

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**September 2007 Term**

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**No. 33335**

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**FILED**  
**November 20,**  
**2007**

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SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**ALLISON J. RIGGS, and**  
**JACK E. RIGGS, M.D.,**  
**Plaintiffs Below, Appellants,**

**v.**

**WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,**  
**Defendant Below, Appellee.**

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**Appeal from the Circuit Court of Monongalia County**  
**The Honorable Robert B. Stone, Judge**  
**Civil Action No. 01-C-147**

**AFFIRMED**

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**Submitted: October 23, 2007**  
**Filed: November 20, 2007**

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**Wilson, Frame, Benninger**  
**& Metheney, PLLC**  
**Morgantown, West Virginia**

**and**

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**Greene, Ketchum, Bailey, Walker**  
**Farrell & Tweel**

**Christina S. Vaglianti**  
**West Virginia University Hospitals, Inc.**  
**Morgantown, West Virginia**

**and**

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Virginia State Medical Association**

**The opinion of the Court was delivered PER CURIAM.**

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

**JUSTICES STARCHER AND ALBRIGHT dissent and reserve the right to file dissenting opinions.**

## SYLLABUS BY THE COURT

1. “The standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to W. Va. R. Civ. P. 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed.” Syllabus Point 1, *Wickland v. American Travelers Life Ins. Co.*, 204 W. Va. 430, 513 S.E.2d 657 (1998).

2. “‘When a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.’ Syllabus Point 5, *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959).” Syllabus Point 4, *State v. Inscore*, 219 W. Va. 443, 634 S.E.2d 389 (2006).

3. “Judicial estoppel bars a party from re-litigating an issue when: (1) the party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, or with a position taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the inconsistent positions received some benefit from his/her original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process.” Syllabus Point

2, *West Virginia Department of Transportation, Division of Highways v. Robertson*, 217 W. Va. 497, 618 S.E.2d 506 (2005).

Per Curiam:

Appellants Allison J. Riggs and Jack E. Riggs, M.D. argue herein that the Circuit Court of Monongalia County erred by reducing a jury verdict awarding non-economic damages in the amount of \$10,000,000 to \$1,000,000 pursuant to the provisions of W. Va. Code § 55-7B-8 (1986).<sup>1</sup> According to Appellants, the non-economic damages cap contained in Section 8 of the Medical Professional Liability Act, W. Va. Code § 55-7B-1, *et seq.*, does not apply to the jury verdict rendered below because their claims against West Virginia University Hospitals, Inc. (“WVUH”) do not arise from health care rendered to Allison Riggs. Instead, Appellants maintain that their claims arise from WVUH’s failure to control an environmental serratia outbreak which resulted in Allison Riggs contracting a near fatal nosocomial serratia infection during an anterior cruciate ligament (“ACL”) surgical reconstruction in 1995. As such, Appellants maintain the claims asserted against WVUH do not fall within the parameters of the MPLA’s non-economic damages cap. Upon a complete and thorough review of the record presented herein, it is readily apparent that Appellants pled, prosecuted and tried their claims against WVUH as claims subject to the provisions of the MPLA. Only after a jury verdict exceeding the MPLA’s non-economic damages cap was rendered did Appellants begin to argue that their claims were not governed

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<sup>1</sup> West Virginia Code § 55-7B-8 (1986), provides that “[i]n any medical professional liability action brought against a health care provider, the maximum amount recoverable as damages for noneconomic loss shall not exceed one million dollars and the jury may be so instructed.” Although W. Va. Code § 55-7B-8 was substantially amended in 2003, those amendments are not at issue herein because the instant action was filed in 2001.

by the MPLA. Finding that Appellants may not change the theory of their case after the return of jury's verdict so as to avoid application of the MPLA's non-economic damages cap, we affirm the trial court's application of W. Va. Code § 55-7B-8 to the jury verdict rendered herein.<sup>2</sup>

## I.

### FACTUAL AND PROCEDURAL BACKGROUND

On April 4, 1995, Appellant Allison J. Riggs ("Ms. Riggs"), then 14 years of age, underwent an ACL reconstruction surgery in her right knee at WVUH's Ruby Memorial Hospital. During the surgery, Ms. Riggs allegedly contracted a *serratia* bacterial infection in the femoral tunnel of the ACL reconstruction surgical site. Ms. Riggs experienced a number of complications after the surgery and underwent a number of subsequent procedures, including surgeries, during the years 1995 and 1996 allegedly as a result of these complications.<sup>3</sup> The infection at issue in this litigation, however, was apparently not

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<sup>2</sup>Though we are deciding this matter on grounds other than those articulated by the various *amici curiae*, we recognize and thank the entities filing *amici curiae* briefs for their contributions.

