IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 21-0031

KAYLA MOSS and
MICHAEL MOSS,
as next friend of A. M., An Infant,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF OF *AMICUS CURIAE* WEST VIRGINIA UNITED HEALTH SYSTEM, INC.

In Support of Respondent and
Urging the Court to Answer the Certified Questions in the Negative

From the United States District Court for the Northern District of West Virginia
Civil Action No. 3:19-cv-187

Karen Tracy McElhinny, Esq. (WVSB #7517)
kmcelhinny@shumanlaw.com
Caleb B. David, Esq. (WVSB #12732)
cdavid@shumanlaw.com
SHUMAN MCCUSKEY SLICER PLLC
1411 Virginia Street East, Suite 200
Charleston, West Virginia 25301
Counsel for West Virginia
United Health System, Inc.

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QUESTIONS PRESENTED

1. Does West Virginia Code § 55-7B-9a or § 55-7B-9d violate Article V, § 1 of the West Virginia Constitution because the Rulemaking clause of Article VIII, § 3 provides the Supreme Court of Appeals of West Virginia solely possesses authority to promulgate rules of evidence and procedure?

2. Does West Virginia Code § 55-7B-9a or § 55-7B-9d violate West Virginia's Equal Protection Clause because all medical malpractice claimants are not treated equally under its provisions?

IDENTITY OF THE *AMICUS CURIAE*, INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE[1]

West Virginia United Health System, Inc. ("WVUHS," "*amicus*," or "*amicus curiae*") submits this Brief as *amicus curiae* based upon its concern regarding the adverse effects that findings of unconstitutionality of West Virginia Code §§ 55-7B-9a and 55-7B-9d would have on West Virginia's health care providers.

A. West Virginia United Health System, Inc.

West Virginia United Health System, Inc. is a non-stock, not-for-profit corporation established pursuant to West Virginia Code § 18-11C-3a for the purpose of creating an integrated health care delivery system. WVUHS is the State's largest health system and largest private employer. It is comprised of sixteen member-hospitals and provides management services or has affiliations with additional hospitals across the State and in bordering counties in Ohio and Maryland.

B. Interest in the Case

West Virginia United Health System's mission is "[t]o improve the health of West Virginians and all we serve through excellence in patient care, research, and education." *See*

[1] The undersigned counsel hereby certifies to the Court that no party to the instant appeal has authored in whole or in part or financially contributed to the preparation of this Brief. *See* W. Va. R. App. P. 30(e)(5).

https://wvumedicine.org/about/leadership-and-more/mission-and-vision. The determination of the questions certified to this Court will have a direct effect on WVUHS and its health care providers.

C. Source of Authority to File

Pursuant to Rule 30(a) of the West Virginia Rules of Appellate Procedure, all parties have consented to *amicus curiae* filing this Brief.[2]

RELIEF SOUGHT BY *AMICUS CURIAE*

Amicus Curiae respectfully requests that this Court affirm the District Court's denial of Petitioner's Motion for Summary Judgment as to the Constitutionality of W. Va. Code §§ 55-7B-9a & 9d and answer the certified questions in the negative.

ARGUMENT

I. West Virginia Code §§ 55-7B-9a and 55-7B-9d are Constitutional and Do Not Violate the Separation of Powers Clause Contained in the West Virginia Constitution

A. West Virginia Code § 55-7B-9a does not violate the Separation of Powers Clause because the Medical Professional Liability Act's post-verdict reduction provision is not a rule of evidence

Petitioners claim that West Virginia Code § 55-7B-9a violates the Separation of Powers Clause contained in the West Virginia Constitution. Article V, Section 1 of the West Virginia Constitution states, "[t]he legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature." W. Va. Const. Art. V, § 1. West Virginia Code § 55-7B-9a provides for adjustments to a verdict for compensatory damages. Specifically, West

[2] *See*, Respondents City Hospital, Inc. and Theresa Triggs' Response to Petitioners' Motion to Remove City Hospital, Inc. and Theresa Triggs as Parties to This Appeal and Motion to File Attached Order Under Seal.

