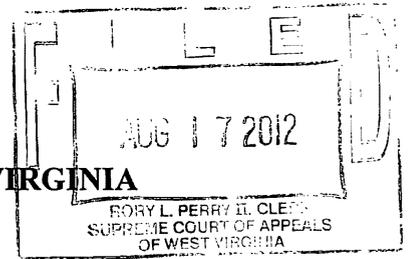


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-1187



APPALACHIAN REGIONAL HEALTHCARE, INC.,
D/B/A BECKLEY ARH HOSPITAL,

Plaintiff Below, Petitioner,

v.

(Civil Action No. 10-C-2311)

WEST VIRGINIA DEPARTMENT OF HEALTH AND
HUMAN RESOURCES; MICHAEL L. LEWIS, M.D.,
PH.D., Secretary in his official capacity and not
individually; WEST VIRGINIA BUREAU FOR
MEDICAL SERVICES; NANCY ATKINS,
Commissioner, in her official capacity and not
individually,

Defendants Below, Respondents.

PETITIONER'S REPLY TO RESPONDENTS' AMENDED BRIEF

Michael S. Garrison (WV Bar No. 7161) (Counsel of Record)
Spilman Thomas & Battle, PLLC
48 Donley Street, Suite 800 (26501)
Post Office Box 615
Morgantown, West Virginia 26507-0615
tel: (304) 291-7926
mgarrison@spilmanlaw.com

Stephen R. Price, Sr. (Admitted *Pro Hac Vice*)
Wyatt, Tarrant & Comb, LLP
500 West Jefferson Street, Suite 2800
Louisville, Kentucky 40202-2898
tel: (502) 589-5235
sprice@wyattfirm.com

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....1

I. SUMMARY OF ARGUMENT.....1

II. ARGUMENT1

A. Assignment of Error No. 11

B. Assignment of Error No. 22

C. Assignment of Error No. 38

D. Assignment of Error No. 49

E. Assignment of Error No. 59

F. Assignment of Error No. 6.....10

G. Assignment of Error No. 7.....11

H. Assignment of Error No. 8.....15

I. Assignment of Error No. 915

III. CONCLUSION17

TABLE OF AUTHORITIES

WEST VIRGINIA CASES

Cooper v. Gwinn, 171 W. Va. 245, 298 S.E.2d 781 (1981)8

Hensley v. West Virginia Dept. of Health and Human Resources, 203 W. Va. 456, 508 S.E.2d 616 (1998).....7, 8

Hurley v. Allied Chemical Corp., 164 W. Va. 268, 262 S.E.2d 757 (1980)3, 4

McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 461 S.E.2d 516 (1995).11

Shobe v. Latimer, 162 W. Va. 779, 253 S.E.2d 54 (1979)2, 3

South Side Lumber Co. v. Stone Construction Co., 151 W. Va. 439, 152 S.E.2d 721 (1967)2

State ex rel. Aaron M. v. West Virginia Dept. of Health and Human Resources, 212 W. Va. 323, 571 S.E.2d 142 (2001).....9, 10

State ex rel. Cooper v. Caperton, 196 W. Va. 208, 470 S.E.2d 162 (1996).....2

State ex rel. West Virginia Parkways Authority v. Barr, 228 W. Va. 27, 716 S.E.2d 699 (2011)8

FEDERAL CASES

Assoc. of Residential Resources in Minnesota v. Minnesota Commissioner of Human Services, 2004 WL 2066822 (D. Minn. Aug. 18, 2004).....5

Bell Atlantic Corporation v. Twombly, 550 U.S. 544 (2007).....15

Cort v. Ash, 95 S. Ct. 2080 (1975)3, 4

Planned Parenthood of Houston and Southeast Texas v. Sanchez, 403 F.3d 324 (5th Cir. 2005).8

Wilder v. Virginia Hospital Assoc., 110 S. Ct. 2510 (1990)4, 5

CASES FROM OTHER JURISDICTIONS

Midwest Division-OPRMC, LLC v. Dept. Soc. Serv., Div. Medical Servs., 241 S.W.3d 371 (Mo. App. 2007).....9, 10

WEST VIRGINIA STATUTES

W. Va. Code § 9-5-16.....5

W. Va. Code § 9-5-16(a)	<i>passim</i>
W. Va. Code § 9-5-16(e)	5
W. Va. Code § 16-29B-20(a)(3).....	<i>passim</i>
W. Va. Code §§ 55-13-1, <i>et seq.</i>	2
W. Va. Code § 55-13-1.....	2
W. Va. Code § 55-13-2.....	2

