

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2005 Term

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No. 31760

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**FILED**  
**July 5, 2005**  
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SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

CHARLOTTE HINCHMAN, as Personal Representative  
of the Estate of Paul Z. Hinchman; Charlotte Hinchman, individually,  
Plaintiffs Below, Appellants

v.

JULIE M. GILLETTE, R.N., C.R.N.A., individually, and  
as the agent, servant and/or employee of Medical Doctor  
Associates, Inc., and as the agent, servant, and/or employee of  
Stonewall Jackson Memorial Hospital Company;  
Medical Doctor Associates, Inc., a foreign corporation doing  
business within the State of West Virginia; Roger K. Pons, M.D.,  
individually and as the agent, servant and/or employee of  
Stonewall Jackson Memorial Hospital; Stonewall Jackson Memorial  
Hospital Company, a West Virginia corporation; John Doe and Jane Doe,  
Defendants Below, Appellees

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Appeal from the Circuit Court of Lewis County  
Hon. Thomas H. Keadle, Judge  
Case No. 03-C-03

REVERSED AND REMANDED

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Submitted: April 5, 2005  
Filed: July 5, 2005

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JUSTICE STARCHER delivered the Opinion of the Court.

JUSTICE DAVIS concurs and reserves the right to file a concurring opinion.

JUSTICE MAYNARD concurs, in part, and dissents, in part, reserves the right to  
file a separate opinion.

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## SYLLABUS BY THE COURT

1. “Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review.” Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

2. Under *W.Va. Code*, 55-7B-6 [2003] the purposes of requiring a pre-suit notice of claim and screening certificate of merit are (1) to prevent the making and filing of frivolous medical malpractice claims and lawsuits; and (2) to promote the pre-suit resolution of non-frivolous medical malpractice claims. The requirement of a pre-suit notice of claim and screening certificate of merit is not intended to restrict or deny citizens’ access to the courts.

3. Before a defendant in a lawsuit against a healthcare provider can challenge the legal sufficiency of a plaintiff’s pre-suit notice of claim or screening certificate of merit under *W.Va. Code*, 55-7B-6 [2003], the plaintiff must have been given written and specific notice of, and an opportunity to address and correct, the alleged defects and insufficiencies.

4. Under *W.Va. Code*, 55-7B-6 [2003], when a healthcare provider receives a pre-suit notice of claim and screening certificate of merit that the healthcare provider believes to be legally defective or insufficient, the healthcare provider may reply within thirty days of the receipt of the notice and certificate with a written request to the claimant for a more definite statement of the notice of claim and screening certificate of merit. The request for a more definite statement must identify with particularity each alleged insufficiency or

defect in the notice and certificate and all specific details requested by the defendant. A claimant must be given a reasonable period of time, not to exceed thirty days, to reply to a healthcare provider's request for a more definite statement, and all applicable periods of limitation shall be extended to include such periods of time.

5. Under *W.Va. Code, 55-7B-6* [2003], the making of a request for a more definite statement in response to a notice of claim and screening certificate of merit preserves a party's objections to the legal sufficiency of the notice and certificate as to all matters specifically set forth in the request; all objections to the notice or certificate's legal sufficiency not specifically set forth in the request are waived.

6. In determining whether a notice of claim and certificate are legally sufficient, a reviewing court should apply *W.Va. Code, 55-7B-6* [2003] in light of the statutory purposes of preventing the making and filing of frivolous medical malpractice claims and lawsuits; and promoting the pre-suit resolution of non-frivolous medical malpractice claims. Therefore, a principal consideration before a court reviewing a claim of insufficiency in a notice or certificate should be whether a party challenging or defending the sufficiency of a notice and certificate has demonstrated a good faith and reasonable effort to further the statutory purposes.

Starcher, J.:

This case involves a circuit court's dismissal of a medical malpractice case because of alleged defects and insufficiencies in the plaintiff's pre-suit notice of claim and screening certificate of merit. Because the plaintiff did not receive specific pre-suit notice of the alleged defects and insufficiencies or an opportunity to correct them, we hold that the case should be reinstated.

I.  
*Facts & Background*

In the instant case, the appellant and plaintiff below, Charlotte Hinchman, is the widow and personal representative of the estate of the late Paul Z. Hinchman.

