

REVIEW OF RECENT WEST VIRGINIA SUPREME COURT CASES APPLICABLE TO PHYSICAL THERAPISTS

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The West Virginia Legislature adopted the Medical Professional Liability Act (“MPLA”) in 1986 to ensure that the best medical care and facilities were available to the citizens of West Virginia.¹ The MPLA was amended in 2003, but its overall purpose has remained the same.² The 2003 Amendments to the MPLA dealt with the growing problem of medical malpractice suits in West Virginia. The amendments limited the amount of monetary recovery a plaintiff could receive³ and required that the plaintiff file a notice of claim with the defendant before filing suit.⁴

The MPLA provides that a plaintiff in a medical malpractice action must prove that a health care provider deviated from the applicable standard of care and that this deviation was the proximate cause of the injury to the plaintiff.⁵ In addition, the plaintiff is required to prove by expert testimony the applicable standard of care and the defendant’s failure to meet it.⁶

Because the MPLA was recently amended, the West Virginia Supreme Court of Appeals has had to render opinions in several medical malpractice cases. Since October of 2005, the West Virginia Supreme Court has decided six cases involving health care and malpractice. While none of the decisions by the Supreme Court have specifically involved a physical therapist, all of the Supreme Court decisions involving the MPLA are applicable to physical therapists because physical therapists are covered as “health care providers” under the Act.

Farley v. Shook

When a physical therapist is facing a medical malpractice suit, the plaintiff must establish that the physical therapist deviated from the standard of care by expert testimony.⁷ To establish the standard of care, the expert must be familiar with physical therapy techniques, standards, and causational issues. In addition, the expert must testify that the physical therapist’s deviation from the standard of care caused the injury that the plaintiff is alleging. In *Farley v. Shook*, the West Virginia Supreme Court of Appeals reaffirmed that an expert testifying against a health care provider must be familiar with that health care provider’s standard of care.

In *Farley*, the plaintiff brought a medical malpractice action against the podiatrists who performed surgery to remove a cyst from her foot.⁸ The plaintiff also brought suit against the emergency room physician, emergency room nurses, and the hospital, all of whom the plaintiff alleged had failed to diagnose her surgical wound with gangrene. All

¹ W. VA. CODE § 55-7B-1 (1986).

² W. VA. CODE § 55-7B-1 (2003).

³ Compare W. VA. CODE § 55-7B-8 (1996) with W. VA. CODE § 55-7B-8 (2003).

⁴ Compare W. VA. CODE § 55-7B-6 (1996) with W. VA. CODE § 55-7B-6 (2003).

⁵ W. VA. CODE § 55-7B-3 (2003).

⁶ W. VA. CODE § 55-7B-7 (2003).

⁷ See e.g. W. VA. CODE § 55-7B-7 (2003).

⁸ *Farley v. Shook*, 629 S.E.2d 739, 742 (W. Va. 2006) (per curiam).

parties agreed that expert testimony would be required for standard of care and causation issues. The plaintiffs' disclosed Dr. Weihl, an emergency medicine doctor, as their expert witness.⁹

During Dr. Weihl's deposition, he testified regarding the deviations from the standard of care for the emergency room doctor and the hospital. Dr. Weihl did not testify regarding causation. Moreover, he did not testify as to any deviation of the standard of care as it would apply to the podiatrists. The hospital and emergency room doctor moved for summary judgment because Dr. Weihl could not establish causation, which is required under the MPLA. Additionally, the podiatrists also filed for summary judgment because Dr. Weihl did not establish any deviation from the standard of care or causal link from the standpoint of a podiatrist. The circuit court granted all motions for summary judgment and the case was dismissed.¹⁰

On appeal to the West Virginia Supreme Court, the plaintiffs' claimed that summary judgment was not proper to any party and alleged that they should have had more time to identify experts. The Supreme Court recognized that it was required and proper for expert testimony to be required to prove both breaches of the applicable standards of care and to prove causation.¹¹ The Court found that because Dr. Weihl was unable to provide a causal link between the plaintiffs' injuries and the actions of the hospital and emergency room doctor, the plaintiffs were unable to prove their case against them.¹² Therefore, the circuit court's ruling granting summary judgment to the hospital and emergency room doctor was affirmed.¹³