FEDERAL STATUTES AND REGULATIONS

42 C.F.R. § 447.15.....	9
42 U.S.C. § 1396a(a)(30)(A).....	13, 14
42 U.S.C. § 1983	4

RULES

West Virginia Rule of Civil Procedure 12(b)(6)	15, 16
--	--------

OTHER SOURCES

Emergency Medical Treatment and Active Labor Act.....	14
Section 907 of the Patient Protection and Affordable Care Act, PL 111-148, March 23, 2010, 124 Stat. 119.....	14

I. SUMMARY OF ARGUMENT

On January 6, 2012, Respondents submitted their Response to Petitioner's brief ("Response), a Response that failed, in its entirety, to conform to the Revised Rules of Appellate Procedure. On July 10, 2012, this Court ordered Respondents to submit an amended response brief.¹ Despite the opportunity to correct the errors and deficiencies that plagued their initial Response, Respondents' "amended" brief is nothing more than an uninspiring rehash of the flawed (albeit reorganized) arguments advanced in their Response. While repetition may demonstrate conviction, it in no way validates an advocate's position and has not cured the legal deficiencies that undermine the arguments advanced by Respondents in this case.

Respondents' Amended Brief has the same fatal flaw as their original brief – not once, anywhere, do Respondents explain how Medicaid rates as low as *forty-eight percent of allowable costs* paid to one of the lowest cost but highest Medicaid utilizing hospitals in the State can be reconciled with statutory directives that rates be adequate and reasonable. Nowhere in their Amended Brief have Respondents even *attempted* to justify, let alone explain their actions in the face of clear legislative mandates. Instead, Respondents have adopted the position that they are above the law and Petitioner is without relief from Respondents' abject dereliction of duty.

II. ARGUMENT

A. Assignment of Error No. 1

Respondents concede that the Circuit Court's whole-sale adoption of their proposed findings of fact and conclusions of law is not the "preferred practice," but argue that such a

¹ Even though Respondents' Amended Brief is nearly identical to their original Response brief, Petitioner submits this Reply to update citations to Respondents' Amended Brief and to address the few, but new, substantive arguments raised therein. This Reply to what is now Respondents' Amended Brief supersedes the original reply brief Petitioner previously submitted on January 26, 2012. For purposes of citations, Respondents' Amended Brief is referred to as "Amended Brief."

practice is not, in itself, grounds for reversal. (Amended Brief at 2). The problem here, though, is that in adopting Respondents' self-serving filing, the Circuit Court did not consider the facts of record, much less the law. Keeping in mind that appellate review in this case is *de novo*, *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 214, 470 S.E.2d 162, 168 (1996), this Court is not bound by the Circuit Court's Order, which was nothing more than a rubber stamp on the Respondents' unsubstantiated findings of fact and conclusions of law. *See South Side Lumber Co. v. Stone Construction Co.*, 151 W. Va. 439, 444, 152 S.E.2d 721, 724 (1967).

B. Assignment of Error No. 2

A litigant may bring a declaratory judgment action under W. Va. Code §§ 55-13-1 *et seq.*, to resolve disputes or uncertainty concerning the constitutionality or interpretation of a statute or the legality of state action. Respondents do not dispute this fact. (Amended Brief at 23). *Shobe v. Latimer*, 162 W. Va. 779, 253 S.E.2d 54 (1979), relied on by both parties, establishes beyond question that the type of declaratory relief sought by Petitioner in this case is proper in all respects.

In *Shobe*, the plaintiffs were not even parties to a contract between the West Virginia Department of Resources and the Dorcas Public Service District — plaintiffs were comprised of a land owner with riparian rights and a sportsman whose fishing trips were allegedly affected by a government contract. As recognized in *Shobe*, the language of W. Va. Code § 55-13-2 is quite broad as to *what* may be the subject of a declaratory judgment action and *who* has standing to bring such an action. *Shobe*, 162 W. Va. at 58, 253 S.E.2d at 784-75. Here, Petitioner is *both* a “person interested under a written contract; or other writings constituting a contract” and “whose rights, status or other legal relations are affected by a statute [or] contract.” W. Va. Code § 55-13-2. Accordingly, Petitioner was entitled to have the Circuit Court determine questions of construction and validity raised in the Complaint, and obtain a declaration of its rights, status,

and other legal relations under the statutes or contract at issue. *Id.* Dismissal of Petitioner's declaratory judgment count was clearly erroneous.

Respondents' argument that a justiciable controversy does not exist because "[i]t is uncertain that Petitioner is or may lose money based on alleged inadequate reimbursement rates" demonstrates incredible hubris, a fundamental misunderstanding of the law, reckless desperation, or some combination of all three. (Amended Brief at 23). Petitioner pleaded, in painstaking detail, the enormous losses it was suffering because of Respondents' failure to pay adequate and reasonable Medicaid rates in compliance with applicable law and/or in breach of contract. Clearly, a declaratory judgment action is appropriate.

