from the State, into a trust that is administered by an outside trustee with a private insurer acting as the beneficiary of that trust. The private insurer then draws down from that trust to pay claims asserted against the State or its agencies and employees. If the amount payable as losses exceeds the amount contained in the trust, BRIM, or in other words the State, is obligated to replenish the

trust. The insurer administering the trust account pays none of its own money to resolve claims. Rather, general revenue funds as appropriated by the legislature to the state agencies fund the trust that is ultimately charged with the claim and expenses for medical negligence.

During the healthcare crisis of 2001, the legislature enacted law requiring BRIM to also fund specific programs to insure the state could provide vital healthcare services to its residents. BRIM was required to provide a preferred medical liability program and a high risk medical liability program to ensure that West Virginians could receive this type of medical service. The legislature required BRIM to:

(A) Administer the preferred medical liability program and the high risk medical liability program and exercise and perform other powers, duties and functions specified in this article;

(B) Obtain and implement, at least annually, from an independent outside source, such as a medical liability actuary or a rating organization experienced with the medical liability line of insurance, written rating plans for the preferred medical liability program and high-risk medical liability program on which premiums shall be based;

(C) Prepare and annually review written underwriting criteria for the preferred medical liability program and the high-risk medical liability program. The board may utilize review panels, including, but not limited to, the same specialty review panels to assist in establishing criteria;

(D) Prepare and publish, before each regular session of the Legislature, separate summaries for the preferred medical liability program and high-risk medical liability program activity during the preceding fiscal year, each summary to be included in the Board of Risk and Insurance Management audited financial statements as "other financial information" and which shall include a balance sheet, income statement and cash flow statement, an actuarial opinion addressing adequacy of reserves, the highest and lowest premiums assessed, the number of claims filed with the program by provider type, the number of judgments and amounts paid from the program, the number of settlements and amounts paid from the program and the number of dismissals without payment;

(E) Determine and annually review the claims history debit or surcharge for the high-risk medical liability program;

(F) Determine and annually review the criteria for transfer from the preferred medical liability program to the high-risk medical liability program;

(G) Determine and annually review the role of independent agents, the amount of commission, if any, to be paid therefore and agent appointment criteria;

(H) Study and annually evaluate the operation of the preferred medical liability program and the high-risk medical liability program and make recommendations to the Legislature, as may be appropriate, to ensure their viability, including, but not limited to, recommendations for civil justice reform with an associated cost-benefit analysis, recommendations on the feasibility and desirability of a plan which would require all health care providers in the state to participate with an associated cost-benefit analysis, recommendations on additional funding of other state-run insurance plans with an associated cost-benefit analysis and recommendations on the desirability of ceasing to offer a state plan with an associated analysis of a potential transfer to the private sector with a cost-benefit analysis, including impact on premiums;

(I) Establish a five-year financial plan to ensure an adequate premium base to cover the long-tail nature of the claims-made coverage provided by the preferred medical liability program and the high-risk medical liability program. The plan shall be designed to meet the program's estimated total financial requirements, taking into account all revenues projected to be made available to the program and apportioning necessary costs equitably among participating classes of health care providers.

W. Va. Code 29-12-5(c)(2)(A)-(I). This statute is currently dormant due to the creation of the West Virginia Physicians' Mutual Insurance Company ("WVPMIC") in 2004. However, if the limits on noneconomic damages are removed and the West Virginia Physicians Mutual Fund contracts or collapses, then BRIM will have to re-administer the preferred medical and high risk medical liability program. *Id.*

Presently without the burden of providing private medical malpractice insurance, BRIM determines what premium is necessary from each of the State's agencies to meet BRIM's need to insure all state entities who provide these medical care and services. BRIM looks at the exposure information provided by each agency and looks at the losses each agency has had over the last five years and determines agency premiums. For example, with limits on noneconomic damages in place, BRIM can fund a trust based upon losses which have generally paid out about \$2.6 million per year for all of the claims of medical malpractice asserted against WVU, Marshall, WVSOM and other state-funded entities that are statutorily entitled to participate in the

BRIM program. Without caps on noneconomic damages, state entities providing primary medical care and high risk specialties including gynecology, obstetrics, cardiothoracic, and trauma surgery, and other high risk medical procedures, become exposed to increased liability requiring higher assessments by BRIM to fund the insurance trust.

On the other hand, by having these limits in place, the State can more accurately estimate the amount needed to fund the BRIM program, making the budgeting process more precise while also reducing the burden upon the taxpayers who ultimately pay for the fund. Without the caps on noneconomic damages, the losses paid in medical malpractice actions become unpredictable, casting significant uncertainty upon the State and how it funds the BRIM program. This greatly impacts the State's ability to properly fund the BRIM program, an essential component to the delivery of essential health care to the State residents, many of whom are dependent on the public fisc.

B. The limits on noneconomic damages in medical liability lawsuits are vital to the healthcare industry as they relieve the State of the responsibility of insuring private practitioners by stabilizing the market for private insurers to provide insurance coverage.

