IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 21-0031

Kayla Moss and Michael Moss, as Father and as next friend of A.M., an infant,

Plaintiffs, Petitioners,

vs.

The United States of America,

Defendant, Respondent.

On Certified Questions from the United States District Court for the Northern District Court of West Virginia

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PETITIONER'S APPEAL BRIEF

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I. QUESTIONS PRESENTED

On December 1, 2020, Gina M. Groh, Chief United States District Judge for the Northern District of West Virginia entered a Memorandum Opinion and Certification Order which was submitted to this Court on January 15, 2021 that presented the following the following two (2) Certified Questions to this Court:

> 1. Does West Virginia Code §55-7B-9(a) or §55-7B-9(d) violate Article V, Section 1 of the West Virginia Constitution because of 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-9(a) or §55-7B-9(d) violate West Virginia's Equal Protection Clause because all medical malpractice claimants are not treated equally under its provisions? (JA 61 – 64)

Petitioners respectfully request this Honorable Court to answer the Certified Questions in the affirmative.

II. STATEMENT OF THE CASE

On November 4, 2019, Petitioners Kayla Moss and Michael Moss, as Father and next friend to A.M., an infant (hereinafter collectively referred to as "Moss"), filed their Complaint in the Unites States District Court for the Northern District of West Virginia against City Hospital, Inc., Theresa Triggs, and the United States of America. (JA 1 – 21) In that litigation, Moss alleged that City Hospital, Inc./Theresa Triggs and the United States of America committed separate acts of medical malpractice which led to Kayla Moss, who was twenty-two (22) years old at the time, having a massive brainstem stroke which has left her paralyzed for the chest downward, with the loss of functional use of one arm, and the inability to orally communicate. She can only communicate by nodding her head, blinking, or through rudimentary tapping on a

computer keyboard. In the Complaint, Moss sought recovery for a variety of different types of damages including past medical bills. In Paragraph 110 of her Complaint, Moss specifically asserted as follows:

> Kayla Moss, among other damages, will be seeking the recovery of her past medical bills. It is anticipated that one or more of the Defendants will assert that in seeking the recovery of past medical expenses Kayla Moss will be limited to recovering only the total amount of paid medical expenses that were paid on her behalf by a collateral source for medical bills or whose bills for which she is personally or another person on her behalf is obligated to pay on her behalf. The West Virginia Code Sections that it is anticipated that one or more of the Defendants will rely upon to make such an argument are W.Va. Code §55-7B-9A (a) and W.Va. Code §55-7B-9B(9d). Kayla Moss intends to challenge in this litigation the constitutionality of each of the two (2) previously referenced W.Va. Code Sections. Pursuant to Rule 5.1 of the Federal Rules of Civil Procedure, Plaintiffs consider this to be a pleading drawing into question the constitutionality of W.Va. Code §55-7B-9A (b) and W.Va. Code §55-7B-9B(9d). Under to Rule 5.1 of the Federal Rules of Civil Procedure, Plaintiffs will be filing a Notice of Constitutional Question stating the question and identifying the Paper that raises it and will serve the Notice and Paper by either certified or registered mail or by sending it to an electronic address designated by the West Virginia Attorney General for this purpose. (JA 1 - 21)

As was anticipated, City Hospital, Inc./Theresa Triggs, (JA 26 – 48) and the United States of America (JA 49 – 60) each asserted in their Answers to Moss' Complaint that they were entitled to the immunities and protections afforded by the West Virginia Professional Medical Liability Act (hereinafter "MPLA") including Section 55-7B-9a and Section 55-7B-9d both of which are Code Sections that effectively abolish West Virginia's judicially adopted Collateral Source Rule in medical malpractice cases. As a result of the affirmative defenses raised by City Hospital, Inc./Theresa Triggs, and the United States, Moss filed a Notice of Constitutional Question (JA 22 – 25) with the United States District Court for the Northern District of West Virginia serving a copy upon Patrick Morrisey, Attorney General for the State of

West Virginia. In addition, on July 1, 2020, the United States District Court for the Northern District of West Virginia entered an Order notifying the Attorney General for the State of West Virginia of the existence of the constitutional questions raised by Moss giving the State of West Virginia the opportunity to intervene. The Attorney General for the State of West Virginia did not respond to the Notice filed by Moss or the Order and Notice issued by the United States District Court for the Northern District of West Virginia and instead elected not to defend the constitutionality of W.Va. Code §55-7B-9(a) and §55-7B-9(d).

