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West Virginia Supreme Court Recognizes Extension of State's Medical Professional Liability Act Addressing "General" Negligence

The Supreme Court of Appeals of West Virginia recently issued an opinion in *State ex rel. West Virginia University Hospitals, Inc. v. The Honorable Cindy Scott*, __ S.E.2d __ (W.Va. 2021) (No. 21-0230; Decided Nov. 22, 2021), which marks the first case to recognize the West Virginia's Legislature's expansion of the definition of "medical professional negligence" in the West Virginia Medical Professional Liability Act ("MPLA") to include claims that were once considered to be general in nature.

BACKGROUND

At the time the West Virginia Medical Professional Liability Act, W.Va. Code §§ 55-7B-1, *et seq.*, was enacted in 1986, the state had seen an unprecedented increase in litigated medical negligence claims. As a result of this increase, medical malpractice coverage premiums increased to such a degree that many medical professionals began to leave the state because the risk and costs associated with practicing medicine in West Virginia had grown unbearable. Many of these professionals were specialists and their departure created a void in medical care specialties thus requiring residents needing such care to seek treatment in other states.

The Legislature, in seeking an answer to this issue, developed the MPLA as a way to provide a statutory scheme for the prosecution of medical negligence claims and curtail the filing of questionable claims while protecting those who have may have been injured by medical malpractice. Two key components of the MPLA are the reduced statute of limitations for medical professional liability claims and the pre-suit requirements which required pre-suit notice to all potential defendants and the execution of a screening certificate by a medical professional which stated there was a breach of the standard of care. Since its enactment, the Legislature has sought to "fine tune" the MPLA through various amendments in order to address issues that were not initially contemplated when the Act first became law.

DETAILS

Facts and Background

In *State ex rel. West Virginia University Hospitals, Inc. v. The Honorable Cindy Scott*, ("WVUH"), plaintiff "S.F." presented was admitted to Ruby Memorial Hospital in Morgantown, West Virginia and subsequently gave birth to twins. At the time one of the twins required intravenous administration of medication or fluids and air bubbles were subsequently introduced into her bloodstream. The air bubbles were delivered by the child's bloodstream to her liver, heart and brain and allegedly caused her to suffer permanent neurological injuries for which she required continuous care.

The parents of the injured child subsequently filed pre-suit notice against various defendants and obtained a screening certificate of merit in which a qualified medical professional certified defendants had breached the standard of care. Once these requirements were met, plaintiff parents brought suit individually and on behalf of their injured daughter. Plaintiffs later amended their complaint to add several corporate negligence claims against WVUH. The corporate negligence claims asserted by plaintiffs included failure to purchase and utilize filtering systems for WVUH's intravenous equipment, spoliation of evidence, failure to document and failure to report. However, plaintiffs did not obtain a screening certificate of merit which addressed the corporate negligence claims as required prior to filing their amended complaint.

In response to the amended complaint, WVUH filed a motion to dismiss the corporate negligence claims on the basis plaintiffs failed to follow the pre-suit requirements of the MPLA. The trial court denied the motion to dismiss and WVUH sought a writ of prohibition to prohibit enforcement of the trial court's order denying its motion.

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Application of Amended MPLA

In reversing the trial court's decision, the court undertook a brief analysis of its prior holding in *Manor Care, Inc. v. Douglas*, 763 S.E.2d 73 (W.Va. 2014), In *Manor Care, Inc.,* plaintiffs brought suit against a nursing home for medical negligence and also asserted claims for negligent failure to establish a sufficient budget and negligent staffing of the facility. The trial court found the corporate negligence claims were claims for "general" negligence and not "medical negligence," and ordered the jury to allocate the damages between "corporate" and "medical" negligence. The Supreme Court of Appeals of West Virginia ultimately affirmed the trial court's decision.

In analyzing *Manor Care, Inc*. as it relates to *WVUH*, the Court noted that the West Virginia Legislature amended the MPLA following the *Manor Care, Inc.*, decision. One of these amendments expanded the definition of "professional medical negligence" to include claims related to decisions made contemporaneous to or related to the claims asserted and made in the context of providing health care. Under the amended definition of "professional medical negligence" the issues plaintiffs claimed fell within the auspice of "corporate negligence" were, under the statute, also claims for "professional medical negligence," and plaintiffs were required to obtain a screening certificate of merit in order to assert those claims. The Court ordered the trial court's decision vacated and remanded the case with instructions to the trial court to enter an order granting WVUH's motion to dismiss.

Pending MPLA Legislation

Additionally, legislation pending before the West Virginia Legislature this session requires plaintiffs to make experts who sign a screening certificate of merit available for deposition. In many cases, plaintiffs' counsel retain an "expert" to conduct a cursory review of a prospective plaintiff's claim in order to obtain a certificate of merit. During litigation, when disclosure of experts is required, plaintiffs retain a different expert to actually testify at trial. Should this legislation pass it would permit defendants in medical professional liability cases to depose the professional(s) who certify the screening certificate of merit to determine whether the professional has the request expertise and training to issue such certification and whether this professional actually conducted a complete review of the claim. In cases where there is a question as to the certifying expert's credentials or the scope of his or her review it may be possible to have the case dismissed for failure to comply with the MPLA.

SUMMARY

The Supreme Court of Appeals of West Virginia recognized the intent of the West Virginia Legislature to supersede the Court's prior holding in *Manor Care, Inc.* The expansion of the MPLA and the Court's holding in *WVUH* are significant steps in expanding protections to health care facilities in the context of potential medical negligence claims. When bringing claims involving alleged medical negligence which occurs in medical facilities, i.e. skilled nursing facilities or hospitals, plaintiffs regularly assert claims for negligent training, negligent supervision, failure to document, etc. … Under the amended MPLA, and in light of the holding in *WVUH,* prior to bringing suit plaintiffs will now have to retain both a medical professional to certify a breach of the standard of care occurred which resulted in injury and an expert in health care administration to discuss a breach of the standard of care as it relates to corporate decisions made by the facility. The likely effect of having to obtain additional experts is that such claims will be abandoned to avoid costs and time.

Phil Fraley handles medical malpractice, insurance coverage and workers' compensation claims and has experience defending physical and sexual abuse claims. He has extensive experience defending products liability matters, auto and trucking liability, construction defect and premises claims. Phil counsels clients on contracts, bad faith and dram shop matters, and represents clients in asbestos cases pending throughout West Virginia, Kentucky, Ohio, Illinois, Texas and California. He also drafts appellate briefs on asbestos-related matters to all district and appellate court. Phil previously submitted two appellate briefs in opposition to writs of certiorari that were pending before the United State Supreme Court.