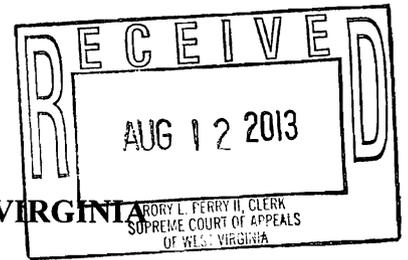


BRIEF FILED
WITH MOTION



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 13-0470

CHARLESTON

**TOM DOUGLAS, Individually and on behalf
of the Estate of Dorothy Douglas,**

Plaintiff Below, Respondent,

v.

**From the Circuit Court of
Kanawha County, West Virginia
Civil Action No. 10-C-952**

**MANOR CARE, INC.; HCR MANOR CARE
SERVICES, INC.; HEALTH CARE AND
RETIREMENT CORPORATION OF
AMERICA, LLC; HEARTLAND
EMPLOYMENT SERVICES, LLC; JOHN
DOES 1 THROUGH 10; and UNIDENTIFIED
ENTITIES 1 THROUGH 10 (AS TO
HEARTLAND OF CHARLESTON),**

Defendants Below, Petitioners.

**BRIEF OF *AMICI CURIAE* THE WEST VIRGINIA HOSPITAL
ASSOCIATION AND THE WEST VIRGINIA HEALTH CARE ASSOCIATION, INC.**

In Support of Petitioners

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1. The punitive damages awarded in this case were not warranted and exceed constitutional limitations on punitive damages because there was insufficient evidence to find each Defendant engaged in conduct supporting punitive damages and the MPLA was not applied to the underlying award.21

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I. INTERESTS OF THE *AMICI CURIAE*

The West Virginia Hospital Association (“WVHA”) and the West Virginia Health Care Association, Inc. (“WVHCA”) submit this Brief as *amici curiae* based upon their common interest in the scope of application of the West Virginia Medical Professional Liability Act (“MPLA”).¹

The verdict in this case, and how it is reviewed by this Court, is of utmost significance to the West Virginia hospitals and nursing homes, which must comply with a myriad of statutes and regulations, both state and federal, and comply with the standard of care. It is of significant import because the verdict, if upheld, exposes hospitals, nursing homes, and assisted living communities to multiple awards of damages, unclear protection under the MPLA, and large punitive awards. The form provided to the jury to record its verdict guided it to make a series of separate awards not permitted under West Virginia law, against a group of defendants, and as a result, denied the Defendants the protection provided to the health care industry by the West Virginia legislature in the MPLA.

A. West Virginia Hospital Association

The WVHA exists as a statewide, not-for-profit organization representing the interests of approximately sixty-five hospitals and health systems. The WVHA sponsors numerous advocacy, education, information, and technical assistance programs designed to build a strong and healthy West Virginia. Through these efforts, and through the efforts of its members, the WVHA strives to be a catalyst for positive change in the delivery of health care services to all West Virginians by creating a strong health care system that supports and improves the health and well-being of those served by our hospitals, as well as the economic condition of the state.

¹ The undersigned counsel hereby certify to the Court that no party to the instant appeal has authored or financially contributed to the preparation of this brief.

Hospitals provide a wide array of services to the communities they serve. The WVHA monitors legal developments that may have an impact upon its members and, where necessary, becomes involved as an *amicus curiae* in proceedings of significant import. The instant appeal is such a proceeding in that the scope of application of the MPLA will affect the liabilities, insurance premiums, and other aspects of the hospitals and health systems whose interest the WVHA represents.

B. West Virginia Health Care Association, Inc.

The WVHCA is a not-for-profit trade association for long-term care providers of health care in West Virginia, providing information, representation, education, and services for the common goal of providing quality care in safe surroundings for fair payment. It is a state affiliate of the American Health Care Association and the National Center for Assisted Living. The WVHCA has more than 125 member facilities that include nursing homes, assisted living communities, and hospital-based skilled nursing facilities. The WVHCA also has an associate membership category for suppliers of goods and services to its members.

The WVHCA provides members and associate members with useful information through publications, seminars, and its website. Through its government affairs division, the WVHCA represents the interests of members and associate members before the executive, legislative, and judicial branches of both federal and state government. The WVHCA becomes involved as an *amicus curiae* in proceedings where the interests of West Virginia assisted living providers and nursing home providers are at stake, such as the instant case. Here, the scope of application of the MPLA will affect the liabilities, insurance premiums, and other aspects of the nursing homes, assisted living communities, and hospital-based skilled nursing facilities whose interests the

WVHCA represents and, in turn, will affect suppliers of goods and services to its member facilities.

C. Relief Sought by *Amici Curiae*

The *amici curiae* ask that the Court review reverse the verdict below and, consistent with West Virginia law, remand the action with instructions to the Circuit Court to prohibit multiple damage awards, properly consider and assess fault, if any, of separate parties, including liability for punitive damages, and properly apply the MPLA.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Heartland of Charleston (“Heartland”) is a licensed nursing home operated in Charleston, West Virginia. App. at 1281. On September 4, 2009, Dorothy Douglas, an 87-year-old woman, was admitted to Heartland as a resident. App. at 180. On October 11, 2009, Ms. Douglas passed away. App. at 180.

Ms. Douglas’ son, Tom Douglas, on his own behalf and on behalf of the Estate of Ms. Douglas, sued the nursing home and related corporations, alleging that his mother’s death was the result of breaches of medical standards of care, violations of the West Virginia Nursing Home Act (“NHA”), breach of fiduciary duty, and “ordinary” negligence.

At the jury trial below, the Circuit Court instructed the jury there were “three separate claims”: “[v]iolations or deprivations of the Nursing Home Act,” “[n]egligence (medical and/or ordinary),” and “[b]reach of fiduciary duty.” App. at 5670. All of these claims are torts and therefore subject to the definition of medical professional liability.