Moss, on June 20, 2020 filed a Motion for Summary Judgment as to the constitutionality of W.Va. Code §55-7B-9(a) and §55-7B-9(d). The United States District Court for the Northern District of West Virginia subsequently issued a Memorandum Opinion and Certification Order (JA 61 – 64) denying Moss' Motion for Summary Judgment and then certifying two (2) Certified Questions to the West Virginia Supreme Court of Appeals.[1]

On January 15, 2021, this Court received the Certification Order entered by the United States District Court and on February 8, 2021, entered an Order accepting the Certified Questions, scheduling this matter for oral argument and establishing a briefing schedule. Subsequent to the entry of the Certification Order Kayla Moss and her daughter, A.M. settled their claims against City Hospital, Inc. and Theresa Triggs. As a result, the United States District Court for the Northern District of West Virginia entered an Order on February 5, 2021 dismissing those claims. Because of their settlement and dismissal, City Hospital, Inc. and Theresa Triggs are no longer parties to the underlying litigation. (See previously filed Motion to Remove City Hospital/Theresa Triggs as parties to this Appeal)

[1] In certifying the two (2) questions to this Court, the United States District Court for the Northern District of West Virginia did not answer the questions either in the affirmative or the negative. Instead, it merely denied Moss' Motion for Summary Judgment without any specific finding as to whether either of the two (2) Code Sections were or were not constitutional.

Before addressing the substantive arguments surrounding the constitutionality of §55-7B-9(a) and §55-7B-9(d) it is important to reemphasize what this Court said in *Louk v. Cromier*, 622 S.E.2d 788 (W. Va. 2005) when made clear it that no special deference is to be given to the MPLA if one of its provisions is being challenged as being unconstitutional merely because that Act was adopted as part of a tort reform effort. This Court rejected that suggestion declaring that:

> This Court is quite sensitive to the need for reform in medical malpractice litigation. Furthermore, we wholeheartedly applaud the efforts of the Legislature in attempting to find the balance between the rights of injured persons and the desire to maintain a stable healthcare system in our state." However; "[i]t is the constitutional obligation of the judiciary to protect its own proper constitutional authority by upholding independence of the judiciary."..."The efficient administration of the judicial system is essential to our duty to implement justice in West Virginia; and, therefore, we must be wary of any legislation that undercuts the power of the judiciary to meet its constitutional obligation"..."[T]he role of this Court is vital to the preservation of the constitutional separation of powers of government were that separation, delicate under normal conditions, is jeopardized by the usurpatory actions of the executive or legislature branches of government".

Justice Benjamin, who was one of the most conservative members of the Supreme Court at that time, summed up this Court's unwavering position that the MPLA is entitled to no special preferences best, when in *Louk*, he stated that:

> "Consistent with this duty it would be calamitous for us to ignore the unconstitutionality of a statute simply because of its endorsement by one group or another as a necessary remedy to a current problem of society. The administration of justice requires more of us than acquiescence to such partisanship. We must base our decisions on the soundness of legal principles and not simply on the expediencies of the day. Therefore, the fact that is case was brought pursuant to the Medical Professional Liability Act...must, necessarily, be of no greater consequence to our deliberation in this matter than our consideration of any other statutory section which we are called upon to review, or to review".

III. SUMMARY OF AGRUMENT

Moss submits that W.Va. Code §55-7B-9a and §55-7B-9d are both unconstitutional for two (2) reasons. First, both Code Sections violate Article V, §1 of the West Virginia Constitution because of the Rule-Making Clause of Article VIII, §3. This is because both Code Sections substantially infringe upon this Courts exclusive jurisdiction and effectively abolish the judicially adopted Collateral Source Rule which is in substantial part a rule of evidence. In addition, Moss asserts that §55-7B-9a and §55-7B-9d are also both unconstitutional because they violate West Virginia's Equal Protection Clause which requires that all persons within the defined protected class must be treated equally. The West Virginia Supreme Court has previously held that for a claim under the MPLA the class is defined as all "medical malpractice victims". *Robinson v. Charleston Area Medical Center, Inc.*, 414 S.E.2d 877 (W.Va. 1991) W.Va. Code §55-7B-9a and §55-7B-9d simply do not treat all members of that class equally but instead discriminate repeatedly between members within that class.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This Court, by Order entered on 18th day of February, 2021, requires that "[t]his matter be scheduled for oral argument under Rule 20 of the Rules of Appellant Procedure on September 1, 2021, at 10:00 a.m.".

V. ARGUMENT

1. Preliminary Statement

West Virginia Code §55-7B-9a provides a statutory mechanism for reduction of compensatory damage awards for economic loss by payments made by collateral sources. West Virginia Code §55-7B-9d limits the recovery of past medical bills to "past medical expenses paid by or on behalf of the plaintiff" and the "total amount of past medical expenses incurred but not

paid by or on behalf of the plaintiff for which the plaintiff or a person on behalf of the plaintiff is obligated to pay". While challenges have been made against the MPLA as to the constitutionality of its caps on non-economic damages (*Robinson v. Charleston Area Medical Center, Inc.*, 414 S.E.2d 877 (W.Va. 1991); *Verba v. Ghaphery*, 552 S.E.2d 406 (W.Va. 2001); and *McDonald v. City Hospital, Inc.*, 715 S.E.2d 405 (W.Va. 2011)) no attempt to-date has been made challenging the constitutionality of §55-7B-9a or §55-7B-9d. Moss does so in this matter asserting each is unconstitutional because they each violate the Separation of Powers Clause contained at Article V, §1 of the West Virginia Constitution and because they each violate the West Virginia's Equal Protection Clause.

