IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 31757

BERNARD BOGGS, as administrator of the
Estate of HILDA BOGGS, deceased, as personal
representative of the statutory beneficiaries of the
wrongful death claim herein asserted and
in his own right,

Appellants,

v.

CAMDEN-CLARK MEMORIAL HOSPITAL, CORP.,
UNITED ANESTHESIA, INC. and
MANISH I. KOYAWALA, M.D.,

Appellees.

MOTION FOR LEAVE TO FILE
BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLEES
by the
WEST VIRGINIA STATE MEDICAL ASSOCIATION
AMERICAN MEDICAL ASSOCIATION
WEST VIRGINIA HOSPITAL ASSOCIATION
WEST VIRGINIA HEALTH CARE ASSOCIATION
THE WEST VIRGINIA ORTHOPAEDIC SOCIETY
THE WEST VIRGINIA ASSOCIATION OF PHYSICIAN ASSISTANTS
THE WEST VIRGINIA CHAPTER OF THE
AMERICAN ACADEMY OF FAMILY PHYSICIANS
THE PHYSICIANS ALLIANCE FOR REFORM
THE WEST VIRGINIA ACADEMY OF OPHTHALMOLOGY
THE WEST VIRGINIA SOCIETY OF OSTEOPATHIC MEDICINE, INC.
THE WEST VIRGINIA ACADEMY OF
OTOLARYNGOLOGY-HEAD AND NECK SURGERY, INC.

Evan H. Jenkins, Esq.
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P.O. Box 4106
4307 MacCorkle Avenue, S.E.
Charleston, WV 25364
Counsel for *Amici Curiae*

COMES NOW The *Amici Curiae*, West Virginia State Medical Association ("WVSMA"), American Medical Association ("AMA"), West Virginia Hospital Association ("WVHA"), West Virginia Health Care Association ("WVHCA"), The West Virginia Orthopaedic Society ("WVOS"), The West Virginia Association of Physician Assistants ("WVAPA"), The West Virginia Chapter of the American Academy of Family Physicians ("AAFP"), The Physicians Alliance for Reform, The West Virginia Academy of Ophthalmology, The West Virginia Society of Osteopathic Medicine, Inc. ("WVSOM"), The West Virginia Academy of Otolaryngology-Head and Neck Surgery, Inc. ("WVAO-HNS"), by counsel, and respectfully move the Court, pursuant to Rule 19, *West Virginia Rules of Appellate Procedure*, for leave to file an *Amici Curiae* brief in support of defendants, CAMDEN-CLARK MEMORIAL HOSPITAL, CORP., UNITED ANESTHESIA, INC. and MANISH I. KOYAWALA, M.D.

In support of said motion, the *Amici Curiae* state:

1. The **West Virginia State Medical Association** ("WVSMA"), established in 1867, is a non-profit, voluntary, professional association of physicians who strive to extend medical knowledge and advance medical science; to promote the public health; to maintain the highest standards of medical education, to secure the enactment and enforcement of just medical laws; to promote the general welfare of the profession and to enlighten and direct public opinion in regard to medicine. The WVSMA has approximately 2500 members, including 65% of the active, practicing physicians in the State. The membership includes active and retired physicians, residents and medical students. WVSMA has filed *amicus* briefs with this Court on numerous, prior occasions. WVSMA members have a special interest in this matter in that they

participated in advancing reforms to the Medical Professional Liability Act and are directly affected by this Court's decision.

2. With approximately 250,000 members, the **American Medical Association** ("AMA") is the nation's largest professional organization of physicians and medical students. Founded in 1847, its purpose is to promote the science and art of medicine and the betterment of public health. Members of the AMA practice in all fields of medical specialization and in every state, including West Virginia.

The escalation of professional liability costs has pushed this nation's health care system into a crisis. In many states, malpractice awards have risen exponentially more than inflation. Insurers have responded by drastically increasing insurance rates. Consequently, physicians are forced to discontinue providing high risk services or to practice in another state. Medical students are compelled to select their specialties based on liability risks rather than their interests. Ultimately, patients suffer because they are denied access to certain medical care or are treated too conservatively for fear of lawsuits.

The AMA believes that effective medical liability reform is vital to limiting the adverse effects of rising medical costs on patients' access to adequate health care. As such, the AMA strongly supports the Medical Professional Liability Act of West Virginia and its amendments.

3. For seventy-nine years, the **West Virginia Hospital Association** ("WVHA"), a not-for-profit organization, has represented its member hospitals and health systems across the continuum of care. WVHA supports its members in achieving a strong, healthy, West Virginia through advocacy, education, information, and technical assistance and by being a catalyst for effective change through collaboration, consensus building and a focus on desired outcomes. The members of the WVHA believe it is in the best interest of the health care community to have

a strong, healthy West Virginia. The mission of the WVHA is to support its member hospitals and health systems in achieving that goal. The WVHA monitors court decisions impacting its members and has filed *amicus* briefs with this Court in previous cases. WVHA members have a special interest in this matter in that they participated in advancing reforms to the Medical Professional Liability Act and are directly affected by this Court's decision.

4. The **West Virginia Health Care Association** ("WVHCA") is a non-profit association incorporated in 1976, which represents 123 long-term health care facilities, including over ninety percent of the state's nursing homes. The mission of the WVHCA is to promote the general welfare through developing and maintaining high standards of professional care in licensed care facilities and to inform the public on Association policy and pending or enacted legislation concerning the physical and mental health of the people. WVHCA members have a special interest in this matter in that they participated in advancing reforms to the Medical Professional Liability Act and are directly affected by this Court's decision.

5. **The West Virginia Orthopaedic Society** ("WVOS") is a non-profit association with approximately 100 members. According to the bylaws, "The purpose of this society shall be the advancement of Orthopaedic Surgery as a medical specialty as defined by the American Academy of Orthopaedic Surgeons." The membership consists of individuals who are licensed and practicing as orthopaedic Doctors of Medicine/Osteopathic Medicine in the State of West Virginia. WVOS has a specific interest in that they participated in advancing reform to the Medical Professional Liability Act and are directly affected by this court's decision.

6. **The West Virginia Association of Physician Assistants** ("WVAPA") is a non-profit corporation association with approximately 92 fellow members and 36 student members, and several affiliated members. According to the Articles of Incorporation, "The purpose of this

Association is to render loyal and honest service to the medical profession and to the public, to develop and enforce continuing medical and medically related education programs for the physician assistant and Association membership, to promote the physician assistant concept and profession through education of professional and lay people, and to promote similar interests in the student society." The WVAPA has a specific interest in the matter because all physician assistant work must be done under the direct supervision of doctors. Physician Assistants work in all areas of medicine from family practice to every specialty field. They have an additional interest in this matter as they are subject to lawsuits, as are the physicians who supervise them.

7. **The West Virginia Chapter of the American Academy of Family Physicians** ("AAFP") is a non-profit corporation with approximately 953 active members. It is believed to be the largest specialty, medical society in the State. Family practice is the specialty which provides continuing and comprehensive health care for the individual and the family. The AAFP mission includes providing responsible advocacy for and education of patients and the public in all health-related matters; and preserving and promoting quality cost-effective health care. AAFP members have a special interest in this matter in that they participated in advancing reforms to the Medical Professional Liability Act and are directly affected by this Court's decision.

8. **The Physicians Alliance for Reform** is a group of 40 Monongalia-area physicians who formed an association to work for professional medical liability reform and to improve the working climate for physicians. All members are actively practicing and paying their own professional liability insurance premiums. The members have an interest in this matter because they believe preserving the provisions of H.B. 601 and H.B. 2122 impacts their ability to serve their West Virginia patients.

9. **The West Virginia Academy of Ophthalmology** is a non-profit association of ophthalmological physicians. It has been in existence for over fifty-five years and has approximately 60 members. Its mission is to promote better eye care for the citizens of West Virginia. The members have a special interest in this matter in that they participated in advancing reforms to the Medical Professional Liability Act and are directly affected by this Court's decision.

10. **The West Virginia Society of Osteopathic Medicine, Inc.** ("WVSOM"), established in 1902 is a non-profit, voluntary professional association of approximately 450 osteopathic physicians and students who promote excellence in education, research, public health, and the delivery of quality, cost effective health care. The WVSOM directs and fosters a correct public understanding of the osteopathic profession and its relation to society and the state. WVSOM members have a special interest in this matter in that they participated in advancing reforms to the Medical Professional Liability Act and are directly affected by this Court's decision.

11 **The West Virginia Academy of Otolaryngology-Head and Neck Surgery, Inc.** ("WVAO-HNS"), is a non-profit association with approximately 32 members. The purpose of the Academy is to advance Otolaryngology as a medical specialty through education of physicians and the public. The membership consists of individuals who are licensed and practicing as Doctors of Medicine/Osteopathic Medicine in the State of West Virginia. WVAO-HNS has a specific interest in the case due to their level of exposure in the medical services area and their leadership in advancing reform to the Medical Professional Liability Act.

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This brief is submitted by *Amici Curiae* to endorse the legal argument of the defendants/appellees: CAMDEN-CLARK MEMORIAL HOSPITAL, CORP., UNITED ANESTHESIA, INC. and MANISH I. KOYAWALA, M.D. The issues raised in the Appeal affect West Virginia physicians, hospitals, nursing homes and other health care providers, the legislatively created and West Virginia physician- supported Physicians' Mutual Insurance Company, as well as any traditional insurance companies who provide professional liability insurance. West Virginia is in the midst of trying to strengthen its health care delivery system such that physicians and other health care providers will be attracted to or will remain in West Virginia as medical liability insurance availability and affordability stabilizes. At the same time, a stable marketplace will provide the public with access to health care from providers with insurance to cover any well-founded claims that might arise. Re-writing the medical professional reform provisions contained in enrolled House Bill 601, passed December 1, 2001 (MPLA II), to prohibit its application to causes of action filed on or after March 1, 2002 unless the causes of action accrue on or after March 1, 2002, and the provisions contained in enrolled House Bill 2122 (MPLA III), effective July 1, 2003, to apply only to auses of action accruing after July 1, 2003, will serve to delay implementation of the tort reform for two plus years and impose unanticipated costs on the fledgling Physicians Mutual. This delay further weakens the ability of the physicians' mutual insurance company and any insurer, from underwriting insurance on an actuarially-sound and stable basis. Further, Appellant's attempt to have the Court strike-down provisions of the medical liability reform as unconstitutional is not properly before the Court and is detrimental to the legislative goal of solving the crisis faced by health care providers. The results Appellant seeks serve only to exacerbate the lack of available health care in West Virginia's many medically underserved communities.

