

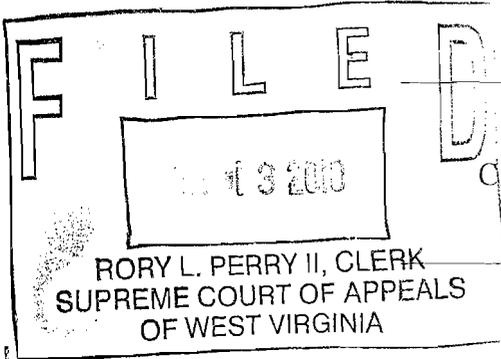
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35543

JAMES D. MACDONALD and DEBBIE MACDONALD,
Plaintiffs Below, Petitioners,

v.

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



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

BRIEF OF *AMICUS CURIAE*
ON BEHALF OF THE WEST VIRGINIA MUTUAL INSURANCE COMPANY

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I. INTERST OF *AMICUS*

The West Virginia Mutual Insurance Company (hereinafter “The Mutual”) is the only non-profit, member-owned medical liability insurance company in West Virginia. The Mutual is the successor to physician insurance policies that were handled by the West Virginia Board of Risk & Insurance Management (hereinafter “BRIM”) and was created, by the same bill that set a non-static non-economic damage caps at Two Hundred Fifty Thousand Dollars (\$250,000.00) for non-catastrophic claims and Five Hundred Thousand Dollars (\$500,000.00) for catastrophic claims, both of which adjust upward annually in accordance with the consumer price index (hereinafter “CPI”), as part of the Legislature’s 2003 response to the medical liability crisis in West Virginia.¹

The Mutual received initial capital from the West Virginia Tobacco Medical Trust Fund as well as “a special one-time assessment, in the amount of One Thousand Dollars (\$1,000.00), [which was] imposed on every physician licensed by the Board of Medicine or by the Board of Osteopathy for the privilege of practicing medicine in this state.”² The Mutual repaid the capital provided by the State and concomitantly reduced the average premium each year thereafter.

The Mutual insures a majority of physicians who practice medicine in West Virginia and has been able to provide coverage to this significant number because of the predictability of operating expenses, including payments of settlements and verdicts, afforded by the existence of the damage caps. As discussed herein, predictability directly leads to stability, not only with respect to those impacted by medical negligence claims, but to the provision of health care and the availability of physicians and providers willing to work and invest in our population. Every

¹ See Acts of the Legislature of West Virginia, 2003 W. Va. Ch. 147 (“HB 2122”).

² W. Va. Code § 33-20F-7 (2003).

citizen of the state needs health care. Every health care provider needs insurance. Predictability and stability are essential to the health of the West Virginia citizenry and health care system.

The outcome of this matter will directly impact the West Virginia Mutual Insurance Company and all current and future health care professionals in the state of West Virginia that carry or will in the future carry medical liability insurance, as well as the residents of the state of West Virginia who depend upon the state's health care professionals for treatment. The Mutual submits this *amicus curiae* brief in support of the Respondents/Defendants below.

II. ARGUMENT

The Mutual exists today because the Governor and Legislature of West Virginia considered and implemented every feasible strategy during their respective responses to the healthcare and medical professional liability insurance crises that had existed since the mid-1980's³ and had been actively percolating during the last few years of the Twentieth Century before becoming fully fulminant in the fall of 2001.⁴ Then and now, the existence of these intersecting crises have been acknowledged by this Court and cannot be credibly denied.⁵

³ The first time that medical professional liability insurance issues were addressed by the West Virginia Legislature was in 1986. *See* W. Va. Code § 55-7B-1, *et seq.* (1986). However, the Legislature has continued to try to find solutions to this ongoing issue. *See* Acts of the Legislature of West Virginia, 2001 W. Va. 6th Ex. Sess. Ch. 19 (“HB 601”); Acts of the Legislature of West Virginia, 2003 W. Va. Ch. 147 (“HB 2122”).

⁴ *See e.g.*, Joann C. Elmer, Physicians Step Up Pressure for Lawmakers to Deal With Malpractice Insurance Crisis, *The State Journal* (Oct. 8, 2001) (<http://www.allbusiness.com/government/government-bodies-offices-regional-local/11446035-1.html>; last visited Oct. 9, 2010) (reporting that “Dr. David W. Thomas of the W[est] V[irginia] P[hysicians for] W[omen] said older doctors will retire, younger doctors will choose to work in other states and it will be impossible to recruit good quality physicians if the problem continues to escalate.”).