2. West Virginia Code §55-7B-9a and §55-7B-9d Are Unconstitutional Because They Violate the Separation of Powers Clause Contained in the West Virginia Constitution

A.

West Virginia Separation of Powers Clause

The enactment of West Virginia Code §55-7B-9a and §55-7B-9d violate the Separation of Powers Clause contained in Article V, § 1 of the West Virginia Constitution because the Rule-Making Clause of Article VIII, §3, grants the West Virginia Supreme Court the sole authority to promulgate rules of evidence and procedure. The Separation of Powers Clause in Article V, §1 provides, in relevant part, that "[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." The Rule-Making Clause of Article VIII, §3 provides, in relevant part, that the West Virginia Supreme "...[C]ourt shall have the 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." Also see Syllabus point 1, *Bennett v. Warner*, 372 SE.2d 920 (W. Va. 1988) where this Court held that "[U]nder

Article VIII, §3 of our Constitution, the Supreme Court of Appeals shall have the power to promulgate rules for all of the Courts of the State related to process, practice, and procedure, which shall have the force and effective of law". As a result of the exclusive authority granted to the West Virginia Supreme Court by the Rule-Making Clause, "a statute governing procedural matters in (civil or) criminal cases which conflicts with a rule promulgated by the Supreme Court would be a legislative invasion of the court's rule-making powers". *State v. Arbaugh*, 595 S.E.2d 289 (W. Va. 2004).

This Court has consistently and diligently enforced the Separation of Powers doctrine set forth in our State Constitution. In no uncertain terms this Court has stated that:

> The separation of these powers; the independence of one from other; the requirement that one department shall not exercise or encroach upon the powers of the other two, is fundamental to our system of Government, State, and Federal. Each acts, and is intended to act, as a check upon the others, and thus a balanced system is maintained. No theory of government has been more loudly acclaimed. *State ex rel., W. Virginia Citizen Action Grp. v. Tomblin*, 715 S.E.2d 36 (W.Va. 2011), quoting *State v. Huber*, 40 S.E.2d 11 (W.Va. 1946)

And, this Court has declared that: "Article V, §1 of the Constitution...is not merely a suggestion; it is part of the fundamental law of our State, and, as such, it must be strictly construed and closely followed". Syl. pt. 1, in part, *State ex rel. Barker v. Manchin*, 279 S.E.2d 881 (1981) In that regard:

> The Separation of Powers Clause is not self-executing. Standing alone the doctrine has no force or effect. The Separation of Powers Clause is given life by each branch of government working exclusively within it constitutional domain and not encroaching upon the legitimate powers of any other branch of government. This is the essence and longevity of doctrine. *State ex rel. Affiliated Constr. Trades Found. v. Vieweg*, 520 S.E.2d 854 (W.Va. 1999)

In *State ex rel. Workman v. Carmichael*, 819 S.E.2d 251 (W.Va. 2018), this Court summarized the long line of cases where this Court without hesitation has struck down statutory provisions if they infringe, to virtually any degree, upon the West Virginia Supreme Court's inherent rule-making authority including cases involving the MPLA:

> In carrying out the responsibility imposed by Section 3, this Court has not been hesitant in finding statutes void when they were in conflict with any rule promulgated by this Court. See Syl. pt. 1, *Witten v. Butcher*, 238 W. Va. 323, 794 S.E.2d 587 (2016) ("The provision in W. Va. Code§ 3-7-3 (1963) requiring oral argument to be held in an appeal of a contested election, is invalid because it is in conflict with the oral argument criteria of Rule 18 of the West Virginia Rules of Appellate Procedure."); Syl. pt. 6, *State Farm Fire & Cas. Co. v. Prinz*, 231 W. Va. 96, 743 S.E.2d 907 (2013) ("Because it addresses evidentiary matters that are reserved to and regulated by this Court pursuant to the Rule-Making Clause, Article VIII, §3 of the West Virginia Constitution, W. Va. Code §57-3-1 (1937), commonly referred to as the Dead Man's Statute, is invalid, as it conflicts with the paramount authority of the West Virginia Rules of Evidence."); Syl. pt. 3, *Louk v. Cormier*, 218 W. Va. 81, 622 S.E.2d 788 (2005) ("The provisions contained in W. Va. Code §55-7B-6d (2001) were enacted in violation of the Separation of Powers Clause, Article V, §1 of the West Virginia Constitution, insofar as the statute addresses procedural litigation matters that are regulated exclusively by this Court pursuant to the Rule-Making Clause, Article VIII, § 3 of the West Virginia Constitution. Consequently, W. Va. Code §55-7B-6d, in its entirety, is unconstitutional and unenforceable."); *Garnes-Neely ex rel. W. Virginia State Police v. Real Property*, 211 W. Va. 236, 245, 565 S.E.2d 358, 367 (2002) ("Rule 60(b) has the force and effect of law; applies to forfeiture proceedings under the Forfeiture Act; and supersedes W. Va. Code §60A-7-705(d) to the extent that Section 705(d) can be read to deprive a circuit court of its grant of discretion to review a default judgment order."); *Oak Cas. Ins. Co. v. Lechliter*, 206 W. Va. 349, 351 n.3, 524 S.E.2d 704, 706 n.3 (1999) ("We note, however, that to any extent that W. Va. Code §56-10-1 may be in conflict with W. Va. R. Civ. P. Rule 22, it has been superseded."); *W. Virginia Div. of Highways v. Butler*, 205 W. Va. 146, 150, 516 S.E.2d 769, 773 (1999) ("if W.Va. Code§ 37-14-1 et seq., unambiguously prohibited anyone but a licensed or certified appraiser from testifying with regard to the value of real estate in a court proceeding, this prohibition would be contrary to the Rules of Evidence promulgated by this Court, pursuant to