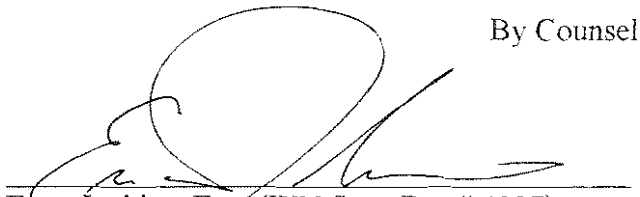
Finally, this brief is submitted to urge the Court to maintain its traditional deference to the Legislature when it undertakes economic legislation which includes a pre-requisite notice to the potential defendants and a screening certificate of merit, as well as specific instruction for the effective dates for the various parts of the affected statutes.

No party will be prejudiced by granting the *amici curiae* the opportunity to join in the filing of an *Amici Curiae* brief in this matter.

WHEREFORE, the *Amici Curiae*: The West Virginia State Medical Association, American Medical Association, West Virginia Hospital Association, West Virginia Health Care Association, The West Virginia Orthopaedic Society, The West Virginia Association of Physician Assistants, The West Virginia Chapter of the American Academy of Family Physicians, The Physicians Alliance for Reform, The West Virginia Academy of Ophthalmology, The West Virginia Society of Osteopathic Medicine, Inc., and The West Virginia Academy of Otolaryngology-Head and Neck Surgery, Inc., respectfully move this Court for leave to file an *Amici Curiae* brief in this matter together with such other and further relief as the Court may deem proper.

WEST VIRGINIA STATE MEDICAL ASSOCIATION, AMERICAN MEDICAL ASSOCIATION, WEST VIRGINIA HOSPITAL ASSOCIATION, WEST VIRGINIA HEALTH CARE ASSOCIATION, THE WEST VIRGINIA ORTHOPAEDIC SOCIETY, THE WEST VIRGINIA ASSOCIATION OF PHYSICIAN ASSISTANTS, THE WEST VIRGINIA CHAPTER OF THE AMERICAN ACADEMY OF FAMILY PHYSICIANS, THE PHYSICIANS ALLIANCE FOR REFORM, THE WEST VIRGINIA ACADEMY OF OPHTHALMOLOGY, THE WEST VIRGINIA SOCIETY OF OSTEOPATHIC MEDICINE, INC., THE WEST VIRGINIA ACADEMY OF OTOLARYNGOLOGY-HEAD AND NECK SURGERY, INC.

By Counsel



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Appellees.

From the Circuit Court of Wood County
Honorable Robert A. Waters, Chief Judge
Civil Action No. 03-C-296

BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLEES

***AMICI CURIAE*:**
WEST VIRGINIA STATE MEDICAL ASSOCIATION
AMERICAN MEDICAL ASSOCIATION
WEST VIRGINIA HOSPITAL ASSOCIATION
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KIND OF PROCEEDING AND NATURE OF THE RULINGS

The instant matter is before the Court upon appeal of the dismissal of a civil action for Appellant's failure to follow the pre-suit requirements of the Medical Professional Liability Act. Subsequent to the dismissal, Appellant filed a new civil action which is pending in the Wood County Circuit Court. The chronology is as follows:

February 28, 2002. First suit filed under the provisions of the Medical Professional Liability Act, effective 1985 (MPLA I).

March 1, 2002. Medical Professional Liability Act amendments contained in House Bill 601 (MPLA II), take effect.

August 2, 2002. Suit 1 was dismissed for lack of service on defendants.

May/June 2003. Procedurally defective, for various reasons, notice of claim/certificate of merit sent to putative defendants.

June 29, 2003. Suit 2 (Civil Action No. 03-C-296) filed in less than 30 days from last defective attempt at pre-suit requirements.

July 1, 2003. Medical Professional Liability Act amendments contained in House Bill 2122 (MPLA III), take effect.

October 20, 2003. Circuit Court dismisses Suit 2 for non-compliance with pre-suit requirements.

December 19, 2003. Lawsuit 3 filed. This lawsuit is actively being prosecuted.

As will be argued by *Amici Curiae*, this Court should affirm the procedural rulings of the circuit court below and dismiss the appeal.

INTEREST OF *AMICI CURIAE*:

1. The **West Virginia State Medical Association** ("WVSMA"), established in 1867, is a non-profit, voluntary, professional association of physicians who strive to extend medical knowledge and advance medical science; to promote the public health; to maintain the highest standards of medical education, to secure the enactment and enforcement of just medical laws; to promote the general welfare of the profession and to enlighten and direct public opinion in regard to medicine. The WVSMA has approximately 2500 members, including 65% of the active, practicing physicians in the State. The membership includes active and retired physicians, residents and medical students. WVSMA has filed *amicus* briefs with this Court on numerous, prior occasions. WVSMA members have a special interest in this matter in that they participated in advancing reforms to the Medical Professional Liability Act and are directly affected by this Court's decision.

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ARGUMENT

I. INTRODUCTION

Amici file this brief to urge the Court to maintain its traditional deference to the Legislature when it undertakes economic legislation rationally related to a legitimate public policy – addressing patient access to health care and injured-patient access to insurance proceeds—both adversely impacted by the collapse of the health care professional insurance industry in West Virginia. The specific matters before the court involve a challenge to procedural changes to the law; specifically, legislation that articulates simple, pre-suit requirements and specifies effective dates for the various parts of the affected statutes including the pre-suit requirements. Appellant Boggs seeks to avoid the application of the legislative changes through inapposite use of Rule 15 and Rule 60 of the W.Va. Rules of Civil Procedure.

However, Appellant has filed a new lawsuit that is active in the Circuit Court and which negates any claimed loss of access to the courts or claimed injury-in-fact.

Amici Curiae join with Appellees and urge the Court to affirm the rulings of the Circuit Court, which dismissed an improperly handled lawsuit, and affirm the adequacy of the plaintiffs' re-filed lawsuit in preserving plaintiff's claim.

Amici further urge the court not to rule on matters not properly before it: specifically, the constitutionality of portions of the amendments to the Medical Professional Liability Act, for which there is no pending case or controversy. However, given the broad brush of issues raised by appellant in his attempt to get the entire set of 2001 and 2003 amendments to the Medical Professional Liability Act before this Court, the brief is also offered to provide legal argument and background information as to the seriousness and deliberativeness of the legislators as they engaged in two years of difficult economic reform: i.e., fixing a broken health care system, so as "to provide for a comprehensive resolution of the matters and factors which the Legislature finds must be addressed..." W. Va. Code § 55-7B-1. The crisis that motivated the Governor and the Legislature to act in late 2001 resulting in the passage of H.B. 601 ("MPLA II"), and to pass comprehensive reform in March 2003 (H.B. 2122, "MPLA III"), will resume its stranglehold on the fragile, West Virginia health care infrastructure if this multi-faceted legislation is set aside by the Court.

II. THE APPELLANT HAS SUFFERED NO HARM AS A RESULT OF THE COURT'S DISMISSAL OF HIS SECOND SUIT AND THEREFORE LACKS STANDING TO CHALLENGE THE PRE-SUIT PROCEDURAL REQUIREMENTS OF MPLA II AND III.

A. Appellant has no actual injury from the dismissal and therefore, the Court need not reach a constitutional issue.

Appellant Boggs has a vested right in his accrued cause of action. *Gibson v. West Virginia Department of Highways*, 185 W.Va. 214, 225, 406 S.E.2d 440, 451 (1991). However, Appellant's vested right has not been substantially impaired by the procedural pre-suit requirements of the Medical Professional Liability Act (MPLA II & III). At present, given the procedural posture of this case and its re-filed status in the circuit court below, Appellant lacks standing to assert an injury resulting from the pre-suit requirements.

"Standing is comprised of three elements: First, the party attempting to establish standing must have suffered an 'injury-in-fact' - an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical. Second there must be a causal connection between the injury and the conduct forming the basis of the lawsuit. Third, it must be likely that the injury will be redressed through a favorable decision of the court." *Syl. Pt. 5, Findley v. State Farm Mutual Automobile Insurance Co.*, 576 S.E.2d 807 (W.Va. 2002). In this case, the first of these three elements is missing.

Appellant in this case complains about the Notice of Claim/Screening Certificate of Merit procedures and asserts that his "vested right in his cause(s) of action against the Defendants by imposing pre-filing requirements [ ] could prevent the prosecution of his claims and increas[e] the burden in obtaining a jury verdict." *See* Brief of Appellant p. 29. This is a conjectural argument and in appellant's case, untrue. Although his second case was dismissed because of Appellant's failure to comply with the statute, following the dismissal counsel for Appellant complied with its provisions and now has a medical liability lawsuit currently pending in the Circuit Court of Wood County. The fact that the Appellant has a viable case confirms that at present Appellant has suffered neither an injury in fact, impairment of a vested right nor a limitation on a procedural remedy. The Court should not reach a constitutional issue when it

need not. This has been the common law for nearly one hundred years. "The rule is that courts will not pass upon the constitutionality or validity of a legislative act when the case can be decided on other grounds." *West Virginia Nat. Bank v. Dunkle,* 64 S.E. 531, 533 (W.Va. 1909); *accord, State ex rel. Wells v. City of Charleston* 114 S.E. 382, 383 (W.Va. 1922)(citations deleted.); *State ex rel. Erie Fire Ins. Co. v. Madden,* 204 W.Va. 606, 610; 515 S.E.2d 351, 355 (W.Va., 1998). This rule is also adhered to at the federal level. *Pennsylvania v. Ritchie* 480 U.S. 39, 75 (1987).