Additionally, the Court noted that "Dr. Weihl admitted at his deposition that he lacked the competency to testify as to any alleged deviations from the standard of care by either [of the podiatrists]."¹⁴ The Court said that "while a physician does not have to be board certified in a specialty to qualify to render an expert opinion, the physician must have some experience or knowledge on which to base his or her opinion."¹⁵ Since Dr. Weihl clearly did not have any knowledge of podiatry on which to base his opinion, the Court agreed with the circuit court that he was not competent to testify against the podiatrists. However, the Court found that the plaintiffs should have had a "reasonable period of time" for retention of an expert witness in accordance with the MPLA.¹⁶ The Court went on to find that the plaintiffs were not awarded an adequate amount of time to identify experts and reversed the circuit court's ruling of summary judgment for the podiatrists.¹⁷

Calhoun v. Traylor

In *Calhoun v. Traylor*, the Supreme Court determined that a supplemental medical expert affidavit did not create a fact issue for whether the physician had breached

⁹ *Id.* at 743.

¹⁰ *Id.*

¹¹ *Id.* at 745.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 746.

¹⁵ *Id.*

¹⁶ *Id.* at 747-748.

¹⁷ *Id.* at 748.

the standard of care.¹⁸ The plaintiff brought a medical malpractice action against the doctor alleging that the doctor should not have performed surgery on her husband due to his elevated blood pressure and that the doctor failed to diagnose and treat her husband's perforated bowel.¹⁹ As required under the MPLA, the plaintiff produced an expert, Dr. Gryska, to testify about the standard of care. In Dr. Gryska's deposition, he did not say if there was a deviation from the standard of care post-surgery. Based on Dr. Gryska's testimony, the defendant physician filed for summary judgment²⁰ on the post-surgery issue.²¹ Subsequently, Dr. Gryska filed a supplemental affidavit altering his original opinion by stating that there had been a deviation from the standard of care post-surgery. The circuit court disregarded the supplemental affidavit and granted judgment in favor of the defendant doctor.²² The plaintiff then appealed to the West Virginia Supreme Court.

The West Virginia Supreme Court agreed with the circuit court and determined that the affidavit fell under the "sham affidavit" rule and should not be considered by the court.²³ The Court stated that the affidavit of Dr. Gryska should not be considered because there was no new medical information available to Dr. Gryska when he submitted the affidavit and the affidavit directly contradicted his earlier deposition testimony.²⁴ Furthermore, the Supreme Court stated that "there can be no question of fact where plaintiff's standard of care expert does not establish that there was a deviation from an applicable standard of care by the physician."²⁵ Because the plaintiff could not prove that the defendant physician deviated from the standard of care post-surgery, the Court granted summary judgment to the defendant physician on the post-surgery issue.²⁶

Calhoun affirmed the MPLA by finding that an expert must testify about the defendant's deviation from the standard of care. *Calhoun* will impact future medical malpractice claims by forcing plaintiffs to ensure that their experts testify about the standard of care and all alleged deviations from the standard of care. When a physical therapist is facing a lawsuit, the plaintiff will have to prove by expert testimony what the standard of care was for the physical therapist and that the physical therapist deviated from that standard. Thus, the plaintiff will have to produce an expert familiar with physical therapy and its standards of care.

Roy v. D'Amato

The plaintiffs in *Roy v. D'Amato* filed a medical malpractice suit against the defendant physician contending that he had committed medical malpractice during his treatment of the Mr. Roy's finger.²⁷ The defendant, Dr. D'Amato, filed a motion to dismiss the case alleging that the plaintiffs had failed to give him notice of the claim

¹⁸ *Calhoun v. Traylor*, 624 S.E.2d 501, 505 (W. Va. 2005) (per curiam).

¹⁹ *Id.* at 502.

²⁰ "Summary judgment" means "[a] judgment granted on a claim about which there is no genuine issue of material fact and upon which the movant is entitled to prevail as a matter of law." BLACK'S LAW DICTIONARY 1449 (7th ed. 1999).

²¹ *Calhoun* at 502.

²² *Id.*

²³ *Id.* at 505.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 506.

²⁷ *Roy v. D'Amato*, 629 S.E.2d 751, 754 (W. Va. 2006).

thirty days before filing their complaint, as required by *West Virginia Code* § 55-7B-6(b) (2003).²⁸ The circuit court dismissed the case because of the plaintiffs' defects in their pre-suit notice of claim to the defendant physician.²⁹ The plaintiffs appealed the case to the West Virginia Supreme Court.