Virginia Code § 55-7B-9a provides a mechanism for a post-verdict hearing at which a defendant may present evidence of payments from collateral sources, and a plaintiff may present evidence of premiums paid by the plaintiff to obtain the benefits of collateral source payments. W. Va. Code § 55-7B-9a(a) – (c). After the post-verdict hearing, the trial court may make findings of fact and then adjust the verdict and enter a judgment in accordance with West Virginia Code § 55-7B-9. W. Va. Code § 55-7B-9a(d) – (h).

The first certified question asks whether West Virginia Code § 55-7B-9a violates the Separation of Powers Clause because those provisions allegedly invade the Court's rule-making authority under the Rule-Making Clause of the West Virginia Constitution. The subject statute does not invade the Court's rule-making authority but, instead, governs the amount of recoverable damages in medical malpractice cases.

The Rule-Making Clause, Article VIII, Section 3 of the West Virginia Constitution, states, in part, "[t]he court shall have power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process, **practice and procedure**, which shall have the force and effect of law." W. Va. Const. Art. VIII, § 3 (emphasis added). "The collateral source rule is both a rule of evidence and a rule of damages." *Kenney v. Liston*, 233 W. Va. 620, 627, 760 S.E.2d 434, 441 (2014). "**As a rule of evidence**, [the collateral source rule] precludes the defendant in a personal injury or wrongful death case from introducing evidence that some of the plaintiff's damages have been paid by a collateral source." *Id.* (quoting James L. Branton, The Collateral Source Rule, 18 St. Mary's L.J. 883 (1987)) (internal quotation marks omitted) (emphasis added). "**As a rule of damages**, the collateral source rule 'precludes the defendant from offsetting the judgment against any receipt of collateral sources by the plaintiff.'" *Id.* (quoting Branton, 18 St. Mary's L.J. at 883) (emphasis added). The rule-making authority of

the courts extends to rules of evidence; however, the Legislature has authority to abrogate common law regarding rules of damages.

This Court has held that the MPLA's non-economic damages caps are constitutional and do not violate the separation of powers:

> As this Court concluded in *Verba*, **establishing the amount of damages recoverable in a civil action is within the Legislature's authority to abrogate the common law.** We reasoned "that if the legislature can, without violating separation of powers principles, establish statutes of limitation, establish statutes of repose, create presumptions, create new causes of action and abolish old ones, then it also can limit noneconomic damages without violating the separations of powers doctrine[.]"

MacDonald v. City Hosp., Inc., 227 W. Va. 707, 718, 715 S.E.2d 405, 415 (2011) (quoting *Estate of Verba v. Ghaphery*, 210 W. Va. 30, 35, 552 S.E.2d 406, 411 (2001) (quoting *Edmonds v. Murphy*, 83 Md. App. 133, 149, 573 A.2d 853, 861 (1990))) (internal quotation marks omitted) (emphasis added). West Virginia Code § 55-7B-9a similarly operates to limit damages *after* trial and do not invade the Court's power to determine trial procedure. Because the subject statute does not invade the Court's power to determine trial procedure, the subject statute does not violate the Separation of Powers Clause. The subject statute only affects the ultimate damages adjudged, and, as this Court has held, establishing the amount of damages recoverable in a civil action is within the Legislature's authority to abrogate the common law. Thus, West Virginia Code § 55-7B-9a is constitutional and does not violate the Separation of Powers Clause. Therefore, the first certified question must be answered in the negative as to West Virginia Code § 55-7B-9a.

B. West Virginia Code § 55-7B-9a can be interpreted consistently with the judicially created collateral source rule; therefore, the Court must uphold the constitutionality of the subject provision

This Court has held,

> In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in

> government among the judicial, legislative and executive branches. [W. Va. Const. art. V, § 1.] Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt.

Syl. Pt. 1, *Robinson v. Charleston Area Med. Ctr.*, 186 W. Va. 720, 414 S.E.2d 877 (1991) (quoting Syl. Pt. 2, *West Va. Pub. Emplees. Retirement Sys. v. Dodd*, 183 W. Va. 544, 396 S.E.2d 725 (1990) (quoting Syl. Pt. 1, *State ex rel. Appalachian Power Co. v. Gainer*, 149 W. Va. 740, 143 S.E.2d 351 (1965))). Thus, unless the challenged statute, under any reasonable construction and beyond a reasonable doubt, cannot be sustained as constitutional, the statute must be upheld as constitutional. Here, respecting the evidentiary province of the Court and recognizing the Legislature's province of policymaking, the challenged statute may be interpreted consistently with the collateral source rule.