Respondents continue to make the unsupported argument that a writ of mandamus could not issue in this instance because (1) Petitioner does not have "a clear legal right" to adequate and reasonable Medicaid reimbursement rates (despite statutory language to the contrary); or that (2) Respondents have no legal duty to set rates that are in compliance with statutory directives. (Amended Brief at 5). Both of these arguments are thwarted by express statutory language to the contrary. Respondents' concession that they feel no compulsion to follow the law is astounding.

Respondents' Amended Brief is also remarkable as much for what it does not say as for what it does. In conclusory fashion, Respondents argue that the test for determining whether a private right of action will be implied from a particular statute, articulated in *Cort v. Ash*, 95 S. Ct. 2080, 2089 (1975) and adopted by this Court in *Hurley v. Allied Chemical Corp.*, 164 W. Va. 268, 262 S.E.2d 757 (1980), is inapplicable *even though* all four prongs are clearly satisfied and Petitioner has a clear legal right to the relief sought. (See Petitioner's Brief at 22-24). Rather than address the substance of Petitioner's argument, Respondent dismisses *Cort*

as inapplicable because, under West Virginia law, “Respondents must administer its [sic] federal assistance program consistent with federal law.” (Amended Brief at 6).

Respondents’ argument that *Hurley* is inapplicable misses the point. It ignores the fact that the West Virginia Legislature adopted federal Boren Amendment standards into W. Va. Code § 16-29B-20(a)(3), and reinforced those standards in W. Va. Code § 9-5-16(a). Only after pages of shadowboxing and filler do Respondents take a wild swing at *Wilder v. Virginia Hospital Assoc.*, 110 S. Ct. 2510 (1990). Yet, the *Wilder* Court found that the *same* language employed by the West Virginia Legislature in the statutes at issue in this case evinced, in their federal counterpart, a Congressional intent to provide an enforceable substantive right to reasonable and adequate rates. (Petitioner’s Brief at 20-22).

Respondents suggest the Boren Amendment was repealed and some “notes” from a Congressional committee expressed an intent to limit federal lawsuits under 42 U.S.C. § 1983. (Amended Brief at 27-29). The Circuit Court went along with this argument, finding that the repeal of the Boren Amendment and the Committee notes “preempt[] any state law regarding reimbursement rate setting for West Virginia hospitals participating in the Medicaid program.” (A.R. 17). But obviously, any withdrawal of a federal remedy does not preempt a state remedy. If anything, federal withdrawal from the field cleared the way for state action and regulation. The states are responsible for administering their own Medicaid Programs and should be able to address deficiencies in their own programs through state law remedies.² Respondents fail to explain *why* the West Virginia Legislature chose to include (but has never repealed or replaced)

² Respondents assert, without citation to any authority, that “[f]ederal and state health officials have ‘exclusive responsibility’ for ensuring state compliance with equal access requirements” (Amended Brief at 30). How two different governmental agencies can each have “exclusive responsibility” is a mystery. In this case, however, what Respondents are really grabbing for is unfettered and unchecked discretion to do anything, answerable to no one.

the plain language in W. Va. Code §§ 9-5-16 and 16-29B-20 which evinces a clear intent to allow provider actions.³

Respondents' reluctance to take on *Wilder* is as understandable as it was expected. *Wilder* knocked the props completely out from under Respondents' oft repeated argument that as long as it jumped through the federal Centers for Medicare and Medicaid Services' ("CMS") procedural hoops, there was nothing for a court to review. *Wilder* recognized, however, that without some substantive review by the courts to determine whether the rates actually were adequate and reasonable, a perfunctory, procedural review by the agency would make the law a dead letter. *Wilder*, 110 S. Ct. at 2519-20. That same rationale applies here. The West Virginia Legislature has *never* seen fit to repeal these statutes. The Circuit Court performed a perfunctory review, however, to find that "WV Code § 16-29B-20 and 9-5-16(a) do not require Defendants to set adequate and reasonable rates"; and that the fact that "Defendants only paid . . . \$2.9M or 48% of its costs" to one of the lowest cost hospitals in West Virginia did "not entitle it to its claim for relief." (A.R. 13-14). Respondents and the Circuit Court would turn these West Virginia statutes into dead letters.