article eight, section three of our Constitution, and, thus, the prohibition would be void."); *State v. Jenkins*, 195 W.Va. 620, 625 n.5, 466 S.E.2d 471,476 n.5 (1995) (finding W.Va. R. Evid. Rule 901 superseded W.Va. Code §57-2-1); Syl. pt. 2, *Williams v. Cummings*, 191 W. Va. 370,445 S.E.2d 757 (1994) ("W.Va. Code §56-1-l (a)(7) provides that venue may be obtained in an adjoining county '[i]f a judge of a circuit be interested in a case which, but for such interest, would be proper for the jurisdiction of his court ....' This statute refers to a situation under which a judge might be disqualified, and therefore it is in conflict with and superseded by Trial Court Rule XVII, which addresses the disqualification and temporary assignment of judges."); *Mayhorn v. Logan Med. Found.*, 193 W. Va. 42, 454 S.E.2d 87 (1994) (finding W.Va. Code §55-7B-7, which outlined the qualifications of an expert in a medical malpractice case, was superseded by W.Va. R. Evid. 702); *Teter v. Old Colony Co.*, 190 W. Va. 711, 726, 441 S.E.2d 728, 743 (1994) ("a legislative enactment which is substantially contrary to provisions in our Rules of Evidence would be invalid."); Syl. pt. 2, *State ex rel. Gains v. Bradley*, 199 W. Va. 412, 484 S.E.2d 921 (1997) ("Rule lB of the Administrative Rules for Magistrate Courts supersedes W.Va. Code§ 50-4-7 (1992), and prospectively provides there is no automatic mandatory right of a party to have a magistrate disqualified."); *Gilman v. Choi*, 185 W. Va. 177, 178, 406 S.E.2d 200, 201 (1990), overruled on other grounds by *Mayhorn v. Logan Med. Found.*, 193 W. Va. 42, 454 S.E.2d 87 (1994) ("W.Va. Code, 55-7B-7 [1986], being concerned primarily with the competency of expert testimony in a medical malpractice action, is valid under Rule 601 of the West Virginia Rules of Evidence."); Syl. pt. 2, *State v. Davis*, 178 W. Va. 87, 88, 357 S.E.2d 769, 770 (1987), overruled on other grounds *State ex rel. R.L. v. Bedell*, 192 W. Va. 435, 452 S.E.2d 893 (1994) ("Rule 7(c)(l) of the West Virginia Rules of Criminal Procedure supersedes the provisions of W.Va. Code, 62-9-1, to the extent that the indorsement of the grand jury foreman and attestation of the prosecutor are no longer required to be placed on the reverse side of the indictment. Such indorsement and attestation are sufficient if they appear on the face of the indictment."); *Bechler v. Casey*, 175 W.Va. 434, 333 S.E.2d 799 (1985) (invalidating a statute in part that was in conflict with W. Va. R. App. P., Rule 23); *State ex rel. Quelch v. Daugherty*, 172 W. Va. 422,425, 306 S.E.2d 233, 236 (1983)("W.Va. Code, 30-2-1, as amended, is an unconstitutional usurpation of this Court's exclusive authority to regulate admission to the practice of law in this State."); Syl. pt. 2, in part, *Carey v. Dostert*, 170 W. Va. 334, 294 S.E.2d 137 (1982) "(West Virginia Code, 30-2-7 and a circuit court's common-law power to disbar are obsolete and have been superseded by ... the Judicial

> Reorganization Amendment of our Constitution, Article VIII."); *State ex rel. Askin v. Dostert,* 170 W. Va. 562, 567, 295 S.E.2d 271 ,276 (1982)(holding that to the extent W.Va. Code §30-2-1 required security from attorneys to insure their good behavior, it "conflicts with the rules promulgated by this Court [and] must fall.")