B. The Pre-Suit requirements are procedural and can be applied to all cases filed after the effective date.

Should this Court reach the merits of appellant's arguments on the pre-suit requirements, then the Court must find that the procedural pre-litigation requirements are constitutional and effect only a minimal change in procedural law. *Amici* join in the constitutional arguments set forth in Appellees' briefs. The Legislature was within its province in asserting and applying an effective date for all cases filed on or after a date certain. As pre-suit requirements affect only the procedures that must be followed prior to filing a lawsuit, it is common sense to impose those requirements on any suit to be filed on or after an effective date. Statutory changes that are procedural in nature are applied retroactively. Syl. Pt. 4. *Findley*, 576 S.E.2d 807.

The Notice of Claim/Screening Certificate of Merit provisions of W.Va. Code §55-7B-6 impair or severely limit only one class: those who want to pursue a meritless lawsuit. The determination of the group or class to be protected by the statute is peculiarly a legislative judgment. *Gibson,* 406 S.E.2d at 446. "Deterring the filing of frivolous lawsuits...is a legitimate governmental interest...Thus, requiring an affidavit of merit is rationally related to achieving the result of reduced frivolous medical malpractice claims." *Bartlett v. North Ottawa Community*

Hosp. 625 N.W.2d 470, 475- 76 (Mich. App. 2001). This is sound public policy both from the courts' perspective of achieving control over its dockets, the public's in controlling the costs of their insurance, and the health care communities' in controlling the time wasted and frustration in responding to nuisance suits. If a plaintiff has a valid cause of action, the Notice of Claim/Screening Certificate of Merit process does not impede the presentation and prosecution of a lawsuit.[1]

The requirement for presenting expert testimony in medical liability actions was affirmed by this Court, prior to the passage of the initial Medical Professional Liability Act in 1986: "[B]ecause medical diagnosis and treatment typically involves professional practices and procedures familiar only to the medical community, it has long been accepted that expert medical testimony delineating the pertinent standard of care is essential to a plaintiff's case." *Totten v. Adongay*, 175 W.Va. 634, 637-38, 337 S.E.2d 2, 6 (1985). The Screening Certificate of Merit does not alter the common law exceptions on expert testimony. "[I]f ...the claimant's counsel, believes that no screening certificate of merit is necessary because the cause of action is

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[1] Other jurisdictions upholding the constitutionality of similar types of Certificate of Merit provisions include: *Mahoney v. Doerhoff Surgical Services, Inc.*, 807 S.W.2d 503 (Mo. 1991)("It is enough to satisfy equal protection that the legislature could have reasonably decided that the early disposition of frivolous medical malpractice suits, those that ultimately must be dismissed for want of expert testimony, would ameliorate the cost and availability of health care services."); *Thomas v. Fellows*, 456 N.W.2d 170 (Iowa 1990)("the problems surrounding medical liability, liability insurance, and the attendant availability and cost of medical services to the public are, at least arguably, rational reasons for the enactment of the expert witness designation requirements."); *Robinson v. Texas Department of Mental Health and Mental Retardation*, 2002 WL 992437, No. 01-01-00685-CV (Tex.App.-Hous.(1 Dist.) 2002)(not designated for publication)("Texas law is clear that when a litigant fails to comply with the expert report provisions of article 4590i, the dismissal of the action... is constitutional."); *Cornblat, P.A. v. Barow*, 708 A.2d 401 (N.J. 1998); *Henke v. Dunham*, 450 N.W.2d 595 (Minn.Ct.App.1990)("It could reasonably be concluded that lawmakers believed this statute would further the legitimate state interest of discouraging meritless medical malpractice claims in an effort to reduce increasing insurance premiums and health care costs."); *Chizmadia v. Smiley's Point Clinic*, 768 F.Supp. 266, 270(D.Minn. 1991); *Sisario v. Amsterdam Memorial Hospital*, 552 NYS2d 989 (N.Y.App.Div. 1990)("[c]learly, the requirement of a certificate of merit is rationally related to the goal of reducing malpractice insurance premiums."); *DeLuna v. St. Elizabeth's Hospital*, 588 N.E.2d 1139 (Ill. 1992).

based upon a well-established legal theory of liability which does not require expert testimony supporting a breach of the applicable standard of care, . . . the claimant's counsel, shall file a statement specifically setting forth the basis of the alleged liability of the health care provider in lieu of a screening certificate of merit." W.Va. Code §55-7B-6(c).

The Notice of Claim requires nothing more than a letter sent certified mail, return receipt requested, which includes a statement of the theory of liability, with a list of all health care providers and facilities that are also receiving a Notice of Claim. As noted above, the Screening Certificate of Merit requires an expert's opinion. This is a mandatory component of plaintiff's prosecution of any medical malpractice case. The only difference is one of timing. *See* Thomas J. Hurney & Rob Aliff, *Medical Professional Liability in West Virginia*, 105 W.Va.L.Rev. 369, 385, n. 115 (2003).

Appellant lacks standing to challenge the Notice of Claim/Screening Certificate of Merit on constitutional grounds because he has now complied with the Notice of Claim/Screening Certificate of Merit in his case below and has no injury-in-fact. Particularly in the absence of a jury verdict, there is no reason for this Court to speculate about potential impacts on Appellant's case.

III. THE APPELLANT HAS SUFFERED NO HARM IN THE ABSENCE OF A VERDICT AND LACKS STANDING; HOWEVER IF THIS COURT FINDS STANDING, THEN THE MEDICAL LIABILITY REFORMS ARE CONSTITUTIONAL UNDER THE CERTAIN REMEDY PROVISION OF THE WEST VIRGINIA CONSTITUTION.

As set forth *supra*, Appellant has suffered no injury in fact but speculates he will suffer harm because of the application of MPLA II and III. The Court should not and need not reach the constitutionality arguments advanced by appellants challenging certain provisions of MPLA

II and III when this matter can be resolved on non-constitutional grounds. However, should the Court reach these provisions, the legislative reforms conform to the balancing test devised by this Court and are constitutional.

Pursuant to the West Virginia Constitution, "[t]he courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law...." W.Va. Const. Art. III, §17. This provision contains three separate rights. *Gibson,* 185 W.Va. at 221, 406 S.E.2d at 447. The first is the "open court" provision stating that the "courts of this State shall be open[.]" The second, and the one implicated here if the Court finds Appellant has standing, is known as the "certain remedy" provision relating to the language "every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law[.]" *Id.* The third and final provision encompassing the remaining language of the provision is referred to as the "sale of justice" provision. *Id.*

Interpreting the certain remedy provision of the West Virginia Constitution, this Court has announced the following test to establish (1) whether the certain remedy provision is implicated and (2) if so, whether it has been violated:

> the legislation will be upheld... if, first, a reasonably effective alternative remedy is provided by the legislation, or second, if no such alternative remedy is provided, the purpose of the alteration or repeal of the existing cause of action or remedy is to eliminate or curtail a clear social or economic problem, and the alteration or repeal of the existing cause of action or remedy is a reasonable method of achieving such purpose.

Lewis v. Canaan Valley Resorts, Inc., 185 W.Va. 684, 695, 408 S.E.2d 634, 645 (1991).

In *Lewis v. Canaan Valley Resorts*, this Court, acknowledged that the certain remedy provision "itself states that the 'remedy' constitutionally guaranteed 'for an injury done' to protected interests is qualified by the words, 'by due course of law.'" *Lewis* at 694, 408 S.E.2d

644 (emphasis added). Specifically, this Court noted that the language extends considerable latitude to the legislature, and under Article VIII, section 13 of the West Virginia Constitution, "the general authority of the legislature to alter or repeal the common law is expressly recognized." *Id.*

Despite Appellant Boggs lack of injury-in-fact, he asserts a constitutional challenge to seven of the provisions of the West Virginia Medical Professional Liability Act: (1) the Notice of Claim/Screening Certificate of Merit requirements of W.Va. Code §55-7B-6,as amended and effective July 1, 2003, discussed by *amici, supra*; (2) the restoration of a twelve member jury panel, W.Va. Code §55-7B-6d; (3) "additional elements that must be proven to prevail on a 'loss of chance theory' of liability"; (4) the revised limits on non-economic damages, W.Va. Code §55-7B-8 effective July 1, 2003; (5) the new several liability provisions, W.Va. Code §55-7B-9 effective July 1, 2003; (6) the elimination of ostensible agency, W.Va. Code §55-7B-9(g) also effective July 1, 2003; and (7) the new collateral source provisions of W.Va. Code §55-7B-9(a). *See* Brief of Appellant, *seriatim.* If this Court reaches the certain remedies analysis, *Amici* join with Appellees in argument supporting the constitutional basis for the Legislature's reforms, both under the reasonably effective alternative remedy analysis, and the elimination or curtailment of a clear social or economic problem analysis, and offer these additional comments.

A. Pre-suit Requirements

In addition to the argument, *supra*, that the pre-suit rules do not implicate constitutional concerns, Amici note that the pre-suit requirements contain several provisions which provide putative plaintiffs protection from application of the statute of limitations while plaintiffs comply with the notice and certificate of merit requirements. W. Va. Code § 55-7B-6(b), (d), (e) & (g) (2003.) The Legislature also inserted the common law alternatives codifying limitations on the

need for expert testimony. W.Va. Code §55-7B-6(c). These protections operate as a reasonably effective alternative remedy to the changes in plaintiffs' pre-suit course of conduct.

B. Jury Size

Appellant argues that a twelve member jury, as opposed to six members, "has imposed a greater burden on Plaintiff than existed at the time his cause of action accrued since he would have to convince more jurors of liability than previously existed." Brief of Appellant at p. 30. First, it is mere speculation and conjecture that the Appellant will win or lose his case contingent upon how many individuals will be on the jury. Furthermore, it can hardly be said that additional jurors would severely limit existing procedural remedies permitting court adjudication. The Appellant's burden of proof remains the same, the manner in which he could present his case to the jury, assuming it goes to trial, remains the same, and the Appellant's right to take this case to trial and submit to "court adjudication" remains the same. Finally, the challenge in American jurisprudence has been over the utilization of six jurors instead of twelve. As noted by Justice Marshall, who opposed six person juries:

> [w]hen a historical approach is applied to the issue at hand, it cannot be doubted that the Framers envisioned a jury of 12 when they referred to trial by jury. It is true that at the time the Seventh Amendment was adopted, jury usage differed in several respects among the States. See generally Henderson, The Background of the Seventh Amendment, 80 Harv.L.Rev. 289(1966). But for the most part at least, these differences did not extend to jury size which seems to have been uniform and, indeed, had remained so for centuries.