<sup>3</sup>Evidence was presented at trial that during this time period the possibility that Ms. Riggs was suffering from an infection was explored. However, testing did not reveal the presence of an infection. Appellants further admitted in pre-trial filings that in 1995 and 1996 there was no evidence of infection, including no culture growth.

discovered nor diagnosed until 1999.<sup>4</sup>

Appellants filed their Complaint in the Circuit Court of Monongalia County in March 2001, against WVUH, University of West Virginia Board of Trustees and West Virginia University Medical Corporation.<sup>5</sup> In their Complaint, Appellants alleged that at the time of Ms. Riggs' surgery in April 1995, Ruby Memorial Hospital was experiencing a *serratia* bacterial outbreak in certain areas of the hospital, including the operating rooms and surgical intensive care unit. All allegations in the Complaint were phrased in terms of proof required under the MPLA.<sup>6</sup> For example, the Complaint alleged that the

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<sup>4</sup>The infection at issue herein was discovered after the second of two surgeries Ms. Riggs underwent in 1999. Appellants asserted in pretrial filings that it was undisputed that at the time of Ms. Riggs' June 15, 1999 operation, there was no notation of a possible infection nor cultures, but that during a June 28, 1999, surgery, a "tremendous amount of bloody purulent material" was revealed and cultures indicated "*serratia marcescens* light growth." Prior to this discovery of the infection, it was believed that Ms. Riggs was experiencing an adverse reaction to the hardware inserted during her prior surgeries.

<sup>5</sup>Prior to trial, appellants voluntarily dismissed their claims asserted against West Virginia Medical Corporation. Additionally, it appears they settled their claims asserted against the University of West Virginia Board of Trustees for the sum of \$75,000.

<sup>6</sup>West Virginia Code § 55-7B-3(a) (2003) provides:

The following are necessary elements of proof that an injury or death resulted from the failure of a health care provider to follow the accepted standard of care:

(1) The health care provider failed to exercise that degree of care, skill and learning required or expected of a reasonable, prudent health care provider in the profession or class to which the health care provider belongs acting in the same or

(continued...)

Defendants negligently failed to exercise that degree of care, skill and learning required of or expected of reasonably careful healthcare providers acting in the same or similar circumstances in treating Plaintiff, Allison J. Riggs, and such negligence was the proximate cause of Plaintiff, Allison J. Riggs', exposure to the serratia bacteria and resulting complications.

More specific acts of negligence specified in the Complaint include: the failure to adequately and properly obtain informed consent; the failure to inform physicians, employees, agents

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<sup>6</sup>(...continued)

similar circumstances; and

(2) Such failure was a proximate cause of the injury or death.

West Virginia Code § 55-7B-3(a) is identical to W. Va. Code § 55-7B-3 (1986) which was in effect at the time this action was file. The 2003 amendment to W. Va. Code § 55-7B-3 re-designated the existing statutory text as subsection (a) and added subsection (b), which is not at issue herein.

Additionally, W. Va. Code § 55-7B-2 (g) (2006) defines “health care provider” as:

a person, partnership, corporation, professional limited liability company, health care facility or institution licensed by, or certified in, this state or another state, to provide health care or professional health care services, including, but not limited to, a physician, osteopathic physician, hospital, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, psychologist, emergency medical services authority or agency, or an officer, employee or agent thereof acting in the course and scope of such officer's, employee's or agent's employment.