As stated in *Kenney*, *supra*, the Supreme Court of Appeals of West Virginia has held, "[t]he collateral source rule is both a rule of evidence and a rule of damages." *Kenney*, 233 W. Va. at 627, 760 S.E.2d at 441. The Court has the "power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to ... practice and procedure ...." W. Va. Const. Art. VIII, § 3. However, "establishing the amount of damages recoverable in a civil action is within the Legislature's authority to abrogate the common law." *MacDonald*, 227 W. Va. at 718, 715 S.E.2d at 415 (quoting *Verba*, 210 W. Va. at 35, 552 S.E.2d at 411).

West Virginia Code § 55-7B-9a can be interpreted consistently with the collateral source rule. The collateral source rule, as stated in *Kenney*, controls the evidence admissible at trial, and the subject statute controls the ultimate damages awarded post-verdict. This interpretation is no different than the application of the non-economic damages cap, West Virginia Code § 55-7B-8,

which does not limit the evidence of non-economic damages admissible at trial but limits the recovery of non-economic damages post-verdict. This Court has upheld the post-verdict application of the MPLA's non-economic damages cap, finding "no merit to [the plaintiffs'] contention that the cap violates the principle of separation of powers." *MacDonald*, 227 W. Va. at 718, 715 S.E.2d at 415. Thus, because a reasonable construction exists to sustain the constitutionality of West Virginia Code § 55-7B-9a, Petitioners cannot meet their heavy burden of proving beyond a reasonable doubt that the subject statute is unconstitutional. The first certified question must be answered in the negative as to West Virginia Code § 55-7B-9a.

C. West Virginia Code § 55-7B-9d does not violate the Separation of Powers Clause because this provision is a rule of damages and, therefore, may abrogate the common law

West Virginia Code § 55-7B-9d states, "[a] verdict for past medical expenses is limited to: (1) The total amount of past medical expenses paid by or on behalf of the plaintiff; and (2) The total amount of past medical expenses incurred but not paid by or on behalf of the plaintiff for which the plaintiff or another person on behalf of the plaintiff is obligated to pay." W. Va. Code § 55-7B-9d. Like West Virginia Code § 55-7B-9a, West Virginia Code § 55-7B-9d is not a rule of evidence and is, instead, a rule of damages similar to other provisions of the MPLA that this Court has deemed constitutional.

In *Estate of Verba v. Ghaphery*, 210 W. Va. 30, 552 S.E.2d 406 (2001), this Court considered the constitutionality of West Virginia Code § 55-7B-8, which provides for a statutory cap on the recovery of damages for noneconomic loss. In *Verba*, the appellant appealed a decision from the circuit court reducing her judgment in accordance with the noneconomic damages cap. *Id.* at 34, 552 S.E.2d at 410. The appellant argued, *inter alia*, that the noneconomic damages cap violated the separation of powers doctrine because it "effectively constitutes a legislative remittitur

...." *Id.* at 35, 552 S.E.2d at 411. This Court reasoned that the Legislature "can limit noneconomic damages without violation the separation of powers doctrine." *Id.* (quoting *Edmonds*, *supra*, 83 Md. App. 133, 149, 573 A.2d 853, 861(1990))) (internal quotation marks omitted). This Court, citing to the Court of Special of Appeals of Maryland, stated that "the power to alter the common law includes 'the power to set reasonable limits on recoverable damages in causes of action the legislature chooses to recognize.'" *Id.* (quoting *Edmonds*, 83 Md. App. at 149, 573 A.2d at 861) (quoting *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325, 1336 (1989))).

Like West Virginia Code § 55-7B-8, West Virginia Code § 55-7B-9d establishes the amount of recoverable damages for past medical expenses in a civil action, and such establishment is within the Legislature's authority to abrogate common law. Therefore, the first certified question must be answered in the negative as to West Virginia Code § 55-7B-9d.