Colgrove v. Battin, 413 U.S. 149, 176 (1973)(Justice Marshall dissenting).

Appellant's speculation regarding the size of the jury does not rise to a constitutionally cognizable challenge. Appellant Boggs cannot show that his vested right in his cause of action

has been substantially impaired or that his procedural remedies have been severely limited. [2]

C. Loss of a Chance Theory

Appellant challenges the constitutionality of the MPLA III provisions that add "additional elements that must be proven to prevail on a 'loss of chance theory' of liability." Brief of Appellant at p. 31. This is an entirely speculative argument. The Complaint does not assert a "loss of a chance" theory of liability. As such, it is impossible for Appellant to assert that he has suffered an "injury in fact" or might possibly suffer an injury under application of this doctrine, as modified. In addition, MPLA III codifies existing case law adding only a measure of clarity as to the terms. W.Va. Code §55-7B-3(b). "Where a plaintiff in a malpractice case has demonstrated that a defendant's acts or omissions have increased the risk of harm to the plaintiff and that such increased risk of harm was a substantial factor in bringing about the ultimate injury to the plaintiff, then the defendant is liable for such ultimate injury." *Thornton v. CAMC*, Syl. Pt. 5, 172 W.Va. 360, 305 S.E.2d 316 (1983). The Medical Professional Liability Act defines what that substantial factor is and sets it at twenty-five percent. Given that twenty-five percent is considerably less than the preponderance of the evidence standard of fifty-one percent; this definition does not qualify as either a substantial impairment or severe limitation.

D. Ostensible agency Theory

Appellant also challenges the constitutionality of the Legislature's re-affirmation of classic ostensible agency principles, modified by the requirement of mandatory insurance, W.Va. Code §55-7B-9(g). The section states that "[a] health care provider may not be held vicariously liable for the acts of a nonemployee pursuant to a theory of ostensible agency unless the alleged agent does not maintain professional liability insurance covering the medical injury which is the

[2] It should be noted that there is no longer a requirement for a unanimous verdict. "If [the jury] cannot reach a unanimous verdict, they may return a majority verdict of nine of the twelve members of the jury." W.Va. Code §55-7B-6d.

subject of the action in the aggregate amount of at least one million dollars." Again, it is pure speculation that (1) Appellant Boggs will prevail on his claim of negligence against defendants, and (2) that the amount of damages awarded by a jury based on actual findings of negligence against each actual tortfeasor, as opposed to an ostensible agent, would not be fully satisfied by the available insurance. In Syllabus Point 7 of *Harless v. First Nat'l Bank in Fairmont*, 169 W.Va. 673, 289 S.E.2d 692 (1982), this Court found that "It is generally recognized that there can be only one recovery of damages for one wrong or injury.... A plaintiff may not recover damages twice for the same injury simply because he has two legal theories." However, a plaintiff can recover against two different tortfeasors for their individual torts. The Legislature has not altered this principle. Rather, the Legislature has limited the application of the doctrine of ostensible agency, which doctrine was expanded by the Court in *Woodrum v. Johnson*, syl. Pt. 3, 210 W.Va. 762, 559 S.E.2d 908 (2001); and *Matheny v. Fairmont General Hosp., Inc.*, 212 W.Va. 740, 575 S.E.2d 350 (2002).

Undoubtedly, one of the Court's main purposes in its expansion of the application of vicarious liability/ostensible agency is to ensure that a plaintiff will be able to recover when the ostensible agent might not have the resources to satisfy the obligation. Here, the Legislature has addressed those concerns by allowing a plaintiff to seek redress from the patient injury compensation fund for uncollectible economic damages, §29-12D-1. The plaintiff is further protected as the provision only applies if the "agent" has professional liability insurance in the aggregate amount of at least one million dollars. As such, a reasonably effective alternative remedy has been provided. Appellant has not suffered and cannot assert that he has suffered an injury in fact, or any impairment or limitation on his medical negligence cause of action by the statutory rules governing the operation of the doctrine of ostensible agency.

E. Damage Calculations

The remaining portions of the MPLA II and III with which the Appellant takes issue deal with the calculations of damage, *i.e.*, the reduction in the existing, non-economic damages cap, several liability and use of collateral sources. First , in *Fein v. Permanente Medical Group*, 695 P.2d 665 (Cal. 1985), a case which this Court relied heavily upon in deciding *Robinson v. CAMC*, 186 W.Va. 720, 414 S.E.2d 877 (1991), the California Supreme Court noted that "it is well established that a plaintiff has no vested property right in a particular measure of damages and that the Legislature possesses broad authority to modify the scope and nature of such damages." *Fein* at 679. (emphasis added). The new caps are more in line with the now existing caps in other states that have enacted reform.[3] The Wisconsin Supreme Court recently reaffirmed the constitutionality of its $350,000 cap on non-economic damages in medical liability actions, as well affirmed the constitutionality of its $100,000 cap on non-economic damages in wrongful death medical liability actions. *Maurin v. Hall*, 682 N.W.2d 866, 2004 WI 100 (2004). The Court found no violations of due process/equal protection or the separation of

[3]*See e.g.*, AK ST §09.17.010(Alaska statute with a $400,000.00 or $8,000 times life expectancy cap on noneconomic damages); Cal.Civ.Code §3333.2 (California statute with a $250,000.00 cap on noneconomic damages); CO ST §13-64-302 (Colorado statute with a $1,000,000.00 cap on all damages of which only $250,000.00 can be noneconomic); HI ST §663-8.7 (Hawaii statue limiting damages for pain and suffering to maximum of $375,000.00); ID ST §6-1603 (Idaho statute limiting noneconomic damages to $250,000.00); KS ST §60-19a02 (Kansas statue limiting noneconomic damages to $250,000.00); MCLA §600.1483 (Michigan statute limiting noneconomic damages to $280,000.00 unless severe injuries then $500,000.00); Miss.Code.Ann §11-1-60 (Mississippi statute limiting noneconomic damages to $500,000.00); MO ST §538.210 (Missouri statute limiting noneconomic damages to $350,000.00); MT ST §25-9-411 (Montana statute limiting noneconomic damages to $250,000.00); NRS §41A.031(Nevada statute limiting noneconomic damages to $350,000 unless exceptional circumstances); ND ST §32-42-02 (North Dakota statute limiting noneconomic damages to $500,000.00); SDCL §21-3-11 (South Dakota statute limiting noneconomic damages to $500,000.00); Texas Civ. Prac.& Rem. §74.301(limiting noneconomic damages to $250,000.00); UT ST §78-14-7.1 (Utah statute limiting noneconomic damages to $400,000.00); WI ST §893.55 (Wisconsin statute limiting noneconomic damages to $350,000.00); LSA-R.S. §40:1299.42 (Louisiana statute limiting damages in general to $500,000.00 exclusive of future medical care and related benefits); and NMSA §41-5-6 (New Mexico statute limiting total damages in malpractice claims to $600,000.00).

powers doctrine. Second, there has been no determination by a jury that the Appellees are liable for damages, nor has there been a determination of damages or whether there are any collateral sources at issue in this case. Third, the Legislature imbedded reasonably effective alternative remedies within each damages provision in the reform; including creation of two different noneconomic damages caps depending on severity of injury, tying the damages caps to the Consumer Price Index to account for inflation, and creation of the Patient Injury Compensation Fund [4]. W.Va. Code §55-7B-8; §55-7B-9(b).

F. Effective dates of MPLA II and III are clear and therefore Constitutional.

The specified, effective date embodied in §55-7B-10 is a clearly-stated expression of legislative intent to provide retroactive effect to specific classes of claims and such an intent is within its province.[5] The Legislature has followed the mandate of this Court in specifying the exact rules for application of the effective dates for various portions of H.B. 601 and H. B. 2122. A presumption of prospective application of a statute is overcome by "clear, strong and imperative words or by necessary implication, that the legislature intended to give the statute retroactive force and effect." *Findley*, Syl. Pt. 3, 576 S.E.2d at 807. Even if the Court determines the provisions of MPLA II and III to be substantive, as opposed to procedural, the

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[4] "There is created the West Virginia patient injury compensation fund, for the purpose of providing fair and reasonable compensation to claimants in medical malpractice actions for any portion of economic damages awarded that is uncollectible as a result of limitations on economic damage awards for trauma care, or as a result of the operation of the joint and several liability principles and standards, set forth in article seven-b, chapter fifty-five of this code." W.Va. Code § 29-12D-1.

[5] As this Court acknowledged, "the determination of the group or class to be protected by the statute is peculiarly a legislative judgment." *Gibson v. West Virginia Dept. of Highways*, 406 S.E.2d at 446.

There are myriad examples of statutes that create or impact subsets of the population. This is neither new nor contrary to our system of government and justice. *See, e.g.*, The West Virginia Skiing Responsibility Act, *W.Va.Code*, §§ 20-3A-1 to 20-3A-8 [1984], which immunizes ski area operators from tort liability for the inherent risks of skiing, upheld by this Court in *Lewis v. Canaan Valley Resorts, Inc*, 185 W.Va. 684, 408 S.E.2d 634, 641 (W. Va. 1991); or the healthcare provider taxes, W.Va. Code §§ 11-27-1 – 36; or The Governmental Tort Claims and Insurance Reform Act, W. Va. Code §§29-12A-1—18, upheld by this Court in *Pritchard v. Arvon*, 186 W.Va. 445, 413 S.E.2d 100(1991).

legislation can be applied retroactively if "the statute provides explicitly for retroactive application." Id. at Syl. Pt. 4.

