

STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

**Loretta Cline, Executrix of the Estate of
Henry Cline, Plaintiff Below,**

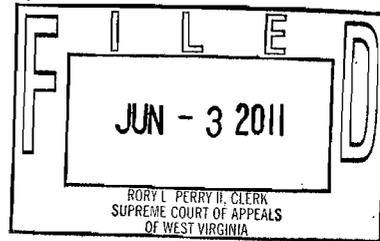
Petitioner,

vs.

**Kiren Jean Kresa-Reahl, M.D.,
Defendant Below,**

Respondent,

Case No. 11-0351
(Lower Court Case No. 09-C-2034)



PETITIONER'S BRIEF

Richard D. Lindsay, M.D., J.D.

WV State Bar # 2216

Matthew C. Lindsay, J.D., M.D.

WV State Bar #7896

Tabor Lindsay & Associates

Post Office Box 1269

Charleston, WV 25325

mlindsay@taborlindsay.com

304/344-5155

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III. ASSIGNMENTS OF ERROR

1. **The lower Court erred by dismissing petitioner's claim based on the failure to qualify as a claim for lack of informed consent and requiring a screening certificate of merit for the same.**

2. **The Court erred by finding that, even if Petitioner's theory of liability satisfied the common law requirements of lack of informed consent, the potential need for expert testimony necessitates the need for a screening certificate of merit.**

3. **The lower Court erred by finding that the Respondent or potential defendant has the authority to determine the sufficiency of a notice of claim or screening certificate of merit.**

IV. STATEMENT OF CASE

Procedural History

On July 6, 2009 petitioner, Loretta Cline, Executrix of the Estate of Henry Cline, provided respondent a "Notice of Claim and Statement Pursuant to West Virginia Code §55-7B-6(c)," stating her intent to file suit against Dr. Kresa-Reahl for lack of informed consent. (*A.R.35.*) On August 4, 2009, respondent, via letter, objected to petitioner's Notice of Claim and asserted, among other things, that petitioner was required to provide a screening certificate of merit. (*A.R. 20.*) On August 5, 2009, petitioner responded in writing asserting that she met the statutory requirements for filing her claim. (*A.R.22.*)

On October 29, 2009, petitioner filed her Complaint. (*A.R.1.*) On December 22, 2009 respondent filed an Answer denying all substantive claims and Motion to Dismiss alleging petitioner failed to comply with pre-suit requirements of §55-7B-6. (*A.R.9.*) Petitioner filed a Response to Motion to Dismiss on April 1, 2010. (*A.R.36.*) Respondent filed a Reply on April 7, 2010. (*A.R.42.*) A hearing on respondent's Motion to Dismiss was held on April 7, 2010. On February 3, 2011, nearly a year later, the trial court entered an Order of Dismissal. (*A.R.47.*) This is an appeal from the final Order of Dismissal.

Statement of Facts

On or about February 22, 2009, petitioner's decedent, Henry Cline, presented to the emergency department at Charleston Area Medical Center by ambulance with complaints of headache followed by sudden onset right-sided weakness, partial paralysis, and decreased ability to speak. At approximately 10:30 p.m., well within the recognized window for lytic therapy, respondent, Dr. Kresa-Reahl, was consulted by telephone and declined to administer thrombolytic therapy based on Mr. Cline's history of prostate cancer. Dr. Kresa-Reahl never saw Mr. Cline, nor did she speak with Mr. Cline or his wife. Petitioner was never provided adequate information regarding treatment options for acute stroke. Mr. Cline was admitted to the Intensive Care Unit where he died the following morning.

V. SUMMARY OF ARGUMENT

1. The lower court ruled that petitioner's case was not predicated on a recommended treatment, and therefore did not qualify as a claim for lack of informed consent. (*A.R. 50.*) Essentially, the court concluded that respondent did not have a duty to disclose that lytic therapy was a potential treatment, the risks associated with that treatment, or the alternatives to that treatment. Put another way, respondent did not have a duty to disclose lytic therapy as an alternative treatment to conservative measures simply because lytic therapy was not recommended by respondent. This ruling virtually destroys the patient need standard by limiting the scope of a physician's duty to disclose information and obtain informed consent to only those treatments recommended by that physician. Furthermore, the court concluded that even if respondent was required to disclose information regarding thrombolytic therapy, petitioner would still require a certificate of merit according to the Medical professional Liability Act. Petitioner asserts that according to the common law patient need standard, a screening certificate is not necessary and a claim for lack of informed consent is proper under §55-7B-6(c).