Indeed, the Circuit Court instructed the jury in tort principles for each claim. As to the NHA violation, the Circuit Court instructed the jury:

Any nursing home that deprives a resident of any right or benefit created or established for the well-being of this resident by the terms of any contract, by any

state statute or rule, or by any applicable federal statute or regulation. Any nursing home that deprives a resident of any right or benefit created or established for the well-being of this resident by the terms of any contract, by any state statute or rule, or by any applicable federal statute or regulation, shall be liable to the resident for injuries as suffered as a result of such deprivation.

App. at 5670–71. The jury was further instructed “unless there is a finding that the nursing home exercised all care reasonably necessary to prevent and limit the deprivation and injury” it could award damages to fully compensate the resident. App. at 5671.

The NHA violations were premised on West Virginia law providing that violation of statute creates a presumption of *negligence*. The court’s instruction stated:

A violation of one or more West Virginia statutes is evidence that, unless rebutted, is sufficient to prove negligence if an injury proximately flows from the violation and the injury is of the sort that the safety rule or statute was intended to prevent. Compliance with a West Virginia statute is competent evidence of due care, but not conclusive evidence of [d]ue care, if rebutted.

App. at 5677–78.

The Circuit Court similarly instructed the jury on negligence, stating “[n]egligence is the failure to exercise ordinary care, and ordinary care is that kind of degree of care or caution which a[n] ordinary prudent and careful person would exercise under the same or similar circumstances.” App. at 5671. The Circuit Court also instructed the jury it could award damages if it found “Dorothy Douglas suffered injury and damage as a proximate result of negligence on the part of a corporation or corporations.” App. at 5672–73.

The “medical negligence” instruction² stated “the Plaintiff must prove that Defendants deviated from the applicable standard of care when providing care and treatment to Dorothy

² There is no “medical negligence” action in West Virginia since the enactment of West Virginia Code 55-7B-1, *et seq.*, in 1986. The MPLA makes clear the cause of action against health care providers is medical professional liability. This Court has made similar observations about statutory “deliberate intention” actions replacing the prior *Mandolidis* cause of action upon the amendment of West Virginia Code § 23-4-2 in 1983. See *Mayles v. Shoney’s, Inc.*, 185 W. Va. 88, 96, 405 S.E.2d 15, 23 (1990).

Douglas” and “the deviation from the standard of care by the Defendants proximately caused injury.” App. at 5674.

The third tort instruction was on fiduciary duty, and the Circuit Court gave a long instruction which suggested the Defendants were liable. The jury was instructed:

A “fiduciary” duty is a duty to act for someone else’s benefit, while subordinating one’s personal interests to that of the other person.

It is the duty of utmost good, faith, trust, confidence, and candor owed by a fiduciary, relying upon the fiduciary to exercise discretion or expertise in acting for the client; and the fiduciary knowingly accepts the trust and confidence and thereafter undertakes to act on behalf of the client by exercising the fiduciary’s own discretion and expertise.

App. at 5678. The instruction contained a litany of things, including the duty of the fiduciary to act in the client’s interest and to disclose conflicts between its interest and the client’s interest. Notably, the jury was instructed that the “fiduciary must exercise skill, care and diligence when acting on behalf of the client.” App. at 5679. The jury was then instructed that a fiduciary relationship existed and that “the Defendant” violated the duty:

SECOND: That the Defendant violated that fiduciary obligation by failing to provide the appropriate level of care and services to which Dorothy Douglas was entitled, by accepting payment for services to which Dorothy Douglas was entitled, by accepting payment for by their concealment of and failure to disclose Defendants’ neglect of Dorothy Douglas.

App. at 5680. The jury was also instructed that “the Plaintiff” suffered damages as a result. App. at 5680.

As to damages, the jury was instructed it could consider a broad range of damages. The jury was instructed it could award Dorothy Douglas damages for:

1. Any and all bodily injuries sustained by Dorothy Douglas and the extent and duration of such bodily injuries;
2. Any and all physical pain for bodily injuries suffered by Dorothy Douglas;

3. Any and all suffering or mental anguish Dorothy Douglas suffered;
4. Any and all effects the bodily injuries, pain, inconvenience or suffering had upon Dorothy Douglas' health, the extent of such losses of her health and ability to enjoy life until her death.

App at 5681.

The jury was also instructed it could award damages “for the loss of consortium, if any, of Tom Douglas and Carolyn Hoy.” App. at 5682. The instruction went on to list the elements of wrongful death damages, stating the jury could consider “[s]orrow, mental anguish, and solace which may include society, companionship and comfort.” *Id.*

At the conclusion of the trial, the jury awarded separate amounts in noneconomic loss for the three tort claims asserted by the Plaintiff: \$1.5 million for breach of the Nursing Home Act, \$5 million to Tom Douglas and Carloyn Hoy for “negligence” apportioned as 80% “ordinary” negligence and 20% “medical” negligence; and \$5 for breach of fiduciary duty. App. at 8502–03. The total award for noneconomic loss was \$11.5 million. The jury then imposed \$80 million in punitive damages upon the Defendants as a group.

In the Judgment Order, dated October 20, 2011, the Circuit Court, applying the percentages listed by the jury, found that only \$1 million of the total award of \$5 million for negligence was subject to reduction pursuant to West Virginia Code § 55-7B-8 because the \$5 million represented the amount of damages attributed to medical negligence. App. at 14. The other damage awards were entered in their entirety in the Judgment Order.

The Defendants’ post-trial motions for judgment as a matter of law, new trial, or remittitur were denied in their entirety by the Circuit Court in an order dated April 10, 2013. App. at 16–33. The Defendants appealed.

The *amici curiae* recognize there are several arguments advanced by the Defendants and that both parties below argued back and forth that the other waived objection on various points. The *amici curiae* do not wade into the waiver arguments, leaving those to the parties. The *amici curiae* seek to assist the Court by focusing on the issues that have broader effects on the hospitals, nursing homes, and other health care providers in West Virginia.