A comparison of the language used by the Legislature beginning with the adoption of MPLA I in 1986 through the adoption of MPLA III, demonstrates the Legislature's deliberate choice.

Medical Liability Reform Statute	**Language Specifying Effective Date**
1986 version (MPLA I)	"The provisions of this article **shall not apply to injuries which occur before the effective date** of this said Enrolled Senate Bill 714."
H.B. 601, (2001) (MPLA II)	"The **amendments** to this article . . . **apply to all causes of action** alleging medical professional liability **which are filed** on or after the first day of March, two thousand two."
H.B. 2122, (2003) (MPLA III)	"The **amendments** to this article . . . **apply to all causes of action** alleging medical professional liability **which are filed** on or after the first day of July, two thousand three."

The Legislature knew and appreciated the difference between when a cause of action accrues ("not apply to injuries which occur before the effective date", MPLA I) and when a cause of action is filed (MPLA II and III).

There is no ambiguity here; there are no conflicting or limiting words; the intent of the Legislature is clear — MPLA II and III apply to all causes of action filed on or after the effective date- - not to causes of action accruing on or after that date. *Amici* join in the arguments of Appellees in support of the clear, constitutionally permissible implementation of the effective date for the provisions of MPLA II and III.

IV. THE LEGISLATURE STUDIED; DELIBERATED AND ENACTED TWO ROUNDS OF CONSTITUTIONAL REFORM RATIONALLY-RELATED TO CRITICAL PUBLIC POLICY OBJECTIVES: ACCESS TO HEALTH CARE AND ACCESS TO LIABILITY INSURANCE .

This Court has already concluded that the legislature could conceive to be true the copious data upon which MPLA I is based. *Verba v. Ghaphery*, 210 W.Va. 30, 35, 552 S.E.2d 406, 411 (2001), *citing, Robinson*, 186 W.Va. at 730, 414 S.E.2d at 887 (citation omitted). The volumes of data that the legislature conceived to be true in undertaking the reforms set forth in MPLA II and III, as briefly referenced herein, support a similar determination by this Court that the legislature acted constitutionally when it undertook reform of MPLA I. As this Court noted in *Verba*: "It is up to the legislature and not this Court to decide whether its legislation continues to meet the purposes for which it was originally enacted. If the legislature finds that it does not, it is within its power to amend the legislation as it sees fit." *Verba*, 210 W.Va. at 36, 552 S.E.2d at 412.

The short term view of whether the new legislative reforms are or are not working is a matter for future legislatures to consider. What is known at present is that the Physician's Mutual Insurance Company is up and running, and that there is healthy competition with two private, for-profit insurance companies remaining in West Virginia. Premiums have risen because the reforms are in their infancy.[6] If the reforms are delayed or struck down by this Court, premiums will have to rise far more for the Mutual to break-even or for for-profit entities to remain in West Virginia. The result will be a return to 2002 for health care: physicians

[6] As of 2003, while insurance premiums have risen 505% nationally, premiums have risen 167% in California which has had tort reform since 1975 with the passage of the Medical Injury Compensation Reform Act. AMA, "MICRA vs. Prop.103, Why are Medical Liability Premiums Stable and Competitive In California?" (Publication available from the American Medical Association 2003).

leaving, nursing homes and hospitals in deficits with steep premiums facing them; the loss of the private sector insurance companies and an unfunded liability for the Mutual. The public is the ultimate loser with either further restrictions on access to care or injury with no insurance to respond to a tort claim.

The Legislature undertook its initial tort reform of medical professional liability litigation to respond to an insurance crisis that existed in 1986 (MPLA I). By 2001-2002 it became obvious to the legislators as well as the Insurance Commissioner that more reform was needed as the existing climate was insufficient to keep medical liability insurers in the West Virginia market or to make West Virginia an attractive place for physicians and other health care professionals to practice. By 2002 the nursing home industry was faced with alarming insurance increases (if it could find insurance at all), and hospitals, largely unprofitable, were facing lack of insurance or increased pressures to put their strained resources into insurance settlement pots, in part due to the Court's decisions in *Woodrum*, 210 W.Va. 762 and *Matheny*, 212 W.Va. 740, which prevents release of the hospital as alleged ostensible principal, even though plaintiff has settled with the alleged ostensible agent.

A. The Legislature deliberately and rationally crafted a legislative solution to a crisis.

1. House Bill 601

The tort reform provisions of H.B. 601 took effect on March 1, 2002, to apply to all lawsuits filed thereafter. MPLA II and the creation of the State's professional liability insurance program ("BRIM II") designed to cover the many hundreds of physicians who were losing their insurance coverage beginning in January 2002, as companies exited the market, succeeded in awakening the majority of stake holders to the reality that the collapse of the professional liability insurance

market in West Virginia is tied to the collapse of the health care system. H.B. 601 was the legislators' first efforts to stabilize the insurance market and create a climate to attract and retain physicians, nursing home providers and support the continued existence of hospital-based services. H.B. 601 includes the modest requirement that a potential plaintiff provide notice and a certificate of merit before filing a lawsuit.

Several of *Amici curiae* began in advance of the regular 2001 session, and continuing through the Sixth Extraordinary Session of 2001, to educate the Legislature and the public about the crises they were facing: the unavailability and unaffordability of professional liability insurance and the inability to attract or retain health care professionals. During the regular session, physicians appeared in large numbers at the Legislature and warned of the impending unavailability and unaffordability of their professional liability insurance, which would quickly drive them out of practice. [7] The West Virginia State Medical Association advocated for pre-litigation screening panels and other reforms. The Legislature took no action during the Session; however, Governor Wise requested the new Insurance Commissioner, Jane Cline, to study the problem and its causes. T. L. Headley, "Wise asks Insurance Commissioner to Study Medical Malpractice Issue," *The State Journal*, March 19, 2001. Also, Senate Concurrent Resolution No. 14 created a Joint Committee on Government and Finance "to review, examine and study the medical malpractice insurance rate crisis," and to report its findings at the regular 2002 session.[8]

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[7] *See, e.g.*, "Doctors Taking Fight to Capitol Group will Present Arguments Against Malpractice Lawsuits." *Charleston Gazette*, January 8, 2001; Bailey, J., "Many Physicians Consider Leaving the State," *The State Journal*, January 8, 2001; Leonard, M., "Insurance Rates Up Dramatically," *Charleston Gazette*, January 26, 2001; Rulon, M., "Official Says WVU, Marshall Owe Millions for Insurance," *Charleston Daily Mail*, March 13, 2001.

8 Senate Conc. Resol. No. 14, by Senators Minard, Kessler, Sharpe, et al, reported March 14, 2001. "The Legislature has been presented various materials demonstrating that these ever-increasing malpractice insurance costs are greatly outpacing the growth of such rates in the states surrounding West Virginia: and Whereas, the potential result of this disparity with other states...could result in an exodus from...West Virginia of our most qualified and dedicated physicians;...[and] could also result in the loss to West

Immediately before the Governor's proclamation calling for an Extraordinary Session to begin October 21, 2001, the West Virginia Trial Lawyers Association posted a policy statement to the *Wheeling Intelligencer* which was printed in full on October 14, 2001. The policy statement included the following: "a common sense compromise between the desirability of weeding out frivolous cases and the injured victim's right to seek redress without being unfairly burdened, would be to shorten the time periods provided by W. Va. Code within which the plaintiff must file a certificate with the court that qualified expert testimony has or will be secured to support the plaintiff's claim." "Lawyers, Problem Doctors Face Rests with Insurance," The Intelligencer, Wheeling News-Record. Oct. 14, 2001. Thus, it is disingenuous for the American Trial Lawyers Association/West Virginia Trial Lawyers Association to be filing an *amicus* brief in opposition to its own public endorsement of the Certificate of Merit process.

Upon the start of the Sixth Extraordinary Session, the Governor was ready with his proposed legislative reforms, which were largely adopted with the passage of amended House Bill 601. These proposals included the notice of claim and screening certificate of merit, which were originally presented in H.B. 603 at the request of the Executive, and introduced by Speaker Kiss and Delegate Trump on October 21, 2001. Simultaneously, S.B. 6001, by request of the Executive and introduced by Senate President Tomblin and Senator Sprouse, was referred to the Senate Judiciary Committee. It, too, contained a proposed screening certificate of merit. The Legislature's adoption of the screening certificate in conjunction with other reforms and the creation of BRIM II, is directly related to a legitimate economic goal that the legislators and executive branch had been focusing on since the regular 2001 session: to make professional

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Virginia communities of hospital units and branch offices, because available, qualified replacements for the lost physicians could not be recruited because West Virginia has high malpractice insurance rates."

liability insurance more affordable and available, and the risks insured against more certain so that accurate underwriting is possible. The certificate of merit is designed to weed out unsupportable claims at the front-end of litigation before health care providers and their insurers spend thousands of dollars defending against meritless suits. The notice of claim is tied to an effort to encourage early mediation which will also decrease costs of defense.

Further, the Legislature created a window of opportunity for plaintiffs with accrued but not filed claims.9 The Legislature deliberately chose a date certain in the future: March 1, 2002, for the reforms to take effect for suits filed that day and thereafter. The remaining portions of H.B. 601 took effect from passage on December 1, 2001.

2. House Bill 2122

Any chance for a healthy, competitive insurance marketplace had collapsed in late 2002 with the departure of St. Paul Insurance Company, which had acquired American Continental Insurance Company in 1999; thus leaving only one remaining private insurer writing coverage for more than five percent of the physician market, and one private insurer writing more than five percent of the hospital market. W.Va. Office of the Insur. Comm'r., *State of W.Va. Medical Malpractice Report on Insurers with over 5% Market Share*. Nov. 2002. All professional liability insurers have lost money in each of the six years by writing business in West Virginia. *Id.* at p. 8. Professional liability insurance through the West Virginia Board of Risk and Insurance Management, BRIM II, created as part of H.B. 601, was unaffordable for many, and BRIM II was already running a deficit based on calculations of prudent reserves to meet expected pay-outs. W.Va. Bd. of Risk and Ins. Management, *2003 Legislative Update* at [p]. 5.