2. The lower court erred in ruling that even if petitioner's claim had met the requirements for lack of informed consent, expert testimony would be necessary to establish certain elements of alternative treatments and potential risks or medical outcomes. Therefore, the court concluded, petitioner must have a certificate of merit to maintain her action for lack of informed consent. (*A.R. 51.*) However, under the patient need standard the sufficiency or reasonableness of a physician's disclosure or non-disclosure is based upon the materiality of such information to the patient. Therefore, whether or not a physician has disclosed a sufficient amount of information to obtain informed consent is wholly dependent on what the patient needs to know. Generally, this includes treatment options, the risks inherent to treatments, and expected result or outcome should the patient choose not to be treated. A screening certificate of merit requires that an expert disclose how the applicable standard of care was breached. In a claim for lack of informed consent, the

applicable standard of care is determined by the patient. Therefore, a claim for lack of informed does not require a screening certificate of merit.

3. The lower court erred in ruling that petitioner had sufficient time or was otherwise provided fair opportunity to address and correct any deficiencies in her notice of claim or certificate of merit because the respondent timely objected to the same. (*A.R. 52.*) The decision of the lower court affords a potential defendant, or her attorney, the authority to determine the sufficiency of a notice of claim or certificate of merit. According to case law in West Virginia, only the Court has authority to determine the sufficiency of a notice of claim or certificate of merit.

VI. STATEMENT REGARDING ORAL ARGUMENT

Although the principle issue in this case, a claim predicated on lack of informed consent, has been reviewed by the Court in *Cross v. Trapp*, 170 W. Va. 459, 294 S.E.2d 446 (1982) and *Hicks v. Ghaphrey*, 212 W. Va. 327, 571 S.E.2d 317 (2002), it has not been reviewed by the Court in light of the Medical Professional Liability Act, *West Virginia Code* §55-7B-6. Therefore, to the extent that a claim of lack of informed consent is subject to or exclusive of the pre-suit requirement of a screening certificate of merit is an issue of first impression and is appropriate for Rule 20 argument.

VII. ARGUMENT

Petitioner presents this brief and/or petition following the trial court's granting of defendant's motion to dismiss. Petitioner takes exception and asserts her right to appeal from the final order of circuit court. (*A.R. 47*) "Appellate review of a circuit court's order granting a

motion to dismiss a complaint is de novo.” Syllabus Pt. 1. *Westmoreland v. Vaidya*, 222 W. Va. 205, 664 S.E.2d 90 (2008) citing *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995); *Albright v. White*, 202 W.Va. 292, 503 S.E.2d 860 (1998).

1. **The lower Court erred by dismissing petitioner’s claim based on the failure to qualify as a claim for lack of informed consent and requiring a screening certificate of merit for the same. (A.R.50)**

A. As a prerequisite to filing a claim in medical negligence *West Virginia Code* §55-7B-6, the Medical Professional Liability Act (herein “MPLA”), mandates that a potential plaintiff first provide a notice of claim and screening certificate of merit to each subject defendant. The certificate of merit must state the expert’s qualifications, familiarity with the standard of care at issue, opinion as to how the standard of care was breached, and how such a breach resulted in injury or death. *Id* at §55-7B-6(b). “[T]he purposes of requiring a pre-suit notice of claim and screening certificate of merit are (1) to prevent the making of and filing of frivolous medical malpractice claims and lawsuits; and (2) to promote the pre-suit resolution of non-frivolous medical malpractice claims.” Syllabus Pt. 2, *Hinchman v. Gillette*, 217 W. Va. 387, 618 S.E.2d 387 (2005). As a practical matter, the prerequisites ensure that the claim has been reviewed by a competent and qualified physician and who opines as to a breach of the applicable standard of care. In anticipation of those cases that are founded upon well-established theories of liability and do not require an expert to opine as to the breach of the applicable standard of care, the MPLA provides an exception in §55-7B-6(c). The case at bar represents a well-established legal theory of liability that does not require expert testimony to establish the scope of a physician’s duty.