D. West Virginia Code § 55-7B-9d can be interpreted consistently with the judicially created collateral source rule; therefore, the Court must uphold the constitutionality of the subject provision

The United States District Court for the Southern District of West Virginia has applied West Virginia Code § 55-7B-9d consistently with the collateral source rule, evidencing that a reasonable construction exists to sustain constitutionality. In *Goodman v. United States*, Civil Action No. 3:16-cv-5953, 2018 U.S. Dist. LEXIS 130460, 2018 WL 3715740 (S.D.W. Va. Aug. 3, 2018), the defendant filed a motion *in limine* asking the Court "to enter an order excluding any evidence of amounts paid for past medical expenses in excess of amounts actually paid for or on behalf of the plaintiff ...." *Id.* at *29. Granting the defendant's motion, the District Court did not permit the defendant to introduce evidence that some of the plaintiff's damages had been paid by a collateral source. Rather, the District Court interpreted West Virginia Code § 55-7B-9d to limit the recoverable damages for past medical expenses to only the amounts actually paid by or on

behalf of the plaintiff. *Id.* *30. As a result, the District Court limited the damages the plaintiff could recover at trial but, consistent with the collateral source rule, did not permit the introduction of evidence of collateral source payments at trial. *Id.* at *30 – 31. Thus, the District Court's application of West Virginia Code § 55-7B-9d was consistent with the collateral source rule and did not invade the Court's province to promulgate evidentiary rules.

Similarly, in *Estate of Burns v. Cohen*, Civil Action No. 5:18-cv-00888, 2020 U.S. Dist. LEXIS 105429, 2020 WL 3271047 (S.D.W. Va. June 17, 2020), the defendant filed a motion *in limine* seeking to exclude written-off medical expenses from consideration at trial. *Id.* at *1. The District Court, like the *Goodman* Court, limited the damages the plaintiff could recover at trial but did not permit the introduction of evidence of collateral source payments at trial. *Id.* at *2 – 3. The District Court reasoned that, "[i]nasmuch as written off or adjusted expenses are neither paid nor obligated to be paid by [the plaintiff] or anyone on her behalf, they cannot be considered damages at trial under the plain language of the MPLA." *Id.* at *3 (citing W. Va. Code § 55-7B-9d). Thus, the Court's ruling limited the damages to the amounts allowable under the MPLA but did not permit the introduction of collateral source payments. Consequently, the *Burns* Court's decision is consistent with the collateral source rule, the District Court's application of West Virginia Code § 55-7B-9d was consistent with the collateral source rule and did not invade the Court's province to promulgate evidentiary rules. Thus, because a reasonable construction exists to sustain the constitutionality of West Virginia Code § 55-7B-9d, Petitioners cannot meet their heavy burden of proving beyond a reasonable doubt that the subject statute is unconstitutional. Therefore, the first certified question must be answered in the negative as to West Virginia Code § 55-7B-9d.

II. West Virginia Code §§ 55-7B-9a and 55-7B-9d are Constitutional and Do Not Violate the Equal Protection Clause Contained in the West Virginia Constitution

A. West Virginia Code §§ 55-7B-9a and 55-7B-9d do not violate the Equal Protection Clause because these provisions place all plaintiffs on equal footing by making them each whole; therefore, the Court must uphold the constitutionality of the subject provisions

Petitioners argue that West Virginia Code §§ 55-7B-9a and 55-7B-9d violate the Equal Protection Clause of the West Virginia Constitution. Article III, Section 10 of the West Virginia Constitution states, "[n]o person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers." W. Va. Const. Art. III, § 10. Petitioners correctly cite to *Israel v. West Virginia Secondary Schools Activities Comm.*, 182 W. Va. 454, 388 S.E.2d 480 (1989), which held that the Due Process Clause of the West Virginia Constitution contains equal protection principles. Petitioners fail, however, to apply the correct analysis to a constitutional challenge under the Equal Protection Clause.

Petitioners provide nine hypothetical situations in which they perceive that the subject statutes could violate equal protection principles based upon a plaintiff's insured status. Pet'r's Br., pp. 20 – 23. Each scenario, however, can be inversely applied to demonstrate that abolishing West Virginia Code §§ 55-7B-9a and 55-7B-9d would differentiate between medical malpractice plaintiffs depending upon their insured status. For example, Petitioners' first scenario proposes that the subject statutes discriminate between medical malpractice plaintiffs who have private medical insurance and uninsured medical malpractice plaintiffs. Pet'r's Br., p. 13. Petitioners argue that insured medical malpractice plaintiffs may only recover the amount actually paid by their medical insurance plan, but uninsured medical malpractice plaintiffs may collect the full amount of their bills. Pet'r's Br., p. 13. Petitioners ignore, however, that the application of the subject statutes places each hypothetical plaintiff on equal footing by making each hypothetical plaintiff whole.