III. ARGUMENT

A. Summary of Argument

The *amici curiae* assert that all of Plaintiff's claims arise from "acts or treatment" performed "for, to or on behalf" of Ms. Douglas, including claimed lack of hydration, lack of nutrition, and insufficient staffing. Under the circumstances of this case, these are "health care" within the definitions and spirit of the MPLA. Thus, the MPLA governs all of Plaintiff's tort claims, including the separate claims for negligence, breach of the NHA, and breach of fiduciary duty, as all are related to health care and all are tort claims. Allowing the jury to consider separate claims and award separate damages was improper and resulted in an excessive, duplicative verdict. In any event, even if separate awards were appropriate, the limits on noneconomic loss under West Virginia Code § 55-7B-8 should have been applied to reduce the total noneconomic damage award. In addition, a punitive damages award against the grouped Defendants lacked sufficient foundation in the record and is grossly excessive. Accordingly, this Court should apply the provisions of the MPLA and reverse the Circuit Court's award of duplicative damages and unconstitutionally excessive punitive damages.

B. Application of the MPLA

The MPLA was enacted "to encourage and facilitate the provision of the best health care services to the citizens of this state." *Robinson v. Charleston Area Med. Ctr.*, 186 W. Va. 720,

724, 414 S.E.2d 877, 881 (1991) (citing W. Va. Code § 55-7B-1). In particular, the MPLA is intended to create predictable, but fair, litigation expectations in an effort to maintain available and affordable liability insurance and help turn around what the legislature saw as a “competitive disadvantage in attracting and retaining qualified physicians and health care providers.” *See* W. Va. Code § 55-7B-1. In this case, by allowing the jury to consider multiple tort claims and grant separate awards of damages, the Circuit Court ignored the MPLA.

The common thread between all of the causes of action contained in the instructions, putting aside whether all should have been given in the first place,³ is that they all sound in tort. Breach of duty, breach of professional duty and violation of statute or regulation, and breach of fiduciary duty are all tort concepts under West Virginia law. As such, each cause of action falls within the “any tort or contract” language defining medical professional liability in West Virginia Code 55-7B-2(i).

- 1. The Circuit Court erred in allowing Plaintiff to argue, and allowing the jury to apportion damages based upon, an arbitrary distinction between “medical” versus “ordinary” negligence all stemming factually from acts or treatment performed for, to or on behalf of Mrs. Douglas, which are governed by the MPLA.**

The MPLA applies to “any medical professional liability action against a health care provider.” W. Va. Code § 55-7B-8. The MPLA defines “medical professional liability” as “*any liability* for damages resulting from the death or injury of a person for *any tort* or breach of contract *based on health care services* rendered, or which should have been rendered, by a health care provider or health care facility to a patient.” W. Va. Code § 55-7B-2(i) (emphasis added). “Health care” is defined as “*any act or treatment* performed or furnished, or which should have been performed or furnished, by any health care provider *for, to or on behalf of a patient during*

³ As set forth in Section III.B.2, *infra*, this Court has never recognized a fiduciary duty on the part of a health care provider outside the context of breaching medical privacy.

the patient's medical care, treatment or confinement." W. Va. Code § 55-7B-2(e) (emphasis added).

In *Boggs v. Camden-Clark Mem'l Hosp. Corp.*, the Court examined the statutory definition of "medical professional liability," stating as follows:

[T]he MPLA . . . applies only to claims resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient. It does not apply to other claims that may be contemporaneous or related to the alleged act of medical professional liability.

Syl. pt. 3, 216 W. Va. 656, 609 S.E.2d 917 (2004). The Court, in *dicta*, suggested that suits involving "battery, fraud, spoliation of evidence, or negligent hiring" do not fall under the MPLA. *Id.* at 622, 609 S.E.2d. at 923. However, in *Gray v. Mena*, the Court clarified *Boggs*, making it clear the MPLA applies to any tort claims based upon health care rendered, or which should have been rendered:

In reviewing the rationale utilized in *Boggs*, we note an inconsistency and seek to remedy that inconsistency in the present opinion. In *Boggs* . . . this Court stated that the Act's protection does not extend to intentional torts; yet the Act itself states that it applies to "any tort," thus encompassing intentional torts. *See* West Virginia Code § 55-7B-2(i) Having examined this matter in the context of the present case, we clarify *Boggs* by recognizing that the West Virginia Legislature's definition of medical professional liability, found in West Virginia Code § 55-7B-2(i), includes liability for damages resulting from the death or injury of a person for *any* tort based upon health care services rendered or which should have been rendered. To the extent that *Boggs* suggested otherwise, it is modified.

218 W. Va. 564, 568–69, 625 S.E.2d 326, 330–31 (2005); *see also* Syl. pt. 4, *id.* As the Court concluded in *Gray*, the very definitions contained in the MPLA demonstrate it is intended to broadly include tort claims related to "acts or treatment" of patients.

Here, *Gray* dictates that the MPLA's definition of "health care," which includes "*any act or treatment*," applies to all of the care of the nursing home resident at issue, including the

provision of food and water and the decision on how to staff the nursing home. Nutrition, hydration, and staffing are acts with a direct nexus to the patient's care during her treatment or confinement at the nursing home. This Court has found that claims against a hospital for injuries resulting from contaminated sutures under a product liability theory were governed by the MPLA, finding that sutures "by their very nature, are implanted during the course of and in furtherance of medical treatment [surgery]." *Blankenship v. Ethicon, Inc.*, 221 W. Va. 700, 707, 656 S.E.2d 451, 458 (2007). This Court has also found that intentional torts, including an alleged assault occurring during the care of a patient, fall under the MPLA. *Gray*, 218 W. Va. at 570, 625 S.E.2d at 332. Certainly acts with a direct relationship and substantial nexus with the care and treatment of a resident such as nutrition, hydration, and staffing are included in the broad definition of "health care" in the MPLA.