The seminal case on informed consent is *Cross v. Trapp*, 170 W. Va. 459, 294 S.E.2d 446 (1982). In that case, the Court adopted the patient need standard. “Pursuant to the patient need standard, the need of the patient for information material to his or her decision as to method of treatment, such as surgery, is the standard by which the physician’s duty to disclose is measured. . . . Therefore, whether a particular medical risk should be disclosed by the physician to

the patient under the patient need standard ordinarily depends upon the existence and materiality of that risk with respect to the patient's decision relating to medical care." *Id.* at 468.

Accordingly, the standard of care is determined by the patient and is evaluated based on the reasonableness of the information desired. Information that is generally accepted as reasonable disclosure includes, but is not limited to, the possibility or potential of treatment, the risks involved with a particular treatment, alternatives to recommended treatments, the risks associated with alternative treatments, and the anticipated outcome should the patient refuse treatment. *Id.* If a physician does not provide the minimum information necessary for the patient to make an educated decision regarding medical treatment, then the physician has failed to obtain informed consent.

Cross does concede that expert testimony may be necessary to establish other matters such as risks concerning a particular treatment or alternatives to a particular treatment. However, this Court was clear, "expert testimony is not required under the patient need standard to establish the scope of a physician's duty to disclose medical information to his or her patient" *Id.* at 468. If expert testimony is not required to establish the scope of a physician's duty, then a screening certificate of merit establishing a breach of the physician's duty to disclose would not be necessary to maintain an action for lack of informed consent. This well established common law theory of liability falls squarely within the purview of §55-7B-6(c), the MPLA's exception to the provision of a certificate of merit.

In the case at bar, Mr. Cline was seen in the emergency department at Charleston Area Medical Center where he was evaluated for stroke. According to the medical records, Dr. Kresa-Reahl was consulted by telephone and considered lytic therapy, but declined to order thrombolytic therapy (clot busting medication) based on Mr. Cline's history of prostate cancer. There are only two options for treatment of acute stroke: lytic therapy or conservative measures. As Mr. Cline was unable to make decisions regarding his care, Mrs. Cline was informed that nothing would be done and Mr. Cline would be admitted to the Intensive Care Unit. The options of treatment were never discussed with Mrs. Cline. The risks associated with the treatment options were never discussed with Mrs. Cline. Mr. Cline's likely outcome with either treatment was never discussed with Mrs. Cline. Essentially, Mrs. Cline, acting on behalf of Mr. Cline, was

provided no information as to the potential courses of treatment. Mr. Cline died the following day.

Petitioner filed her claim based on the lack of information provided to her concerning the treatment rendered to her husband by respondent. At this juncture, the sole question is whether or not petitioner is required to provide a screening certificate of merit before filing her claim of lack of informed consent. Common law mandates that petitioner is not required to provide a certificate of merit to establish the scope of respondent's duty to disclose medical information. Because the MPLA is in derogation of common law, the provisions contained therein should be strictly construed in a manner that makes the least changes to the common law. *See Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W.Va. 492, 647 S.E.2d 928 (2007). When viewed in terms of *Phillips*, a claim made for common law lack of informed consent falls under §55-7B-6(c), and does not require a screening certificate of merit.

B. The lower Court rejected Petitioner's claim of lack of informed consent based on *Hicks v. Ghaphrey*, 212 W. Va. 327, 571 S.E.2d 317 (2002), citing *Vandi v. Permanente Medical Group, Inc.*, 7 Cal.App.4th 1064, 9 Cal.Rptr.2d 463 (1992) opining that a claim for lack of informed consent must be predicated on a recommended treatment. In *Vandi*, the Court declined to extend the duty imposed by the patient need standard to include disclosure of alternative diagnostic procedures. Mr. Vandi alleged that a C.T. scan following a seizure would have detected the cause of the seizure, a brain abscess. In essence, the Court declined to extend the physician's duty to disclose alternative treatments to include potential diagnostic procedures opining that there are hundreds of potential diagnostic procedures available for a given condition and it is unreasonable to impose such a burden on a physician. However, the Court in *Vandi* reserved the potential for the duty to extend to non-recommended procedures, "In an appropriate case there may be evidence that would support the conclusion that a doctor should have disclosed information concerning a nonrecommended procedure." *Id* at 467.