This definition of “health care provider” is virtually identical to that contained within the 1986 enactment in effect at the time the instant action was filed. The only difference is that this definition was amended in 2003 to include entities “professional limited liability company” and “emergency medical services authority or agency” within its scope.



and representatives of the serratia bacteria outbreak at Ruby Memorial Hospital; the failure to conduct proper testing, monitoring and preventive control of the serratia bacterial outbreak; and the failure to consult with health care providers with knowledge and experience in the field of bacterial infections, outbreaks, control and containment. Additionally, the Complaint alleged the Defendants negligently “failed to diagnose, detect and/or discover that the complications suffered by Plaintiff, Allison J. Riggs, were proximately caused by a serratia bacterial infection in the femoral tunnel of the anterior cruciate ligament reconstruction surgical site” and “failed to perform adequate and proper diagnostic testing to determine the source and/or origins of” Ms. Riggs’ complications. Finally, the Complaint asserted that the alleged damages were caused “*as a direct and proximate result of the negligent failure of the Defendants to exercise the proper degree of skill, care and learning required of reasonably prudent healthcare providers.*” (Emphasis added).

Continuing with the theme that the MPLA applied to their claims, Appellants summarized their allegations in their pre-trial memorandum stating:

On or about April 4, 1995, the Robert C. Byrd Health Sciences Center of West Virginia University and Ruby Memorial Hospital w[ere] experiencing a serratia bacterial outbreak in certain areas of the health care facility including operating rooms and surgical intensive care units. The physicians, employees, agents and representatives of the Defendants hereinbefore named negligently monitored the serratia outbreak, negligently disclosed its inherent dangers and committed other

acts of negligence which proximately caused Plaintiffs to suffer significant personal injuries and damages.

As a direct and proximate result of the *negligent failure of the Defendants to exercise the proper degree of skill, care and learning required of reasonable prudent healthcare providers*, Plaintiff, Allison J. Riggs, was required to incur medical bills and suffer agonizing physical pain and suffering, mental anguish and anxiety and permanent physical injury. As a direct and proximate result of the *negligent failure of the defendants to exercise the proper degree of skill, care and learning required of reasonable prudent healthcare providers*, Plaintiff, Jack E. Riggs, incurred expenses and costs which were unnecessary and burdensome.

(Emphasis added). These allegations were then incorporated verbatim into the Pre-Trial/Scheduling Order entered by the trial court.

Appellants' acknowledgment that their claims against WVUH were subject to the provisions of the MPLA continued during the course of discovery as evidenced by their expert witness disclosures. In supplemental disclosures filed on June 14, 2002, Appellants disclosed the expert witness opinion of Grant O. Westenfelder, M.D., FACP, ("Dr. Westenfelder") relating to WVUH's Department of Infection Control "in this medical professional negligence case." Therein, Appellants disclosed that Dr. Westenfelder would "testify to a reasonable degree of medical probability" that WVUH "deviated from the standard of care" by failing to adequately inform and warn physicians, staff and patients regarding an "ongoing endemic/epidemic Serratia problem" and by failing to seek assistance from the West Virginia Department of Health and the Centers for Disease Control. According to the disclosure, these "deviations from the standard of care were a proximate

cause of Plaintiffs' ultimate injuries and damages." On September 3, 2004, Appellants again supplemented their expert witness disclosures. At that time, Appellants admitted that "[t]his medical malpractice action arises out of an intra-operative infection[.]" Each expert disclosed therein as expected to testify against WVUH was represented to be testifying "to a reasonable degree of medical probability" that WVUH "deviated from the standard of care" in (1) determining the source of serratia infections; (2) investigating, remediating and monitoring a serratia epidemic "which proximately resulted in Ms. Allison Riggs' contracting a nosocomial serratia infection"; (3) "failing to implement appropriate standards to locate, identify, isolate and remediate a nosocomial serratia epidemic"; and/or (4) "failing to take appropriate affirmative actions to locate, identify, isolate and remediate a nosocomial serratia epidemic[.]"

Appellants' unequivocal position that their claims against WVUH were MPLA claims continued at the trial which commenced on August 22, 2006. During voir dire, Appellants' counsel informed the potential jurors that the injuries and damages they were claiming were "a result of the hospital failing to meet the applicable standard of care in monitoring the infectious disease control procedures within the hospital and perhaps in some other ways that they were guilty of medical negligence[.]" This position was further evidenced by Appellants' request that the jury be instructed regarding the legislative purpose behind the MPLA and the elements of a MPLA claim both by their proposed jury instructions and during arguments regarding the trial court's proposed jury charge. During

discussions with the trial court regarding jury instructions, Appellants' counsel acknowledged that he "tried to state the statutory burden of proof verbatim" in his proposed instructions. Reviewing the trial court's suggestion regarding a proposed instruction, Appellants' counsel acknowledged "I think that's an accurate statement of medical malpractice or negligence, degree of care, skill and learning. . . I like it." At one point, Appellants' counsel maintained that he did not "want the statement that we are alleging that the hospital failed to maintain a safe and proper hospital environment with respect to infection control" included in the jury instructions. At no time did Appellants request that the jury be instructed upon any theory of liability other than medical negligence nor were any objections raised to the instructions ultimately given by the trial court. The following portions of the jury charge are particularly relevant to the matters raised in this appeal:

