IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, ex rel.,
WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,

Petitioner,

v.

Case No. 21-0230
~~**(Civil Action No. 20-C-101)**~~

THE HONORABLE CINDY S. SCOTT,
Chief Judge of the Seventeenth Judicial Circuit,
and A.F., a minor, by and through her next
friends, SARAH FOX and DANIEL FOX,
individually,

Respondents.

BRIEF OF *AMICI CURIAE* ON BEHALF OF THE WEST VIRGINIA HOSPITAL ASSOCIATION, THE WEST VIRGINIA MUTUAL INSURANCE COMPANY, A MAGMUTUAL COMPANY, AND THE WEST VIRGINIA STATE MEDICAL ASSOCIATION IN SUPPORT OF PETITIONER AND IN SUPPORT OF REVERSING THE CIRCUIT COURT

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I. INTERESTS OF THE *AMICI CURIAE*

The West Virginia Hospital Association ("WVHA"), the West Virginia Mutual Insurance Company, a MagMutual Company ("the Mutual"), and the West Virginia State Medical Association ("WVSMA") submit this Brief as *amici curiae*[1] based on their interest in the interpretation of the Medical Professional Liability Act ("MPLA"). Petitioner's Writ Petition addresses an important question for West Virginia health care providers and their liability insurance carriers: Can plaintiffs label claims as "corporate negligence" and strip hospitals of the protections of the MPLA? The *amici* urge this Court to squarely answer this question "No." Creative pleading to avoid the applicability of the MPLA goes against the language and intent of the West Virginia Legislature and this Court's prior decisions.

A. The West Virginia Hospital Association

The WVHA is a statewide, not-for-profit organization representing the interests of approximately fifty-nine hospitals and health care systems in West Virginia. WVHA's mission is to create a strong health care system that supports the health and well-being of those served by their hospitals. WVHA accomplishes this by sponsoring numerous advocacy, education, and technical assistance initiatives designed to build a strong, healthy West Virginia.

Hospitals are an integral part of the communities they serve. Because hospitals provide a wide variety of services to their respective communities, the WVHA monitors legal developments that could impact its member hospitals and those hospitals' communities. When necessary, the

[1] Statement required by Rule 30(e)(5) of the West Virginia Rules of Appellate Procedure: This amicus brief was authored by counsel for the WVHA, the Mutual, and the WVSMA. No counsel for any party authored the brief in whole or in part, and no party or counsel made a monetary contribution intended to fund the preparation or submission of the brief. J.W. Ruby Memorial Hospital and other hospitals in the WVU Health System (WVU Medicine) are members of the WVHA.

WVHA becomes involved as an *amicus curiae* in cases significant to its members.[2] This case is significant because the circuit court's failure to apply the MPLA effectively stripped West Virginia University Hospitals, Inc. ("WVU Hospitals") of the MPLA's important safeguards, including enforcement of the pre-suit notice requirements. To the contrary, the MPLA plainly applies to the claims asserted by Plaintiffs in the underlying case against WVU Hospitals.

B. The West Virginia Mutual Insurance Company, a MagMutual Company

The Mutual provides medical professional liability coverage and hospital professional liability coverage to physicians who practice in West Virginia and West Virginia hospitals. In 2001, the West Virginia Legislature enacted House Bill 601 to address issues related to the lack of stable and affordable medical malpractice insurance, and the need for the state to provide such insurance. 2001 W. Va. Acts 3115-16, *codified at* W. Va. Code § 29-12B-2. House Bill 601 provided temporary insurance options for physicians as well as contained provisions to provide the initial surplus loan and enable the formation of a physicians' mutual insurance company. *Id.*

In 2003, the Legislature passed House Bill 2122, which formally enabled the creation of the Mutual to respond to the "nationwide crisis in the field of medical liability insurance," causing "physicians in West Virginia [to] find it increasingly difficult, if not impossible, to obtain medical liability insurance either because coverage is unavailable or unaffordable." *Zaleski v. W. Va. Physicians' Mut. Ins. Co.*, 220 W. Va. 311, 314, 647 S.E.2d 747, 750 (2007) (quoting W. Va. Code § 33-20F-2(a)(1), (6) (2003)). According to the West Virginia Insurance Commissioner, in 2018,