In *Hicks*, this Court employed the rationale in *Vandi* to address the decision of the a lower

court to decline to give a jury instruction on the lack of informed consent.¹ In that case, Mr. Hicks had been in an motor vehicle accident which left him paralyzed. Several weeks after being release from the hospital Mr. Hicks developed a pulmonary embolism which caused his death. Mr. Hicks' Estate claimed that doctors failed to insert an inferior vena cava filter to prevent pulmonary embolism while Mr. Hicks was in the hospital. Moreover, the Estate requested an instruction to the jury on lack of informed consent because Mr. Hicks was never made aware of the possibility of a filter insertion. Relying on the language of the Court in *Vandi*, this Court concluded that the difficulty in applying the patient need standard in *Cross* to the facts in *Hicks* is that “[a]fter a medical condition has been discovered it may be relatively easy to look back and identify a diagnostic procedure which would have revealed the condition but which was not medically indicated at the time. But in treating a patient a physician can consider only what is known at the time he or she acts.” *Hicks* at 335. Therefore, this Court concluded that “it would be inappropriate to impose such an imprecise and unpredictable duty burden upon a physician.” *Id* at 335, citing *Vandi* at 467.

However, the Court considered another case in *Hicks*. In *Matthies v. Mastromonaco*, 160 N.J. 26, 733 A.2d 456(1999), an elderly patient was being seen by a physician for a fractured hip. The surgeon recommended bed rest and neglected to advise the patient that surgery was an option for treatment. *Id* at 38. With only two treatment options, as in the case at bar, “the New Jersey Supreme Court held that ‘physicians do not adequately discharge their responsibility by disclosing only treatment alternatives that they recommend.’” *Hicks* at 334.

Unfortunately, by adopting the retrospective numerous diagnostic procedure rule in *Vandi*, the Court in *Hicks* inadvertently eradicated the very core of the patient need standard articulated in *Cross* - “the disclosure issue is approached from the reasonableness of the physician’s disclosure or nondisclosure in terms of what the physician knows or should know to be the patient’s informational needs.” *Id* at 461. If a physician is only duty bound to disclose information regarding recommended procedures or treatments, then patients will never be aware

¹The Court in *Hicks* was addressing an appeal from the lower court’s refusal to give a jury instruction on informed consent, and it was reviewed under abuse of discretion. It was held that the primary theory of the case, a negligence claim for failure to insert the vena cava filter, was properly submitted to the jury.

of alternative procedures or treatments that exist. Respondent had a duty to disclose to Mrs. Cline the two potential treatments for acute stroke, including the risks inherent to each, and the likely outcomes of each. At the time of Mr. Cline's diagnosis there were only two possible treatment options. This is clearly distinguishable from *Hicks* and *Vandi*, where each diagnosis was remote in time from the alleged injury. As in *Matthies*, at the time of diagnosis and discussion of potential treatments, "for consent to be informed, the patient must know not only of alternatives that the physician recommends, but of medically reasonable alternatives that the physician does not recommend." *Id* at 38. Therefore, a claim for lack of informed consent is not predicated upon or limited to only those treatments that are recommended by a physician.

Moreover, there was no discussion between Mrs. Cline and respondent regarding Mr. Cline's care or potential course of treatment. Mr. Cline was simply admitted to the intensive care unit. This is clearly distinguishable from *Vandi*, because there are not potentially hundreds of diagnostic procedures nor treatment options. Certainly, at the very least, respondent had a duty to disclose the chosen course of treatment, including the risks and likely outcome associated therewith.