The four appellees are Julie M. Gillette, R.N., C.R.N.A.; Medical Doctor Associates, Inc.; Stonewall Jackson Memorial Hospital Company; and Roger K. Pons, M.D. All are healthcare providers who are alleged, in a complaint filed in the Circuit Court of Lewis County on January 7, 2003, to be legally liable to the appellant for wrongful death damages as a result of their alleged negligence in providing medical care and services to Mr. Hinchman during a pre-operative procedure. Specifically, Mr. Hinchman was being sedated in preparation for an outpatient biopsy surgery of his anal canal.

On July 7, 2003, the circuit court dismissed the appellant's case on the grounds that the appellant's pre-suit notice of claim and screening certificate of merit ("notice and

certificate”), required by *W.Va. Code*, 55-7B-6 [2003],<sup>1</sup> were legally defective and insufficient.

*W.Va. Code*, 55-7B-6 [2003] states:

(a) Notwithstanding any other provision of this code, no person may file a medical professional liability action against any health care provider without complying with the provisions of this section.

(b) At least thirty days prior to the filing of a medical professional liability action against a health care provider, the claimant shall serve by certified mail, return receipt requested, a notice of claim on each health care provider the claimant will join in litigation. The notice of claim shall include a statement of the theory or theories of liability upon which a cause of action may be based, and a list of all health care providers and health care facilities to whom notices of claim are being sent, together with a screening certificate of merit. The screening certificate of merit shall be executed under oath by a health care provider qualified as an expert under the West Virginia rules of evidence and shall state with particularity: (1) The expert’s familiarity with the applicable standard of care in issue; (2) the expert’s qualifications; (3) the expert’s opinion as to how the applicable standard of care was breached; and (4) the expert’s opinion as to how the breach of the applicable standard of care resulted in injury or death. A separate screening certificate of merit must be provided for each health care provider against whom a claim is asserted. The person signing the screening certificate of merit shall have no financial interest in the underlying claim, but may participate as an expert witness in any judicial proceeding. Nothing in this subsection may be construed to limit the application of rule 15 of the rules of civil procedure.

(c) Notwithstanding any provision of this code, if a claimant or his or her counsel, believes that no screening certificate of merit is necessary because the cause of action is based upon a

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<sup>1</sup>*W.Va. Code*, 55-7B-6 [2001], which applied to the instant case, was slightly amended in 2003. It does not appear that the 2003 amendments raise any issues that are germane to this opinion; therefore, we will use the current (2003) version of the statute in this opinion.

well-established legal theory of liability which does not require expert testimony supporting a breach of the applicable standard of care, the claimant or his or her counsel, shall file a statement specifically setting forth the basis of the alleged liability of the health care provider in lieu of a screening certificate of merit.

(d) If a claimant or his or her counsel has insufficient time to obtain a screening certificate of merit prior to the expiration of the applicable statute of limitations, the claimant shall comply with the provisions of subsection (b) of this section except that the claimant or his or her counsel shall furnish the health care provider with a statement of intent to provide a screening certificate of merit within sixty days of the date the health care provider receives the notice of claim.

(e) Any health care provider who receives a notice of claim pursuant to the provisions of this section may respond, in writing, to the claimant or his or her counsel within thirty days of receipt of the claim or within thirty days of receipt of the screening certificate of merit if the claimant is proceeding pursuant to the provisions of subsection (d) of this section. The response may state that the health care provider has a bona fide defense and the name of the health care provider's counsel, if any.

(f) Upon receipt of the notice of claim or of the screening certificate of merit, if the claimant is proceeding pursuant to the provisions of subsection (d) of this section, the health care provider is entitled to pre-litigation mediation before a qualified mediator upon written demand to the claimant.

(g) If the health care provider demands mediation pursuant to the provisions of subsection (f) of this section, the mediation shall be concluded within forty-five days of the date of the written demand. The mediation shall otherwise be conducted pursuant to rule 25 of the trial court rules, unless portions of the rule are clearly not applicable to a mediation conducted prior to the filing of a complaint or unless the supreme court of appeals promulgates rules governing mediation prior to the filing of a complaint. If mediation is conducted, the claimant may depose the health care provider before mediation or take the testimony of the health care provider during the mediation.

(h) Except as otherwise provided in this subsection, any statute of limitations applicable to a cause of action against a health care provider upon whom notice was served for alleged medical

professional liability shall be tolled from the date of mail of a notice of claim to thirty days following receipt of a response to the notice of claim, thirty days from the date a response to the notice of claim would be due, or thirty days from the receipt by the claimant of written notice from the mediator that the mediation has not resulted in a settlement of the alleged claim and that mediation is concluded, whichever last occurs. If a claimant has sent a notice of claim relating to any injury or death to more than one health care provider, any one of whom has demanded mediation, then the statute of limitations shall be tolled with respect to, and only with respect to, those health care providers to whom the claimant sent a notice of claim to thirty days from the receipt of the claimant of written notice from the mediator that the mediation has not resulted in a settlement of the alleged claim and that mediation is concluded.