⁵ *See Zaleski v. W. Va. Physicians' Mut. Ins. Co.*, 220 W. Va. 311, 314-15, 647 S.E.2d 747, 750-51 (2007) (recognizing that “Mutual is a West Virginia corporation formed in 2004 in accord with statutory provisions enacted by the Legislature to address the ‘nationwide crisis in the field of medical liability insurance’ causing ‘physicians in West Virginia [to] find it increasingly difficult, if not

A. Like Most Other States, West Virginia Has Had Public Policy Issues Regarding Medical Malpractice Litigation And Access To And Affordability Of Medical Professional Liability Insurance, Which Have Had An Adverse Impact On Health Care Providers And The Health And Welfare Of Our Citizens.

The delivery of health care is dependent upon physicians and hospitals. All hospitals require physicians to possess medical professional liability insurance. Doctors depend upon medical professional liability insurance for protection from liability. Injured patients depend upon the fund of insurance money to pay meritorious claims.⁶ Access and affordability of health care is dependent upon the existence of medical professional liability insurance. Access and affordability of medical professional liability insurance is essential to recruiting and retaining physicians in West Virginia.⁷

The chronology of events should be important to the Court in resolving this cap challenge because it demonstrates the length of time the Legislature took before it reluctantly selected the imposition of damage caps and the loan of state monies to capitalize the Mutual.

impossible, to obtain medical liability insurance either because coverage is unavailable or unaffordable.” W. Va. Code § 33-20F-2 (a)(1) and (6) (2003) (Repl.Vol.2006).”.

⁶ See W. Va. Code § 55-7B-1 (2003) (finding that “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.”).

⁷ See W. Va. Code § 55-7B-1 (2003) (finding that “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.”).

1. Although the Health Care Access and Medical Liability Crises are National in Scope, West Virginia’s Response Demonstrates the Acute Nature of the Crises in the State as the State became an Insurer through BRIM II.

West Virginia was not alone in 2001, when it was besieged by the sudden and crippling collapse of the commercial medical professional liability insurance market.⁸ The Governor called a Special Session to address these crises. The legislative response was groundbreaking and dramatic.

House Bill 601 was enacted. It boldly deployed multiple strategies including amendment of Chapter 11 of the West Virginia Code to allow for a tax credit for medical liability insurance premiums paid, amendment of Chapter 29 to establish the Board of Risk and Insurance Management (“BRIM II”⁹), amendment of Chapter 33 to create and fund a joint underwriting association for liability insurance, amendment of Chapter 55 to limit bad faith claims, amendment of Chapter 55 to require a notice of claim and a screening certificate of merit before the filing of an action, amendment of Chapter 55 to require access to medical records within thirty (30) days of the filing of an answer provide for expedited resolution of cases, amendment

⁸ Office of the West Virginia Insurance Commission, State of West Virginia Medical Malpractice Report on Insurers with over 5 percent Market Share at 15 (Nov. 2002) (<http://www.wvinsurance.gov/LinkClick.aspx?fileticket=V29NPU-rru8%3d&tabid=207&mid=798>; last visited Oct. 9, 2010) (reporting an 85% increase in rates for Medical Assurance of West Virginia, who comprised 26.3% of the market share of medical liability insurance market; reporting that St. Paul, who comprised 32.6% of the market share, withdrew entirely from the market; reporting that “[t]otal losses paid rose 27% in 2000 and an additional 46% in 2001;” reporting that “[t]he number of claims paid rose 26% in 2000 and 84% in 2001;” and concluding that “[m]edical malpractice results in West Virginia have been (and continue to be) worse than the national averages.”).

⁹ BRIM I is commonly used to for the insurance program for the West Virginia University School of Medicine, the Marshall University Joan C. Edwards School of Medicine and the West Virginia Osteopathic School of Medicine, as well as their physicians. BRIM II is commonly used for the insurance program for private physicians and hospitals. See Office of the West Virginia Insurance Commission, State of West Virginia Medical Malpractice Report on Insurers with over 5 percent Market Share at 6 (Nov. 2003) (<http://www.wvinsurance.gov/LinkClick.aspx?fileticket=OjFwBPHnTiU%3d&tabid=207&mid=798>; last visited on Oct. 9, 2010).

of Chapter 55 to provide a summary jury trial process, amendment of Chapter 55 to provide for a twelve (12) member jury trial, amendment of Chapter 56 to allow for a twelve (12) member jury trial, and amendment of Chapter 59 regarding the amount of fees charged by the clerk for the filing of a medical professional liability action.¹⁰

The entire country was adversely affected with the collapse of the commercial medical professional insurance industry, but only West Virginia had to take the extraordinary measure of developing a state-operated replacement in the form of BRIM II. This state-operated replacement became the insurers for the physicians and hospitals that could not obtain medical professional liability insurance in the commercial market.¹¹ The West Virginia Health Care Provider Professional Liability Insurance Availability Act, adopted as part of the 2001 Legislature's response to the crises, made the state an insurer for those physicians and hospitals that could not purchase insurance through a commercial provider.¹² This program was commonly known as BRIM II.¹³ This statutory change became effective in January 2002.