- 2. The Court erred by finding that, even if Petitioner's theory of liability satisfied the common law requirements of lack of informed consent, the potential need for expert testimony necessitates the need for a screening certificate of merit. (A.R.51)**

Cross explicitly states that expert testimony is not required to establish the physician's duty to disclose medical information to his or her patient. *Id* at Syl Pt. 5. In fact, the Medical Professional Liability Act reflects this notion in §55-7B-6(c), by asserting that if a "cause of action is based upon a well-established legal theory of liability which does not require expert testimony supporting the breach of the applicable standard of care, the claimant or his or her counsel shall file a statement specifically setting forth the basis of the alleged liability of the health care provider in lieu of a screening certificate of merit." *Cross* does concede that expert

testimony may ordinarily be necessary to establish certain facts such as the risks inherent to a particular treatment, alternative methods of treatment, the risks associated with alternative treatments, and potential outcomes. *Id.* at Syl. Pt. 5, citing *Sard v. Hardy*, 281 Md. 432, 379 A.2d 1014. However, the lower court erroneously interprets the potential need for expert testimony at some point during the prosecution of a claim for lack of informed consent as requiring a screening certificate of merit in order to file the claim.

Given the complexity of issues and information involved in claim for lack of informed consent to medical treatment, it is virtually impossible to envision an instance where some type of expert testimony would not be required to prove certain matters. However, *Cross* explicitly precludes the need for expert testimony to establish the standard of care regarding a physician's duty to disclose. §55-7B-6(c), the exception to the provision of a screening certificate of merit, explicitly applies to cases where expert testimony is not required to establish the standard of care. The lower court erroneously assumed that if expert testimony is need in a claim made pursuant to the MPLA, then a certificate of merit would be required.

3. The lower Court erred by finding that the Respondent or potential defendant has the authority to determine the sufficiency of a notice of claim or screening certificate of merit

Respondent, Dr. Kresa-Reahl, by counsel, timely made her objections to Petitioner's Notice of Claim and Statement of Liability by letter dated August 4, 2009. Among other things, Respondent claimed that a screening certificate of merit was required. Relying on *Westmoreland v. Vaidya*, 222 W. Va. 205, 664 S.E.2d 90 (2008), the Court concluded that the objection provided by respondent qualified as an authoritative decision as to the sufficiency of or need for a certificate of merit. Petitioner believes this to be plain error. In *Westmoreland*, the Court specifically stated that the sufficiency of or need for a certificate of merit must be determined by the trial court. "Upon a trial court's determination that an expert witness is required to prove the standard of care or proximate cause in an action brought under the West Virginia Medical

Professional Liability Act. . . a reasonable period of time **must** be provided for retention of an expert witness.” [citing *Daniel v. Charleston Area Medical Center, Inc.* 209 W. Va. 203, 544 S.E.2d 905 (2001)]. . . Thus, at the time the trial court determined that subsection (c) of W. Va. Code §55-7B-6 did not apply and that a certificate of merit was needed, Dr. Westmoreland should have been allowed time to secure a certificate of merit executed by an expert.” *Id* at 97. (emphasis added) In the case at bar, the lower court opined that Petitioner had adequate time to correct deficiencies in her Notice of Claim and Statement of Intent since respondent provided an timely and proper objections to the same - the very same rational which was rejected by the Court in *Westmoreland*.

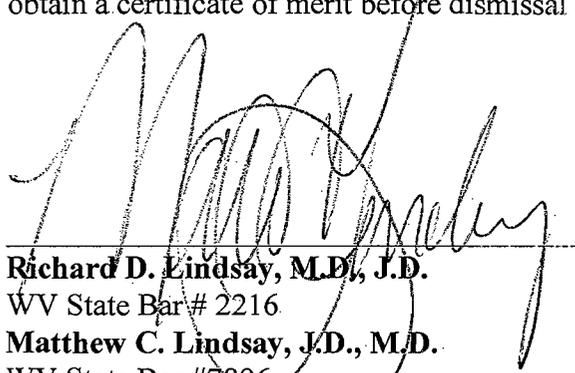
A potential defendant only has thirty (30) days to respond to a certificate of merit, and, as a practical matter, it is common place that an objection to the certificate is made to preserve the opportunity to raise objections at a later date with the court. Moreover, potential defendants attempt to force plaintiffs to provide more information than is required by the MPLA. For example, in the case at bar, respondent demanded that petitioner identify, among other things, how she intended to establish Mr. Cline had a stroke, the last “clock time” Mr. Cline was normal, and the National Institute of Health Stroke Score assigned to Mr. Cline. (*A.R. 20-21*). Without providing this information, respondent would have maintained that petitioner failed to meet the requirements for a screening certificate of merit. Moreover, it is difficult to imagine a scenario in which a potential defendant would recognize a well-established theory of liability that did not require a screening certificate of merit.