Collateral Source Rule

The Collateral Source Rule is a long-standing component of West Virginia Law and has been "a staple of American Tort Law since before the civil war".[2] The Collateral Source Rule excludes evidence of payments from other sources to plaintiffs from being used to reduce damage awards imposed upon culpable defendants. *Ilosky v. Michelin Tire Corp.*, 307 S.E.2d 603 (W. Va. 1983) In other words, the Collateral Source Rule "operates to preclude the offsetting of payments made by health and accident insurance companies or other collateral sources as against the damages caused by the injured party" by precluding their introduction of such evidence. *Ratlief v.* Yokum, 280 S.E.2d 854 (W.Va. 1981). In West Virginia "[O]ur law is quite clear that the amount of the money that an injured plaintiff receives from a collateral source is not admissible". *Pax v. VanMeter*, 354 S.E.2d 581 (W.Va. 1986).

In 2014, this Court issued its most expansive opinion dealing with the Collateral Source Rule turning down attempts to infringe upon its parameters. In *Kenney v. Liston*, 760 S.E.2d 434 (W.Va. 2014), this Court of declared that:

> "Examples of collateral sources that are inadmissible to reduce a defendant's liability, in both our jurisprudence and that of other states, are legion. Benefits to a plaintiff protected by the collateral source rule come from sources as diverse as life insurance, health insurance, accident insurance, Workers' Compensation, sick pay, vacation pay, gratuitous nursing care by a relative, charity, remarriage, disability insurance, veterans and military hospitals, tax savings, private or government pension programs such as

[2] Michael I. Krauss & Jeremy Kidd, Collateral Source and Tort's Soul 48 U. Louisville L. Rev. 1, 4 (2009); *The Propeller Monticello v. Mollison*, 58 U.S. 152 (1854).

> Social Security, and government programs like Medicare and Medicaid".

And, in *Kenney*, this Court also rejected the argument that the Collateral Source Rule should be rewritten so as to only permit a plaintiff to be able to recover medical bills that had been paid by a collateral source versus the actual amount of the bills. In rejecting that argument, the Court stated that:

> "Stated another way, the collateral source rule permits an injured person to recover all of his or her reasonable medical costs that were necessarily required by the injury. Where a person's healthcare provider agrees to reduce, discount or write-off a portion of the persons medical bill, the collateral source rule permits the person to recover the entire reasonable value of the medical services necessarily required by the injury. The tortfeasor is not entitled to receive the benefit of the reduced, discounted, or written-off amount...Whether the plaintiff took benefits from his health insurer in the form of medical expense payments or in the form of discounts and write-offs because of agreements between the health insurer and its healthcare provider is irrelevant. Those amounts written-off are as much of a benefit for which the plaintiff pay consideration as are the actually cash payments made by its health insurer to the healthcare providers. This is the very purpose of the collateral source rule: to prevent a defendant from reaping the benefits of plaintiff's preparation and protection".

W. Va. Code §55-7B-9a and §55-7B-9d are nothing less than direct attacks by the West Virginia Legislature against our judicially adopted Collateral Source Rule which on their face effectively abolish the entire Collateral Source Rule in medical malpractice actions. §55-7B-9a provides that after a verdict is returned, a defendant may present "...evidence of payments the plaintiff has received for the same injury from collateral sources". In addition, it allows the defendant to then "...present evidence of future payments from collateral sources" which are likewise to be deducted from the verdict. §55-7B-9d goes even further limiting the evidence that may be presented to a jury regarding past medical bills restricting that evidence to only the "amount of past medical expenses paid by or on behalf of the plaintiff" and those "past medical

expenses occurred by 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." Both Code Sections are in direct contravention of the Collateral Source Rule expressed in Kenney supra where this Court made clear that the "[p]ublic policies behind the Collateral Source Rule are wide ranging. For one, it is better for injured plaintiffs to receive the benefit of collateral sources in addition to actual damages than for defendants to be able to limit their liability for damages merely by the fortuitous presence of these sources". Yet, that is exactly what §55-7B-9a and §55-7B-9d do. Very simply, if found constitutional both Code Sections would for all practical purposes abolish in medical malpractice actions this Court's rulings in Kenney and the judicially adopted Collateral Source Rule that has existed for decades.

The issue of whether §55-7B-9a and §55-7B-9d violate the Separation of Powers Clause contained in Article V, §1 of the West Virginia Constitution because of the Rule-Making Clause in Article VIII §3 revolves solely and singularly around whether West Virginia's Collateral Source Rule is or is not a "rule of evidence". As Justice Workman stated in her concurring opinion in the case of *State of West Virginia ex rel. Marshall County Commission v. Carter*, 689 S.E.2d 796 (W.Va. 2010):

> "Article V, Section 1 Constitution of West Virginia which prohibits any one department of our state government from exercising the powers of the other, is not merely a suggestion; it is part of the fundamental law of our State and, as such, it must be strictly construed and closely followed. Furthermore, this Court has never "hesitated to utilize the doctrine where we felt there was a direct and fundamental encroachment by one branch of the government into the traditional powers of another branch of government".
>
> "In instant case, the underlying issue surrounds a potential conflict between a legislatively-created statute and rules on admissibility of evidence promulgated by this Court in the Rules of Evidence and case law. That conflict is created by the Appellant seeking to have

> this Court hold that the statute it issued trumps the judicial decision as to the admissibility of evidence. Although the statute at issue here is valid and not in and of itself intrusive into judicial powers, the interpretation which Petitioner seek to have this Court adopt would violate the Separate of Powers. This Court has made it abundantly clear through numerous prior decisions that statutes that conflict with rules and principles promulgated by this Court as to the admissibility of evidence will be invalidated".