The Supreme Court affirmed its position that failing to strictly follow the pre-filing requirements of the MPLA will not keep plaintiffs out of court.³⁰ The Court found that the doctor, through his lawyer, had a duty to ask for clarification of the issues if the notice was too vague.³¹ As such, the Court found that the defendant doctor waived any objections he may have had to the improper timing and deficiencies in the plaintiffs' pre-suit notice of claim and certificate of merit.³² The Court reinstated the lawsuit against Dr. D'Amato.³³

Under *Roy*, a physical therapist facing a medical malpractice action has a duty to ask for a more definite notice of claim, if the notice is too vague. Even though the MPLA requires that a plaintiff file a notice of claim and screening certificate of merit, it is the defendant health care provider's duty, along with the aid of his or her attorney, to request a more specific notice of claim or screening certificate of merit. The West Virginia Supreme Court has consistently held that the notice of claim and screening certificate of merit requirements of the MPLA will not be strictly followed to keep plaintiffs out of court.³⁴ Thus, it is the health care provider's duty to ask for a more specific notice of claim when the MPLA's requirements have not been met.

Gray v. Mena

In *Gray v. Mena*, a plaintiff brought an assault and battery action against a physician and the hospital.³⁵ The plaintiff alleged that the defendant physician moved her underclothing and inserted his non-gloved finger into her vagina during an examination at the hospital, without the plaintiff's consent and a nurse in the room. In the plaintiff's complaint, the plaintiff asserted claims of assault and battery. The defendants asked the circuit court to dismiss the action, since the plaintiff did not follow the pre-suit requirements provided for in the MPLA.³⁶ The circuit court granted the defendants motion, sustaining the defendants contention that the suit was subject to the pre-suit requirements of the MPLA.³⁷ The plaintiff appealed the court's decision.

²⁸ *Id.* W. VA. CODE § 55-7B-6(b) states, in part: "[a]t least thirty days prior to the filing of a medical professional liability action against a health care provider, the claimant shall serve by certified mail, return receipt requested, a notice of claim on each health care provider the claimant will join in the litigation."

²⁹ *Roy* at 755.

³⁰ *Id.* at 756.

³¹ *Id.* at 757.

³² *Id.*

³³ *Id.* at 758.

³⁴ See e.g. *Roy and Hinchman v. Gillette*, 618 S.E.2d 387 (W. Va. 2005).

³⁵ *Gray v. Mena*, 625 S.E.2d 326, 329 (W. Va. 2005).

³⁶ *Id.* W. VA. CODE § 55-7B-6(b) (2001) required the plaintiff to file a Notice of Claim against a health care provider thirty (30) days before filing the medical professional liability action. In addition to the Notice of Claim, the plaintiff had to file a Screening Certificate of Merit executed under oath by an expert health care provider. Neither the Notice of Claim nor the Screening Certificate of Merit were filed in this case.

³⁷ *Gray* at 329.

On appeal, the West Virginia Supreme Court first had to decide if the plaintiff's assault and battery³⁸ claims should be governed by the MPLA, since the Act applies only to "medical professional liability actions."³⁹ The Supreme Court noted that in its previous decision in *Boggs v. Camden-Clark Memorial Hospital*, it stated that the MPLA protection did not extend to intentional torts.⁴⁰ However, the Court noted that the language of the MPLA indicated that the Act applied to "any tort," thus encompassing intentional torts.⁴¹ The Court determined that the definition of "medical professional liability" found in § 55-7B-2(i) of the *West Virginia Code* includes liability for damages resulting from the death or injury of a person for any tort based upon health care services rendered. To any extent that *Boggs* suggested otherwise, the Supreme Court modified it.⁴²

The holding in *Gray* impacts physical therapists by attempting to define the boundaries and limitations of the MPLA. Because "assault"⁴³ and "battery"⁴⁴ are part of the MPLA, physical therapists should take note. Physical therapy involves manipulation of the body, which could be construed to the patient as assault and battery. If a suit for assault and battery is filed against a physical therapist that occurred in the course of patient care, the suit should be filed in accordance with the requirements of the MPLA.