The Court further instructs you that in cases involving allegations of *medical negligence* the law recognizes that the complexity of the human body and medical science places questions as to the *standard of medical care* beyond the knowledge of the average lay person. Therefore, the law requires that expert medical testimony be presented to establish the *standard of care to be exercised by medical care providers*, whether the defendant's conduct amounted to a deviation from the standard of care was a proximate cause of the injuries and damages of the plaintiffs.

The jury is instructed that the *medical care providers against whom medical negligence is asserted*, that is, the *healthcare providers at West Virginia University Hospitals*, by virtue of their education, training and experience, are qualified and entitled to give opinion testimony concerning the medical issues in this case as are the medical experts called by either the plaintiffs or the defendant in this case.

...

The Court instructs the jury that the plaintiffs, Allison J. Riggs and Jack E. Riggs, allege that the defendant, West Virginia University Hospitals, Inc., was *negligent in the care and treatment of Allison J. Riggs, by failing to maintain a safe and proper hospital environment with respect to infection control, and that such negligence proximately caused her injuries.*

...

For plaintiffs to recover on their claims, they must prove to you by a preponderance of the evidence that the *defendant was negligent in its care and treatment of Allison J. Riggs* by failing to maintain a safe and proper hospital environment with respect to infection control, and that its negligence was also a proximate cause of Allison J. Riggs' injuries and damages.

*Healthcare providers owe the patients they treat a duty to refrain from medical negligence.* "Medical malpractice or negligence" is the failure to treat a patient in accordance with the degree of care, skill and learning required of a reasonably prudent health care provider in the profession or class to which the defendant belongs acting in the same or similar circumstances which proximately causes injury to the patient. That is, a healthcare provider must have and use the same knowledge and skill and exercise the same care as that which is usually had and exercised in the medical profession. *A healthcare provider whose conduct does not meet this standard of care is negligent.*

The Court instructs you that at various times throughout this trial you have heard the term "standard of care." That term means the level of medical care that should be given by a healthcare provider in a given class at a given time and which is reasonably prudent under the circumstances. It is what you find from the evidence to be what is reasonable for a prudent and competent healthcare provider engaged in the same or similar practice to have done under the same set of circumstances.

The standard of care for medical professionals and healthcare

providers is a national standard of care. *West Virginia University Hospitals is a healthcare provider under the law.*

*Plaintiffs allege that West Virginia University Hospitals deviated from the standard of care by negligently failing to properly conduct surveillance, prevention and control of a serratia epidemic proximately causing Allison J. Riggs to become severely ill and suffer injuries and damages.*

. . .

Accordingly, if you find from a preponderance of the evidence that, in treating Allison J. Riggs, the medical provider employees or agents of West Virginia University Hospitals failed to fulfill their duty or standard of care, then you may find that the defendant was negligent.

. . .

The jury is instructed that it must consider *the conduct of the healthcare providers based on the circumstances* at the time of their treatment of the plaintiff in other words what they knew or reasonably should have known at that time, and without the knowledge that Allison J. Riggs would develop any particular problem, complication, or condition, or would suffer or sustain injuries.

. . .

Before you can find the *defendant liable to plaintiffs in damages for malpractice*, you must find *not only that one or more of the healthcare providers of West Virginia University Hospitals deviated from the appropriate standard of care and was negligent, as to which you have been instructed, but also that this breach of duty was a proximate cause of or substantially contributed to Allison J. Riggs' injuries or damages.*

(Emphasis added).<sup>7</sup>

The clarity of Appellants' theory of the case presented to the jury was exemplified in rebuttal closing arguments wherein counsel argued:

You go to a hospital with the dependency and the confidence that what they are going to do to you isn't going to hurt you or inflict additional harm. And we depend on that. We depend on that environment. We don't go there to get sick. The hospital is to do no harm.

...