Respondents also fail to address *Assoc. of Residential Resources in Minnesota v. Minnesota Commissioner of Human Services*, 2004 WL 2066822 (D. Minn. Aug. 18, 2004), where CMS said that it was not required by federal law and therefore did not and would not give anything more than a cursory review to a state's "assurances" that its Medicaid rates were adequate or reasonable. (*See* Petitioner's Brief at 10). Imagining themselves free from any serious oversight, Respondents chortle that "[n]othing [in W. Va. Code § 9-5-16(e)] shall be

³ Respondents now, for the first time, label this action a "contract case" and assert that sovereign immunity protects them from their dereliction of duty. (Amended Brief at 10). The Circuit Court's Order is devoid of a sovereign immunity analysis, and Respondents take a wide detour discussing Massachusetts law and federal Eleventh Amendment cases are inapplicable to this state action. (*Id.* at 10, 11).

construed to give the Legislature any jurisdiction over the Medicaid program or its operations.” (Amended Brief at 4-5). In sum, Respondents believe they can do anything they please.

The fact that the Legislature does not run the Medicaid Program’s daily operations does not mean, however, that Respondents are free to disregard statutory directives.⁴ The intent of the West Virginia Legislature could not have been more clearly expressed than when the Legislature gave Respondents three directives to follow in setting Medicaid rates. The Agency is

- (1) [T]o encourage the long-term well planned development of fair and equitable reimbursement methodologies and systems for all health care providers reimbursed under the Medicaid program in its entirety, and
- (2) To ensure that reimbursement for services of all such health care providers is determined without undue discrimination or preference, and
- (3) With full consideration of adequate and reasonable compensation to such health care providers for the cost of providing such services.

⁴ Respondents perform a two-step dance with the record in an effort to distance themselves farther from any statutory directives, making the following statement:

At the hearing on the Motion to Dismiss, counsel for Petitioner admitted that W.Va. Code §16-29B-20 did not apply to Medicaid hospital reimbursement. (A.R. 619).

(Amended Brief at 3). But at the cited place in the hearing record, it was Respondents’ counsel who said:

Now Plaintiffs admitted in their response to the Motion to Dismiss that §16-29B-20 doesn’t apply to Medicaid rates.

(A.R. 619). What Petitioner actually said in its Response to Respondents’ motion was that from West Virginia case law, it appeared that historically a needed waiver from CMS was never obtained, thus leaving Respondents as the state agency responsible for Medicaid rate setting. The important thing, however, was the recognition that adequate rates were needed for the effective operation of hospitals and to avoid the problems with cost shifting that would otherwise occur. (A.R. 210 n. 9).

W. Va. Code § 9-5-16(a). The express intention of the Legislature has always been that Respondents should pay *adequate* and *reasonable* rates for Medicaid services.⁵

This statutory language is anathema to Respondents. In designing a methodology that pays Petitioner -- one of the lowest cost, highest Medicaid utilizing hospitals in the state -- rates as low as forty-eight percent of costs, Respondents have clearly failed to give “full consideration of adequate and reasonable compensation to . . . the cost of providing such services.” W. Va. Code § 9-5-16(a). When Respondents’ only suggested solution to Petitioner’s plea for relief is that **Petitioner quit the Medicaid Program**, Respondents are not acting “to encourage the long-term well planned development of fair and equitable reimbursement methodologies and systems.” *Id.* When Respondents devise a methodology that produces rates that are so inadequate that they have to make special, additional payments to government hospitals and not others (even though the latter hospitals are providing the same services), then Respondents have made no effort “to ensure that reimbursement for services of all such health care providers is determined without undue preference or discrimination.” *Id.* It is no wonder Respondents avoid this statutory language like the plague. Respondents’ methodologies and the directives in W. Va. Code § 9-5-16(a) are as alike as night and day.⁶

In arguing that Petitioner cannot obtain relief from Respondents’ dereliction of duty through a writ of mandamus, Respondents also fail to address *Hensley v. West Virginia Dept. of*

⁵ Divorcing themselves entirely from this statutory language, Respondents make the bald assertion that this “code provision only requires Respondent to study its rates.” (Amended Brief at 4). In other words, they only need to watch Rome burn from their balcony.

⁶ Respondents claim they “set their rates using Medicare’s cost payment principles and this action has been approved by its federal partner, CMS.” (Amended Brief at 27). While discovery is needed into the internal machinations of Respondents’ rate setting methodology, one thing is abundantly clear already – Respondents are not using Medicare’s cost payment principles. Petitioner would have received \$1 million more a year for its top twenty-five Medicaid DRGs had Medicare principles been used. (A.R. 410).

Health and Human Resources, 203 W. Va. 456, 508 S.E.2d 616 (1998), where a mandamus was properly issued to force the Agency to pay its employees in accordance with a legislative mandate. (See Petitioner’s Brief at 24). Respondents also ignore *State ex rel. West Virginia Parkways Authority v. Barr*, 228 W. Va. 27, 716 S.E.2d 689 (2011), holding that it is the “absence of another adequate remedy at law” that is relevant; and that if that “other remedy is not equally as beneficial, convenient, and effective, mandamus will lie.” Syl. pt. 3, *Barr* (quoting Syl. pt. 4, *Cooper v. Gwinn*, 171 W. Va. 245, 298 S.E.2d 781 (1981)). (See Petitioner’s Brief at 25). Respondents’ arguments are riddled through with gaping holes. Petitioner has stated valid claims and the Complaint should not have been summarily dismissed.