(i) Notwithstanding any other provision of this code, a notice of claim, a health care provider's response to any notice claim, a screening certificate of merit and the results of any mediation conducted pursuant to the provisions of this section are confidential and are not admissible as evidence in any court proceeding unless the court, upon hearing, determines that failure to disclose the contents would cause a miscarriage of justice.

The appellant's notice and certificate read as follows:

\* \* \*

This letter is a Notice of Claim made under the provisions of § 55-7B-6 of the *West Virginia Code*. The claimant is my client, Charlotte Hinchman, Administratrix of the Estate of Paul Z. Hinchman.

Charlotte Hinchman intends to file a medical malpractice suit against you as a result of medical treatment you and others attempted to provide to her late husband, said Paul Z. Hinchman.

Specifically, Charlotte Hinchman claims that you breached applicable standards of care while attempting to provide medical treatment to Paul Z. Hinchman at Stonewall Jackson Memorial Hospital in Weston, West Virginia, on or about October 2, 2002

[2001], when he appeared there for a scheduled outpatient examination. Mrs. Hinchman claims that your breach of standards caused irreversible brain injury to Paul Z. Hinchman. Mr. Hinchman died of complications arising from said injuries on June 17, 2002.

A verified Certificate of Merit prepared by Roberto C. Valenzuela, J.D., a board certified anesthesiologist, is attached to this letter. Dr. Valenzuela's Certificate of Merit sets forth (1) that [*sic*] his familiarity with the applicable standard of care in issue; (2) his qualifications; (3) his opinion as to how the applicable standard of care was breached; and (4) his opinions as to how the breach of the applicable standard of care resulted in injury to Paul Z. Hinchman.

You are strongly cautioned to report receipt of Notice of Claim to your liability carrier and lawyer without delay. Section 55-7B-6 of the *West Virginia Code* requires that you file a written response to Charlotte Hinchman's claim within thirty (30) days of receipt.

Please govern yourself accordingly.

\* \* \*

The appellant's attached certificate of merit read:

\* \* \*

Thank you for asking me to review the medical records from Stonewall Jackson Memorial Hospital pertaining to the treatment of Paul Z. Hinchman dated October 2, 2001 through October 7, 2001.

I have been practicing anesthesiology in West Virginia since 1991, and have had the good fortune to participate in 5 years of academic practice as well as 6 years of private practice. I am a board certified anesthesiologist and have been appointed to the American Society of Anesthesiologists Committee on Surgical and Preoperative Anesthesia since October 2001. Therefore, I feel that I am familiar with the applicable standard of care in issue.

As a board certified anesthesiologist as well as with my participation in peer review, medical executive, and clinical competency committees I feel that I am qualified to render an

opinion on the case of Mr. Hinchman. I have enclosed a copy of my *curriculum vitae* for your review.

After careful review of the records furnished me from Stonewall Jackson Memorial Hospital, Weston, WV, dated October 2, 2001 through October 7, 2001 pertaining to the treatment provided to Paul Z. Hinchman by Roger K. Pons, M.D., Julie M. Gillette, R.N., C.R.N.A., and various employees of Stonewall Jackson Memorial Hospital I conclude that the applicable standard of care was breached by the above entities in numerous ways.

First, Mr. Hinchman was excessively sedated for his physical condition, medical illnesses, and operative position. Second, the patient was inadequately monitored. Third, there was inadequate vigilance on the part of Nurse Gillette, Dr. Pons, and the other members of the OR Staff. Fourth, there was inadequate airway control. Fifth, there was a lack of recognition as to the underlying etiology of the patient's bradycardia resulting in delay of resuscitative efforts. And sixth, there was delayed airway securement once the patient was noted to be cyanotic.

The above deviations resulted in prolonged hypoxia, and subsequent respiratory and cardiac arrest.

\* \* \*

Copies of medical records relating to the claim and Mr. Hinchman's death were attached to the notice, as well as a copy of the certifying expert's resumé. A separate copy of this notice of claim and attached screening certificate of merit was personally addressed to and sent to each of the appellees on or about December 3, 2002.