In addition, the application of the MPLA to intentional torts, like assault and battery, provides additional protections to physical therapists. For example, the MPLA provides for a \$250,000 cap for a plaintiff's non-economic damages and a \$500,000 cap for non-economic damages where the loss was due to wrongful death, loss of limb, or permanent physical or mental injury.⁴⁵ Because *Gray* states that MPLA applies to intentional torts, the plaintiff's damages would be limited to the caps. If the MPLA's caps did not apply, a plaintiff would not be limited in the amount of damages the jury could award, and a physical therapist could potentially be liable for non-economic damages well above the statutory caps.

Like the damage caps, the MPLA also protects physical therapists from frivolous lawsuits by requiring plaintiffs to file pre-suit notice of claim and a screening certificate of merit before filing suit. These requirements of the MPLA notify health care providers

³⁸ Assault and battery are traditionally recognized as intentional torts.

³⁹ *Id.* at 330.

⁴⁰ *Id.* citing *Boggs v. Camden-Clark*, 609 S.E.2d 917, 923-924 (W. Va. 2004).

⁴¹ *Id.*

⁴² *Id.* at 331.

⁴³ "Assault" means "the threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact." BLACK'S LAW DICTIONARY 109 (7th ed. 1999).

⁴⁴ "Battery" means "an intentional and offensive touching of another without lawful justification." BLACK'S LAW DICTIONARY 146 (7th ed. 1999).

⁴⁵ W. VA. CODE § 55-7B-8(a) (2003) states "[i]n any professional liability action brought against a health care provider pursuant to this article, the maximum amount recoverable as compensatory damages for noneconomic loss shall not exceed two hundred fifty thousand dollars per occurrence, regardless of the number of plaintiffs or the number of defendants." W. VA. CODE § 55-7B-8(b) (2003) states "[t]he plaintiff may recover compensatory damages for noneconomic loss in excess of the [\$250,000 cap], but not in excess of five hundred thousand dollars for each occurrence, regardless of the number of plaintiffs or the number of defendants or, in the case of wrongful death, regardless of the number of distributees, where the damages for noneconomic losses suffered by the plaintiff were for: (1) wrongful death; (2) permanent and substantial physical deformity, loss of use of a limb or loss of a bodily organ system; or (3) permanent physical or mental functional injury that permanently prevents the injured person from being able to independently care for himself or herself and performing life sustaining injuries."

of the specific claim the plaintiff has against the health care provider before suit is filed. The pre-suit requirements allow the health care provider time to settle the case before an official lawsuit is filed. These requirements provide added protection to the health care provider, or physical therapist, which are not provided for under general tort law.

Thomas v. Makani

When facing a trial for medical malpractice, a physical therapist may know one or several of the potential jurors. When questioning the jurors prior to trial, the attorney and judge should make certain that the juror feels no bias or prejudice for or against the physical therapist.

In *Thomas v. Makani*, the plaintiff brought a medical malpractice suit against the defendant, Dr. Makani, alleging that Dr. Makani negligently cut her hepatic bile duct during her gall bladder surgery.⁴⁶ The case went to trial and a six-person jury returned a verdict for Dr. Makani. However, during jury selection, one of the jurors stated that he had been treated by Dr. Makani following a motor vehicle accident. The juror indicated that he had a “good experience” with Dr. Makani and that he might possibly “lean toward” him.⁴⁷ Based on these statements, the plaintiff argued that the juror should have been removed from the jury panel. The circuit court denied the plaintiff’s motion for a new trial, and the plaintiff appealed to the Supreme Court.

The West Virginia Supreme Court of Appeals noted that “[i]t is a fact of life that in many rural jurisdictions in this State, a limited number of physicians may practice within any given community.⁴⁸ As a result, “when one of these doctors is a party or a witness in a medical malpractice action, it is unlikely the court can seat a panel of jurors with absolutely no contacts with the doctor.”⁴⁹ Accordingly, the Court held “[w]here a physician-patient relationship exists between a party to litigation and a prospective juror, although such prospective juror is not disqualified *per se*, special care should be taken by the trial judge to ascertain . . . that such a prospective juror is free from bias or prejudice.”⁵⁰

After reviewing the record, the Court concluded that the circuit court took “special care” to determine that the juror was free from bias and prejudice.⁵¹ Accordingly, the Supreme Court affirmed the ruling of the circuit court.⁵²

Richmond v. Levin

In July of 2005, the West Virginia Supreme Court of Appeals held in *Louk v. Cormier* that section 6d of the MPLA was unconstitutional because it violated the Separation of Powers Clause in the West Virginia Constitution.⁵³ Specifically, *Louk* held

⁴⁶ *Thomas v. Makani*, 624 S.E.2d 582, 584 (W. Va. 2005) (per curiam).