For example, assume each hypothetical plaintiff incurred $100,000 in medical expenses. The insured hypothetical plaintiff paid $10,000 out of pocket, and insurance covered the remaining $90,000. The insured paid $1,000 in premiums to obtain the insurance benefits. The uninsured hypothetical plaintiff paid the full $100,000 out of pocket. Applying West Virginia Code § 55-7B-9d to the recoverable damages and applying West Virginia Code § 55-7B-9a post-verdict, the insured medical malpractice plaintiff would be awarded $11,000 to cover the out-of-pocket expenses. The uninsured medical malpractice plaintiff would be awarded $100,000 to cover the out-of-pocket expenses. As a result, each hypothetical plaintiff has been made whole by application of the statute and has been placed on equal footing.

This same analysis may be applied to each scenario posed by Petitioners to reach the same conclusion: the application of the subject statutes makes medical malpractice plaintiffs whole and places them each on equal footing. Without the application of the subject statutes, the insured hypothetical plaintiff receives a double recovery, while the uninsured hypothetical plaintiff only receives a single recovery. Thus, the subject statutes are not discriminatory and, rather, are anti-discriminatory by ensuring that all medical malpractice plaintiffs are made whole and are placed on equal footing. Therefore, West Virginia Code §§ 55-7B-9a and 55-7B-9d do not violate the Equal Protection Clause, and the second certified question must be answered in the negative.

B. West Virginia Code §§ 55-7B-9a and 55-7B-9d do not violate the Equal Protection Clause because, assuming *arguendo* that classes of plaintiffs are treated differently, a rational basis exists to treat those classes of plaintiffs differently

Petitioners argue that, under their interpretation of West Virginia Code §§ 55-7B-9a and 55-7B-9d, classes of medical malpractice plaintiffs are treated differently, and Petitioners' equal protection analysis stops there. Even assuming that the subject statutes do differentiate between

classes of medical malpractice plaintiffs based upon their insured statuses, a rational basis exists for such differentiation.

With respect to an equal protection challenge, this Court has held,

> "'Where economic rights are concerned, we look to see whether the classification is a rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally. **Where such classification is rational and bears the requisite reasonable relationship, the statute does not violate Section 10 of Article III of the West Virginia Constitution, which is our equal protection clause.**' Syllabus Point 7, [as modified,] *Atchinson v. Erwin*, [172] W. Va. [8], 302 S.E.2d 78 (1983)." Syllabus Point 4, as modified, *Hartsock-Flesher Candy Co. v. Wheeling Wholesale Grocery Co.*, [174] W. Va. [538], 328 S.E.2d 144 (1984).

Syl. Pt. 4, *MacDonald*, 227 W. Va. 707, 715 S.E.2d 405 (quoting Syl. Pt. 4, *Gibson v. West Virginia Dep't of Highways*, 185 W. Va. 214, 406 S.E.2d 440 (1991)) (emphasis added). This Court has "recognized that 'the right to bring a tort action for damages, even though there is court involvement, is economically based and is not a 'fundamental right' for ... state constitutional equal protection purposes." *O'Dell v. Town of Gauley Bridge*, 188 W. Va. 596, 602, 425 S.E.2d 551, 557 (1992) (quoting *Robinson v. Charleston Area Medical Ctr.*, 186 W. Va. at 728-29, 414 S.E.2d at 885-86). Thus, "for purposes of equal protection analysis, the legislative classifications involved in this case 'are subjected to a minimum level of scrutiny, the traditional equal protection concept that the legislative classification will be upheld if it is reasonably related to the achievement of a legitimate state purpose.'" *Id.* (quoting *Randall v. Fairmont City Police Dep't*, 186 W. Va. 336, 345, 412 S.E.2d 737, 746 (1991)).