Two of the appellees, Stonewall Jackson Memorial Hospital and Medical Doctor Associates, responded to the notice and certificate within thirty days of its receipt.

One response read:

On behalf of Stonewall Jackson Memorial Hospital, this letter serves as the response to your Notice of Claim dated December

3, 2002 with the attached Screening Certificate from Dr. Valenzuela. Based on the scant details regarding standard of care deviations on the part of my client or its employees, all allegations contained in the Notice of Claim and Screening Certificate are hereby denied.

Also, please be advised that Stonewall Jackson Memorial Hospital declines to exercise its right to pre-litigation mediation authorized by West Virginia Code § 55-7B-6.

The other response read:

On behalf of Medical Doctor Associates, this letter serves as a response to your Notice of Claim dated December 3, 2002. Based on the inadequacy of the information concerning the alleged standard of care deviations on the part of Medical Doctor Associates or any of its agents or employees, all allegations contained in the Notice of Claim and screening certificate are hereby denied.

Please be advised that Medical Doctor Associates declines to exercise its right to pre-litigation mediation authorized by West Virginia § 55-7B-6.

The other appellees, Nurse Gillette and Dr. Pons, made no response to the notice and certificate.

After suit was filed on January 7, 2003, all of the appellees answered the complaint. On April 18, Nurse Gillette filed a motion to dismiss the complaint pursuant to *W.V.R.C.P.*, Rule 12(b)(6), alleging that the complaint should be dismissed because the appellant had failed to state a claim for relief by failing to properly comply with the pre-suit notice and certificate process set forth in *W.Va. Code*, 55-7B-6b [2003]. That motion was

joined by Dr. Pons and Stonewall Jackson, and after a hearing on the motion, the circuit court granted those appellees' motions to dismiss.<sup>2</sup>

The circuit court's order stated:

1. The Plaintiffs provided one screening certificate of merit from Roberto C. Valenzuela, M.D., an anesthesiologist, for all of the defendant health care providers, rather than the required separate screening certificate of merit for each health care provider against whom a claim was asserted.

2. Dr. Valenzuela's discussion of his qualifications, and his curriculum vitae, which was attached to his screening certificate of merit, generally documented his qualifications to comment on the standard of care applicable to an anesthesiologist. However, Dr. Valenzuela did not expressly state with particularity his familiarity with any specific standard of care. Rather, he stated in a conclusory fashion, "I feel that I am familiar with the applicable standard of care in issue." Therefore, the certificate of merit is deficient in failing to state with particularity Dr. Valenzuela's familiarity with the standard of care applicable to Dr. Pons, a surgeon; Ms. Gillette, a Certified Registered Nurse Anesthetist; or any of the unnamed "various employees of Stonewall Jackson Memorial Hospital."

3. Dr. Valenzuela failed to state with particularity the standard of care applicable to each health care provider against whom a claim was asserted and how that standard of care was breached.

4. Finally, the screening certificate of merit did not state with particularity how each alleged breach of the standard of care resulted in injury to or the death of the Plaintiffs' decedent.

## II.

### *Standard of Review*

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<sup>2</sup>Subsequently the circuit court dismissed the remaining appellee, Medical Doctor Associates, whose liability was "vicarious" to one of the already-dismissed appellees.

The circuit court’s ruling in its dismissal order applied the law to undisputed facts, and rested upon the interpretation of a statute. “Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a de novo standard of review.” Syllabus Point 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

### III. *Discussion*

We begin our discussion with the caution that our decision in the instant case does not address the constitutionality of *W.Va. Code, 55-7B-6* [2003]. We assume *arguendo* that the statute is constitutional. *Cf. Harshbarger v. Gainer*, 184 W.Va. 656, 660, 403 S.E.2d 399, 403 (1991).

Having said this, we examine the pre-suit notice and certificate statute, *W.Va. Code, 55-7B-6* [2003]. This is a new statutory provision that this Court has not previously addressed. However, a similar statute for medical malpractice claims has been in effect in Florida for some time. The Florida courts have addressed a number of issues arising under their statute, and their analyses are instructive and persuasive.

In *Shands Teaching Hospital and Clinics, Inc. v. Barber*, 638 So.2d 570, 572 (Fla.App. 1994), the court stated:

The purpose of a notice of intent to sue is to give the defendant notice of the incident in order to allow investigation of the matter and promote presuit settlement of the claim; the expert

corroborative opinion is designed to prevent the filing of baseless litigation. [Citations omitted.]