Now in a few minutes I am going to sit down and your job is going to begin. My job is going to end and you assume this

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<sup>7</sup>During post-trial proceedings and during oral argument before this Court, Appellants have attempted to argue that the re-typed jury charge signed by the trial court and entered into the record was not the actual jury charge read to the jury. More specifically, Appellants argue that the red-lined charge read to the jury did not use the terms "in the care and treatment of Allison J. Riggs" but rather "relating to the hospitalization of" Ms. Riggs. However, review of the portions of the record cited by Appellants in support of this argument do not lend the support implied by counsel. During arguments relating to the formulation of the jury charge there was a discussion regarding this substitution. However, placing the discussion relied upon by Appellants in context, it appears that the substitution was in relation to a portion of the jury instructions regarding the actions of the infectious disease control employees who admittedly did not have direct contact with Allison Riggs. During post-trial hearings, the trial court rejected Appellants' argument that the jury charge entered in the record did not reflect the actual charge given by stating that the trial court had compared the re-typed version entered in the record to the typed copy which included the hand-written notes utilized at trial and verified that the re-typed version corresponded to the marked-version read at trial. Responding to an inquiry from Appellants' counsel regarding the document with hand-written notes utilized at trial, the trial court explained "[t]he retyped jury charge is what I read . . . I did [read from a document that I made writings on] and then I gave it to Janet and she incorporated it and typed it exactly the way it was and I sort of go through in kind comparing it."

awesome responsibility. We are going to ask that you return a verdict in favor of Allison Riggs. We have worked on this case over five years. Any mention of the investment of time and resources has been necessary and just on this issue in this town at this hospital.

*A full and fair verdict for Allison Riggs in this case will send a message that you must provide medical services in this town responsibly. When this jury returns a verdict, a full and fair verdict for Allison Riggs, changes will occur.*

Serratia marcescens at Ruby Hospital will get the attention it deserves. Staffing requirements will be met. *Health care will be improved.* And yes, lives will be saved.

*Holding people accountable creates consequences and change. And I told you you would become the conscience of the jury. You determine what a reasonably prudent health care provider should do. You get to say what the community standard on nosocomial infection, what you are willing to accept serratia bacteria in this town will be. You get to say that. I don't have that power. The hospital doesn't have that power.*

(Emphasis added.) After receiving the trial court's instructions and listening to closing arguments, the jury began deliberations and were presented with a jury verdict form consisting of two primary questions: 1) whether WVUH was negligent in its care and treatment of Ms. Riggs by failing to maintain a safe and proper hospital environment with respect to infection control and 2) whether any such negligence proximately caused or contributed to plaintiffs' damages.<sup>8</sup> Appellants did not object to the use of this verdict form.

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<sup>8</sup> The verdict form read, in its entirety:

**Question No. 1:** Do you find by a preponderance of the  
(continued...)



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<sup>8</sup>(...continued)

evidence that West Virginia University Hospitals, Inc., was *negligent in its care and treatment of plaintiff*, Allison J. Riggs, by failing to maintain a safe and proper hospital environment with respect to infection control?

Yes \_\_\_\_\_ No \_\_\_\_\_

If you answered “No” to Question No. 1, STOP HERE. Have your foreperson sign and date this form and notify the Bailiff that a verdict has been reached. If you answered “Yes” to Question No. 1, go to Question No. 2.

**Question No. 2:** Do you find by a preponderance of the evidence that any such negligence by West Virginia University Hospitals, Inc., proximately caused or contributed to plaintiffs’ damages?

Yes \_\_\_\_\_ No. \_\_\_\_\_

If you answered “No” to Question NO. 2, STOP HERE. Have your foreperson sign and date this form and notify the Bailiff that a verdict has been reached. If you answered “Yes” to Question No. 2, go the “Damages” portion of this form.

**DAMAGES:** We, the jury, find by a preponderance of the evidence that the total amount of damages to be assessed are as follows:

- A. Jack E. Riggs – Special damages (medical expenses to date): \$ \_\_\_\_\_
- B. General damages (any permanent injury, past pain and suffering, mental anguish and past and future loss of enjoyment of life. \$ \_\_\_\_\_

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FOREPERSON

(continued...)

Answering both questions in the affirmative, the jury assessed special damages in the amount of \$84,989.39 and general damages in the amount of \$10,000,000 on September 5, 2006.