Here, the West Virginia Legislature has detailed the rational basis upon which it enacted the MPLA:

> The unpredictable nature of traumatic injury health care services often results in a greater likelihood of unsatisfactory patient outcomes, a higher degree of patient and patient family dissatisfaction and frequent malpractice claims, creating a financial

> strain on the trauma care system of our state, increasing costs for all users of the trauma care system and impacting the availability of these services, requires appropriate and balanced limitations on the rights of persons asserting claims against trauma care health care providers, this balance must guarantee availability of trauma care services while mandating that these services meet all national standards of care, to assure that our health care resources are being directed towards providing the best trauma care available;
>
> The cost of liability insurance coverage has continued to rise dramatically, resulting in the state's loss and threatened loss of physicians, which, together with other costs and taxation incurred by health care providers in this state, have created a competitive disadvantage in attracting and retaining qualified physicians and other health care providers;
>
> ... The modernization and structure of the health care delivery system necessitate an update of provisions of this article in order to facilitate and continue the objectives of this article which are to control the increase in the cost of liability insurance and to maintain access to affordable health care services for our citizens.
>
> Therefore, the purpose of this article is to provide a comprehensive resolution of the matters and factors which the Legislature finds must be addressed to accomplish the goals set forth in this section. In so doing, the Legislature has determined that reforms in the common law and statutory rights of our citizens must be enacted together as necessary and mutual ingredients of the appropriate legislative response relating to:
>
> (1) Compensation for injury and death;

W. Va. Code § 55-7B-1. In upholding the constitutionality of the MPLA's non-economic damages caps, this Court found "that the Legislature could have reasonably conceived to be true the facts on which the amendments to the Act, including the cap on noneconomic damages in W. Va. Code § 55-7B-8, were based." *MacDonald*, 227 W. Va. at 720, 715 S.E.2d at 418 (cleaned up). This Court further found, "[t]he Legislature could have rationally believed that decreasing the cap on noneconomic damages would reduce rising medical malpractice premiums and, in turn, prevent physicians from leaving the state thereby increasing the quality of, and access to, healthcare for West Virginia residents." *Id.* This Court also stated its role in determining whether a rational basis

exists: "While one or more members of the majority may differ with the legislative reasoning, it is not our prerogative to substitute our judgment for that of the Legislature, so long as the classification is rational and bears a reasonable relationship to a proper governmental purpose." *Id.* (cleaned up). This Court concluded, "[w]hile we may not agree with the Legislature's decision to limit noneconomic damages in medical professional liability cases to $250,000 or $500,000, depending on the nature of the case, we cannot say the cap bears no reasonable relationship to the purpose of the statute. Accordingly, we find no merit to the [plaintiffs'] equal protection argument." *Id.* at 722, 715 S.E.2d at 420.

The same analysis applies to West Virginia Code §§ 55-7B-9a and 55-7B-9d. The Legislature has detailed a rational basis, which bears a reasonable relationship to the purpose of the statute, that is, to resolve issues of rising healthcare and liability insurance costs. Thus, even assuming that the subject statutes differentiate between medical malpractice plaintiffs based upon their insured status, a rational basis for such differentiation exists, and, thus, the subject statutes do not violate the Equal Protection Clause. Therefore, the second certified question must be answered in the negative.

Additionally, numerous states have adopted statutes providing for similar post-verdict reductions for collateral source payments in medical negligence suits.[3] Illinois' post-verdict

[3] *See, e.g.,* Alaska Stat. § 09.55.548(b) ("Evidence of collateral sources, other than a federal program that must by law seek subrogation and the death benefit paid under life insurance, is admissible after the fact finder has rendered an award."); Conn. Gen. Stat. § 52-225a(b) ("Upon a finding of liability and an awarding of damages by the trier of fact and before the court enters judgment, the court shall receive evidence from the claimant and other appropriate persons concerning the total amount of collateral sources which have been paid for the benefit of the claimant as of the date the court enters judgment."); 735 ILCS 5/2-1205 (providing for post-verdict reduction of collateral source payments); 24 M.R.S. § 2906(2) ("In all actions for professional negligence, as defined in section 2502, evidence to establish that the plaintiff's expense of medical care, rehabilitation services, loss of earnings, loss of earning capacity or other economic loss was paid or is payable, in whole or in part, by a collateral source is admissible to the court in which the action is brought after a verdict for the plaintiff and before a judgment is entered on the verdict."); ALM GL ch. 231, §60G (providing for post-verdict reduction of collateral source payments); Minn. Stat. § 548.251(2) ("In a civil action, whether based on contract or tort, when liability is admitted or is determined

reduction statute was challenged on equal protection grounds in *Bernier v. Burris*, 497 N.E.2d 763 (Ill. 1986). There, the Illinois Supreme Court found that the Illinois statute "eliminates certain duplicative recoveries and therefore bears a rational relationship to the legitimate governmental interest of reducing the costs of malpractice actions. For that reason, then, we find no violation of equal protection ...." *Id.* at 775. The Illinois Supreme Court held, "[i]t is well recognized that the collateral-source rule 'is of common law origin and can be changed by statute.'" *Id.* (quoting Restatement (Second) of Torts sec. 920A, comment d (1979)).