Whether expert testimony is required to show that health care, or lack thereof, constituted medical professional liability does not take a claim outside the purview of the MPLA. The MPLA recognizes the common knowledge exception; thus, some cases falling within its scope are so obvious to a lay person that expert testimony is not necessary. W. Va. Code § 55-7B-6(c). Even if medical negligence is within the common knowledge of jurors, the act or treatment remains governed by the MPLA. So, if the MPLA applies even where an expert is not required to prove a breach of the standard of care, it must apply to decisions related to hydration, nutrition, and staffing during the care and treatment of a patient, as these are "acts or treatment" contemplated by the statute.

This Court has long recognized this concept, holding that expert testimony is not required

[i]n medical malpractice cases where lack of care or want of skill is so gross, so as to be apparent, or the alleged breach relates to noncomplex matters of diagnosis and treatment within the understanding of lay jurors by resort to common knowledge and experience.

Syl. pt. 4, *Totten v. Adongay*, 175 W. Va. 634, 337 S.E.2d 2 (1985); *see also* Syl. pt. 6, *McGraw v. St. Joseph's Hosp.*, 200 W. Va. 114, 488 S.E.2d 389 (1997); Syl. pt. 4, *Banfi v. Am. Hosp. for Rehabilitation*, 207 W. Va. 135, 529 S.E.2d 600 (2000). For example, in *Banfi*, this Court determined that decisions regarding use of restraints on a patient and diagnosis and treatment issues required expert testimony because expert testimony would be necessary to fully inform the jury of the standard of care. *See Banfi*, 207 W. Va. at 141–44, 529 S.E.2d at 606–09. Nonetheless, this Court determined that the applicable standard of care regarding a patient's fall was within the common knowledge of the jury and did not require expert testimony. *Id.* at 142–143, 529 S.E.2d at 607–08. Notably, the claims at issue in *Banfi* remained governed by the MPLA, regardless of whether expert testimony was required to prove the standard of care.

Here, contrary to the definitions contained in the MPLA, the Circuit Court allowed Plaintiff to argue that nutrition, hydration, and staffing were “nonmedical” acts that constituted “ordinary” negligence and, thus, fell outside of the realm of the MPLA. To this end, the concept of “ordinary” versus “medical” negligence was applied by Plaintiff's counsel in argument to suggest to the jury

Do you find by a preponderance of the evidence more right than wrong that there was negligence that contributed to her death? Yes. According to Dr. Mitchell, yes. It's clear. The following question then will be ordinary negligence versus medical negligence. This is a little confusing. It has to equal one hundred percent.

Here's the argument on that. It is our position and I think common sense tells you not giving someone enough water is ordinary negligence and is reasonable here. You don't need to be a nurse, you don't need to be a doctor, you don't need to be a scientist. Everybody needs water. My little girl knows that. Everybody needs water. We all know that. That's ordinary negligence. I say you put one hundred percent there, because that's what it is. She didn't get enough water. Then you decide the damages.

App. at 5719–20.

This argument took the common knowledge exception, an evidentiary doctrine applicable to determinations within the common knowledge of jurors, and changed it into a separate kind of negligence. Nothing in West Virginia law supports this concept. Deviations from the standard of care within the jury’s common knowledge are still subject to the MPLA; they simply do not require expert testimony. Plaintiff’s closing argument demonstrates the mixing of apples (the need for expert testimony) and oranges (ordinary negligence) to urge the jury to slant its award to the “ordinary” with the intent to avoid the MPLA. This cannot stand—the provision of nutrition and hydration is as much a part and parcel of health care as sutures are to surgery. *See Blankenship*, 221 W. Va. at 707, 656 S.E.2d at 458.

The jury was then permitted to apportion by percentage “medical” versus “ordinary” negligence.⁴ Apportionment of “medical” versus “ordinary” negligence was inappropriate given that the actions at issue below all fall within the scope of the MPLA as an “act or treatment” performed “for, to or on behalf of a patient during the patient’s medical care.” W. Va. Code § 55-7B-2(e).

The MPLA itself does not discuss the apportionment of different types of negligence. Instead, it addresses the division of fault among parties. W. Va. Code § 55-7B-9a. Allowing a jury to make decisions regarding “medical” versus “ordinary” negligence all stemming from decisions pertaining to treatment of this patient during her nursing home care constituted error by the Circuit Court.

The Plaintiff below relied heavily on Justice Davis’ concurring opinion in *Riggs* to support their position. *See Riggs v. W. Va. Univ. Hosp., Inc.*, 221 W. Va. 646, 665-76, 656

⁴ The Circuit Court applied the percentage of “medical negligence” apportioned by the jury (20%) to the award for noneconomic loss (\$5 million), and reduced only that portion (25% of \$5 million, or \$1 million) to \$594,000, the adjusted amount of the limit on liability for noneconomic losses under West Virginia Code § 55-7B-8, leaving a total noneconomic damage award of \$4,594,615.

S.E.2d 91, 110–21 (2007) (Davis, J. concurring). As seen in the order denying post-trial motions, Plaintiff argued that Justice Davis’ concurring opinion discussing the scope of the MPLA in *Riggs* supports the premise in this case that separating “ordinary” and “medical” negligence was appropriate. *See* App. at 18. In *Riggs*, the majority opinion affirmed the lower court’s application of West Virginia Code § 55-7B-8 because the plaintiff pled and proved a medical professional liability case and only changed theories after trial in an effort to avoid reduction of a \$10 million dollar non-economic damages award. *Riggs*, 221 W. Va. at 648, 656 S.E.2d at 93. Justice Davis concurred with this finding, writing at length about judicial estoppel. *See id.* at 673–76, 656 S.E.2d at 118–121 (Davis, J., concurring). Justice Davis also stated that absent estoppel, she would have found the hospital’s actions related to infection control were not governed by the MPLA. *Id.* at 665, 656 S.E.2d at 110. Justice Davis noted that the infection “was not the reason [the plaintiff] was admitted” and that the hospital “breached a general duty owed to all patients and nonpatients to maintain a safe environment.” *Id.* at 666, 656 S.E.2d at 111 (citing *Padney v. MetroHealth Med. Ctr.*, 764 N.E.2d 492 (Ohio 2001)). Justice Davis’ opinion is not precedent, but even if it was, it does not apply to attain the result Plaintiff seeks here. In this case, the issues of hydration, nutrition, and staffing all related to the care of Ms. Douglas—Was she given enough water and food? Did she have enough staff watching over her? All fall within “acts or treatment” for Ms. Douglas—issues not addressed by Justice Davis in her separate opinion. To the contrary, your *amici curiae* submit, Justice Davis’ opinion does not stand for the restrictive definition of “health care” urged by the Plaintiff.