C. **Assignment of Error No. 3**⁷

Respondents’ Amended Brief correctly states “[t]here is a legal duty on the part of Respondents to set rates that are reasonable and adequate” (Amended Brief at 9). Yet, Respondents curiously argue that because the West Virginia Legislature “has recognized that Respondents’ [sic] must administer federal assistance programs consistent with federal law,” federal law somehow preempts state court action challenging Respondents’ woefully deficient Medicaid reimbursement rates. (*Id.* at 9). Nowhere do Respondents address the three factors for federal preemption addressed in *Planned Parenthood of Houston and Southeast Texas v. Sanchez*, 403 F.3d 324, 336 (5th Cir. 2005).⁸

⁷ In their initial Response Brief, Respondents did not oppose Assignment of Error No. 3.

⁸ Respondents’ reliance on *In re E.B.*, 2012 WL 2368978 (W. Va. June 21, 2012) is unavailing. The *E.B.* court found that federal law preempted West Virginia’s Medicaid Subrogation Act because of a direct conflict between W. Va. Code § 9-5-11 and the federally mandated method of subrogation.

D. Assignment of Error No. 4

Equally unavailing is Respondents' insistence that "tempering" by federal law somehow nullifies the duty of good faith and fair dealing imposed on Respondents, or any obligation on their part to set adequate and reasonable rates as required by state and federal statutes. (Amended Brief at 15). Respondents' assertion that "BMS is the single state agency authorized to 'unilaterally' set Medicaid reimbursements rates" only reinforces the fact that Respondents breached this duty. (*See* Petitioner's Brief at 21, 28-29). Whether relief for that failure comes through declaratory, injunctive, or contractual avenues (or even all three), valid claims were raised that should not have been dismissed.

Whether a hospital's inadequate reimbursement claims implicate declaratory, injunctive, or even contractual relief is often at issue in cases where state Medicaid agencies argue that such reimbursements are contractual in one instance and non-contractual the next. *See e.g. Midwest Division-OPRMC, LLC v. Dept. Soc. Serv., Div. Medical Servs.*, 241 S.W.3d 371 (Mo. App. 2007) (finding that intense factual inquiries were necessary under that state's Uniform Declaratory Judgment Act before the nature of the relief available could be determined). As the *Midwest* court's discussion of the issues makes clear, the Circuit Court below should not have summarily dismissed this case.

E. Assignment of Error No. 5

Referencing the balance billing prohibitions in their Provider Agreement and 42 C.F.R. § 447.15, Respondents adopt the mantra that "Petitioner agreed to accept the payment it receives as payment in full" and, therefore, "the contract speaks for itself and needs no adjudication." (Amended Brief at 24-25). Once again, Respondents cannot oppose (and conveniently ignore) federal case-law, *see* Petitioner's Brief at 30-31, and this Court's own holding in *State ex rel. Aaron M. v. West Virginia Dept. of Health and Human Resources*, 212 W. Va. 323, 325, 571

S.E.2d 142, 144 (2001), that balance billing protections are for the benefit of the Medicaid beneficiaries. These billing protections prohibit providers from turning to Medicaid beneficiaries to make-up Medicaid payment shortfalls (i.e., the unpaid balance). Such protections **do not** absolve a rate-setting agency from its duty to follow the law by setting reasonable and adequate rates.

Respondents' contract arguments simply do not work. Nowhere in the portion of the "Provider Agreement"⁹ submitted by Respondents are the Medicaid rates spelled out, much less agreed upon by the parties – that is, reasonable and adequate rates. What *was* required, however, was that Respondents set rates in accordance with the law. *See Midwest Division OPRMC*, 241 S.W.3d at 378 (concluding that alleged contracts cannot be inconsistent with a statute). The Circuit Court clearly got a pig in a poke when it bought into this argument by Respondents.

F. Assignment of Error No. 6

The federal Upper Payment Limits ("UPL") are designed to prevent Medicaid funding intended to pay fair and adequate rates to privately-owned and operated hospitals from being channeled to disproportionately benefit government-owned and operated hospitals. The Circuit Court erred in finding that these UPL could be used by Respondents to justify providing government-owned and operated hospitals with additional, special payments that other hospitals did not receive to ensure adequate Medicaid reimbursements to government hospitals, specifically. (Petitioner's Brief at 32).