So, if the Collateral Source Rule is a "rule of evidence" to any degree, then both statutory provisions are unconstitutional under the Separation of Powers Clause.

The answer to that question is that at its core the Collateral Source Rule is a rule of evidence with the evidentiary component being the barring of the introduction of evidence of the existence of the collateral source or the receipt of benefits. The reason for the exclusion of this type of evidence is the concern that the trier of fact might use evidence of the collateral source or the benefits provided there from to improperly deny the plaintiff the full recovery to which he or she is entitled. "The evidentiary component bars admission of evidence of the existence of the collateral source or the receipt of benefits". James M. Fisher, Understanding Remedies Section 12(a), et. 77 (1999)

To lay to rest any doubt that the Collateral Source Rule is at least in substantial part a rule of evidence, this Court in *Kenney* answered that question where it declared that:

> "The collateral source rule is both a rule of evidence and a rule of damages. "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 plaintiff's damages have been paid by a collateral source." Because the likelihood of misuse by the jury clearly outweighs the probative value of evidence of collateral benefits, the "induction of collateral sources into the jury's consciousness for whatever purpose is to be avoided." The theory is "that the jury may well reduce the damages based on the amounts that the plaintiff has been shown to have received from collateral sources." For example, "[c]alling attention to the fact that a plaintiff had [hospitalization or medical] insurance can be prejudicial error because the jury may conclude that

> plaintiff sustained no damages for which he was entitled to recover if his medical bills were paid by insurance."

Because the Collateral Source Rule is in West Virginia at least in substantial part a rule of evidence the West Virginia Legislature is not entitled to nor is it permitted to infringe into this area of law whose development and enforcement solely rests with the West Virginia Supreme Court under the Separation of Powers and the Rule-Making Clauses. This Court has repeatedly made clear that it and it alone "unquestionably possesses paramount authority to adopt and amend rules of evidence" and that the Court will "not hesitate to invalidate a statute that conflicts" with the Court's "inherent rule-making authority". *State Farm* supra. What the Legislature has tried to do is trump West Virginia's judicial decisions that have uniformly held that evidence regarding collateral sources is not admissible in a personal injury action in West Virginia. That is not permitted under the Separation of Powers Clause.

So, in the end, how should this Court go about answering the first certified question? Moss suggests it should do so as follows. The Collateral Source Rule is without any argument at least in substantial part a rule of evidence that has existed in West Virginia for decades. W.Va. Code §55-7B-9a and §55-7B-9d do not involve a slight infringement around the edges of the Collateral Source Rule. Their enactment is not some minimal overlapping between the functions of legislative and judicial branches. Their effect does not involve minimal changes to the Collateral Source Rule. Instead, §55-7B-9a and §55-7B-9d eviscerate the judicially adopted Collateral Source Rule in every medical malpractice action. The legislation does exactly what this Court refused to do in *Kenney*. Both Code Sections represents direct and fundamental encroachments by the legislative branch into the traditional powers held by the West Virginia Supreme Court. If found to be constitutional, they each for all practical purposes abolish the Collateral Source Rule. It is for these reason that Moss respectfully asks that this Court find that W.Va. Code §55-7B-9a

and §55-7B-9d violate the Separate of Powers Clause contained in Article V, §1 of the West Virginia Constitution because of the Rule-Making Clause found in Article VIII, §3.

3. West Virginia Code §55-7B-9a and §55-7B-9d are Unconstitutional Because They Violate West Virginia's Equal Protection Clause Found in Article III, §10 of the West Virginia Constitution

While Article III, §10 of the West Virginia Constitution does not contain the words "equal protection" this Court in *Israel v. West Virginia Secondary Activities Commission*, 388 S.E.2d 480 (W. Va. 1989) acknowledged that while that precise phrase (equal protection) is not found in the West Virginia Constitution its principles are an intricate unequivocal rule of constitutional law and for that reason you held that: "[t]o finally settle where our State's constitutional equal protection principle is located, we hold that it a part of our Due Process Clause found in Article III, §10 of the West Virginia Constitution".

In its most elementary form, the West Virginia Equal Protection Clause provides that:

> "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..." *Atchinson v. Erwin*, 302 S.E.2d 78 (W. Va. 1983); *Hartsock – Flesher Candy Co. v. Wheeling Wholesale Grocery Co.*, 320 S.E.2d 144 (W. Va. 1985); *Gibson v. West Virginia Department of Highways*, 406 S.E.2d 440 (W. Va. 1991); and *Robinson v. Charleston Area Medical Center*, 414 S.E. 2d. 877 (W. Va. 1991) *Emphasis added.*

Moss asserts that both §55-7B-9a and §55-7B-9d violate West Virginia's Equal Protection Clause because "all persons within the class (medical malpractice victims)" are not "treated equally".