Alaska's post-verdict damages reduction statute has also been challenged on equal protection grounds. There, in upholding the statute, the Alaska Supreme Court reasoned, "[r]educing medical malpractice damage awards by the amount received by a malpractice victim's insurer lessens the liability of health care providers. This in turn reduces the cost of insuring the health care providers. We therefore conclude that AS 09.55.548(b) bears a fair and substantial relation to the goal of alleviating the medical malpractice insurance crisis." *Reid v. Williams*, 964 P.2d 453, 459 (Ak. 1998) (citing *Eastin v. Broomfield*, 570 P.2d 744, 753, 116 Ariz. 576 (Ariz. 1977) (stating that "by scaling down the size of jury verdicts by the amount of collateral benefits the plaintiff may have received, the legislature could reasonably assume that a reduction in premiums would follow")). The Alaska Supreme Court noted that "[c]ourts that have reviewed the statutes under a version of the rational basis test have found that the statutory distinctions between malpractice plaintiffs and defendants and other tort plaintiffs and defendants were reasonably

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by the trier of fact, and when damages include an award to compensate the plaintiff for losses available to the date of the verdict by collateral sources, a party may file a motion within ten days of the date of entry of the verdict requesting determination of collateral sources."); R.R.S. Neb. § 44-2819 (providing for post-verdict reduction of collateral source payments); NY CLS CPLR § 4545 (same); Tenn. Code Ann. § 29-26-119 (limiting damages awards in health care liability actions to actual economic losses); Utah Code Ann. § 78B-3-405(1) ("In all malpractice actions against health care providers ... in which damages are awarded to compensate the plaintiff for losses sustained, the court shall reduce the amount of the award by the total of all amounts paid to the plaintiff from all collateral sources which are available to him.").

related to the legislative objectives of lowering the costs of medical malpractice actions, and ensuring the continued availability of health care for the public." *Id.* at 460 (citing *Ferguson v. Garmon*, 643 F. Supp. 335, 342 (D. Kan. 1986); *Baker v. Vanderbilt Univ.*, 616 F. Supp. 330, 332 (M.D. Tenn. 1985); *Eastin*, 570 P.2d at 753; *Fein v. Permanente Medical Group*, 38 Cal. 3d 137, 164, 695 P.2d 665, 684-86 (Cal. 1985); *Pinillos v. Cedars of Lebanon Hosp. Corp.*, 403 So. 2d 365, 367-68 (Fla. 1981); *Bernier*, 497 N.E.2d at 768, 775; *Rudolph v. Iowa Methodist Med. Ctr.*, 293 N.W.2d 550, 559 (Iowa 1980)).

To support their argument, Petitioners rely upon *Wentling v. Medical Anesthesia Svcs.*, 701 P.2d 939 (Kan. 1985). *Wentling* is distinguishable for two reasons. First, in *Wentling*, the challenged statute governed trial conduct and jury instructions, which is not at issue here. Second, the provision that was found to violate equal protection principles does not exist in the challenged West Virginia statutes. In *Wentling*, the court noted that the statute drew two classifications: it allowed the introduction of evidence of collateral source payments only if the alleged tortfeasor was a physician or hospital, and it excluded such evidence if the payments were from insurance or from services paid for by the plaintiff's employer. *Id.* at 950. The court's analysis focused exclusively on the second classification, which it italicized when reciting the statute:

> "(a) In any action for damages for personal injuries or death arising out of the rendering of or the failure to render professional services by any health care provider, evidence of any reimbursement or indemnification received by a party for damages sustained from such injury or death, *excluding payments from insurance paid for in whole or in part by such party or his or her employer*, and services provided by a health maintenance organization to treat any such injury, excluding services paid for in whole or in part by such party or his or her employer, shall be admissible for consideration by the trier of fact subject to the provisions of subsection (b). Such evidence shall be accorded such weight as the trier of fact shall choose to ascribe to that evidence in determining the amount of damages to be awarded to such party."