Respondents describe additional features of the UPL, but do not explain the relevance of those features to this case, Amended Brief at 18, 20-21, or dispute the purpose served by the

⁹ Respondents submitted nine pages of a 207-page document titled "West Virginia Medicaid Provider Re-Enrollment Application" (A.R. 135-143) attached to the Affidavit of Tina Bailes, Deputy Commissioner, (A.R. 132) which they refer to as the "Provider Agreement."

UPL. Nor do Respondents explain how the UPL serves as a relevant and legitimate classification for equal protection purposes. Respondents simplistically argue that since CMS accepted its State Plan, no equal protection problem can exist. (Amended Brief at 17-18). But as already discussed, Respondents do not dispute the perfunctory nature of CMS review. *See, supra*, pp. 6-7. Indeed, the very fact that Petitioner's Medicaid reimbursements are so low attests to the perfunctory nature of CMS review. Petitioner's equal protection claim was more than adequately pleaded and the Circuit Court's Order should be reversed.

G. Assignment of Error No. 7

Ironically, Respondents' Amended Brief provides a plethora of reasons why Petitioner's claims are perfectly suited for a declaratory judgment action. For example, Respondents pay lip service to well-known principles of statutory construction saying, sanctimoniously, that "[i]f possible, a statute should be construed in a way that conforms to the plain meaning of the text." (Amended Brief at 12). Respondents further demonstrate that they know letter of the law, conceding that a circuit court "begin(s), as it must, by examining the statutory language, bearing in mind that [it] should give effect to the legislative will as expressed in the language." (Amended Brief at 12) (quoting *McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 777, 461 S.E.2d 516, 523 (1995)).

But when it comes to W. Va. Code § 9-15-16(a), Respondents cannot (and do not) claim that they gave "effect to the legislative will as expressed in the language." When Respondents are not disclaiming any duty to follow the law, they are making excuses for their failure to comply with the very West Virginia law they are charged with carrying out:

Respondents have developed reimbursement methodologies and systems for all health care providers reimbursed under the Medicaid program in its entirety within its budgetary constraints and in compliance with federal standards, which includes hospital services reimbursement.

(Amended Brief at 29-30). As far out on a limb as their arguments have taken them, Respondents still cannot contend that they have complied with W. Va. Code § 9-15-16(a).

Respondents tacitly blame the Legislature for their grossly inadequate Medicaid rates, implying that Respondents were unable to comply with their statutorily imposed duty because of unidentified “budgetary constraints.” But Respondents have never contested the facts pleaded in the Complaint and liberally cited throughout the record that (i) the federal government and Petitioner have put up most of the monies needed here, and (ii) the Legislature has allocated *more* than enough to the Medicaid Program to enable the agency to pay adequate rates. Respondents have been amassing budget surpluses to the tune of **\$255 million per annum**. (See Petitioner’s Brief at 10-12 & n. 10). They have no excuse for failing to follow the law.

Respondents claim that they are “not required to pay rates that meet Petitioners’ costs. Petitioner alleges no statute, federal or state, that so requires.” (Amended Brief at 6). What the West Virginia Code does say, however, is that Respondents are to pay rates with “full consideration of adequate and reasonable compensation to such health care providers for the cost of providing such services.” W. Va. Code § 9-5-16(a). In the light of that clear statutory language, the question then becomes “What is adequate and reasonable compensation for the cost of providing such services?” When Petitioner’s hospital is one of the lowest cost, full to capacity, economical and efficient hospitals in West Virginia serving West Virginians who could not receive crucial medical treatment and care but for Medicaid, the burden is Respondents’ to demonstrate how a rate **less than costs** is adequate and reasonable.

Forty-eight percent of costs (or sixty-seven percent of costs) is not adequate. It is not reasonable. Reimbursement of forty-eight percent of costs puts the continued existence of Petitioner’s hospital at risk, and poses a very real and very serious threat to the health and well-

being of West Virginians, young and old alike, who cannot afford healthcare in the absence of Medicaid assistance.

Respondents' suggested "remedy"— that Petitioner "terminate its contract as a Medicaid provider" and its Medicaid patients simply go elsewhere¹⁰ — confirms that Respondents' plan is not designed to ensure that "care and services are available at least to the extent that such care and services are available to the general population in the service area." 42 U.S.C. § 1396a(a)(30)(A). The availability of services for Medicaid patients has already been constricted due to Respondents' inadequate rate, and Respondents' suggested "resolution" – that Petitioner turn West Virginia residents dependent on Medicaid for treatment and care out on the street – is no suggestion at all.¹¹

The Legislature expressed its intent concerning Medicaid rates in in a very specific manner, ordering that rates be

reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated hospitals subject to the provision of this article. The rates shall take into account the situation of hospitals which serve disproportionate numbers of low income patients and assure that individuals eligible for Medicaid have reasonable access, taking into account geographic location and reasonable travel time, to inpatient hospital services of adequate quality.