9 See *Appendix*, Exhibit A. A significant spike in lawsuit filings occurred at the end of February 2002 and again at the end of June 2003. In each spike over one hundred suits were filed. Pursuant to MPLA II, the circuit court clerks began in February 2002 to pay into the medical liability fund the filing fees for any medical professional liability action. W.Va. Code §59-1-28a(f). The filing data has been aggregated by the State Treasurer.

As of November 30, 2002, for the prior five months of operation, BRIM showed net losses of $1.3 million for the H.B. 601 doctors. *Id.* For the ten year period, 1991-2000, West Virginia had the distinction of having the worst underwriting losses as a percentage of direct premiums earned, *minus* 55%. NAIC, *Profitability by Line by State in 2000.*

Many legislators expressed unhappiness about being in the insurance business; i.e., BRIM II. *See, e.g., Physicians' State Run Insurance Nears End*, Charleston Gazette, January 20, 2003. Doctors were leaving or not coming to West Virginia causing patients to lose their doctors and hospitals to experience staffing shortages. John G. Brehm & Patricia Ruddick, *Evidence of Decline in Physician Availability to W. Va. Hospitals*, West Virginia Medical Institute, 2003. Given that West Virginia is already "medically underserved" as defined by the state and federal government, *see* W.V. Dept. of Health and Human Resources, *Medically Underserved Population*, January 2003, any decrease in available physicians, clinics or hospitals is critical. Several small hospitals already in weak financial condition were facing intolerably large insurance increases. Charleston Area Medical Center lost its status as a level one trauma center in August 2002. *See CAMC Issues Warning on Care*, Charleston Gazette, August 29, 2002, p. 1. The administration's "quick fix" moved the physicians into the state run BRIM I insurance program and provided four million dollars to the four state trauma centers. *See Trauma Care Crisis Not Over*, Charleston Daily Mail, October 22, 2002. Tom Susman, Director of the Public Employees Insurance Agency, warned a Legislative Committee that "We've got ninety days to come up with a program that deals with the true trauma center issues." *Id.*

The cost of professional liability insurance for nursing homes moved into the stratosphere leaving many in precarious financial condition. "The Legislature further finds that medical liability issues have reached critical proportions for the state's long-term heath care facilities....

the medical liability insurance crisis for nursing homes may soon result in a reduction of the number of beds available to citizens in need of long-term care." H.B. 2122, *codified at* §55-7B-1.

The *amici curiae* were informed of and advised Legislators of the twenty-five years of experience that California had with tort reform and the resulting stability of their insurance market. U.S. Dept. of Health and Human Serv., *Confronting the New Health Care Crisis: Improving Health Care Quality and Lowering Costs by Fixing our Medical Liability System*, July 24, 2002, at pp. 17-18; and *Update on the Medical Litigation Crisis: Not the Result of the 'Insurance Cycle,'* Sept. 25. 2002. *Amici* had studied and shared with legislative committees the Willis Re, *Physician Mutual Insurance Company Analysis*, prepared for the WVSMA in 2002, advising as to needed tort reform for a physicians' mutual insurance company to have any chance of financial stability. ("The California Medical Injury (MICRA) Reform Act of 1975 is universally regarded as the most successful and durable set of reforms for creating a stable medical malpractice environment and encouraging an active, competitive voluntary insurance market for physician coverage." Id. at p. [15]...."without these type of changes, ... success is unlikely." Id. at p. [16].) Based on these studies and many others, *amici curiae* joined in advocating for a long-term solution to the tenuous health care liability insurance market, which would include, *inter alia,* tort reform. The goal: to create a climate, as quickly as possible, where insurance is available and affordable for the professional health care community so that patients truly deserving of a damages award will have a remedy without bankrupting their individual doctors or forcing closure of the hospital or nursing home doors.

The Insurance Commissioner briefed the interim legislative committee in December 2002, on the losses suffered by the insurance companies in West Virginia leading to the unavailability of professional liability insurance. *Amici* and others continued to provide research

studies and other materials either during legislative interims or during the session similar to that reviewed by this Court at the time it rendered its decision in *Verba*.

In early January, the Governor submitted his proposed medical liability tort reform legislation. The Governor stated in his press release: "The health of tens of thousands of West Virginians is at stake, and I urge this Legislature to put this bill at the top of the agenda." Governor's Press Release, January 8, 2003. The Governor's bill included a specified July 1, 2003, effective date for implementation of the tort reform for all cases filed on and after that date. On January 16, 2003, Com. Sub. for H.B. 2122 passed the House of Delegates. It contained an identical July 1, 2003, effective date.

The Senate spent the next month studying and working on its tort reform bill. The Senate passed its bill on February 7, 2003. It, too, contained a specified July 1, 2003, effective date for all cases filed on or after July 1.

During the remaining weeks of the session, the two houses worked out their differences. Finally, an agreed upon bill was passed and went to the governor. The bill was vetoed for technical flaws, re-voted upon and re-sent to the Governor on March 1, 2003. The explicit statement of the effective date of July 1, 2003, for the MPLA III provisions to apply to all suits filed on that date and thereafter, was *not* one of the points of contention during the final negotiation process between the two houses. It was one of the points upon which both sides agreed. *See Appendix, Exhibit B*, affidavit of Don R. Sensabaugh, Jr.

The Legislature, Governor and current Insurance Commissioner have studied the medical liability insurance crisis and its impact on professional health care delivery in West Virginia for the period 2001-2003. They concluded the problem was acute. The Legislature addressed the social and economic problem as by passing two rounds of tort reform, as well as creation of a

physician's mutual insurance company, with financing, certain tax credits and reform of the West Virginia Medical Practice Act. The comprehensive economic legislation is rational and bears a reasonable relationship to the proper governmental purposes of developing a stable and insured health care community.

B. The Crisis Is Easing But The Health Of The Health Care Community Remains Fragile.

As this Court has observed, it is not its role to decide on the wisdom of the Legislature's choices to address a recognized social problem. *Lewis*, 408 S.E.2d at 692. The crisis, which the medical community predicted in 2001-2002, is upon West Virginia. The fact that the plaintiffs' bar or some members of this Court prefer another solution to this economic crisis is not within the scope of this Court's analysis. The Legislature had to immerse itself in the business of providing professional liability insurance when the market collapsed. The Legislature quickly learned that the business as it existed in 2002-2003 could not break even without impairing health care in this state. They also learned that the entire medical delivery system was in upheaval. Consequently, the Legislature adopted medical liability tort reforms to support its creation of the Physicians' Mutual Insurance Company, so that it and other insurers' might have a stable environment in which to accurately underwrite risk and cover losses. The Legislators' stated purposes include: 1) "promotion of stable and affordable medical malpractice liability insurance premium rates [to] induce retention of physicians practicing in this state," W.Va. Code § 11-13T-1; 2) lessen the "competitive disadvantage [West Virginia has] in attracting and retaining qualified physicians and other health care providers," W. Va. Code §55-7B-1; 3) address the nursing home liability crisis, *Id.*; 4) form the physician's mutual and 5) establish a fund to assure adequate compensation to victims of malpractice, *Id.* West Virginia, at present, remains woefully medically underserved. The West Virginia Board of Medicine has improved its

record-keeping since the crisis began in 2002. The Board reports that as of August 11, 2004, there are 3467 active and practicing physicians for the entire state. In West Virginia 40 of the 55 counties are designated as partial or whole-county Health Professional Shortage Areas (HPSA). This is a federal designation that identifies areas with a shortage of primary care physicians—generally, areas with a ratio of less than one primary care physician per 3,500 population. In addition, with only a few exceptions, every West Virginia County is designated as medically underserved. *See* Division of Recruitment, WVDHHR website: http://www.wvrecruitment.org/index.htm.

Might the legislature be successful in achieving its goals? On September 08, 2004, Governor Wise commenting on the decision of Medical Assurance of West Virginia's decision to stay and expand its market share, stated: "There is mounting evidence that West Virginia's medical liability insurance market continues to stabilize....We will do all we can to guarantee that every West Virginian has access to the doctors he or she needs and that every West Virginia doctor has access to reasonably priced medical malpractice insurance." R. Wise, *Wise Announces Medical Assurance to Expand its Presence in the State.* Governor's Press Release, September 8, 2004. John Brehm, Karen Hannah and Patricia Ruddick report in their survey of 32 West Virginia hospitals that there has been a steady decline in the number of staff physicians from 2001—2004, but that the decrease has leveled off. J. Brehm et al.. *Physician Supply in Key Medical Specialties in West Virginia Hospitals, 2001—2004.* W. Va. Medical Journal, vol.100, no. 4 (July/August 2004). The Legislature and the health care community believe the reforms can work. *Amici* urge this Court to resolve this case without reaching the constitutional issues, as such are not necessary, but ultimately when the matter is properly before it, to uphold MPLA II and III, as a constitutional exercise of the Legislature's power to engage in economic reform to

address compelling societal issues.

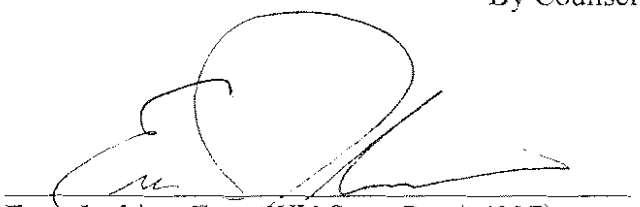
CONCLUSION

Amici curiae ask this Court to follow the enduring common law principle that it not reach a constitutional issue when a matter can be decided on other grounds. In this case, Appellant Boggs has his on-going cause of action filed in December 2003, civil action No. 03-C-623. The prior suit, civil action No. 03-C-296 that forms the basis for this appeal, was properly dismissed for non-compliance with the pre-suit requirements of the Medical Professional Liability Act. *Amici curiae* join Appellees in asking this court to affirm the rulings below.

Alternatively, should this Court reach the merits, then *Amici* ask this court to affirm the constitutionality of the pre-suit litigation statutory requirements. Finally, should this Court deem it necessary to reach beyond the pre-suit requirements, *Amici* ask this Court to affirm the Legislature's medical liability reforms created to provide insurance for those with valid claims by supporting a solvent physicians' mutual insurance company, and a stable and growing medical community.