BRIM II was a stop-gap intervention as the state itself could not afford to be the insurer of health care providers or to run a medical professional liability company. It provided insurance

¹⁰ Acts of the Legislature of West Virginia, 2001 W. Va. 6th Ex. Sess. Ch. 19 ("HB 601").

¹¹ See W. Va. Code § 29-12B-1, *et seq.* (2001).

¹² Acts of the Legislature of West Virginia, 2001 W. Va. 6th Ex. Sess. Ch. 19 ("HB 601").

¹³ One insurance broker aptly turned a phrase by correctly characterizing the West Virginia medical professional insurance market as "grim" and noting the acronym for the remedial program was "BRIM." "West Virginia, like its neighbor Pennsylvania, is struggling with a crisis in the availability of medical malpractice insurance. The situation worsened considerably when The St. Paul Cos., the second-largest underwriter of medical malpractice insurance in the country, announced plans to exit the medical-malpractice insurance market due to a \$940 million loss in 2001." Insure.com, West Virginia's medical malpractice insurance market goes from grim to BRIM (March 20, 2002) (<http://www.insure.com/articles/generalinsurance/west-virginia-malpractice.html>; last accessed on Oct. 9, 2010).

coverage for the massive number of uninsured physicians and shuttered trauma centers.¹⁴ The Legislative and Executive Branches employed this approach in their good faith attempt to keep hospitals and trauma centers open and keep doctors from fleeing across the state borders.¹⁵ Nonetheless, despite the creation of BRIM II, the health care and medical insurance markets remained dysfunctional sixteen (16) months after the 2001 Special Session.

Nevada was a similarly afflicted state that structured its remedy upon the twin foundations of a new medical mutual insurer and damage caps. First, Nevada doctors formed the Nevada Mutual Insurance Company on May 2, 2002.¹⁶ Two years later, the voters of Nevada approved a Ballot Initiative that enacted a \$350,000 flat cap of all non-economic damages on medical malpractice verdicts.¹⁷ Both exist today.

Even though Nevada formed a medical mutual insurance company which predated West Virginia's decision by two years, West Virginia's BRIM II claims and actuarial data provides indisputable empirical data by which this Court can confidently conclude that a crisis existed and that the Legislature rationally and exhaustively pursued alternatives short of these damage caps

¹⁴ Acts of the Legislature of West Virginia, 2001 W. Va. 6th Ex. Sess. Ch. 19 ("HB 601").

¹⁵ See W. Va. Code § 55-7B-1 (2003).

¹⁶ "Nevada Mutual was formed in 2002 in response to an unparalleled crisis in the availability and cost of medical malpractice insurance. At our formation, we immediately implemented a plan to stabilize costs and defend doctors. Our belief, based upon the proven results in many other states, is that a stable, affordable medical malpractice market leads directly to better health care for Nevadans." Nevada Mutual Insurance Company, Owned by Nevada Doctors for Nevada Doctors (<http://www.nevadamutual.com/index.html>; last accessed on Oct. 9, 2010).

¹⁷ Nev. Rev. Stat. § 41A.035 (2004).

from December 2001 through March 3, 2003, when the caps were approved and the ground work for the formation of the Mutual was laid.¹⁸

2. West Virginia's Response Demonstrates the Acute Nature of the Crises as BRIM II Saddled the State with Liability, Creating a Need for the Creation of the Mutual and for Non-Economic Damage Caps.

The claims experience and underwriting by BRIM II proved to be too risky for the state.¹⁹ BRIM II incurred "significant losses" which were "primarily due to adverse claim development in the general liability and medical malpractice lines of business."²⁰ State leadership surveyed the nation in 2002 and 2003 for alternative approaches. The Mutual was the best and enduring response.²¹ However, state leaders knew that without some additional change to the system, the Mutual and hence, the entire population dependent upon a stable and viable medical professional insurance system, would end up in the same economic malaise as had BRIM II. That is why the 2003 change included both the creation of the Mutual and the non-economic damage cap of Two Hundred Fifty Thousand Dollars (\$250,000.00) for non-catastrophic and Five Hundred Thousand Dollars (\$500,000.00) for catastrophic claims *adjusted annually upward in accordance with the CPI*.²² The cap adjusts upward to account for inflation.²³ The 2003 Legislature ultimately made

¹⁸ W. Va. Code §33-20F-2(a)(13) & (14) (finding that being a medical professional liability insurer created "a substantial actual and potential liability to the state.").