¹⁰ (See Amended Brief at 7, 30). The only evidence of record is that the other hospital in the area has a full Emergency Department that is constantly on diversion; that it could not absorb Petitioner's patients; and that the two state psychiatric hospitals are full and all Petitioner's psychiatric patients (forty-three percent of which are Medicaid patients) would have nowhere to go if Petitioner accepted Respondents' invitation to quit the Medicaid Program. (A.R. 283 & 284).

¹¹ The University of Virginia Health System stopped treating West Virginia Medicaid patients because the reimbursement were "substantially below our costs of providing care." (A.R. 47). Respondents said that UVHS quit their Program because "Respondents would not negotiate a rate specific to its facility." (A.R. 75). This is a distinction without a difference. Either way, West Virginia Medicaid patients are not receiving medical care because of Respondents' inadequate rates.

W. Va. Code § 16-29B-20(a)(3). Respondents cannot pay a hospital (here, Petitioner), on average, sixty-seven percent of its costs on twenty-two percent of its business (with other government programs, bad debt and charity care constituting another sixty-one percent of the hospital's business pay less than costs) without affecting the costs and accessibility of hospital services for all West Virginians. (*See* Petitioner's Brief at 8-9 & 13-14). At a minimum, Section 16-29B-20(a)(3) demonstrates that the Legislature appreciated the nexus between the adequacy of Medicaid reimbursements and the WVHCA's ability to regulate health care costs for the rest of the population.

Respondents argue that it is just tough (but no concern of their own) if Petitioner is subject to the Emergency Medical Treatment and Active Labor Act ("EMTALA") and Section 907 of the Patient Protection and Affordable Care Act ("PPACA"), PL 111-148, March 23, 2010, 124 Stat. 119 or other federal or state mandates. (Amended Brief at 30). But if Petitioner is to operate as a hospital and provide services to Medicaid beneficiaries, it must comply with all statutes, regulations, and rules (state *and* federal) that apply to hospitals. Petitioner cannot pick and choose what laws and quality of care standards it will follow. Petitioner cannot discriminate against Medicaid patients or provide them with inferior care, nor will it. Nor can Respondents design and pay for a second-tier, substandard health care system for Medicaid beneficiaries.

Respondents are charged with setting rates that are "consistent with quality of care and are sufficient so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the service area." 42 U.S.C. § 1396a(a)(30)(A). West Virginia law permits nothing less. W. Va. Code § 9-5-16(a).

Respondents are out of step with both federal and state law. The Circuit Court should have allowed this case to proceed so the facts could have been fully fleshed out.

H. Assignment of Error No. 8

Respondents tacitly acknowledge the Circuit Court's error in dismissing Petitioner's Complaint, conceding now that this Court has not adopted the more stringent federal pleading requirements articulated in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007). (Amended Brief at 33). Even under West Virginia's notice pleading standard, Petitioner filed an extremely detailed (some would even say "prolix") Complaint describing specifically and with ample adornment the harm being caused by Respondents' failure to comply with applicable law. The Circuit Court improvidently dismissed this action.

I. Assignment of Error No. 9

Respondents correctly note that for purposes of their Rule 12(b)(6) motion to dismiss, the Complaint should have been construed in the light most favorable to Petitioner as the non-moving party. (Amended Brief at 33). But the Circuit Court's Order adopted Respondents' suppositions while ignoring the allegations in Petitioner's well-pleaded Complaint. In so doing, the Circuit Court resolved important and disputed questions of fact and law against Petitioner even though it was required, as a matter of law, to resolve *all* facts and *all* inferences in Petitioner's favor.¹²

¹² While Respondents acknowledge that "[o]nly matters contained in the pleading can be considered on a motion to dismiss under Rule 12(b)(6)," Amended Brief at 34, they interjected "facts" that appear nowhere in the pleadings. For example, Respondents try to shore up their case even now with the following suppositions:

- Respondents have public hearings when they change their rates that provide an adequate remedy. (Amended Brief at 8).
- "Medicaid patients in Petitioners' [sic] service area will not be without access to Medicaid in-patient hospital services." *Id.* at 30.

Because Respondents' motion to dismiss was filed with affidavits that the Circuit Court considered in ruling, Rule 12(b)(6) required the Circuit Court to treat Respondents' motion as one for summary judgment. Incredibly, Respondents now argue that the lengthy affidavits submitted with their motion "did not contain matters outside the pleadings." (Amended Brief at 36). Even a cursory review of the affidavits shows that not only did they contain numerous factual allegations appearing nowhere in the pleadings, but that these newly proffered allegations created genuine issues of material fact that bar summary judgment.