The trial court entered a judgment order reflecting the jury verdict and reducing the general/non-economic damage award to \$1,000,000 pursuant to the provisions of W. Va. Code § 55-7B-8 (1986) on September 12, 2006. On September 18, 2006, Appellants filed a motion pursuant to Rule 59(e) of the *West Virginia Rules of Civil Procedure* to reinstate the damages awarded in the jury order arguing that the MPLA's non-economic damages cap did not apply<sup>9</sup> because "no allegation has been made that WVUH negligently rendered care directly to Allison Riggs" and that the MPLA's non-economic damages cap was unconstitutional despite being upheld against constitutional challenges twice before by this Court. At a September 29, 2006, hearing on post-trial motions, Appellants began articulating a position that the MPLA applied only if personnel from the

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<sup>8</sup>(...continued)

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DATE

(Emphasis added).

<sup>9</sup>This argument is directly contrary to Appellants' counsel's admissions to the trial court during discussions relating to jury instructions and Appellants' request to instruct the jury regarding legislative findings included within the MPLA. After discussing Appellants' proposed instruction number 1 and legislative findings regarding an insurance crisis in this State as supporting the MPLA, counsel stated "*let's say by some chance we win and we have all these caps that come in to reduce the verdict. If that happens, this hospital is self-insured so all those caps for the benefit of an insurance crisis I'm going to argue are inapplicable to a self-contained limit.*" (Emphasis added).

infection control department actually provided hands-on care to Allison Riggs. Specifically, counsel argued:

So if you want to broadly interpret the MPLA to include claims against infection control, then the non-economic cap applies. If you want to narrowly interpret the actual words of the statute, I think it's reasonable to find that in this instance the claims that we have alleged do not involve health care services which were actually rendered by infection control to Allison Riggs. This is an administrative function involving the environmental safety of the hospital and is no different from negligent credential[ing] which was specifically carved out of the MPLA in the Boggs decision.

The trial court orally denied Appellants' motion at the hearing finding a definitional analysis of the MPLA's terms reveals that a showing "that anybody in infection control did directly render care to Allison Riggs" was not required for the claims to fall within the MPLA. A formal written order denying Appellants' Rule 59(e) motion to reinstate the damages awarded by the jury was entered on October 26, 2006. It is from this order that the instant appeal arises.<sup>10</sup>

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<sup>10</sup>When petitioning this Court to review the October 26, 2006, order, Appellants raised two issues: 1) the trial court's application of the MPLA's non-economic damages cap and 2) the constitutionality of the non-economic damages cap. This Court granted review as to the first issue only. Additionally, WVUH filed a cross-petition for appeal raising three issues: 1) improper and prejudicial remarks during closing argument; 2) excessiveness of the jury verdict; and 3) that the verdict was against the clear weight of the evidence. This Court denied WVUH's petition for cross appeal.

## II.

### STANDARD OF REVIEW

The sole issue on appeal is whether the trial court properly denied Appellants' Rule 59(e) motion to reinstate the damages awarded by the jury. In syllabus point 1 of *Wickland v. American Travelers Life Insurance Company*, 204 W. Va. 430, 513 S.E.2d 657 (1998), this Court found that "[t]he standard of review applicable to an appeal from a motion to alter or amend a judgment, made pursuant to W. Va. R. Civ. P. 59(e), is the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is filed." As the issue raised directly challenges the trial court's application of the MPLA's non-economic damages cap to the jury verdict, our review is *de novo*. Syl. Pt. 1, *Crystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995) ("Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review."). It is also clear that "[w]hen a statute is clear and unambiguous and the legislative intent is plain, the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Syllabus Point 5, *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars*, 144 W. Va. 137, 107 S.E.2d 353 (1959)." Syl. Pt. 4, *State v. Inscore*, 219 W. Va. 443, 634 S.E.2d 389 (2006). Accordingly, our review is focused upon whether the trial court properly applied W. Va. Code § 55-7B-8 to reduce the jury's non-economic damages award from \$10,000,000 to \$1,000,000 under the facts and

circumstance of this case.