¹⁹ See Acts of the Legislature of West Virginia, 2003 W. Va. Ch. 147 ("HB 2122").

²⁰ State of West Virginia Board of Risk and Insurance Management, Comprehensive Annual Financial Report at 22 (June 30, 2005) (<http://www.state.wv.us/BRIM/Finance/2005CAFR/2005%20Final%20CAFR.pdf>; last visited Oct. 9, 2010).

²¹ See W. Va. Code § 33-20F-2 (2003).

²² The non-economic damage cap was not new to West Virginia, as there was already a non-economic damage cap of \$1 million that had been instituted in 1986. The 2003 changes to the MPLA merely lowered the cap to \$250,000 and \$500,000 dependent upon the nature of the injury. Compare W. Va. Code § 55-7B-8 (1986) with W. Va. Code § 55-7B-8 (2003).

the application of the damage caps at issue in this case contingent upon the co-existence of medical professional liability insurance coverage in the amount of One Million Dollars (\$1,000,000.00).²⁴

The Legislature made a policy decision in setting the non economic damage cap, but could easily have granted immunity²⁵ from non-economic damages altogether.²⁶ The cap²⁷ is a

²³ W. Va. Code § 55-7B-8(c) (2003).

²⁴ W. Va. Code § 55-7B-8(d) (2003).

²⁵ Immunity is simply a \$0 cap.

²⁶ See W. Va. Code § 14-2-12 (1977) (granting immunity from liability to the state and state agencies); W. Va. Code § 19-25-1 through 19-25-7 (1997) (granting immunity to property owners who make land available for military training or recreational or wildlife propagation purposes); W. Va. Code § 20-3A-1 through 20-3A-9 (1984) (granting immunity to ski operators); W. Va. Code § 20-3B-1 through 20-3B-5 (1987) (granting immunity to whitewater outfitters and guides); W. Va. Code § 22-27-1 through 22-27-12 (2005) (granting immunity from liability to landowners and project sponsors who participate in the reclamation of land affected by mining); W. Va. Code § 23-2-6 (2003) (granting immunity from liability to employers who participate in workers compensation); W. Va. Code § 29-12A-1 through 29-12A-18 (1986) (granting immunity from liability to political subdivisions); W. Va. Code § 29-21-20 (1989) (granting immunity from liability to court appointed attorneys); W. Va. Code § 30-3C-1 through 30-3C-4 (1980) (granting immunity from liability to persons involved in peer review); W. Va. Code § 55-7-15 (1985) (granting immunity from liability to persons rendering emergency assistance at the scene of an accident or crime without remuneration); W. Va. Code § 55-7-16 (2003) (granting immunity from liability for members of a national ski patrol who, without compensation, provide emergency aid or assistance to an injured or ill person at the scene of a ski resort rescue operation); W. Va. Code § 55-7-17 (1994) (granting immunity from liability for persons trained in hazardous substance emergency response who renders assistance at an actual or threatened discharge scene); W. Va. Code § 55-7-18 (1996) (granting immunity from liability for registered, licensed, or certified residential care facilities; licensed day care centers; and agencies providing services in the home to children or incapacitated adults; for the provision of employment references for persons who have provided services); W. Va. Code § 55-7-18a (2006) (granting immunity from liability for employers disclosing job-related information about a former or current employee to a prospective employer); W. Va. Code § 55-7-19 (1998) (granting immunity from liability for licensed physicians volunteering for school athletics); W. Va. Code § 55-7-20 (2000) (granting immunity from liability for non-profit corporations who arrange excursions on trains); W. Va. Code § 55-7-23 (2005) (granting immunity from liability to health care providers who prescribe or use prescription drugs or medical devices in accordance with the U.S. F.D.A. instructions); W. Va. Code § 55-7C-1 through 55-7C-4 (1988) (granting immunity to qualified directors of voluntary organizations); W. Va. Code § 55-7D-1 through 55-7D-5 (1998) (granting immunity from liability to persons donating food, without profit or gain, to nonprofit organizations for distribution to needy individuals).

legislative policy decision which does not infringe on a person's constitutional²⁸ rights any more than does a statute of limitations.²⁹ The Legislature, after having tried the 1986 \$1 million non-economic damage caps and after having been unsuccessful as an insurer through BRIM II, chose to provide the mechanism to capitalize the Mutual and an inflation-adjusted, tiered non-economic damage cap system as a solution to the crises in West Virginia health care and medical liability. This Legislative remedy continues to be effective and has unquestionably promoted the public policy quality health care tenets articulated in the respective statutes.³⁰

B. Public Policy Regarding Medical Liability Insurance Is Ultimately About Access To Quality Health Care For West Virginia Citizens.