⁴⁷ *Id.* at 585.

⁴⁸ *Id.* citing *Dupuy v. Allara*, 543 S.E.2d 320 (W. Va. 1995).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 386.

⁵² *Id.*

⁵³ Syl. Pt. 3, *Louk v. Cormier*, 622 S.E.2d 788 (W. Va. 2005). W. VA. CODE § 55-7B-6d states, in part, that in medical malpractice litigation “[t]he jury in any trial of an action for medical professional liability shall consist of twelve members. The judge shall instruct the jury that they should endeavor to reach a

that the provisions of § 55-7B-6d requiring a twelve person jury and not requiring a unanimous jury verdict were unconstitutional because the provisions conflicted with the West Virginia Rules of Civil Procedure.⁵⁴

Six-months prior to the *Louk* decision, *Richmond v. Levin*, a medical malpractice action, was pending in circuit court.⁵⁵ The plaintiff in *Richmond* was alleging negligent treatment of her distal radius fracture. The circuit court advised the jury that it was not necessary for the jury to come to a unanimous verdict. The jury returned a verdict in which nine jurors found in favor of Dr. Levin and three jurors found in favor of Ms. Richmond.⁵⁶ Thereafter, the *Louk* decision was rendered by the Supreme Court, which caused Ms. Richmond to appeal the jury's decision in her case. Based on the *Louk* decision, Ms. Richmond alleged that West Virginia Code § 55-7B-6d was unconstitutional and she should therefore be awarded a new trial.⁵⁷

The Supreme Court focused primarily on whether the *Louk* decision was foreshadowed by other opinions of the Court and what the impact of the *Louk* decision would be. In regards to foreshadowing, the Court noted that it should have been reasonably foreshadowed that the Court would invalidate the jury requirements of § 55-7B-6d because those requirements conflicted with the Rules of Civil Procedure.⁵⁸ In regards to the impact that the *Louk* decision would have, the Court held that the application of *Louk* retroactively would only affect a limited class of litigants.⁵⁹ The Court found that the *Louk* decision would not extend to all medical malpractice judgments entered upon a non-unanimous verdict, but only to those cases pending in circuit court or on appeal at the time *Louk* was decided that involved a non-unanimous, twelve person jury verdict.⁶⁰ Accordingly, the Court found that the decision in *Louk* may be applied retroactively to cases pending at the time *Louk* was decided.⁶¹ Thus, the Court set aside the defense verdict in favor of Dr. Levin and sent the case back to circuit court to be re-tried with a six-person jury.

Richmond reaffirmed the Court's decision in *Louk* that found § 55-7B-6d of the *West Virginia Code* unconstitutional. Because of *Louk*, every jury decision rendered under the MPLA must be a unanimous six-person jury verdict. In accordance with *Richmond*, if a physical therapist had a suit pending on July 1, 2005, the day *Louk* was decided, the jury had to consist of six people and the jury verdict must have been unanimous. If not, physical therapist may appeal the jury decision.

While none of the recent cases decided by the West Virginia Supreme Court of Appeals has involved a physical therapist or a physical therapy assistant, the cases are applicable to physical therapists and physical therapy assistants. The Supreme Court's decisions modified the 2003 amendments to the MPLA by eliminating the twelve person

unanimous verdict but, if they cannot reach a unanimous verdict, they may return a majority verdict of nine of the twelve members of the jury.”

⁵⁴ *Louk* at 804.

⁵⁵ *Richmond v. Levin*, --- S.E.2d ---, 2006 WL 1585120 (W.Va. 2006) (per curiam).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

jury and non-unanimous jury requirements. The Supreme Court also modified the applicability of the MPLA by finding that the Act applies to all torts, including intentional torts. Ultimately, the Supreme Court preserved several important provisions of the MPLA, including the notice of claim and screening certificate of merit requirements.