### **III.**

#### **DISCUSSION**

On appeal to this Court, Appellants argue that the MPLA's non-economic damages cap does not apply to the jury verdict unless WVUH's infection control department had direct contact and involvement in the care and treatment of Allison Riggs during her hospitalization.<sup>11</sup> Rather, Appellants maintain that their claims arise out of environmental

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<sup>11</sup>In support of this argument, Appellants rely heavily upon a stipulation incorporated into the order approving the partial settlement with the University of West Virginia Board of Trustees (also referred to in the record as the Board of Governors) which was entered on October 16, 2006. In that order, the trial court notes that WVUH did not object to the settlement and stipulated that the Rashida Khahoo, M.D. and Bonny McTaggart, R.N., employees of WVUH's infection control department, did not provide medical or nursing care or treatment to Allison J. Riggs. However, reading the matters stipulated in their entirety reveals that this stipulation is related to any alleged agency and/or employment relationship between these individuals, WVUH and the Board of Trustees. The limited nature of this stipulation is further evidenced by a letter sent by counsel for WVUH to the trial court prior to the entry of this order. That letter, dated October 11, 2006, stamped received on October 13, 2006, and entered into the record in this matter states, in its entirety:

West Virginia University Hospitals, Inc. does not object to the proposed Order submitted by Mr. Farrell [Appellants' counsel] concerning the August 10, 2006 hearing to approve plaintiffs' settlement with the West Virginia University Board of Governors.

WVUH, Inc. will object, however, to any attempt by plaintiffs' counsel to use the stipulations concerning Dr. Khakoo and Bonny McTaggart to argue plaintiffs' case against WVUH is or was anything other than a medical professional liability case [sic] of action.

conditions at the hospital and thus do not fall within the parameters of the MPLA. The fundamental problem with this argument, as recognized and argued by WVUH before this Court, is that Appellants pled, developed, argued and submitted their claims to the jury as governed by the MPLA. If Appellants are attempting post-verdict to re-define their claims in terms of a premises liability theory arising from an environmental contamination in order to avoid application of the MPLA's non-economic damages cap, a fundamental problem exists - the jury was not instructed on any premises liability theory of recovery, Appellants did not request such an instruction and the verdict form utilized by the jury did not include findings on a premise liability theory of recovery.

This Court recently discussed at length the doctrine of judicial estoppel and its importance in maintaining the integrity of our judicial system. In *West Virginia Department of Transportation, Division of Highways v. Robertson*, 217 W. Va. 497, 618 S.E.2d 506 (2005), we stated:

The doctrine of “[j]udicial estoppel is a common law principle which precludes a party from asserting a position in a legal proceeding inconsistent with a position taken by that party in the same or a prior litigation.” *In re C.Z.B.*, 151 S.W.3d 627, 633 (Tex.Ct.App. 2004). Under the doctrine, a party is “generally prevent[ed] . . . from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.” *Pegram v. Herdrich*, 530 U.S. 211, 227 n. 8, 120 S.Ct. 2143, 2154, n. 8, 147 L.Ed.2d 164, 180 n. 8 (2000). This Court recognized long ago that “[t]here are limits beyond which a party may not shift his position in the course of litigation[.]” *Watkins v. Norfolk & Western Ry. Co.*,

125 W. Va. 159, 163, 23 S.E.2d 621, 623 (1942). Thus, “[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.” *Hubbard v. State Farm Indem. Co.*, 213 W. Va. 542, 552 n. 21, 584 S.E.2d 176, 186 n. 21 (2003) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749, 121 S.Ct. 1808, 1814, 149 L.Ed.2d 968, 977 (2001)). See also Syl. pt. 2, *Dillon v. Board of Educ. of Mingo County*, 171 W. Va. 631, 301 S.E.2d 588 (1983) (“Parties will not be permitted to assume successive inconsistent positions in the course of a suit or a series of suits in reference to the same fact or state of facts.”); *Gelwicks v. Homan*, 124 W. Va. 572, 583, 20 S.E.2d 666, 671 (1942) (“One may not defend a suit upon one ground, and then later defend the same suit, or one growing out of the same transaction, on grounds separate and distinct from those formerly asserted[.]”).