This case does not present a new issue. West Virginia enacted the Medical Professional Liability Act in 1986 as a legislative response to the withdrawal of many commercial insurers licensed to sell medical professional liability insurance.³¹ Then, as now, the debate was acrimonious and emotionally charged as the existence of a "crisis" and its causes and the actual palpable impact of adverse jury awards and settlements was realized.³² Then, as now, the

²⁷ The Legislature has imposed other caps. *See* W. Va. Code § 16-5G-6 (1999) (placing a \$500.00 cap on compensatory and punitive damages for intentional violations of the Open Hospital Proceedings Act); W. Va. Code § 55-7A-2 (1995) (placing a cap on the amount of damages for liability of parents for act of children); and W. Va. Code § 29-12A-7(b) (1986) (placing a cap on non-economic damages under the Governmental Tort Claims and Insurance Reform Act).

²⁸ This Court has upheld caps in the past. *See Robinson v. Charleston Area Med. Ctr., Inc.*, 186 W. Va. 720, 414 S.E.2d 877 (1991); *Verba v. Ghaphery*, 210 W. Va. 30, 552 S.E.2d 406 (2001).

²⁹ W. Va. Code § 55-2-1 through 55-2-22 (1995) (providing statutes of limitations which have the effect of granting immunity from liability after a prescribed period of time set by the discretion of the legislature).

³⁰ W. Va. Code § 55-7B-1 (2003); W. Va. Code § 33-20F-2 (2003).

³¹ W. Va. Code § 55-7B-1 (1986).

³² The Congressional Budget Office analyzed the data and described the increase in claim payments from 1986 through 2002. "Payments of claims are the most significant costs that malpractice insurers

commercial insurance market balked at doing business in the Mountain state because of its perception that the venue was hostile and the book of business was too risky and not profitable.³³ Then, as now, counsel for injured patients vilified the rationally-based legislative policy and codification of common law, the MPLA, as being unconstitutional.

Today, the West Virginia Legislature approaches its twenty-fifth year of determining a balanced public policy for physicians, other health care providers and health care facilities.³⁴ Hordes of lobbyists on all sides of the public policy debate have aggressively advocated for their clients and constituencies. Every Governor since 1986 has confronted the issue and sought counsel from physicians, patients, lawyers, hospital administrators, actuaries, underwriters, consultants, and insurance commissioners. Whether one will admit the existence or extent of a malpractice and medical professional liability insurance crisis at any point in time over these last twenty-five years, no one can fault either the Executive or Legislative branches of West Virginia government for their persistence in addressing the issue.

Each member of this Court lived in West Virginia and followed the legislative enactment of the MPLA and participated in the process as lawyer, Judge, Justice, and/or consumer of health care services. Like a veteran of any historical conflict, the present day principals of this *Amicus*

face, accounting for about two-thirds of their total costs. The average payment for a malpractice claim has risen fairly steadily since 1986, from about \$95,000 in that year to \$320,000 in 2002. That increase represents an annual growth rate of nearly 8 percent--more than twice the general rate of inflation." Congressional Budget Office, *Limiting Tort Liability for Medical Malpractice* (<http://www.cbo.gov/doc.cfm?index=4968&type=0>; last accessed on Oct. 9, 2010).

³³ The Petitioners' own citation demonstrates that the Legislature was rightly concerned about the effect of runaway jury verdict upon medical liability insurance and the resulting effect upon both health care providers and citizens of West Virginia who need access to health care. *See* Lawrence Messina, *Malpractice Claims Have Decreased*, THE [CHARLESTON] SUNDAY GAZETTE-MAIL (Feb. 25, 2001) (<http://www.wvgazette.com/News/Price+of+Practice/200102250011>; last visited Oct. 9, 2010) (admitting that prior to the non-economic caps, there was a \$15.25 million jury verdict).

³⁴ *See* W. Va. Code § 55-7B-1 (1986).