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[2] This Court has previously permitted the WVHA to appear as an *amicus curiae* in *Wilson v. Kerr*, Mem. Dec. No. 19-0933 (W. Va. Dec. 16, 2020); *Manor Care, Inc. v. Douglas*, 234 W. Va. 57, 763 S.E.2d 73 (2014); *Riggs v. West Virginia Univ. Hosps., Inc.*, 221 W. Va. 646, 656 S.E.2d 91 (2007); *Family Med. Imaging, LLC v. West Virginia Health Care Auth.*, 218 W. Va. 146, 624 S.E.2d 493 (2005); *Boggs v. Camden-Clark Mem'l Hosp. Corp.*, 216 W. Va. 656, 609 S.E.2d 917 (2004), holding modified by *Gray v. Mena*, 218 W. Va. 564, 625 S.E.2d 326 (2005); *Verba v. Ghaphery*, 210 W. Va. 30, 552 S.E.2d 406 (2001); *DeVane v. Kennedy*, 205 W. Va. 519, 519 S.E.2d 622 (1999).

the Mutual insured 47.85% of the physicians in West Virginia. W. VA. OFFICES INS. COMM'R, 2019 ANNUAL MEDICAL MALPRACTICE REPORT 45 (2019). As the primary insurer of West Virginia physicians, the Mutual has an interest in decisions impacting the MPLA because the MPLA's interpretation directly affects its insureds. When appropriate, the Mutual becomes involved as an *amicus curiae* in cases of significant import.[3]

C. The West Virginia State Medical Association

Established in 1867, the WVSMA is a not-for-profit, voluntary, professional association of physicians who strive to serve the citizens of West Virginia by promoting the health and general welfare of the state; advancing and expanding medical knowledge and science; maintaining a high standard of medical education; and advocating for and enforcing just medical laws. The WVSMA has approximately 2,700 members, including practicing physicians, medical students, medical residents, and retired physicians. The WVSMA advances health and promotes quality and safety in the practice of medicine by representing the interests of physicians, patients, and public health in matters such as this. When necessary, the WVSMA becomes involved as an *amicus curiae* in cases of significant import.[4] The WVSMA has an interest in this appeal because this Court's

[3] Cases in which the Mutual has appeared as an *amicus curiae* include *Wilson v. Kerr*, Mem. Dec. No. 19-0933 (W. Va. Dec. 16, 2020); *MacDonald v. City Hosp., Inc.*, 227 W. Va. 707, 715 S.E.2d 405 (2011) (upholding noneconomic damage limitations in W. Va. Code § 55-7B-8); *State ex rel. State Farm Mut. Auto. Ins. Co. v. Bedell*, 228 W. Va. 252, 719 S.E.2d 722 (2011); *State ex rel. State Farm Mut. Auto. Ins. Co. v. Marks*, 230 W. Va. 517, 741 S.E.2d 75 (2012); *Riggs v. West Virginia Univ. Hosps., Inc.*, 221 W. Va. 646, 656 S.E.2d 91 (2007); *Boggs v. Camden-Clark Mem'l Hosp. Corp.*, 216 W. Va. 656, 609 S.E.2d 917 (2004), holding modified by *Gray v. Mena*, 218 W. Va. 564, 625 S.E.2d 326 (2005); *Lindsay v. Att'ys Liab. Prot. Soc., Inc.*, No. 11-1651, 2013 WL 1776465 (W. Va. Apr. 25, 2013); *Davis v. Mound View Health Care, Inc.*, 220 W. Va. 28, 640 S.E.2d 91 (2006).

[4] The WVSMA has also appeared as an *amicus curiae* in several cases, including *Riggs v. West Virginia Univ. Hosps., Inc.*, 221 W. Va. 646, 656 S.E.2d 91 (2007); *Boggs v. Camden-Clark Mem'l Hosp. Corp.*, 216 W. Va. 656, 609 S.E.2d 917 (2004), holding modified by *Gray v. Mena*, 218 W. Va. 564, 625 S.E.2d 326 (2005); *Verba v. Ghaphery*, 210 W. Va. 30, 552 S.E.2d 406 (2001); *DeVane v. Kennedy*, 205 W. Va. 519, 519 S.E.2d 622 (1999); *State ex rel. Clark v. Blue Cross Blue Shield of West Virginia, Inc.*, 203 W. Va. 690, 510 S.E.2d 764 (1998).

decision could impact its members' liabilities, insurance premiums, and the health care systems within which they work.

D. Relief Sought by *Amici Curiae*

For these reasons, the WVHA, the Mutual, and the WVSMA urge the Court to find that the MPLA applies to Plaintiffs' "corporate negligence" claims.

Amici served notice on the parties of its intent to file this amicus brief on March 16, 2021, by email, as required by Rule 30 of the West Virginia Rules of Appellate Procedure.