The petitioner relied on §55-7B-6(c) in a good faith, and presented a claim, based on a well-established common law theory of liability, that does not require expert testimony to establish the scope of a physician’s duty. Only a trial court has the authority to determine whether or not petitioner meets the requirements of §55-7B-6(c). Therefore, only the trial court can determine the sufficiency of, or need for, a screening certificate of merit. The time period for remedying insufficiencies then runs from the point where a court has deemed the screening certificate of merit necessary. In the present case, the lower court waited nearly a year after the initial hearing on respondent’s motion to dismiss before erroneously determining that petitioner’s claim did not meet the requirements of §55-7B-6(c) . For the court to then dismiss the claim and

not provide petitioner additional time to obtain a certificate of merit is draconian.

VIII CONCLUSION

The lower court erred in granting respondent's motion to dismiss. First, the common law doctrine of informed consent is a well-established principle of law. In Cross, West Virginia adopted the patient need standard which does not require expert testimony to establish the scope of a physician's duty to disclose. The need for expert testimony to prove certain matters beyond or outside the scope of a physician's duty does not impose a duty upon petitioner to provide a screening certificate of merit. Therefore, a claim of lack of informed consent made pursuant to West Virginia Code §55-7B-6(c), does not require that petitioner provide a screening certificate of merit. Furthermore, a physician has a duty to provide reasonable information regarding multiple treatment options, which is generally construed to include the possibility of treatment, the risks inherent to recommended treatment, alternative treatments, risks inherent to alternative treatments, and the likely outcome of a chosen course of treatment regardless of whether the physician recommends a particular treatment. Therefore, petitioner requests that ruling of the lower court be reversed, and this case remanded for further proceedings. In the alternative, should this Court affirm the trial court ruling above, petitioner should be provided adequate time to obtain a certificate of merit before dismissal of her claim.



Richard D. Lindsay, M.D., J.D.

WV State Bar # 2216

Matthew C. Lindsay, J.D., M.D.

WV State Bar #7896

Tabor Lindsay & Associates

Post Office Box 1269

Charleston, WV 25325

mlindsay@taborlindsay.com

304/344-5155

**Loretta Cline, Executrix of the
Estate of Henry Cline
By Counsel:**

CERTIFICATE OF SERVICE

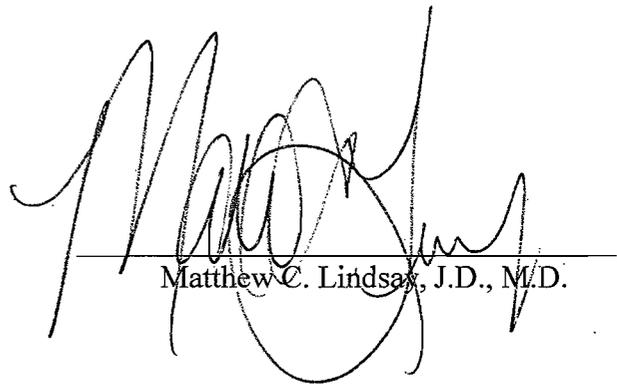
I hereby certify that on this 3 day of June, 2011, true and accurate copies of the foregoing Petitioner's Brief were deposited in the U.S. Mail contained in postage-paid envelope addressed to counsel for all other parties to this appeal as follows:

Barry M. Taylor, Esquire

Jenkins Fenstermaker, PLLC

Post Office Box 2688

Huntington, WV 25726-2688



Matthew C. Lindsay, J.D., M.D.