For similar reasons, *Phillips v. Larry’s Drive In*, 220 W. Va. 484, 647 S.E.2d 920 (2007), does not compel Plaintiff’s narrow reading of the definition of “health care.” *Phillips* dealt with whether a pharmacy was a “health care provider” within the meaning of the MPLA and the Court

held it was not. *Phillips* also proclaimed, “[w]here there is any doubt about the meaning or intent of a statute in derogation of the common law, the statute is to be interpreted in the manner that makes the least rather than the most change in the common law.” Syl. pt. 5, *id.* *Phillips* does not require this Court to ignore the plain language of W. Va. Code § 55-7B-2(e) that health care includes any “act or treatment” performed “for, to or on behalf of a patient during the patient’s medical care.” Unlike the dispute over whether pharmacies, not mentioned in the definition of “health care providers” were sufficiently similar to those listed to be included in the group, the language here expressly states what the Legislature meant.

Additionally, the Plaintiff will undoubtedly argue, as he did below, that not all the Defendants were health care providers entitled to the protection of the MPLA. If the intent of the instructions was to differentiate the types of claims made against “health care providers” and “non-health care providers,” then the instructions here did not provide the jury with the any guidance as to who was who, and instead, lumped “the Defendants” together as a group.

In this case, there should have been no distinction between “medical” and “ordinary” negligence. Whether a claim is governed by the MPLA is determined based on whether the claim is based on acts or treatment performed for, to or on behalf of a patient. Whether expert testimony is required does not change medical professional liability into “ordinary” negligence that lies outside the purview of the MPLA. In this case, all of the claims rest on the health care provided, or not provided, to Ms. Douglas and, therefore, all are governed by the MPLA.

2. **The Circuit Court erred in allowing multiple awards for noneconomic loss by providing for separate awards for three categories of claims because all claims were in tort and this Court only recognizes a physician’s fiduciary duty of confidentiality.**

A plaintiff may only recover damages once regardless of whether damages for pre-death pain and suffering are asserted through a wrongful death claim or as a separate claim. Syl. pt. 7,

Harless v. First Nat. Bank in Fairmont, 169 W. Va. 673, 289 S.E.2d 692 (1982) (“It is generally recognized that there can be only one recovery of damages for one wrong or injury.”). Further, “[a] plaintiff may not recover damages twice for the same injury simply because he has two legal theories.” *Id.*; *see also* W. Va. Code § 55-7-8 (“[T]here shall be but one recovery for each element of damages.”); *State Farm Mut. Auto. Ins. Co. v. Schatken*, 230 W. Va. 201, 201, 737 S.E.2d 229, 237 (2012) (noting that double recovery is a notion “this Court has long found violative of public policy”); *McDavid v. United States*, 213 W. Va. 592, 601, 584 S.E.2d 226, 235 (2003) (“[I]t is axiomatic that the jury is only allowed to award the decedent’s beneficiaries one recovery for each loss.”).

The MPLA governs medical professional liability, which is defined as “any liability for damages resulting from the death or injury of a person for *any tort or breach of contract* based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient.” W. Va. Code § 55-7B-2 (emphasis added). Creative pleading of varied causes of action will not assist a plaintiff in avoiding the requirements of the MPLA. Syl. pt. 4, *Blankenship*, 221 W. Va. 700, 656 S.E.2d 451 (“Where the alleged tortious acts or omissions are committed by a health care provider within the context of the rendering of ‘health care’ . . . the [MPLA] applies regardless of how the claims have been plead.”).

In this case, the Verdict Form separated tort claims into negligence, “breach of fiduciary duty” and “Nursing Home Act” claims. This circumvented the MPLA and subjected Defendants to multiple and duplicative damage awards. As discussed, all of the claims presented in this case were premised on the health care provided or not provided by Defendants that resulted in the injuries sustained by and the death of Ms. Douglas. As such, all of these claims should have been governed by and subject to the provisions of MPLA.

With regard to the NHA claims, West Virginia law provides that “[v]iolation of a statute is prima facie evidence of negligence.” Syl. pt. 1, *Anderson v. Moulder*, 183 W. Va. 77, 394 S.E.2d 61 (1990). In this case, the Circuit Court instructed the jury of the legal duties imposed on nursing facilities and that a violation of the NHA permits a presumption of negligence. App. at 5674–78. Because all of the acts supporting the NHA and negligence claims were health care services, this allowed the jury to provide an additional award based solely on the same acts, the same negligence. The fact that the NHA provides a basis for recovery, West Virginia Code § 16-5C-15(c), does not change the applicability of the MPLA by its definitions, nor does it allow a recovery in excess of the single recovery allowed under West Virginia law.

The Plaintiff’s claim of “breach of fiduciary duty” was similarly grounded in the same alleged negligent acts by the Defendants. It was error to allow this separate claim because the MPLA applies to all torts based on health care rendered. *See* Syl. pt. 3, *Gray*, 218 W. Va. 564, 625 S.E.2d 326. Moreover, this Court has never recognized a general fiduciary duty by a health care provider related to the treatment of patients. The only fiduciary duty a health care provider owes to a patient is the duty not to disclose confidential information. *R.K. v. St. Mary’s Med. Ctr., Inc.*, 226 W. Va. 715, 723, 735 S.E.2d 715, 726 (2012) (holding that the improper disclosure of medical records “does not fall within the MPLA’s definition of ‘health care’”); *State ex rel. Kitzmiller v. Henning*, 190 W. Va. 142, 145, 437 S.E.2d 452, 455 (1993) (holding that a doctor has a fiduciary duty to keep a patient’s medical information confidential because “the absence of a formal codified physician-patient privilege does not destroy the confidential nature of the doctor-patient relationship”).