II. ARGUMENT

Plaintiffs seek to avoid the MPLA's applicability by pleading around it, an approach this Court has consistently rejected. *See Grey v. Mena*, 218 W. Va. 564, 625 S.E.2d 326 (2005), *Blankenship v. Ethicon, Inc.*, 221 W. Va. 700, 656 S.E.2d 451 (2007), *Minnich v. MedExpress Urgent Care*, 238 W. Va. 533, 796 S.E.2d 642 (2017). When the allegations in a complaint fit within its definitions, the MPLA applies. No creative or tactical pleading can (or should) avoid the MPLA's application. Upholding the applicability of the MPLA is of the utmost importance to health care providers and facilities in West Virginia, especially given the tumultuous year such institutions have had with the COVID-19 pandemic. The MPLA's applicability must be upheld early in the civil action process, particularly when there is no allegation in the complaint supporting a claim outside the statutory parameters.

No such claim exists here. At its simplest, this case is about holding a hospital and its employee liable for a mishap that occurred after the employee changed the decedent's intravenous line—a situation which clearly falls within the parameters of the MPLA. Plaintiffs attempt to avoid the MPLA's application by claiming WVU Hospitals committed "corporate negligence," an action the Legislature intended to prohibit in passing its 2015 and 2017 amendments to the MPLA.

For these reasons, this Court should reverse the ruling of the circuit court, declare that the MPLA applies to Plaintiffs' "corporate negligence" claims, and hold that the circuit court committed clear error by denying WVU Hospitals' motion to dismiss.

A. The West Virginia Legislature's 2015 and 2017 Amendments to the Medical Professional Liability Act were intended to broaden its applicability to "corporate negligence" claims.

First enacted in 1986, West Virginia's MPLA governs actions involving medical professional liability. When the West Virginia Legislature enacted the MPLA, it "set forth a detailed explanation of its findings and purpose of the Act in W. Va. Code § 55-7B-1 (1986)." *MacDonald v. City Hosp., Inc.*, 227 W. Va. 707, 719, 715 S.E.2d 405, 417 (2011). The findings and purpose explain that "[i]n recent years, the cost of insurance coverage has risen dramatically while the nature and extent of the coverage has diminished, leaving the health care providers, the health care facilities and the injured without the full benefit of professional liability insurance coverage." W. VA. CODE § 55-7B-1. The rising cost of liability insurance coverage and the state's inability to effectively control the insurance industry resulted in "the state's loss and threatened loss of physicians, which, taken together with other costs and taxation incurred by health care providers in the state, have created a competitive disadvantage in attracting and retaining qualified physicians." *Id.*

To address these issues, the Legislature crafted different reforms within the MPLA to "balance the rights of our individual citizens to adequate and reasonable compensation with the broad public interest in the provision of services by qualified health care providers and health care facilities . . . ." *Id.*; *see also Robinson v. Charleston Area Med. Ctr., Inc.*, 186 W. Va. 720, 724, 414 S.E.2d 877, 881 (1991) (finding that the MPLA was enacted "to encourage and facilitate the provision of the best health care services to the citizens of this state"). Over the years, the

Legislature has amended the MPLA to maintain this "balance of rights" between West Virginia citizens and health care providers and facilities, most notably in 2001, 2003, 2015, and 2017.

In 2015, Senate Bill 6 was passed in response to this Court's decision in *Manor Care, Inc. v. Douglas*, 234 W. Va. 57, 763 S.E.2d 73 (2014). The bill amended the MPLA by broadening several statutory definitions, including "health care," "health care provider," and "health care facility." In *Manor Care*, the plaintiff alleged that several companies who operated Heartland Nursing Home committed corporate negligence by failing "to allocate a proper budget to Heartland Nursing Home to allow it to function properly, including maintaining adequate numbers of staff to care for its residents." *Manor Care, Inc.*, 234 W. Va. at 74, 763 S.E.2d at 90. The plaintiff argued that these decisions were not health care related and, therefore, constituted "ordinary negligence" rather than "medical negligence." The circuit court instructed the jury to allocate its negligence award between "ordinary" and "medical" negligence, and applied the MPLA's economic damages limitation only to the portion of the award for "medical" negligence. *Id.* at 74, 763 S.E.2d at 90. On appeal, the defendants argued this was error because the MPLA provided the exclusive remedy for the plaintiff's claims as the MPLA was "designed by the Legislature to apply broadly and specifically to limit malpractice claims concerning nursing homes." *Id.* at 71, 763 S.E.2d at 87.