Curiae and the undersigned counsel have personal perspectives about the shaping of this ongoing public policy debate because they participated in the historical events recounted herein as a BRIM II executive, counsel to St. Paul Fire & Marine Insurance, and consultants to several Governors, Senators, and Delegates who struggled to balance the competing interests.

West Virginians are unhealthy and require more health care than similarly situated citizens in our region and our nation.³⁵ In almost every category of illness or disease, West Virginians rank above the national average.³⁶ West Virginia is ranked as the number one (1) most medicated state in the United States.³⁷ While our medical and osteopathic graduates have learned well and graduated with the requisite skills and stayed in-state more frequently in recent years, a supermajority of West Virginia counties are designated as “medically underserved” with

³⁵ The United States Department of Health and Human Services has focused its research efforts on West Virginia and several other states because of its rural population and significant access to health care issues. “AHCPR has awarded almost \$10 million in grants to demonstrate innovative ways to deliver health services through managed care in rural areas of Arizona, Iowa, Maine, Nebraska, Oklahoma, and West Virginia. . . . One-fourth of America's population lives in rural areas. Compared with urban Americans, rural residents have higher poverty rates, a larger percentage of elderly, tend to be in poorer health, have fewer doctors, hospitals, and other health resources, and face more difficulty getting to health services.” U.S. Dept. Health and Human Services, *Improving Health Care for Rural Populations* (<http://www.ahrq.gov/research/rural.htm>; last accessed on Oct. 9, 2010).

³⁶ See The Henry J. Kaiser Family Foundation (<http://www.statehealthfacts.org>; last accessed Oct. 9, 2010).

³⁷ In addition to being the number one (1) most medicated state in the United States, Forbes.com also reports that: sixty-eight (68%) percent of adults in West Virginia are obese or overweight compared to the national average of sixty point eight percent (60.8%); twelve point three percent (12.3%) of adults in West Virginia have diabetes compared to the national average of eight point three percent (8.3%); in West Virginia, two hundred twenty-nine point four (229.4) out of every one hundred thousand (100,000) persons die from heart disease compared to the national average of one hundred ninety point nine (190.9) out of every one hundred thousand (100,000) persons. Forbes.com, *The Most Medicated States* (http://www.forbes.com/2010/08/16/medications-pharmaceuticals-drugs-medicine-lifestyle-health-rx_slide_2.html?partner=msnbc; last accessed Oct. 11, 2010).

several confirmed as such.³⁸ See Appendix 1. If our state is ever to turn the corner from illness and disease management to health promotion and prevention of disease, we need our physicians to stay in the state, to have certainty with respect to the cost of doing business and for our population to reap the long term benefit of a stable insurance system when medical errors do occur.

The legislative findings articulated in W. Va. Code § 33-20F-2 are profound in their recognition of the complex interrelationship between quality health care, access to and affordability of medical professional liability insurance, and the stability of a system of funding a medical liability civil justice system.³⁹

³⁸ West Virginia Department of Health and Human Resources, West Virginia Medically Underserved Areas (Jan. 2010) (www.wvochs.org/shared/content/recruitment/08mua1008.pdf; last accessed on Oct. 9, 2010).

³⁹ W. Va. Code § 33-20F-2 (2003):

- (1) There is a nationwide crisis in the field of medical liability insurance;
- (2) Similar crises have occurred at least three times during the past three decades;
- (3) Such crises are part of a naturally recurring cycle of a hard market period, when medical professional liability coverage is difficult to obtain, and a soft market period, when coverage is more readily available;
- (4) Such crises are particularly acute in this state due to the small size of the insurance market;
- (5) During a hard market period, insurers tend to flee this state, creating a crisis for physicians who are left without professional liability coverage;
- (6) During the current crisis, physicians in West Virginia find it increasingly difficult, if not impossible, to obtain medical liability insurance either because coverage is unavailable or unaffordable;
- (7) The difficulty or impossibility of obtaining medical liability insurance may result in many qualified physicians leaving the state;
- (8) Access to quality health care is of utmost importance to the citizens of West Virginia;
- (9) A mechanism is needed to provide an enduring solution to this recurring medical liability crisis;
- (10) A physicians' mutual insurance company or a similar entity has proven to be a successful mechanism in other states for helping physicians secure insurance and for stabilizing the insurance market;
- (11) There is a substantial public interest in creating a method to provide a stable medical liability market in this state;