In *Robinson* supra, this Court ruled that the MPLA's provisions dealing with caps on non-economic damages did not violate state or federal Equal Protection under a "rational basis" analysis merely because the law establishing them differentiated or discriminated against

medical malpractice victims versus other tort victims. This Court apparently believed at that time that the MPLA's non-economic damage caps did not violate the Equal Protection Clause because its provisions applied equally to all medical malpractice victims. In other words, all medical malpractice victims constituted the class and the caps applied to each of them equally.

Importantly, in *Robinson* this Court reiterated its holding in *Gibson v. West Virginia Department of Highways*, 406 S.E.2d 440 (W. Va. 1991) where this Court had previously held that:

> "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…*Emphasis added.*

This is the very essence of the West Virginia Equal Protection guarantee. The Equal Protection guarantee assures that all similarly situated persons be treated alike. Thus, everyone stands before the law on equal terms to enjoy the same rights as belong to, and to bear the same burden as are imposed upon others in a like situation. In this case, Moss is not asserting that §55-7B-9a and §55-7B-9d are unconstitutional under an Equal Protection analysis because the Code Sections differentiate between victims of medical malpractice versus of all other tort victims. Instead, Moss asserts that the Code Sections are unconstitutional under an equal protection analysis because "all persons within the class (which this Court in *Robinson* defined as being all medical malpractice victims) are (not) treated equally". So, the question that is presented to this Court is whether §55-7B-9a and §55-7B-9d treat all medical malpractice victims exactly the same or do these Code Sections subdivide that class of victims into different categories treating each differently thus violating the Equal Protection guarantee that "all persons within the class are (must be) treated equally". If all medical malpractice victims are not "treated equally" then

this Court is required to find §55-7B-9a and §55-7B-9d unconstitutional under an Equal Protection analysis.

§55-7B-9a and §55-7B-9d do not treat all medical malpractice victims equally. Instead, those Code Sections subdivide medical malpractice victims into multiple sub-classes so that their recovery is affected by whether they do or do not have private insurance, by who issued the policy, whether there is a subrogation provision in the medical insurance plan, by the location the medical care was provided, and by whether the victim does or does not qualify for social assistance programs such as Medicare and Medicaid. By way of example:

1. Both Code Sections discriminate between those medical malpractice victims who have private medical insurance and those who do not. Under these Code Sections if you have private medical insurance a malpractice victim may only recover the amount actually paid by their medical insurance plan but if they have no medical insurance, they are permitted to collect the full amount of their bills. So, for two (2) individuals having an identical injury, caused by the exact same medical negligence, who are treated by the same medical providers, that have the same exact amount of medical bills, those who have medical insurance will always recover less than those who do not.
2. And §55-7B-9a goes further discriminating between medical malpractice victims who have private medical insurance and those who do not because if a medical malpractice victim is making a claim for future medical costs their recovery for those expenses will be reduced by what their private medical insurance may pay in the future but if they do not have any insurance, they can collect the full amount of their future medical costs. So, if you have no medical insurance you may recover your full future damages, but if you have medical insurance you can only recover a portion of your future damages.

3. Even for medical malpractice victims who have private medical insurance, both Code provisions discriminate depending on the insurance company who issued the policy. Depending upon the reimbursement rate any particular medical insurance carrier has with any given medical facility or provider the amount paid for the medical malpractice victim's medical bills will fluctuate from insurance carrier to insurance carrier. So, if your medical insurance has high reimbursement rates a medical malpractice victim will recover more than a similarly situated malpractice victim whose insurance policy has low reimbursement rates.
4. The disparity in what can be recovered set forth in sub-paragraph No. 3 above becomes even more dramatic when you compare medical malpractice victims with private insurance and those medical malpractice victims that must rely upon Medicare or Medicaid to cover their medical expenses. If the medical malpractice victim has private medical insurance, the amounts their insurance carrier reimburses medical providers is almost always universally higher that what Medicare and Medicaid reimburse medical providers. That means that the code sections discriminate between classes of medical malpractice victims because if you are a medical malpractice victim with private insurance versus a medical malpractice victim with Medicare or Medicaid, you will recover more in a medical malpractice action for your medical bills then those who cannot afford provide medical insurance and have to rely upon social programs such as Medicare and Medicaid.
5. Similarly, for medical malpractice victims who have private medical insurance both Code provisions discriminate between plans based upon whether any particular medical insurance policy does or does not contain a subrogation provision. So, if your plan does not have a subrogation provision the medical malpractice victim is precluded from recovering any

medical bills paid by the plan versus those who have their bills paid under a health insurance policy that does have a subrogation plan.