The Supreme Court of Appeals upheld the circuit court's conclusion that the defendants' conduct constituted both "ordinary negligence" and "medical negligence," *id.* at 75, 763 S.E.2d at 91, and affirmed the application of the MPLA's economic damage limit only to the "medical negligence" assessed by the jury. The Court issued a new syllabus point, stating "[w]hile the applicability of the Medical Professional Liability Act, W. Va. Code § 55–7B–1 *et seq.*, is based upon the facts of a given case, the determination of whether a particular cause of action is governed

by the Act is a legal question to be decided by the trial court." *Id.* at Syl. Pt. 3, 763 S.E.2d at 79.

After *Manor Care*, plaintiffs began to argue "corporate negligence" in an effort to avoid the MPLA. *See Hooper v. 1543 Country Club Rd. Manor Operations LLC*, No. 16-1226, 2018 WL 472952, at *2 (W. Va. Jan. 19, 2018) (Defense verdict affirmed. On appeal, "Petitioner assert[ed] that the circuit court committed reversible error when it instructed the jury on a vicarious liability theory, because petitioner's claim was pled and litigated as a direct corporate negligence claim against Genesis, pursuant to this Court's decision in *Manor Care, Inc., v. Douglas*, 234 W. Va. 57, 763 S.E.2d 73 (2014).").

Prior to the 2015 amendments, the MPLA's "health care" definition was "any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to or on behalf of a patient during the patient's medical care, treatment or confinement." W. VA. CODE § 55-7B-2(e) (2003). The amendment expanded the definition:

> (e) "Health care" means:
>
> > (1) Any act, service or treatment provided under, pursuant to or in the furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis or treatment;
> >
> > (2) Any act, service or treatment performed or furnished, or which should have been performed or furnished, by any health care provider or person supervised by or acting under the direction of a health care provider or licensed professional for, to or on behalf of a patient during the patient's medical care, treatment or confinement, including, but not limited to, staffing, medical transport, custodial care or basic care, infection control, poisoning, hydration, nutrition and similar patient services; and
> >
> > (3) The process employed by health care providers and health care facilities for the appointment, employment, contracting, credentialing, privileging and supervision of health care providers.

W. VA. CODE § 55-7B-2(e) (2015) (new language underlined). This new language broadened the definition of "health care" to encompass not only the actual treatment of a patient, but also the

patient's diagnosis and comprehensive plan of care. The "act, service or treatment" is not limited to only health care providers, but includes any person acting under a health care provider's or licensed professional's direction, and broadly includes staffing and other similar patient services. The third subsection applies to the employment and supervision of health care providers.

The Legislature also expanded the definition of "medical professional liability." The prior definition was "any liability for damages resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient." W. VA. CODE § 55-7B-2(i) (2003). The 2015 amendment added the following sentence: "It also means other claims that may be contemporaneous to or related to the alleged tort or breach of contract or otherwise provided, all in the context of rendering health care services." W. VA. CODE § 55-7B-2(i) (2015). By including this additional sentence combined with the broadened definition of "health care," the Legislature expanded what services, and therefore what claims, are included in the definition of medical professional liability.

The Legislature amended the MPLA again in 2017. Senate Bill 338 added the definition of "occurrence" to W. Va. Code § 55-7B-2[5] and provided additional protections for long-term care facilities. The Legislature defined "occurrence" as the following:

> (l) "Occurrence" means any and all injuries to a patient arising from health care rendered by a health care facility or a health care provider and includes any continuing, additional or follow-up care provided to that patient for reasons relating to the original health care provided, regardless if the injuries arise during a single date or multiple dates of treatment, single or multiple patient encounters, or a single admission or a series of admissions.

[5] This amendment may also be fairly traced to efforts by plaintiffs to argue for recovery for multiple "occurrences" of negligence by a health care provider. *See Dawson v. United States*, No. 1:11CV114, 2013 WL 3187078, at *5 (N.D.W. Va. June 20, 2013).

W. VA. CODE § 55-7B-2(l). As with the expanded definition of "health care" in 2015, the inclusion of the "occurrence" definition is another way in which the Legislature extended the MPLA's protections. All services related to the original health care will be considered as a single occurrence, rather than multiple occurrences which could give rise to multiple claims.