Breach of fiduciary duty should not be recognized as a free-standing tort not subject to the MPLA. To recognize such a claim would, in effect, invalidate the MPLA. Other courts

have found that to so extend a health care provider's fiduciary duties "would permit avoidance of every statute defining the physician/patient relationship. Indeed, it is difficult to imagine any medical malpractice claim that would not be pleaded as a breach of fiduciary duty claim in order to bypass legislative procedures aimed at implementing common law." *D.A.B. v. Brown*, 570 N.W.2d 168, 171 (Minn. Ct. App. 1997) (holding that "[t]he doctor's duty to disclose [a] kickback scheme presents a classic informed consent issue"); *see also Neade v. Portes*, 739 N.E.2d 496, 503 (Ill. 2000) ("[W]e need not recognize a new cause of action for breach of fiduciary duty when a traditional medical negligence claim sufficiently address the same alleged misconduct. The breach of fiduciary duty claim in the case at bar would be duplicative of the medical negligence claim."); *Hart v. Wright*, 16 S.W.3d 872, 878 (Tex. Ct. App. 2000) (finding that the appellants' fiduciary duty theory was premised on a breach of the standard of care and was, therefore, a medical malpractice claim).

This re-casting of causes of action is further evidenced by the Circuit Court's instructions. The Circuit Court instructed the jury that breaches of fiduciary duties owed to Ms. Douglas could be proven by a showing of Defendants' "fail[ure] to provide the appropriate level of care and services to which Dorothy Douglas was entitled." App. at 5680. This is almost exactly what is required to establish the breach of care element in an MPLA action. W. Va. Code § 55-7B-3(a)(1) ("The health care provider failed to exercise that degree of care, skill and learning required or expected of a reasonable, prudent health care provider in the profession or class to which the health care provider belongs acting in the same or similar circumstances.").

The Circuit Court characterized the NHA and fiduciary duty claims as addressing "'survival' damages," or causes of action that did not cause Ms. Douglas' death and, therefore, could be pursued separate from the wrongful death claim. App. at 22. Even if this Court

recognized a breach of fiduciary duty under the circumstances of this case, both of these claims should be subject to the MPLA. Both constitute tortious conduct that arose during the provision of health care and resulted in noneconomic loss. As such, both claims are subject to the limitations set forth in West Virginia Code § 55-7B-8(a)-(b). By inappropriately characterizing these claims, the Circuit Court subjected the Defendants to duplicitous damages.

The Verdict Form further exasperated the problem. The Circuit Court instructed the jury that it could award damages for various injuries suffered by Ms. Douglas and by Tom Douglas and Carolyn Hoy, but the Circuit Court failed to instruct the jury as to which damages related to which claim. The problem created by the Verdict Form is that it encouraged the jury to award separate damages for each claim, instead of the appropriate measures of damages provided by statute. At most, the damages awarded should have reflected noneconomic awards for the survival claims of Mrs. Douglas, West Virginia Code § 55-7-8a, and an award to the beneficiaries of the Estate for damages for wrongful death. W. Va. Code § 55-7-5. Instead, the jury was given a laundry list of claims which allowed multiple and unfettered separate awards of damages without regard to the principle of a single recovery.⁵

⁵ This Court has noted the problems with verdict forms with multiple lines allowing the award of damages. In *Gebhardt v. Smith*, 187 W. Va. 515, 420 S.E.2d 275 (1992), the verdict form required the jury to itemize damages as follows:

- (1) "pain and suffering experienced to date, if any";
- (2) "pain and suffering to be experienced in the future if any";
- and (3) "loss of enjoyment of life, including the inability to engage in normal pursuits and activities and permanent disability and disfigurement."

Id. at 518, 420 S.E.2d at 278. Commenting on these deficiencies, this Court found

[i]t is not clear from the record why the jury was requested to itemize the general verdict in the manner set forth in the text of the opinion. Such specificity in a personal injury case such as this appears to be of limited value. It may, in some cases, cause error by focusing on the itemized categories and the potential inconsistencies contained therein (i.e., a jury could be presented evidence of substantial pain and suffering in the past and of only a limited likelihood of pain and suffering in the future, and nonetheless grant more damages for future pain and suffering). The potential for error by itemizations such as this in such a personal injury case is greater than in verdicts of a more general nature.

Id. at 518 n.3, 420 S.E.2d at 278 n.3. The problem this Court recognized in *Gebhardt* exists here, where the Verdict Form required the jury to award damages for each cause of action, as opposed to simply requiring that it award the damages to the Plaintiffs for survival and wrongful death, as allowed by statute.

Ultimately, allowing the Plaintiff to engage in artful pleading in order to avoid the application of the MPLA and to mischaracterize wrongful death claims as “survival” claims has the potential to render the MPLA meaningless. As the Minnesota Court of Appeals noted, any claim of malpractice can be shaped into a different claim in order to avoid compliance with medical professional liability statutes. *D.A.B.*, 570 N.W.2d at 171. To allow the Plaintiff to engage in this practice in the instant case will encourage future plaintiffs to find alternative avenues of pleading that render the MPLA wholly devoid of meaning and legal significance, which this Court sought to avoid in *Blankenship*, 221 W. Va. at 703, 656 S.E.2d at 454 (“[W]hether a cause of action falls within the MPLA is based upon the factual circumstances giving rise to the cause of action, not the type of claim asserted.”).

C. Under the prevailing view, whether each Defendant should be responsible for punitive damages should have been determined on an individual basis because joint and several liability for punitive damages contravenes the purposes underlying punitive damages.