“Judicial estoppel is an extraordinary remedy that should be invoked only when a party’s assertion of a contrary position will result in a miscarriage of justice and only in those circumstances where invocation of the doctrine will serve its stated purpose[.]” *Puder v. Buechel*, 362 N.J.Super. 479, 828 A.2d 957, 965 (2003). See also *Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629, 632 (2004) (“The application of judicial estoppel must be determined on a case-by-case basis, and must not be applied to impede the truth-seeking function of the court.”). The “dual goals [of the doctrine] are to maintain the integrity of the judicial system and to protect parties from opponents’ unfair strategies. *People ex rel. Sneddon v. Torch Energy Servs., Inc.*, 102 Cal.App.4th 181, 125 Cal.Rptr.2d 365, 370 (2002). The doctrine fulfills its goals by “bind[ing] a party to his or her judicial declarations, and precludes [that] party from taking a position inconsistent with previously made declarations in a subsequent action or proceeding.” *Kauffman-Harmon v. Kauffman*, 307 Mont. 45, 36 P.3d 408, 412 (2001).

*Robertston*, 217 W. Va. at 504-5, 618 S.E.2d 513-14 (footnotes omitted). Upon examination

of the factors utilized in various jurisdictions for the application of judicial estoppel, we held in syllabus point 2 that:

Judicial estoppel bars a party from re-litigating an issue when: (1) the party assumed a position on the issue that is clearly inconsistent with a position taken in a previous case, or with a position taken earlier in the same case; (2) the positions were taken in proceedings involving the same adverse party; (3) the party taking the inconsistent positions received some benefit from his/her original position; and (4) the original position misled the adverse party so that allowing the estopped party to change his/her position would injuriously affect the adverse party and the integrity of the judicial process.

Applying these factors to the instant matter it is plainly evident that the doctrine of judicial estoppel applies to preclude Appellants from arguing that their claims against WVUH are anything other than claims governed by the MPLA, including the MPLA's non-economic damages cap. The first factor looks to whether the party has assumed a position clearly inconsistent with one taken earlier in the case. As noted throughout this opinion, Appellants pled, prosecuted, tried and argued their claims as falling within the MPLA, including continual references to WVUH as a healthcare provider, breaches of the applicable standard of care to a reasonable degree of medical probability and characterizations of the action as a medical professional liability action. Moreover, the verdict form utilized, *without objection from the Appellants*, specifically contradicts the position taken by the Appellants post trial. The verdict form specifically asked the jury whether WVUH was “*negligent in its care and treatment*” of Allison J. Riggs. Appellants



did not assume the position that their claims were not governed by the MPLA until *after* a verdict in excess of the MPLA's non-economic damages cap was rendered and their verdict was reduced by order of the trial court.

The second factor regarding the identity of the parties is easily satisfied as the contradictory positions raised by Appellants on appeal are being taken in the same litigation. Likewise, the third factor involving benefit achieved by assuming an inconsistent position is easily satisfied. By characterizing their claims as medical negligence claims, the Appellants' were able to attempt to invoke strong emotional responses and a sense of authority from the jury in their closing arguments. In their rebuttal closing arguments, Appellants strongly encouraged the jury to "send a message that you must provide medical services in this town responsibly . . . changes will occur . . . health care will be improved . . . you decide what a reasonably prudent health care provider should do . . . you say what the community standard . . . will be." Additionally, if the adverse position is accepted, Appellants will receive an additional \$9,000,000 in non-economic damages. Lastly, the final factor involving misleading the opposing party and injurious affect on the integrity of the judicial process is clearly met herein. By not characterizing their claims as premises liability claims until *after* the jury verdict was rendered, Appellants precluded WVUH from developing a theory of defense on this theory. There was no alternative pleading or arguments made herein. Appellants proceeded at all times prior to entry of the judgment order applying the MPLA's non-economic damages cap as if their claims were governed by

the MPLA. This Court will not sanction a change in liability theories post-verdict to avoid application of clear statutory provisions. The doctrine of judicial estoppel applies to preclude Appellants' arguments that the MPLA does not apply to the jury verdict rendered herein. Accordingly, the trial court's application of W. Va. Code § 55-7B-8 to reduce the jury verdict rendered in this matter from \$10,000,000 to \$1,000,000 is affirmed.

#### **IV.**

#### **CONCLUSION**

For the reasons set forth herein, the October 26, 2006, order of the Circuit Court of Monongalia County is affirmed. The provisions of W. Va. Code § 55-7B-8 apply to the verdict rendered in this matter and the Circuit Court of Monongalia County did not err by reducing the jury verdict to \$1,000,000 in its September 11, 2006, judgment order.

Affirmed.