

## COURT WATCH

FROM THE OFFICES OF FLAHERTY, SENSABAUGH & BONASSO, PLLC.

March 22, 2007

*Phillips v. Larry's Drive-In Pharmacy, Inc.*, No. 33194.

Certified Question from the Circuit Court of Boone County to the West Virginia Supreme Court of Appeals

**TOPIC: In a civil action filed against a defendant licensed pharmacy for allegedly having negligently dispensed medication, is the pharmacy a “health care provider,” as defined by West Virginia Code § 55-7B-2(c)?**

In *Phillips v. Larry's Drive-In Pharmacy, Inc.*, plaintiffs filed suit against the defendant pharmacy alleging that the pharmacy improperly dispensed a toxic dose of medication to the plaintiff. Prior to trial, plaintiffs filed a motion with the court, seeking a ruling that the Medical Professional Liability Act of 1986<sup>1</sup> (“MPLA”) did not apply to defendant pharmacy. The trial court denied the plaintiffs’ motion, ruling that “pharmacies” were included in the definition of a “health care provider” under the MPLA. Plaintiffs’ appealed the trial court’s ruling by seeking certification of the question: “In a civil action filed against a defendant licensed pharmacy for allegedly having negligently dispensed medication, is the pharmacy a “health care provider,” as defined by West Virginia Code § 55-7B-2(c)?”

Plaintiffs argue that the Legislature purposely left pharmacies out of the definition of “health care provider,” and therefore, the MPLA does not apply to pharmacies. The MPLA defines “health care providers” as:

[A] person, partnership, corporation, facility or institution licensed by, or certified in, this state or another state, to provide health care or professional health care services, including, *but not limited to*, a physician, osteopathic physician, hospital, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, psychologist, or an officer, employee or agent thereof acting in the course and scope of such officer’s, employee’s or agent’s employment.<sup>2</sup>

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<sup>1</sup> The 1986 version of the MPLA applies to this case because plaintiffs’ action was filed in March of 2003, prior to the 2003 amendments to the MPLA.

<sup>2</sup> W. Va. Code § 55-7B-2(c) (1986) (emphasis added).

Defendant argues that the definition of “health care provider,” as set forth in the 1986 version of the MPLA, should include pharmacists and pharmacies in the definition. Defendant alleges that the Legislature included the words “but not limited to” in the definition of “health care provider” to allow for the inclusion of other providers. Defendant also argues that a pharmacy is the agent of a doctor, and “agents” are included in the definition of “health care providers.”

In addition to the briefs filed by plaintiffs and defendant, Rite-Aid, the National Association of Chain Drug Stores, and West Virginia Pharmacists Association, Inc. submitted *amicus curiae* briefs to the Supreme Court.<sup>3</sup>

The West Virginia Supreme Court of Appeals is scheduled to hear arguments on this case on March 13, 2007. The court has also accepted the *Riggs v. WVUH* case dealing with the issue of whether infection control claims are governed by the MPLA (and perhaps, whether that claim can be first raised at the appellate stage when the whole case was governed by the MPLA). Additional Court Watch updates will be provided as these cases develop.

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<sup>3</sup> An “*amicus curiae*” is “[a] person who is not a party to the lawsuit but who petitions the court or is requested by the court to file a brief in the action because that person has a strong interest in the subject matter.” *Black’s Law Dictionary* 83 (7th ed. 1999).