The primary purposes of punitive damages are “(1) to punish the defendant; (2) to deter others from pursuing a similar course; and, (3) to provide additional compensation for the egregious conduct to which the plaintiff has been subjected.” *Harless*, 169 W. Va. at 691, 289 S.E.2d at 702. Thus, other courts have recognized that

[t]he imposition of joint and several liability for punitive damages is contrary to the purpose for which punitive damages are awarded. Punitive damages are awarded to punish the wrongdoer. Each wrongdoer is liable to pay the punitive damages assessed against him or her. . . . Joint and several liability undermines these considerations and therefore is unavailable.

Smith v. Printup, 866 P.2d 985, 1011 (Kan. 1993); *see also Beerman v. Toro Mfg. Corp.*, 615 P.2d 749, 755 (Haw. Ct. App. 1980) (noting that “the purpose of punitive awards is to punish a particular offender”); *Embrey v. Holly*, 442 A.2d 966, 973 (Md. 1982) (“Punitive damages, in essence, represent a civil fine, and as such, should be imposed on an individual basis.”); *Heights*

Assocs. v. Bautista, 683 N.Y.S.2d 373, 374 (N.Y. App. Term 1998) (“It has long been the rule with respect to punitive damages that the motive of one party cannot be imputed to another party.”).

In this case, the Verdict Form merely stated as follows: “Under the circumstances of this case, state whether you find by the preponderance of the evidence that punitive damages are warranted against the Defendants.” App. at 13. Thus, the Circuit Court allowed imposition of joint and several liability for punitive damages. The jury did not consider the individual liability of each Defendant. As the Kansas Supreme Court noted in *Smith*, this undermines the policies underlying imposition of punitive damages by seeking to deter and punish defendants who are not so culpable that they should be held liable to such a degree.

In conclusion, the jury should have been instructed to find whether each Defendant was sufficiently culpable to be found liable to the Plaintiff for punitive damages. To allow otherwise defeats the underlying purposes of punitive damages.

D. The punitive damages awarded in this case were not warranted and exceed constitutional limitations on punitive damages because there was insufficient evidence to find each Defendant engaged in conduct supporting punitive damages and the MPLA was not applied to the underlying award.

Punitive damages are reviewed via a two-step process, which considers (1) whether punitive damages are warranted and (2) whether the amount of punitive damages is proper. Syl. pt. 7, *Alkire v. First Nat. Bank of Parsons*, 197 W. Va. 122, 475 S.E.2d 122 (1996). In this case, the record fails to demonstrate the level of conduct necessary to assess punitive damages against each party to whom they were awarded. Further, in light of the exclusive application of the MPLA as discussed above, the punitive damages levied against the Defendants are grossly excessive.

1. Punitive damages were not warranted because the record fails to demonstrate the level of conduct necessary to assess punitive damages against each party to whom to whom they were awarded.

Punitive damages are warranted where a defendant's tortious conduct exhibits "gross fraud, malice, oppression, or wanton, willful, or reckless conduct or criminal indifference to civil obligations affecting the rights of others." Syl. pt. 4, *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895). Generally, mere negligence alone is insufficient to support a finding of such conduct. Instead,

[w]here there is a deliberate as opposed to a negligent circumvention of [the standard of care or statutory provisions designed to safeguard others], malice may be inferred although there may not have been any actual malice toward a particular individual. The foundation of the inference of malice is the general disregard of the rights of others, rather than an intent to injure a particular person.

Addair v. Huffman, 156 W. Va. 592, 603, 195 S.E.2d 739, 745–46 (1973).

In this case, there are insufficient grounds to find that each and every Defendant deliberately breached the standard of care owed to Ms. Douglas and residents of Heartland in general. The Circuit Court found that such a finding was warranted because of understaffing and knowledge of complaints regarding neglect. App. at 41–42. However, because all of the Defendants were considered as a whole for purposes of imposing punitive damages, these actions were imputed to all Defendants, regardless of the wrongdoer. See *Heights Assocs.*, 683 N.Y.S.2d at 374 (finding that motive cannot be imputed for purposes of punitive damages).

Due to the extraordinary level of conduct required in order to support an award of punitive damages, a jury should be required to determine whether each defendant has engaged in the requisite conduct. Absent such a showing, defendants not engaging in such conduct may be subject to excessive and extraordinary damages that are unwarranted. The blanket finding of

willful, wanton, and reckless conduct with regard to all Defendants in this case improperly imposes joint and several liability for punitive damages. *See Smith*, 866 P.2d at 1011.

2. **The punitive damages greatly exceed the constitutional bounds placed on punitive damages because the underlying award was not reduced pursuant to the MPLA and the evidence was insufficient to support punitive damages in excess of a 5-to-1 ratio.**

Where punitive damages are warranted, there are limits to the total amount of punitive damages that may be imposed upon a defendant. This Court has found that the constitutionally permissible “outer limit of the ratio of punitive damages to compensatory damages . . . is roughly 5 to 1. However, when the defendant has acted with actual evil intention, much higher ratios are not per se unconstitutional.” Syl. pt. 15, *TXO Prod. Corp. v. Alliance Res. Corp.*, 187 W. Va. 456, 419 S.E.2d 870 (1992).

First, as the damages in this case should have been reduced under West Virginia Code § 55-7B-8, as discussed above, the total noneconomic damages should have been \$594,615.22. Even if punitive damages were warranted, any amount in excess of \$2,973,076.10 (five times the appropriate noneconomic damages) falls outside of constitutionally permissible bounds. Thus, the \$80 million award in this case is more than twenty-six times the amount considered constitutional. An award of this size is substantially excessive and highly offensive to constitutional notions of proportionate damages.