The reality is that the Legislature, with the support of every Governor since 1986, incrementally added tort and insurance reform components that, until 2003, did not stem the tide of defections from the state by commercial insurance companies or provide a climate for health care professionals to practice throughout the state. The 2003 reforms produced the damage caps at issue and the statutory financial support to capitalize the Mutual as the state's first physician owned insurance company. These two initiatives were intertwined then and remained intertwined today because both work together to promote a stable, affordable medical professional insurance market. Abandonment of the damage caps will de-stabilize the capacity of the Mutual to continue its efforts and successes in reducing the premiums. Even with the dramatic reduction in premiums effectuated to date by the Mutual, its insureds still pay nearly twice the premium paid by similarly situated physicians who practice in states that border West Virginia. This Court is aware that as a licensed and regulated insurer, the Mutual must annually provide evidence to the West Virginia Insurance Commissioner to justify its premium rates. Today, the cost of medical professional liability insurance in West Virginia remains higher because of the losses and expenses incurred in defending medical professional liability claims.

(12) The state has attempted to temporarily alleviate the current medical crisis by the creation of programs to provide medical liability coverage through the board of risk and insurance management;

(13) The state-run program is a substantial actual and potential liability to the state;

(14) There is substantial public benefit in transferring the actual and potential liability of the state to the private sector and creating a stable self-sufficient entity which will be a source of liability insurance coverage for physicians in this state;

(15) A stable, financially viable insurer in the private sector will provide a continuing source of insurance funds to compensate victims of medical malpractice; and

(16) Because the public will greatly benefit from the formation of a physicians' mutual insurance company, state efforts to encourage and support the formation of such an entity, including providing a low-interest loan for a portion of the entity's initial capital, is in the clear public interest.

This premium differential reality continues to disadvantage the state, as compared with its border states, when physicians make a choice where to practice. The foregoing historical review of what happened in 2001 and why the responsible government officials recognized the need for a physician owned insurer should be persuasive when considering the injurious consequences that would surely follow any modification of the caps provided by W. Va. Code § 55-7B-8 (2003).

C. The Reforms Made By The West Virginia Legislature Work Together To Help Provide Affordable And Stable Medical Liability Coverage For West Virginia Health Care Providers And As A Result, Better Access To Quality Health Care For West Virginia Citizens.

Historians and pundits continue to debate whether the 2001 crisis that caused Governor Wise to convene a Special Session of the Legislature⁴⁰ and create a government run medical malpractice insurer was the result of excessive verdicts and settlements, the September 11 attack and its catastrophic impact on the insurance industry, or mismanagement of the insurance companies. Regardless, there is no debate that before September 11 one major insurer non-renewed all of its high risk specialties (obstetrics, surgery, and emergency medicine) and after that date then non-renewed every insured health care provider as part of its global strategy to exit the business that had been its flagship franchise for seventy years.⁴¹

Unlike many public policy debates that are academic and hypothetical, West Virginia's Executive Branch responded first by attempting to expand the eligibility requirements for BRIM

⁴⁰ See Joann C. Elmer, Physicians Step Up Pressure for Lawmakers to Deal With Malpractice Insurance Crisis, *The State Journal* (Oct. 8, 2001) (<http://www.allbusiness.com/government/government-bodies-offices-regional-local/11446035-1.html>; last visited Oct. 9, 2010) (quoting Governor Wise as saying, "I can tell you that doctors will not have to leave the state on Jan. 1.").

⁴¹ *St. Paul Fire & Marine Insurance Company. See State ex rel. Mantz v. Zakaib*, 216 W. Va. 609, 611-12, 609 S.E.2d 870, 872-73 (2004).

I, the existing insurance program for the state medical school health care providers.⁴² This effort was short-lived and abandoned when it became overwhelmed by applications from a deluge of uninsured physicians and near panic among the public highlighted by the temporary closure of trauma services at the state's most prominent tertiary care center, Charleston Area Medical Center, and a national spotlight on the diminishing access to healthcare for our citizens.⁴³

The cause or causes of the 2001 crises are not nearly as important to this review of the public policy choices made by the West Virginia Legislature as the events beginning in December of that year until the Mutual novated the policies of the BRIM II insureds on July 1, 2004. BRIM II did not stabilize the medical professional insurance market for doctors. The 2001 MPLA amendments did not quell the medical liability litigation crises.

Unquestionably, the continuing existence of the Mutual is essential to providing a stable market for medical liability insurance, which in turn helps to attract and keep health care providers in West Virginia, promoting access to health care for the citizens of West Virginia.

The Legislature's actions have made a difference. In the West Virginia Insurance Commission Report for 2006, just three years after the 2003 additions to the MPLA, including the non-economic damage cap and the creation of the Mutual, the Insurance Commission

⁴² See Office of the West Virginia Insurance Commission, State of West Virginia Medical Malpractice Report on Insurers with over 5 percent Market Share at 6 (Nov. 2003) (<http://www.wvinsurance.gov/LinkClick.aspx?fileticket=OjFwBPHnTiU%3d&tabid=207&mid=798>; last visited on Oct. 9, 2010).