6. Both Code provisions also discriminate between medical malpractice victims who have sought medical care from a charitable institution such as the Shriners' Hospitals or St. Jude's which do not charge for medical services versus medical malpractice victims who obtain their medical care at a traditional hospital that does charge for those services. If the medical malpractice victim seeks their care and treatment at a hospital or other medical facility that provides charitable healthcare, then those malpractice victims are precluded from making any recovery for that gratuitous care and treatment while malpractice victims who seek similar care at a for profit institution are allowed to make at least a limited recovery for the expenses of their medical care.
7. Both Code Sections likewise discriminate between medical malpractice victims who have medical or other care services provided to them, like Kayla Moss in this matter whose mother and family members care for her 24 hours a day, gratuitously and those who have to obtain the exact same care and services from medical providers that charge for their services. In West Virginia it has traditionally been the rule that medical malpractice victims are permitted to recover for gratuitous services provided by a family member or loved one. Both Code provisions now eliminate any recovery for gratuitous services, thus discriminating between medical malpractice victims depending upon who provides their care.
8. Each Code Section also discriminates between medical malpractice victims who have medical expenses paid by a government social program such as Medicaid and those who do not qualify for the services. If the malpractice victim has no private insurance coverage and essentially has no assets, they can obtain healthcare coverage through Medicaid. However, if

that same malpractice victim owns assets that exceeds Medicaid's limitations, they are ineligible for that healthcare coverage. So, the malpractice victims who do not qualify for Medicaid are entitled to recover the full costs of all of their medical expenses while the economically disadvantaged malpractice victims, who must rely upon Medicaid, can only recover a fraction of their medical costs i.e. only what is paid by Medicaid.

9. Finally, the Code Sections discriminate between those malpractice victims who receive Medicare versus those who receive Medicaid. By way of example, West Virginia Code §55-7B-9a excludes Medicare payments from being considered as a collateral source while Medicaid is considered a collateral source. So, if a medical malpractice victim is making a claim for future medical care and benefits their future award under West Virginia Code §55-7B-9a will be reduced by the amount Medicaid will pay for those costs in the future but if they are covered by Medicare, their future damages will not be reduced because Medicare is not considered a collateral source under the Code Section.

The only case Moss has been able to find that has addressed this type of equal protection argument in the context of medical malpractice victims is the case of *Wentling v. Medical Anesthesia Services*, 701 P.2d 939 (Kan 1985). *Wentling* involved a challenge to determine the constitutionality of *K.S.A.* 60-471 which was part of Kansas' medical malpractice legislation which abrogated certain elements of the common law collateral source rule. Just like in the current litigation, the plaintiff in *Wentling* asserted that the collateral source provision in K.S.A. 60-471 did not treat all individuals in the class of medical malpractice victims equally but instead discriminated against certain member of the class based upon their sources of payment for medical bills, thus violating equal protection guarantees. The Kansas Supreme Court agreed finding as follows:

> "The instant case deal with a rule of evidence which first applies to parties claimed to have been injured through the wrongful conduct of another only if the putative tort-feasor is a healthcare provider. It then further discriminates between those who paid for insurance, or have such benefits from their employment, and anyone who must rely upon charity or other gratuitous care... The statute before the court embodies elements of putativeness and discrimination which violate the rights of citizens to equal treatment under the law. Like the difference in treatment between classes of civil judgment debtors, the discrimination between classes of medical malpractice plaintiffs is lodged within the heart of the judicial process. Rules governing the admissibility of evidence in a civil trial is a type of discrimination not to be approved automatically. Rather, this court must apply scrutiny which, as the United States Supreme Court has called it in another context, is "not a toothless one"... The statute is intended to keep down the costs of medical malpractice insurance, and to limit the size of medical malpractice verdicts. The distinction between insured plaintiffs, and ones who must rely upon kindness for some of their pre-litigation care, is not one which furthers that goal. Rather is substantially undermines the purpose, and at the expense of the indigent litigant. It therefore is violative of the rights of all litigants to equal protection under the 14th Amendment to the United States Constitution."

For these reasons, this Court should find that West Virginia Code §55-7B-9a and §55-7B-9d both violate West Virginia Equal Protection Clause.

CONCLUSION

Moss requests that this Court find that both W.Va. Code §55-7B-9a and §55-7B-9d both are unconstitutional because (1) they each violate Article V, §1 of the West Virginia Constitutional because of the Rule-Making Clause of Article VIII, §3, and (2) the violate West Virginia's Equal Protection Clause.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 21-0031

Kayla Moss and Michael Moss, as Father and as next friend of A.M., an infant,

Plaintiffs, Petitioners,

vs.

The United States of America,

Defendant, Respondent.

CERTIFICATE OF SERVICE

I, Arden J. Curry, II, attorney for the within named Petitioners, Kayla Moss and Michael Moss as Father, and next friend of A.M., an infant, do hereby certify that I have this 7th day of April, 2021 served true copies of the **PETITIONER'S APPEAL BRIEF** and **JOINT APPENDIX** upon the parties by mailing the same, postage prepaid, to the following addressee:

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