There is a recognized substantial public interest in providing access to quality health care to the citizens of West Virginia. See *W. Va. Code* § 33-20F-2(a)(8). Access to quality health care is inextricably intertwined with affording physicians the opportunity to obtain medical malpractice insurance. See *W. Va. Code* § 33-20F-2(a)(7). Indeed, it was as a result of this significant public interest that BRIM was compelled to underwrite numerous private practitioners in order to prevent a substantial short-coming of available medical care for West Virginia residents.

During a hard market period, insurers tend to flee this state, creating a crisis for physicians who are left without professional liability coverage. See *W. Va. Code* § 33-20F-2(a)(5). The State attempted to temporarily alleviate the previous medical liability crisis by providing medical malpractice coverage through the exclusively State-run BRIM program. See *W. Va. Code* § 33-20F-2(a)(1), (2), (12). This placed the burden on the State to provide coverage to not only its own physicians for the preferable and high risk medical care and services, but for private practitioners as well. If BRIM had not provided the means to obtain coverage, a number of the private practitioners would have retired, left the State, or limited their practices to low-risk procedures and treatments, each of which would have been detrimental to the State's health-care system.

Thus, to alleviate the potential crisis of losing countless physicians unable to obtain medical malpractice insurance on their own, which would then jeopardize health care to a significant portion of the State's population, BRIM extended the insurance option to private practitioners as a temporary measure to alleviate the medical liability insurance problem until the physicians' mutual insurance company came into operation. See *Zaleski v. West Virginia Physicians' Mut. Ins. Co.*, 647 S.E.2d 747, at 750-751 (W. Va. 2007), citing to *W. Va. Code* § 33-20F-2(b) (2003); *W. Va. Code* § 29-12B-6(a). The West Virginia Physicians Mutual Fund was established to eliminate the substantial actual and potential liability to the State, through BRIM, to provide medical liability coverage to private practitioners. *W. Va. Code* § 33-20F-2(a)(12), (13). The West Virginia Physician's Mutual Fund not only permitted the physicians insured by this insurer to control their own insurance coverage but to also allow the State to rid itself of this potential and actual medical malpractice liability from private practitioners. See, *W.*

Va. Code § 33-20F-2(a)(16). Thus, the Mutual fund provides a substantial relief to BRIM by insuring private practitioners.

In addition, the reforms enacted in 2001 – 2003 served to stabilize the private insurance market and caused private insurers to once again write medical malpractice policies in West Virginia. The limits have operated to allow not only the State but also private insurers to make a reasonable prediction as to their annual exposure to losses. Without limitations, predictions as to exposure of potential losses, especially in high-risk practices, are impossible. Thus, without these limits or caps, insurers, including the West Virginia Physician's Mutual Fund, will likely cease doing business in this State altogether. Alternatively, the premiums would be so high that physicians would stop providing high-risk services as a means to control the insurance premium, thus jeopardizing the medical care available to State citizens. Another possibility is that private physicians will be either forced to retire, move out of State, or seek employment through the State, shifting private practitioners to the State pay roll.

The State is presently not in the business of obtaining insurance coverage for private practitioners and certainly does not want to find itself in that position again. Yet, if the MPLA caps are found to be unconstitutional, there is little doubt that the State would once again find itself providing insurance for private physicians to ensure that the State continues to have a sufficient number of health care professionals to provide medical care to the residents of this State, with the consequence of placing an additional financial burden upon the State, BRIM and the taxpayers.

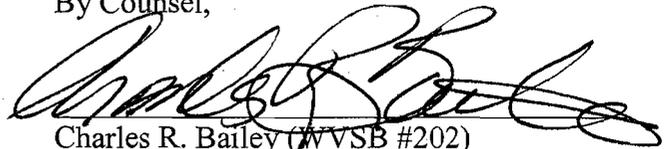
V. CONCLUSION

One of the primary purposes of the limits on noneconomic damages was to ensure physicians had available affordable medical malpractice liability insurance. A rational basis

existed and still exists for the limits placed on recovery from non-economic damages in claims against medical professionals. The MPLA, as the legislature predicted, has stabilized the market forces that affect professional liability coverage. Without these limits, the medical malpractice insurance market becomes unstable such that BRIM and private insurers alike are unable to underwrite medical malpractice insurance in a predictable manner, which predictably aids BRIM and the State in the management of the insurance program. Without meaningful limits to non-economic recovery, insurance premiums will substantially rise, making medical malpractice insurance unaffordable to most private practitioners. Doctors will leave the State, while others will eliminate portions of their practice that dealt with high-risk services in order to continue practicing in this State. This will once again force the State to step in and insure private physicians in order to preserve the availability of necessary medical care to its citizens.

**WEST VIRGINIA BOARD OF RISK &
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vs.

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Defendants Below, Appellees

CERTIFICATE OF SERVICE

I, Charles R. Bailey, do hereby certify that on October 13, 2010, I served a copy of the foregoing **“AMICUS BRIEF OF THE WEST VIRGINIA BOARD OF RISK & MANAGEMENT IN SUPPORT OF DEFENDANTS/RESPONDENTS”** upon counsel of record by depositing a true copy of the same in the United States mail, postage prepaid, addressed as follows:

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