In *Patry v. Capps*, 633 So.2d 9, 11-12 [Fla. 1994], Florida's Supreme Court stated:

The goal of [pre-suit notification] is to promote the settlement of meritorious claims early in the controversy in order to avoid full adversarial proceedings. [Citations omitted.]

The Florida Supreme Court has also held that the purpose of pre-suit requirements is to alleviate the high cost of medical negligence claims through early determination and prompt resolution of claims, not to deny access to the courts to plaintiffs. *Weinstock v. Groth*, 629 So.2d 835, 838 (Fla. 1993).

And in *Wolfsen v. Applegate*, 619 So.2d 1050, 1055 (Fla. Ct. App. 1993), the court said:

The procedure for judicial review [of pre-suit notice] cannot be converted into some type of summary proceeding to test the sufficiency, legally or factually, of medical negligence claims.

A reading of *W.Va. Code*, 55-7B-6 [2003] shows a purpose that is the same as that identified by the Florida courts for their statutory scheme. We hold therefore that under *W.Va. Code*, 55-7B-6 [2003] the purposes of requiring a pre-suit notice of claim and screening certificate of merit are (1) to prevent the making and filing of frivolous medical malpractice claims and lawsuits; and (2) to promote the pre-suit resolution of non-frivolous medical malpractice claims. The requirement of a pre-suit notice of claim and screening certificate of merit is not intended to restrict or deny citizens' access to the courts.

In the instant case, two of the appellees made no response to the appellant's notice and certificate of merit, only asserting the insufficiency of the notice and certificate after suit was filed. Two of the appellees made brief responses in which they asserted that there was a lack of detail or information about the standard of care in the notice and certificate. These appellees made no other criticism of the notice and certificate in their response.<sup>3</sup>

However, after suit was filed, three of the appellees, including two who had not responded to the notice or certificate, attacked the notice and certificate at length and on several distinct grounds.

Without determining whether any of the appellees' post-suit claims of alleged defects and insufficiencies in the appellant's notice and certificate were to any degree meritorious, we will assume *arguendo* that they had at least some degree of merit. So assuming, it is then necessary to ask whether it was appropriate and fair to dismiss the appellant's lawsuit – a draconian remedy – when the appellant had received no specific notice of the claimed alleged defects and insufficiencies, and no opportunity to correct them.

This Court stated in *Rosier v. Garron, Inc.*, 156 W.Va. 861, 875, 199 S.E.2d 50, 58 (1973) that “. . . to the extent possible, under modern concepts of jurisprudence, legal

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<sup>3</sup>Thus, with respect to the first purpose of the statute, all four of the appellees waived their right to engage in pre-suit mediation to attempt to resolve the claim against them. Why they did this, the record does not disclose.

contests should be devoid of those sporting characteristics which gave law the quality of a game of forfeits or trial by ambush.”

In the instant case, the appellees used a Rule 12(b)(6) motion to dismiss to challenge the sufficiency of the contents of the appellants’ pre-suit notice and certificate. Ordinarily, in the case of a challenge to a complaint under Rule 12(b)(6), if the court determines that there is an insufficiency in a complaint, a party is afforded the opportunity to amend the complaint before dismissal of a case, which opportunity should be liberally given. Syllabus Point 6, *Cotton States Mut. Ins. Co. v. Bibbee*, 147 W.Va. 786, 131 S.E.2d 745 (1963); *Farmer v. L.D.I., Inc.*, 169 W.Va. 305, 286 S.E.2d 924 (1982).

However, in the situation in the instant case, there would seem to be no sense or utility in allowing amendment of a pre-suit notice and certificate *after* suit is filed. For specific objections to a pre-suit notice and certificate to be made for the first time only after suit is filed is contrary to the purposes of the statute – to avert frivolous claims leading to a lawsuit and to promote the pre-suit resolution of non-frivolous claims.

We hold therefore that before a defendant in a lawsuit against a healthcare provider can challenge the legal sufficiency of a plaintiff’s pre-suit notice of claim or screening certificate of merit under *W.Va. Code, 55-7B-6* [2003], the plaintiff must have been given written and specific notice of, and an opportunity to address and correct, the alleged defects and insufficiencies.