This legislative history is significant here because it demonstrates the Legislature's intent that the MPLA applies broadly to actions related to patient care. Plaintiffs expressly seek to avoid the MPLA, arguing that their "corporate negligence" claims "center on corporate-level conduct that had nothing to do with Plaintiff's condition or plan of care." [Pls' Resp. in Opp'n Pet. for Decl. J., p. 3; App. at 135]. Plaintiffs cite to *Manor Care* to support the assertion that the MPLA does not apply to their claims. *Id.* But *Manor Care* was decided before the Legislature expanded the definitions of "health care" and "medical professional liability" in 2015; indeed, the amendments were a response to *Manor Care*. And *Minnich v. MedExpress Urgent Care*, 238 W. Va. 533, 796 S.E.2d 642 (2017), contrary to Plaintiffs' assertion, holds that "[t]he critical inquiry" in determining whether the MPLA applies is "whether the subject conduct that forms the basis of the lawsuit is conduct related to the provision of medical care." *Minnich*, 238 W. Va. at 538, 769 S.E.2d at 647.

A broad interpretation of the MPLA is consistent with this Court's recent decision in *State ex rel. PrimeCare Med. of W. Virginia, Inc. v. Faircloth*, 242 W. Va. 335, 835 S.E.2d 579 (2019). In *Faircloth*, the plaintiff's Estate alleged that PrimeCare failed to properly supervise, train, and discipline a correctional officer who improperly monitored the decedent's medical condition, which resulted in the decedent's suicide. *Faircloth*, 242 W. Va. at 339, 835 S.E.2d at 583. PrimeCare filed a motion to dismiss, arguing that plaintiff accused PrimeCare of medical negligence and, therefore, the MPLA applied; thus, plaintiff should have served a notice of claim

and certificate of merit. *Id.* at 340, 835 S.E.2d at 584. This Court determined that the MPLA did apply to the plaintiff's claims: "these allegations state a claim for medical professional liability' because the acts or omissions in question were 'health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient.'" *Id.* at 343, 835 S.E.2d at 587; *see also Cunagin as next friend of J.C. v. Cabell Huntington Hosp.*, No. 3:19-0250, 2020 WL 6216830, at *6 (S.D.W. Va. Oct. 22, 2020) ("In *Faircloth*, the claim related to the correctional officer was based on PrimeCare's alleged 'failure to train, monitor, and discipline' the officer with regard to monitoring the decedent's medical condition, that is, his risk of suicide. The guard's monitoring of the suicide risk was integral to the medical care.").

The MPLA does have limitations, and when a plaintiff's core allegations do not arise under the statute, the MPLA does not apply. For example, in *Cunagin as next friend of J.C. v. Cabell Huntington Hospital*, the court held MPLA did not apply to plaintiff's claim of negligence against the hospital because the claim was not based on health care services rendered but "a lapse in security [that] resulted in an assault." *Cunagin*, 2020 WL 6216830, at *6 Here, the conduct that forms the basis of Plaintiffs' Complaint is WVU Hospitals' employee's actions in changing the decedent's intravenous line—conduct undertaken in the provision of medical care. Plaintiffs' attempt to avoid the MPLA by labeling claims as "corporate negligence" is exactly what the Legislature sought to preclude in enacting the MPLA amendments. Plaintiffs' claims are not barred, but hospitals, like WVU Hospitals, are entitled to the protection of the MPLA.

B. This Court should hold that the MPLA applies to Plaintiffs' "corporate negligence" claims.

In ruling on WVU Hospitals' motion to dismiss and for declaratory judgment, the circuit court declined to apply the MPLA to Plaintiffs' Complaint and Amended Complaint based on its conclusion that discovery was necessary. [Order Den. Mot. to Dismiss & Mot. for Decl. J., ¶¶ 15,

20; App. at 7, 8]. As a result, the circuit court did not apply the MPLA to Plaintiffs' "corporate negligence" claims, [Def.'s Mem. in Supp. for Decl. J., p. 1; App. at 44], did not dismiss paragraphs (h) through (k) of Count II in the Amended Complaint [Def.'s Mot. to Dismiss, p. 6; App. at 84], and did not enforce the MPLA's jurisdictional pre-suit certification requirement. [Def.'s Mot. to Dismiss, p. 3; App. at 81]. Under an appropriate reading of the MPLA, these conclusions were clear error.