-
- "Petitioner may have made business decisions which have resulted in costs above what it is able to claim as Medicaid reimbursable costs. . . ." *Id.* at 31.
 - "Petitioner must tighten its belt as the Respondents, and all providers of Medicaid services have." *Id.*
 - "Respondents' reimbursement methodology complies with its State Plan and Federal law as evidenced by CMS acceptance of its State Plan." *Id.* at 17.
 - "That Petitioner may not be able to contain its costs for providing Medicaid reimbursable services. . . ." *Id.* at 14.
 - "The Respondents' State Plan meets the above requirements." *Id.* at 22.
 - "To allow this private litigant to bring such an action because it believes the state has misread federal [sic] could devastate the Respondents' financial ability to provide public assistance" *Id.* at 25.
 - "Respondent is already capping the number of individuals accepted into its Aged and Disabled Waiver Program." *Id.*
 - "There are several others" – "enough providers so that care and services are accessible to recipients of Medicaid." *Id.* at 26.
 - "Respondents set their rates using Medicare's cost payment principles" *Id.* at 27.
 - "Respondents use the same rates methodology established for federal Medicare reimbursement rates to set WV Medicaid hospital reimbursement rates." *Id.* at 6.

These are all genuine issues of material fact, many of which contradict Petitioner's facts in the record, *see e.g.* Rocco Massey and Joseph Grossman Affidavits (A.R. 278-285 & 409-410 respectively), making summary judgment inappropriate.

III. CONCLUSION

Respondents' "helter skelter" arguments confused the Circuit Court below. The Amended Response (much like Respondents' initial response) is not designed to bring light or clarity to the issues because Respondents' rate setting methodology cannot withstand the light of day. But there has to be a remedy when an agency charged with administering the State's Medicaid Program in accordance with the law ignores the law completely and pays an efficiently and economically operated hospital only forty-eight percent (or even sixty-seven percent) of its costs for inpatient hospital services. The Circuit Court erred as a matter of law in dismissing Petitioner's Complaint and its Order should be reversed and this case remanded for further proceedings.

**APPALACHIAN REGIONAL HEALTHCARE, INC.,
d/b/a BECKLEY ARH HOSPITAL**

By counsel

Handwritten signature of Michael S. Garrison in black ink, with the initials "TDH" written to the right of the signature.

Michael S. Garrison (WV Bar No. 7161) (Counsel of Record)
Spilman Thomas & Battle, PLLC
48 Donley Street, Suite 800 (26501)
Post Office Box 615
Morgantown, West Virginia 26507-0615
tel: (304) 291-7926
mgarrison@spilmanlaw.com

Stephen R. Price, Sr. (Admitted *Pro Hac Vice*)
Wyatt, Tarrant & Comb, LLP
500 West Jefferson Street, Suite 2800
Louisville, Kentucky 40202-2898
tel: (502) 589-5235
sprice@wyattfirm.com

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO. 11-1187

APPALACHIAN REGIONAL HEALTHCARE, INC.,
D/B/A BECKLEY ARH HOSPITAL,

Plaintiff Below, Petitioner,

v.

(Civil Action No. 10-C-2311)

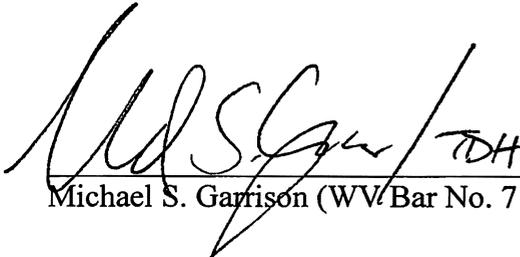
WEST VIRGINIA DEPARTMENT OF HEALTH AND
HUMAN RESOURCES; MICHAEL L. LEWIS, M.D.,
PH.D., Secretary in his official capacity and not
individually; WEST VIRGINIA BUREAU FOR
MEDICAL SERVICES; NANCY ATKINS,
Commissioner, in her official capacity and not
individually,

Defendants Below, Respondents.

CERTIFICATE OF SERVICE

I, Michael S. Garrison, hereby certify that service of the foregoing **“Petitioner’s
Reply to Respondents’ Amended Brief”** has been made via hand delivery on this 17th day of
August, 2012, addressed as follows:

Charlene A. Vaughan, Esq.
The Honorable Darrell V. McGraw, Jr.
Office of the Attorney General
812 Quarrier Street, 2nd Floor
Charleston, West Virginia 25301
Counsel for the DHHR


Michael S. Garrison (WV Bar No. 7161)