Id. at 949 (quoting K.S.A. 60-471(a)) (emphasis in original). To illustrate its reasoning for striking down the statute, the court provided a hypothetical:

> Assume a married couple is injured in the same catastrophe. They are both treated by the same health care provider with disastrous results. The husband is employed and his employer provides health insurance. The wife is not gainfully employed. In separate actions for similar treatment provided by the same health care provider as a result of the same catastrophe, the fact that the wife's medical expenses were paid by insurance is proper evidence to submit to the jury but the same evidence as it applies to the husband is not. Such a distinction makes no sense whatsoever.

Id. at 950. The court found that this distinction was not rationally related to any legitimate end. *Id.* The provision within Kansas' statute does not appear in the challenged West Virginia statutes. Thus, *Wentling* is distinguishable and unpersuasive.

Thus, numerous legislatures across the country have adopted similar damages statutes, and courts, when faced with an equal protection challenge to those statutes, have found that resolving issues of rising healthcare and liability insurance costs provides a rational basis. Similarly, West Virginia Code §§ 55-7B-9a and 55-7B-9d are based upon the rational legislative objectives of reducing medical malpractice premiums and reducing the number of physicians who leave West Virginia and, thus, do not violate equal protection principles. Therefore, West Virginia Code §§ 55-7B-9a and 55-7B-9d do not violate the Equal Protection Clause, and the second certified question must be answered in the negative.

CONCLUSION

Amicus Curiae respectfully requests that this Court affirm the District Court's denial of Petitioner's Motion for Summary Judgment as to the Constitutionality of W. Va. Code §§ 55-7B-9a & 55-7B-9d and answer the certified questions in the negative.

Karen Tracy McElhinny, Esq. (WVSB #7517)
kmcelhinny@shumanlaw.com
Caleb B. David, Esq. (WVSB #12732)
cdavid@shumanlaw.com
SHUMAN MCCUSKEY SLICER PLLC
1411 Virginia Street East, Suite 200
Charleston, West Virginia 25301
Counsel for West Virginia
United Health System, Inc.

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 21-0031

KAYLA MOSS and
MICHAEL MOSS,
as next friend of A. M., An Infant,

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

CERTIFICATE OF SERVICE

I, Karen Tracy McElhinny/Caleb B. David, counsel for *amicus curiae* West Virginia United Health System, Inc., hereby certify that I have served a true and accurate copy of the foregoing "Brief of *Amicus Curiae* West Virginia United Health System, Inc." upon all counsel of record by placing said copies in the United States mail, with first-class postage prepaid, on this day, May 21, 2021, addressed separately as follows:

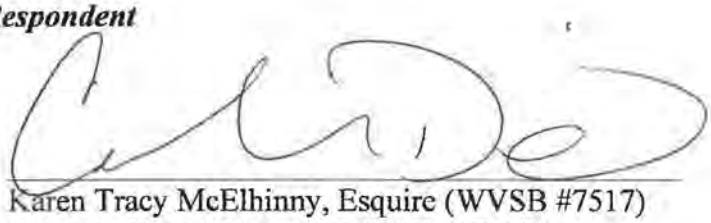
Arden J. Curry, II
Pauley Curry, PLLC
P.O. Box 2786
Charleston, WV 25330
Counsel for Petitioner

William Samuel Druckman
Madonna Cook Estep
Law Offices of Druckman & Estep
606 Virginia Street, East
Suite 100
Charleston, WV 25301
Counsel for Petitioner

Erin K. Reisenweber
U.S. Attorney's Office – Martinsburg

U.S. Courthouse
217 W. King Street, Suite 400
Martinsburg, WV 25401
Counsel for Respondent

Christopher James Prezioso
U.S. Attorney's Office – Wheeling
P.O. Box 591
Wheeling, WV 26003
Counsel for Respondent



Karen Tracy McElhinny, Esquire (WVSB #7517)
Caleb B. David, Esquire (WVSB #12732)
Counsel for West Virginia
United Health System, Inc.