1. The plain language of the MPLA applies to Plaintiffs' "corporate negligence" claims.

Correctly interpreted, as intended by the intent of the 2015 and 2017 amendments, the MPLA applies to Plaintiffs' eleven "corporate negligence" claims and accompanying allegations.[6] The first four allegations fall within the MPLA's definitions because they relate to acts performed by health care providers, or persons supervised by health care providers or licensed professionals, regarding staffing. W. VA. CODE § 55-7B-2(e)(2). And "health care" includes the processes used "by health care providers and health care facilities for the appointment, employment, contracting, credentialing, privileging and supervision of health care providers." W. VA. CODE § 55-7B-2(e)(3). Allegations five, six, and seven are all acts "which should have been performed or furnished" by WVU Hospitals during A.F.'s medical care and are, therefore, also covered under the MPLA's "health care" definition. W. VA. CODE § 55-7B-2(e)(2). Allegations eight through eleven, added in Plaintiffs' Amended Complaint, are covered by the MPLA's definition of

[6] Plaintiffs' "corporate negligence" claim is supported by eleven allegations: (1) negligently hiring and/or retaining agents; (2) negligently staffing; (3) negligently failing to train agents; (4) negligently failing to supervise agents; (5) negligently failing to have proper protocols; (6) failing to protect Plaintiff A.F. from harm; (7) failing to take reasonable steps to prevent the intravenous infusion of air; (8) failing to purchase air filter which would have prevented the air embolism that Plaintiff A.F. suffered; (9) failing to document the cause of injuries in Plaintiff A.F.'s discharge summary; (10) post-event spoliation of device tubing; and (11) failing to report any [and all] sentinel events to third parties. [Compl. ¶ 56(a)–(g); Am. Compl. ¶ 56(h)–(k); App. at 23–24, 74–76].

"medical professional liability" because they are claims that are "contemporaneous to or related to the alleged tort" that occurred "in the context of rendering health care services" to Plaintiff A.F. W. VA. CODE § 55-7B-2(i).

2. Failure to apply the MPLA to Plaintiffs' "corporate negligence" claims goes against the Legislature's intent and effectively "judicially repeals" the statute.

Not only does the plain language of the MPLA apply to Plaintiffs' "corporate negligence" claims, but to find otherwise would be contrary to the Legislature's intent in enacting the MPLA: to ensure that hospitals and health care facilities receive protections so they can continue providing quality health care services to the citizens of West Virginia. Providing limited protections to health care providers and facilities stabilizes West Virginia's health care industry because the protections encourage physicians to practice here and helps regulate the professional liability insurance market to ensure coverage remains available and affordable. *See* W. VA. CODE § 55-7B-1.

The MPLA's protections also afford the parties in medical professional liability actions predictable litigation expectations. These include statutory limitations on noneconomic damages, applicable statutes of limitations, standards for expert witnesses, and the pre-suit notice of claim and certificate of merit. *See* W. VA. CODE § 55-7B-1 *et seq*. Health care providers and facilities rely on these expectations in risk management and procuring insurance, as well as in assessing and defending medical professional liability actions. These expectations provide both sides with insight into the strengths, weaknesses, and value of the opponent's case. If the Court fails to apply the MPLA to Plaintiffs' "corporate negligence" claims, WVU Hospitals will be stripped of the MPLA's protections moving forward in this litigation.

Amici believe this Court must apply the mandatory notice of claim and certificate of merit requirements in W. Va. Code § 55-7B-6 to the facts here. Because the "corporate negligence"

claims fall within the MPLA's parameters, Plaintiffs cannot avoid the MPLA with "creative" pleading. *See* Syl. Pt. 4, *Blankenship v. Ethicon, Inc.*, 221 W. Va. 700, 656 S.E.2d 451 (2007) ("Where the alleged tortious acts or omissions are committed by a health care provider within the context of the rendering of 'health care' as defined by [the MPLA], the Act applies regardless of how the claims have been pled."). And circuit courts do not have the authority to suspend the MPLA's pre-suit notice requirements because "[t]o do so would amount to a judicial repeal" of the MPLA. *See* Syl. Pt. 5, *State ex rel. PrimeCare Med. of W. Virginia, Inc. v. Faircloth*, 242 W. Va. 335, 835 S.E.2d 579 (2019) ("A circuit court has no authority to suspend the West Virginia Medical Professional Liability Act's pre-suit notice requirements and allow a claimant to serve notice after the claimant has filed suit. To do so would amount to a judicial repeal of W. Va. Code § 55-7B-6 [2003].").

Allowing Plaintiffs to evade the MPLA's requirements through creative pleading effectively sanctions the "judicial repeal" of the MPLA this Court disapproved in *State ex rel. PrimeCare Med. of W. Virginia, Inc. v. Faircloth*. Instead, by enforcing these protections as the Legislature intended, the Court will provide a clear message that hospitals and health care facilities are entitled to the protection of the MPLA, and discourage "creative" pleading intended to avoid the statute.