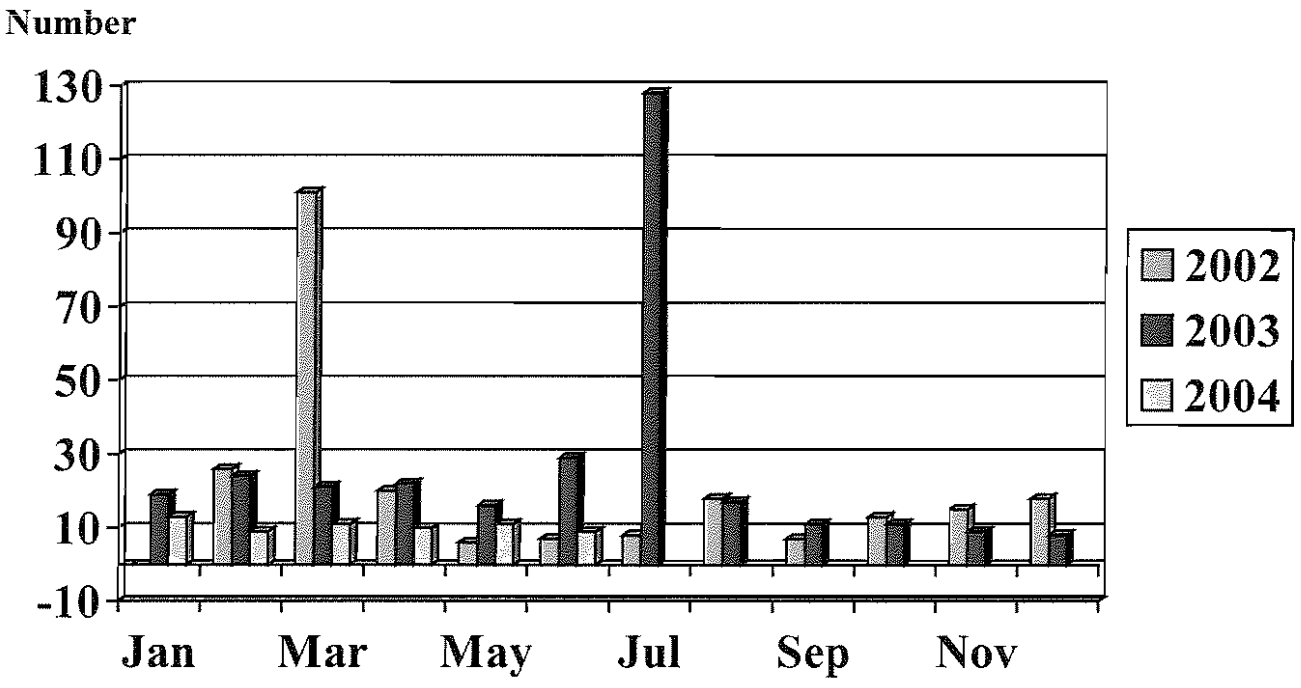
WEST VIRGINIA STATE MEDICAL ASSOCIATION, AMERICAN MEDICAL ASSOCIATION, WEST VIRGINIA HOSPITAL ASSOCIATION, WEST VIRGINIA HEALTH CARE ASSOCIATION, THE WEST VIRGINIA ORTHOPAEDIC SOCIETY, THE WEST VIRGINIA ASSOCIATION OF PHYSICIAN ASSISTANTS, THE WEST VIRGINIA CHAPTER OF THE AMERICAN ACADEMY OF FAMILY PHYSICIANS, THE PHYSICIANS ALLIANCE FOR REFORM, THE WEST VIRGINIA ACADEMY OF OPHTHALMOLOGY, THE WEST VIRGINIA SOCIETY OF OSTEOPATHIC MEDICINE, INC., THE WEST VIRGINIA ACADEMY OF OTOLARYNGOLOGY-HEAD AND NECK SURGERY, INC.

By Counsel

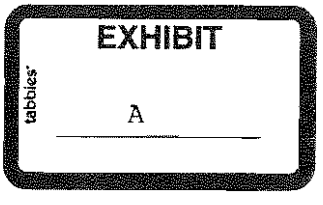


Evan Jenkins, Esq. (WV State Bar # 4907)
4307 MacCorkle Avenue, S.E.
Charleston, West Virginia 25304
Counsel for *Amici Curiae*

Medical Liability Suits Filed*



*Derived from data supplied by the W. Va. State Treasurer's Office provided on the attached spreadsheets.



MEDICAL LIABILITY FUND -- 2002

West Virginia State Treasurer's Office

Reported by Month Collected *

COUNTY	Jan-02		Feb-02		Mar-02		Apr-02		May-02		Jun-02		Jul-02		Aug-02		Sep-02		Oct-02		Nov-02		Dec-02		2002 TOTALS		COUNTY
	Amount	No	Amount	No	Amount	No	Amount	No	Amount	No	Amount	No	Amount	No	Amount	No	Amount	No	Amount	No	Amount	No	Amount	No	Amount	No.	
Barbour																											Barbour
Berkeley															$330	2			$495	3			$165	1	$990	6	Berkeley
Boone																											Boone
Braxton																											Braxton
Brooke					$165	1	$165	1													$330	2	$165	1	$825	5	Brooke
Cabell			$330	2	$2,475	15	$330	2	$165	1			$495	3	$165	1					$495	3	$330	2	$4,785	29	Cabell
Calhoun																											Calhoun
Clay					$165	1																			$165	1	Clay
Doddridge																											Doddridge
Fayette					$165	1																			$165	1	Fayette
Gilmer															$165	1									$165	1	Gilmer
Grant			$165	1	$330	2	$165	1																	$660	4	Grant
Greenbrier					$495	3			$165	1											$165	1			$825	5	Greenbrier
Hampshire																											Hampshire
Hancock																											Hancock
Hardy																											Hardy
Harrison					$165	1											$165	1							$330	2	Harrison
Jackson															$165	1									$165	1	Jackson
Jefferson																							$165	1	$165	1	Jefferson
Kanawha			$2,145	13	$5,940	36	$330	2	$165	1	$165	1	$495	3	$165	1	$165	1	$495	3	$495	3	$990	6	$11,550	70	Kanawha
Lewis											$165	1			$165	1									$330	2	Lewis
Lincoln																											Lincoln
Logan			$495	3	$660	4			$330	2	$165	1			$330	2	$165	1	$165	1			$165	1	$2,475	15	Logan
Marion																											Marion
Marshall					$495	3									$165	1									$660	4	Marshall
Mason							$990	6											$165	1	$165	1			$1,320	8	Mason
McDowell																					$330	2	$165	1	$495	3	McDowell
Mercer					$660	4	$495	3															$165	1	$1,320	8	Mercer
Mineral																											Mineral
Mingo					$165	1					$165	1							$165	1			$165	1	$660	4	Mingo
Monongalia			$495	3	$1,485	9					$165	1			$330	2			$165	1			$165	1	$2,805	17	Monongalia
Monroe																											Monroe
Morgan																											Morgan
Nicholas																											Nicholas
Ohio			$165	1	$1,320	8									$495	3			$330	2	$165	1			$2,475	15	Ohio
Pendleton																											Pendleton
Pleasants																											Pleasants
Pocahontas																											Pocahontas
Preston			$330	2																					$330	2	Preston
Putnam					$165	1	$165	1	$165	1			$165	1											$660	4	Putnam
Raleigh					$660	4	$330	2			$330	2					$330	2			$330	2	$165	1	$2,145	13	Raleigh
Randolph																	$165	1	$165	1					$330	2	Randolph
Ritchie																											Ritchie
Roane					$165	1	$165	1																	$330	2	Roane
Summers																											Summers
Taylor																											Taylor
Tucker																											Tucker
Tyler							$165	1																	$165	1	Tyler
Upshur			$165	1																					$165	1	Upshur
Wayne																											Wayne
Webster																											Webster
Wetzel															$330	2	$165	1							$495	3	Wetzel
Wirt																											Wirt
Wood					$990	6							$165	1	$165	1							$165	1	$1,485	9	Wood
Wyoming																											Wyoming
TOTALS			$4,290	26	$16,665	101	$3,300	20	$990	6	$1,155	7	$1,320	8	$2,970	18	$1,155	7	$2,145	13	$2,475	15	$2,970	18	$39,435	239	TOTALS

* January shows zero amounts and numbers because January collections are received in February. Consequently, each month's numbers are recorded in the following month. Therefore, the number of lawsuits filed in February is reported in the March column.