The statutory scheme as set forth in *W.Va. Code, 55-7B-6* [2003] and otherwise is silent as to when and how objections to the sufficiency of a notice of claim or certificate

may be made. To address this evident gap or *lacuna* in the statute, *see Harmon v. Fayette County Bd. of Educ.*, 205 W.Va. 125, 136-137, 516 S.E.2d 748, 759-760 (1999),<sup>4</sup> we turn to an analogous provision, Rule 12(e) of the *West Virginia Rules of Civil Procedure*, which provides:

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

In the pre-suit situation, of course, there is no court to rule on a motion for a more definite statement. Therefore, we modify Rule 12(e)'s approach, and hold that under *W.Va. Code*, 55-7B-6 [2003], when a healthcare provider receives a pre-suit notice of claim and screening certificate of merit that the healthcare provider believes to be legally defective or insufficient, the healthcare provider may reply within thirty days of the receipt of the notice and certificate with a written request to the claimant for a more definite statement of the notice of claim and screening certificate of merit. The request for a more definite statement must identify with particularity each alleged insufficiency or defect in the notice and certificate and all specific details and information requested by the defendant. A

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<sup>4</sup>*See also Rogers v. City of South Charleston*, 163 W.Va. 285, 304-305, 256 S.E.2d 557, 568 (1979) (Neely, J. dissenting).

claimant must be given a reasonable period of time, not to exceed thirty days, to reply to a healthcare provider's request for a more definite statement, and all applicable periods of limitation shall be extended to include such periods of time.

Additionally, we hold that under *W.Va. Code, 55-7B-6* [2003], the making of a request for a more definite statement in response to a notice of claim and screening certificate of merit preserves a party's objections to the legal sufficiency of the notice and certificate as to all matters specifically set forth in the request; all objections to the notice or certificate's legal sufficiency not specifically set forth in the request are waived.

We also hold that in determining whether a notice of claim and certificate are legally sufficient, a reviewing court should apply *W.Va. Code, 55-7B-6* [2003] in light of the statutory purposes of preventing the making and filing of frivolous medical malpractice claims and lawsuits; and promoting the pre-suit resolution of non-frivolous medical malpractice claims. Therefore, a principal consideration before a court reviewing a claim of insufficiency in a notice or certificate should be whether a party challenging or defending the sufficiency of a notice and certificate has demonstrated a good faith and reasonable effort to further the statutory purposes.<sup>5</sup>

This Court is attuned to and understanding of the legislative purpose of promoting the pre-suit resolution of medical malpractice claims that are not frivolous. Under

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<sup>5</sup>The Florida courts have concluded that legal wrangling about the technicalities of pre-suit notice is unwarranted if a court is satisfied that the statutory purposes of reasonably ensuring an adequate basis for the possible pre-suit resolution of non-frivolous medical malpractice claims have been achieved. *See Wolfsen, supra.*

the approach formulated in the instant case, the statutory purpose of avoiding frivolous litigation is served by authorizing a pre-suit request for a more definite statement, because a claimant is on notice before filing any suit of potential challenges to the sufficiency of a notice of claim and screening certificate of merit, and has an opportunity to provide a modified or supplemented notice or certificate that addresses any meritorious concerns raised by the healthcare provider. The purpose of encouraging pre-trial resolution is served by authorizing a pre-suit request for a more definite statement, and by affording an opportunity to the claimant to respond to the request, because if a claimant makes a more definite statement in response to a request, the healthcare provider has more information upon which to investigate and decide whether to mediate or otherwise respond to the claim.

Applying the foregoing principles to the facts of the instant case: two of the appellees, Nurse Gillette and Dr. Pons, made no response to the notice and certificate. They did not request mediation and they raised no objection to the notice and certificate, thereby waiving any objection thereto post-suit. Two appellees, Stonewall Jackson Memorial Hospital and Medical Doctor Associates, responded to the appellant's notice and certificate with only a generic objection alleging lack of information or detail regarding the standard of care. These appellees also declined to engage in pre-suit mediation.

The appellant was not on notice, pre-suit, of the specific alleged defects and insufficiencies that the appellees asserted after suit was filed; nor did the appellant have an opportunity to address the allegations with further submissions. No appellee took advantage of the opportunity pre-suit to attempt mediation to further understand and possibly resolve

the appellant's claims. Under these facts, dismissal of the appellant's suit, which was not clearly frivolous, was erroneous.<sup>6</sup>

IV.  
*Conclusion*

The circuit court's dismissal order is reversed and this case is remanded for further proceedings consistent with this opinion.

Reversed and Remanded.

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<sup>6</sup>Whatever technical insufficiencies the appellant's notice and certificate in the instant case may arguably have had, it strains common sense to assert that the notice and certificate support any contention that the appellant's claims were frivolous.