Applied here, the circuit court's failure to dismiss the new "corporate negligence" claims in the Amended Complaint was clear error. By holding Plaintiffs to W. Va. Code § 55-7B-6's plain language, this Court will send the clear message that the MPLA's requirements are mandatory. Further, health care providers, like WVU Hospitals, will be assured of the protections intended by the Legislature, claimants and plaintiffs are on notice of their mandatory obligations,

and the application of the statute is made clear to circuit judges. This message provides a consistent, stable, and fair application of the MPLA.

C. **Sound public policy supports a broad interpretation of the MPLA.**

Amici urge the Court to interpret the MPLA to effectuate the intent expressed by the Legislature to provide broad protection to health care providers, particularly in the 2015 amendments. In this regard, the Court should strongly consider reversing Syllabus Point 5 issued in *Phillips v. Larry's Drive-In Pharmacy, Inc.*, 220 W. Va. 484, 647 S.E.2d 920 (2007), which states that because the MPLA is in "derogation of common law," it must be interpreted narrowly: "[w]here there is any doubt about their meaning or intent they are given the effect which makes the least rather than the most change in the common law." Syl. Pt. 5, *Larry's Drive-In Pharmacy*, 220 W. Va. at 486, 647 S.E.2d at 922. Instead, the Court should apply the MPLA broadly to health care providers and facilities to effectuate the Legislature's clear intent.[7] *See* Syl. Pt. 4, *State ex rel. Morrisey v. Diocese of Wheeling-Charleston*, 851 S.E.2d 755, 756 (W. Va. 2020) ("The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.") (citation removed); *see also Bryant v. Brazos Kidney Disease Ctr.*, No. 14-19-00024-CV, 2021 WL 282586, at *5 (Tex. App. Jan. 28, 2021) (In interpreting the Texas Medical Liability Act ("TMLA"), the Court of Appeals of Texas determined that the TMLA applied to plaintiffs' claims for defamation and falsification of medical records because "the TMLA's text has been broadly interpreted" thereby creating "a rebuttable presumption that a patient's claims

[7] For an in-depth study on statutory interpretation, *see* CONGRESSIONAL RESEARCH SERVICE, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 4 (2018): "The predominant view of a judge's proper role in statutory interpretation is one of 'legislative supremacy.' This theory holds that when a court interprets a federal statute, it seeks 'to give effect to the intent of Congress.' Under this view, judges attempt to act as 'faithful agents' of Congress. They 'are not free to simply substitute their policy views for those of the legislature that enacted the statute. This belief is rooted in the constitutional separation of powers: in the realm of legislation, the Constitution gives Congress, not courts, the power to make the law."

against a physician or health care provider, based on facts implicating the physician's conduct during the patient's care, treatment, or confinement[,] are health care liability claims implicating the TMLA.").

In these uncertain times, health care providers and health care facilities need to rely on the stable application of the MPLA and its protections. The COVID-19 pandemic has created historic financial and logistical pressures on West Virginia's health care system. On March 16, 2020, Governor Justice declared a State of Emergency in response to the COVID-19 pandemic.[8] This Court was a leader in adopting policies, procedures, and temporary rules in response to the crisis. Health care providers and facilities were directly affected. As part of the Executive Order, the Governor prohibited all elective medical procedures in an effort to prevent the spread of COVID-19 and conserve medical equipment and supplies. Although this action was necessary to address the COVID-19 pandemic, health care facilities rely on elective medical procedures for revenue. WVHA estimates that West Virginia hospitals have lost close to $400 million from March 2020 to March 2021.[9]

As hospitals and health care facilities have experienced dramatic losses in revenue, their costs have increased. According to the American Hospital Association, COVID-19-related hospitalizations are associated with higher costs of treatment.[10] The increased demand for medical

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[8] State of West Virginia Executive Department, Executive Order No. 16-20, issued March 16, 2020, https://governor.wv.gov/Documents/EO%2016-20electiveprocedures.pdf.

[9] *West Virginia Hospital Association kicks off Hospital Advocacy Week*, WV NEWS (Mar. 8, 2021), https://www.wvnews.com/news/wvnews/west-virginia-hospital-association-kicks-off-hospital-advocacy-week/article_d48128f2-a051-5e77-bd2c-830d3cc37370.html.