MEDICAL LIABILTY FUND -- 2003
West Virginia State Treasurer's Office
Reported by Month Collected

COUNTY	Jan-03		Feb-03		Mar-03		Apr-03		May-03		Jun-03		Jul-03		Aug-03		Sep-03		Oct-03		Nov-03		Dec-03		2003 TOTALS		COUNTY
	Amount	No.	Amount	No.	Amount	No.	Amount	No.	Amount	No.	Amount	No.	Amount	No.	Amount	No.	Amount	No.	Amount	No.	Amount	No.	Amount	No.	Amount	Number	
Barbour									$165	1															$165	1	Barbour
Berkeley	$165	1					$165	1			$165	1	$825	5			$165	1							$1,485	9	Berkeley
Boone															$165	1									$165	1	Boone
Braxton																											Braxton
Brooke	$165	1	$330	2	$330	2							$165	1			$165	1							$1,155	7	Brooke
Cabell			$330	2					$660	4	$825	5	$2,310	14			$165	1			$165	1	$165	1	$4,620	28	Cabell
Calhoun																											Calhoun
Clay																											Clay
Doddridge																											Doddridge
Fayette	$165	1									$165	1	$495	3											$825	5	Fayette
Gilmer																											Gilmer
Grant													$330	2											$330	2	Grant
Greenbrier			$165	1							$165	1			$660	4			$165	1					$1,155	7	Greenbrier
Hampshire					$165	1																			$165	1	Hampshire
Hancock													$165	1											$165	1	Hancock
Hardy																			$165	1					$165	1	Hardy
Harrison	$165	1					$165	1			$330	2	$1,650	10											$2,310	14	Harrison
Jackson					$165	1																			$165	1	Jackson
Jefferson					$165	1					$165	1													$330	2	Jefferson
Kanawha	$825	5	$990	6	$1,155	7	$1,155	7	$660	4	$990	6	$4,455	27	$165	1	$165	1			$165	1	$165	1	$10,890	66	Kanawha
Lewis			$165	1							$165	1													$330	2	Lewis
Lincoln																											Lincoln
Logan	$330	2			$165	1			$165	1			$990	6											$1,650	10	Logan
Marion											$165	1	$165	1											$330	2	Marion
Marshall			$165	1							$165	1	$165	1	$330	2			$165	1					$990	6	Marshall
Mason															$165	1	$165	1							$330	2	Mason
McDowell			$165	1					$165	1			$165	1											$495	3	McDowell
Mercer	$165	1	$330	2			$825	5					$330	2	$165	1	$165	1	$495	3	$165	1	$165	1	$2,805	17	Mercer
Mineral																											Mineral
Mingo	$165	1											$330	2									$165	1	$660	4	Mingo
Monongalia	$330	2	$330	2	$165	1	$330	2			$330	2	$3,135	19			$165	1			$165	1	$165	1	$5,115	31	Monongalia
Monroe																											Monroe
Morgan																	$165	1							$165	1	Morgan
Nicholas					$165	1							$165	1	$165	1					$165	1			$660	4	Nicholas
Ohio	$165	1	$330	2	$165	1	$660	4	$165	1	$495	3	$1,155	7							$165	1			$3,300	20	Ohio
Pendelton																											Pendelton
Pleasants																											Pleasants
Pocahontas																											Pocahontas
Preston									$165	1															$165	1	Preston
Putnam					$165	1	$165	1	$165	1			$1,485	9	$165	1	$330	2	$660	4			$165	1	$3,300	20	Putnam
Raleigh	$330	2	$660	4	$495	3	$165	1			$165	1	$825	5	$165	1	$135	1	$165	1	$330	2			$3,435	21	Raleigh
Randolph											$165	1	$165	1							$165	1			$495	3	Randolph
Ritchie																											Ritchie
Roane																											Roane
Summers																											Summers
Taylor									$165	1															$165	1	Taylor
Tucker									$165	1															$165	1	Tucker
Tyler															$165	1									$165	1	Tyler
Upshur															$330	2									$330	2	Upshur
Wayne											$165	1													$165	1	Wayne
Webster																											Webster
Wetzel											$165	1			$165	1									$330	2	Wetzel
Wirt																											Wirt
Wood	$165	1			$165	1							$1,650	10									$330	2	$2,310	14	Wood
Wyoming																											Wyoming
TOTALS	$3,135	19	$3,960	24	$3,465	21	$3,630	22	$2,640	16	$4,785	29	$21,120	128	$2,805	17	$1,785	11	$1,815	11	$1,485	9	$1,320	8	$51,945	315	TOTALS

MEDICAL LIABILTY FUND - 2004

West Virginia State Treasurer's Office

Reported by Month Collected

COUNTY	Jan-04		Feb-04		Mar-04		Apr-04		May-04		Jun-04		Jul-04		Aug-04		Sep-04		Oct-04		Nov-04		Dec-04		2004 TOTALS		COUNTY
	Amount	No.	Amount	No.	Amount	No.	Amount	No.	Amount	No.	Amount	No.	Amount	No.	Amount	No.	Amount	No.	Amount	No.	Amount	No.	Amount	No.	Amount	Numbe	
Barbour		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Barbour
Berkeley		0		0		0	$165	1		0		0		0		0		0		0		0		0	$165	1	Berkeley
Boone		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Boone
Braxton		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Braxton
Brooke		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Brooke
Cabell	$330	2	$330	2	$660	4		0		0		0		0		0		0		0		0		0	$1,320	8	Cabell
Calhoun		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Calhoun
Clay		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Clay
Doddridge		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Doddridge
Fayette		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Fayette
Gilmer		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Gilmer
Grant		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Grant
Greenbrier	$165	1		0		0		0	$165	1		0		0		0		0		0		0		0	$330	2	Greenbrier
Hampshire	$165	1		0		0		0		0		0		0		0		0		0		0		0	$165	1	Hampshire
Hancock		0		0		0		0		0	$165	1		0		0		0		0		0		0	$165	1	Hancock
Hardy		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Hardy
Harrison		0		0		0		0	$330	2		0		0		0		0		0		0		0	$330	2	Harrison
Jackson		0		0		0		0	$165	1		0		0		0		0		0		0		0	$165	1	Jackson
Jefferson	$165	1		0		0		0		0		0		0		0		0		0		0		0	$165	1	Jefferson
Kanawha	$330	2	$330	2		0	$330	2	$165	1	$495	3		0		0		0		0		0		0	$1,650	10	Kanawha
Lewis	$165	1		0		0		0		0		0		0		0		0		0		0		0	$165	1	Lewis
Lincoln		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Lincoln
Logan		0	$165	1		0		0		0		0		0		0		0		0		0		0	$165	1	Logan
Marion		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Marion
Marshall		0	$165	1		0		0		0		0		0		0		0		0		0		0	$165	1	Marshall
Mason		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Mason
McDowell		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	McDowell
Mercer		0	$330	2		0		0		0		0		0		0		0		0		0		0	$330	2	Mercer
Mineral		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Mineral
Mingo		0		0	$165	1		0		0		0		0		0		0		0		0		0	$165	1	Mingo
Monongala	$165	1		0		0	$165	1	$330	2	$165	1		0		0		0		0		0		0	$825	5	Monongala
Monroe		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Monroe
Morgan		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Morgan
Nicholas		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Nicholas
Ohio		0		0	$165	1	$165	1	$165	1	$165	1		0		0		0		0		0		0	$660	4	Ohio
Pendelton		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Pendelton
Pleasants		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Pleasants
Pocahontas		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Pocahontas
Preston		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Preston
Putnam		0		0		0	$165	1		0		0		0		0		0		0		0		0	$165	1	Putnam
Raleigh	$165	1		0	$165	1	$495	3		0		0		0		0		0		0		0		0	$825	5	Raleigh
Randolph		0	$165	1	$165	1		0		0		0		0		0		0		0		0		0	$330	2	Randolph
Ritchie		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Ritchie
Roane		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Roane
Summers		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Summers
Taylor		0		0		0		0	$330	2		0		0		0		0		0		0		0	$330	2	Taylor
Tucker		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Tucker
Tyler		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Tyler
Upshur		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Upshur
Wayne		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Wayne
Webster		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Webster
Wetzel		0		0		0		0	$165	1		0		0		0		0		0		0		0	$165	1	Wetzel
Wirt		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Wirt
Wood	$495	3		0	$495	3	$165	1		0	$495	3		0		0		0		0		0		0	$1,650	10	Wood
Wyoming		0		0		0		0		0		0		0		0		0		0		0		0	$0	0	Wyoming
																									$0		
TOTALS	$2,145	13	$1,485	9	$1,815	11	$1,650	10	$1,815	11	$1,485	9	0		0		0		0		0		0		$10,395	63	TOTALS

April 2004 Kanawha County - 2 suits filed - $175.45 remitted. Only $10.45 paid as an initial installment by an inmate at the regional jail. Inmate will continue making monthly payments until the entire $165 is paid.

AFFIDAVIT

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

1. I am Don R. Sensabaugh, Jr., a practicing attorney and member of the law firm of Flaherty, Sensabaugh & Bonasso, P.L.L.C., in Charleston, West Virginia. My State Bar license number is 3336.

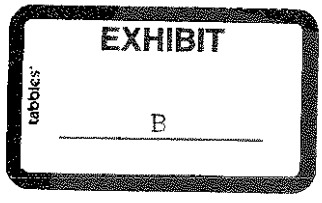
2. I was retained by the West Virginia State Medical Association to work with the CARE Coalition to lobby the legislature to pass meaningful economic legislation for the health care community including professional medical liability reform.

3. Specifically, during the 2003 legislative session, I appeared at the legislature almost daily to work on House Bill 2122, including educating members of the legislature, attending committee meetings and speaking when requested.

4. I worked closely with various members of the legislature in both Houses on crafting language, as requested.

5. During the waning days of the legislative session, after the House of Delegates and the Senate had each passed its version of HB 2122, there was significant negotiating between the Houses to arrive at an agreed upon bill which could be passed and sent to the Governor.

6. While I attended meetings during the last weeks of the session, where many points of contention were hotly debated such as the tax credits and the board for the Physicians Mutual Insurance Company, at no point during the last two weeks was tort reform and the effective date for the tort reform to apply to all cases filed on or after July 1, 2003, a point of contention. In fact, I was



advised that the House and Senate had reached agreement on the tort reform provisions and an effective date of July 1, 2003, for all cases filed on that day and thereafter.

Further the Affiant saith not.

Don R. Sensabaugh, Jr.

Taken, subscribed and sworn to before me this 29th day of September 29, 2004.

My commission expires June 8, 2010.

Notary Public

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
NORA E. LANTZ
RT. 2, BOX 35
CLAY, WV 25043
My Commission Expires June 8, 2010

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 31757

BERNARD BOGGS, as administrator of the Estate of HILDA BOGGS, deceased, as personal representative of the statutory beneficiaries of the wrongful death claim herein asserted and in his own right,

Appellants,

v.

CAMDEN-CLARK MEMORIAL HOSPITAL, CORP., UNITED ANESTHESIA, INC. and MANISH I. KOYAWALA, M.D.,

Appellees.

CERTIFICATE OF SERVICE

I, Evan Jenkins, do hereby certify that I have served the foregoing "**MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLEES and BRIEF OF *AMICI CURIAE* IN SUPPORT OF APPELLEES**" upon the following counsel of record by depositing a true and accurate copy thereof in the United States Mail, postage prepaid, this 1st day of October, 2004, addressed as follows:

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