The Circuit Court also improperly permitted the punitive damages award to exceed the ratio set forth in *TXO* under the “evil intention” exception. The Circuit Court found a higher ratio appropriate due to evidence of malice, relying on *Peters*.⁶ This was inappropriate because

⁶

[T]he Court finds the 7:1 ratio is appropriate in this wrongful death action because the HCR Manor Care Defendants acted with “evil intention” and *malice*. *Peters v. Rivers Edge Min., Inc.*, 224 W. Va. 160, 190, 680 S.E.2d 791, 821 (2009) (“The foundation of an inference of malice is

the standard articulated in *Peters* applies to “general disregard,” as *Peters* only addressed a damages ratio of 1.13 to 1 and did not require a review of what constituted actual “evil intention.” See *Peters v. Rivers Edge Min., Inc.*, 224 W. Va. 160, 190, 192, 680 S.E.2d 791, 821, 823 (2009). As such, the Circuit Court’s reliance on this standard for “evil intention” was inappropriate. Furthermore, the evidence relied upon to support a heightened ration demonstrated, at most, negligence on part of the Defendants. See App. at 53–54.

Absent evidence of “evil intention” on behalf of any of the Defendants and because the MPLA compensatory damages limitations apply to this case, the punitive damages levied against the Defendants grossly exceed the constitutional standards set by this Court in *TXO*.

IV. CONCLUSION

On three occasions, the West Virginia Legislature, after considerable debate, decided to provide limited protection to the hospitals and nursing homes of this State in the MPLA and its 2001 and 2003 amendments. The Legislature recognized the need for stability and limited protection to encourage physicians to practice here and to provide for a stable insurance market providing affordable and available coverage. On several occasions, this Court has recognized the Legislature’s determination of the need for the protections and has deferred to these decisions as within the proper constitutional authority of the Legislature. See *MacDonald v. City Hospital, Inc.*, 227 W. Va. 707, 715 S.E.2d 405 (2011); *Verba v. Ghaphery*, 210 W. Va. 30, 552 S.E.2d 407 (2001); *Robinson v. Charleston Area Med. Ctr.*, 186 W. Va. 720, 414 S.E.2d 877 (1991).

The review of this case is important to the hospitals and nursing homes of West Virginia because, if allowed to stand, the verdict and the reasoning of the Circuit Court in affirming it will virtually emasculate the protection of the MPLA. Plaintiffs will be able to avoid the MPLA,

the general disregard of the rights of others, rather than an intent to injure a particular individual.”).
App. at 53.

either wholly or in part, by pleading and arguing “ordinary” negligence claims, violations of statute and breach of dicuiary duty as separate torts, all in contravention of the MPLA’s definitions under West Virginia Code § 55-7B-2(e). As below, the Plaintiff argues that Justice Davis’ separate opinion in *Riggs* is precedent for this argument despite the fact her opinion was a concurrence not joined by other justices.⁷ In an effort to avoid the MPLA, the Plaintiff, as below and as in *Riggs*, presses the boundaries of the MPLA, despite this Court’s clear limitation in *Gray* and *Blankenship*. The absurd result is that hospitals and nursing homes may have *less* protection than the Legislature intended, as plaintiffs are allowed wide latitude to plead and argue around the MPLA. They are less protected because plaintiffs are allowed to separate awards of damages for each claim pled, instead of a single award for an indivisible injury as required by West Virginia law. This leads back to the same uncertainty, the same problems with claims advanced without expert testimony, the lack of limitation on jury awards and the like all addressed three times by the Legislature. In this regard, *Phillips* supports the premise that the MPLA should apply to health care providers. *Phillips* should not be read beyond its holding that pharmacies are not health care providers or its view of statutory construction used to parse the MPLA to expose hospitals and nursing homes to a variety of “uncovered” claims, an absurd result certainly not contemplated by our Legislature.

Accordingly, the entire noneconomic award should have been reduced to \$594,000, the adjusted amount of the limit on liability for noneconomic losses under West Virginia Code § 55-

⁷ Justice Davis was careful to point this out, noting in her separate opinion, “I have chosen to write separately to discuss the issue of whether or not the cause of action filed against WVUH *could have been* brought outside the MPLA,” and stating:

I wish to make clear that the majority opinion did not address the question of whether or not the Appellants’ cause of action had to actually be commenced and litigated under the MPLA. The majority opinion was narrowly focused upon the issue of whether or not the Appellants should be judicially estopped from asserting that the MPLA did not apply, even though they commenced and litigated their claim under the MPLA.

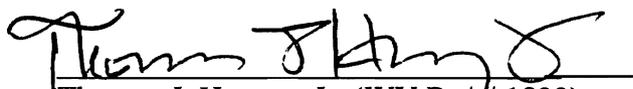
Riggs, 221 W. Va. at 665, 656 S.E.2d at 110 (Davis, J., concurring) (emphasis added).

7B-8. In light of the limit on liability for noneconomic losses, the punitive damages awarded were grossly excessive and conduct of each party against whom punitive damages were assessed did not meet the threshold necessary to warrant such award.

Respectfully submitted,

**WEST VIRGINIA HOSPITAL
ASSOCIATION and WEST VIRGINIA
HEALTH CARE ASSOCIATION, INC.**

By Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

**TOM DOUGLAS, Individually and on behalf
of the Estate of Dorothy Douglas,**

Plaintiff Below, Respondent,

v.

APPEAL NO. 13-0470

**MANOR CARE, INC.; HCR MANOR CARE
SERVICES, INC.; HEALTH CARE AND
RETIREMENT CORPORATION OF
AMERICA, LLC; HEARTLAND
EMPLOYMENT SERVICES, LLC; JOHN
DOES 1 THROUGH 10; and UNIDENTIFIED
ENTITIES 1 THROUGH 10 (AS TO
HEARTLAND OF CHARLESTON),**

Defendants Below, Petitioners.

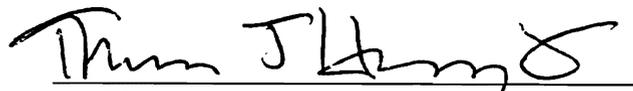
CERTIFICATE OF SERVICE

I, Thomas J. Hurney, Jr., do hereby certify that service of the foregoing *Brief of Amici Curiae of the West Virginia Hospital Association and the West Virginia Health Care Association, Inc.* was made upon counsel of record this the 12th day of August, 2013 by mailing a true and exact copy thereof via first class United States Mail, postage prepaid, in an envelope addressed as follows:

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