[10] HOSPITALS AND HEALTH SYSTEMS FACE UNPRECEDENTED FINANCIAL PRESSURES DUE TO COVID-19, AMERICAN HOSPITAL ASSOCIATION (May 2020), https://www.aha.org/guidesreports/2020-05-05-hospitals-and-health-systems-face-unprecedented-financial-pressures-due.

equipment and supplies has driven the price of such necessities upward. Many hospitals were struggling financially before the COVID-19 pandemic. For example, two months before Governor Justice declared a State of Emergency, Thomas Health announced it was filing for bankruptcy.[11] After the pandemic struck, several West Virginia hospitals closed or severely cut back on their services. In March 2020, both Williamson Memorial Hospital in Mingo County, and Fairmont Regional Medical Center in Marion County shut down.[12] In May 2020, Bluefield Regional Medical Center in Mercer County announced that it would be closing its inpatient and ancillary services in July 2020.[13]

As hospitals and health care facilities continue to serve on the frontlines of battle against COVID-19, the consistent application of the MPLA is more important than ever. This Court should respect the Legislature's intent and hold that Plaintiffs cannot evade the MPLA's application and protections for hospitals and health care facilities through creative pleading.

III. CONCLUSION

The West Virginia Legislature enacted the MPLA to establish a balance between the needs of West Virginia's health care system and the rights of citizens to reasonable compensation for their injuries. To ensure this balance is maintained, the Legislature has amended the MPLA to

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[11] *West Virginia hospital group eyes bankruptcy, not closing*, THE WASHINGTON TIMES (Jan. 11, 2020), https://www.washingtontimes.com/news/2020/jan/11/west-virginia-hospital-group-eyes-bankruptcy-not-c/.

[12] *West Virginia Hospital Announces Closure Amid Pandemic*, WV PUBLIC BROADCASTING (Mar. 31, 2020, 10:28 A.M.), https://www.wvpublic.org/news/2020-03-31/west-virginia-hospital-announces-closure-amid-pandemic; Anthony Izaguierre, *West Virginia hospital closing in 'days,' owner says in letter*, WHSV (Mar. 17, 2020, 3:04 P.M.), https://www.whsv.com/content/news/West-Virginia-hospital-closing-in-days-owner-says-in-letter-568868801.html.

[13] Charles Boothe, *Bluefield Regional Medical Center closing all inpatient and ancillary services by July 30*, BLUEFIELD DAILY TELEGRAPH (May 29, 2020), https://www.bdtonline.com/news/bluefield-regional-medical-center-closing-all-inpatient-and-ancillary-services-by-july-30/article_ae2bfa3a-a1e0-11ea-9f9f-83c26f36480a.html.

include additional protections for health care facilities. Plaintiffs seek to disrupt this carefully crafted balance by arguing that the MPLA does not apply to their "corporate negligence" claims, even though the MPLA's definitions for "health care" and "medical professional liability" encompass Plaintiffs' allegations. The Court should not be persuaded by Plaintiffs' arguments. Accordingly, this Court should follow the Legislature's intent and determine that the MPLA does apply to Plaintiffs' "corporate negligence" claim and reverse the circuit court's decision.

Respectfully submitted,

THE WEST VIRGINIA HOSPITAL ASSOCIATION, THE WEST VIRGINIA MUTUAL INSURANCE COMPANY, A MAGMUTUAL COMPANY, AND THE WEST VIRGINIA STATE MEDICAL ASSOCIATION

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, ex rel.,
WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,

Petitioner,

v.

Case No. _____
(Civil Action No. 20-C-101)

THE HONORABLE CINDY S. SCOTT,
Chief Judge of the Seventeenth Judicial Circuit,
and A.F., a minor, by and through her next friends, SARAH FOX and DANIEL FOX, individually,

Respondents.

CERTIFICATE OF SERVICE

I, Blair E. Wessels, counsel for the West Virginia Hospital Association, the West Virginia Mutual Insurance Company, a MagMutual Company, and the West Virginia State Medical Association, do hereby certify that on the 22nd day of March, 2021, I have served a true and exact copy of the foregoing ***Brief of Amici Curiae on Behalf of the West Virginia Hospital Association, the West Virginia Mutual Insurance Company, a MagMutual Company, and the West Virginia State Medical Association in Support of Petitioner and in Support of Reversing the Circuit Court***, via the United States Postal Service, by placing the same in a stamped envelope, addressed to the following counsel of record:

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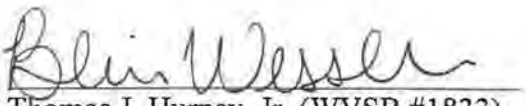

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