⁴³ See W. Va. Code § 33-20F-2(a)(12)-(14) (2003) (finding actual and potential liability to the state for the medical liability insurance coverage under BRIM); see also, State of West Virginia Board of Risk and Insurance Management, Comprehensive Annual Financial Report at 22 (June 30, 2005) (<http://www.state.wv.us/BRIM/Finance/2005CAFR/2005%20Final%20CAFR.pdf>; last visited on October 9, 2010) (showing that BRIM incurred "significant losses" which were "primarily due to adverse claim development in the general liability and medical malpractice lines of business.").

concludes that “Medical Malpractice rates appear to have genuinely stabilized and are now declining in West Virginia.”⁴⁴

No one can dispute that an essential component of West Virginia’s health care delivery system is the existence of a viable medical professional liability insurance market. The Mutual has become the foundation upon which West Virginia physicians have relied to provide medical professional liability insurance.⁴⁵ The Mutual has and will continue to underwrite the majority of the medical professional liability insurance policies for West Virginia physicians premised on the existence of the damage caps.⁴⁶ The premiums for this coverage are dependent on the stability and actuarial predictability provided by continuing viability of W. Va. Code §55-7B-8.

⁴⁴ See Office of the West Virginia Insurance Commission, State of West Virginia Medical Malpractice Report on Insurers with over 5 percent Market Share at 32 (Nov. 2006) (<http://www.wvinsurance.gov/LinkClick.aspx?fileticket=16xed00agb8%3d&tabid=207&mid=798>; last visited on Oct. 9, 2010).

⁴⁵ The 2009 Report by the West Virginia Insurance Commission confirms that the Mutual insures a majority of West Virginia physicians and that the commercial market has returned as evidenced by the licensure of 107 separate medical professional liability insurers. In 2008, 100% the market share was comprised of 107 companies: [1] West Virginia Mutual Insurance Company comprised 55.65%; Lexington Insurance Company comprised 8.07%; Mountaineer Freedom RRG Inc. comprised 4.31%; ProAssurance Indemnity Company comprised 2.66%; Evanston Insurance Company comprised 2.25%; Community Hospital RRG comprised 2.14%; Health Care Industry Liab Recip Insurance comprised 1.86%; Homeland Insurance Company of NY comprised 1.85%; Medicus Insurance Company comprised 1.77%; Darwin Select Insurance Company comprised 1.75%; American Casualty Company of Reading Pennsylvania comprised 1.53%; Ophthalmic Mutual Insurance Company RRG comprised 1.34%; Continental Casualty Company comprised 1.10%; Columbia Casualty Company comprised 1.02%; and 93 other companies comprised the remaining 11.70%. See Office of the West Virginia Insurance Commission, State of West Virginia Medical Malpractice Report on Insurers with over 5 percent Market Share at 32 (Nov. 2009) (<http://www.wvinsurance.gov/LinkClick.aspx?fileticket=KHt9sy2Fod4%3d&tabid=207&mid=798>; last visited Oct. 9, 2010).

⁴⁶ See W. Va. Code §55-7B-8 (2003).

III. CONCLUSION

For the foregoing reasons, the Mutual respectfully requests that this Honorable Court affirm the Order of the Circuit Court of Berkeley County that upheld the constitutionality of the non-economic damage caps established by West Virginia Code § 55-7B-8 (2003).

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 35543

JAMES D. MACDONALD and DEBBIE MACDONALD,

Plaintiffs Below, Petitioners,

v.

CITY HOSPITAL, INC., and SAYEED AHMED, M.D.,

Defendants Below, Respondents.

I, the undersigned counsel for the West Virginia Mutual Insurance Company, hereby certify that I served true copies of the *Motion for Leave to File an Amicus Curiae Brief on Behalf of the West Virginia Mutual Insurance Company* and the *Brief of Amicus Curiae on Behalf of the West Virginia Mutual Insurance Company*, on this the 13th day of October, 2010, via United States Mail, First Class, postage prepaid, upon counsel of record:

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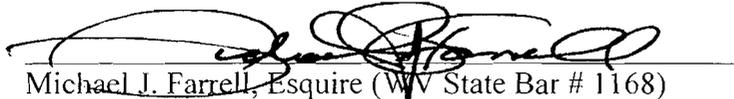
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