

COURT WATCH

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

February 18, 2008

Westmoreland v. Vaidya, Appeal No. 33459.

Appeal from the Circuit Court of Mason County to the West Virginia Supreme Court of Appeals

TOPIC: Whether plaintiffs' medical malpractice claim should be dismissed for failure to comply with the pre-suit requirements of the Medical Professional Liability Act?

Whether the pre-suit requirements of the Medical Professional Liability Act are constitutional?

On February 14, 2008, the West Virginia Supreme Court of Appeals rendered an opinion in the *Westmoreland v. Vaidya* case.

In *Westmoreland*, the plaintiff's case was dismissed by the Circuit Court of Mason County for failure to provide the defendant with a certificate of merit, as required by the Medical Professional Liability Act ("MPLA"). On appeal to the West Virginia Supreme Court of Appeals, the plaintiff argued that the MPLA's pre-suit requirements are unconstitutional. Further, the plaintiff argued that he tried to comply with the pre-suit requirements, but was unable to do so because of the high cost.

In the *per curiam* opinion issued by the West Virginia Supreme Court of Appeals, the Court declined to rule on the constitutionality of the MPLA's pre-suit requirements. The issue of constitutionality has been before the Court in the past, but has never been decided by the Court. Instead of ruling on the constitutionality of the pre-suit requirements, the Court opted to decide the case on other grounds.

The West Virginia Supreme Court of Appeals found that the plaintiff's case was governed by the MPLA, which required the plaintiff to abide by the pre-suit notice of claim and certificate of merit requirements. The Court found that instead of dismissing the case, the Circuit Court should have allowed the plaintiff additional time to obtain a certificate of merit, in accordance with the Court's prior holding in *Hinchman v. Gillette*. In *Hinchman*, the Court found that when a healthcare provider receives a pre-suit notice of claim or certificate of merit from a claimant that the healthcare provider deems to be insufficient, the healthcare provider, within thirty days, may request that the claimant provide a more definite statement.

The West Virginia Supreme Court of Appeals asserted that the defendant never filed a *Hinchman* notice upon the plaintiff, and therefore, the plaintiff had no notice that his notice of claim and certificate of merit were insufficient. The Court found that the plaintiff did not have a chance to fix any deficiency before the case was dismissed. Thus, the Court remanded the case back to the Circuit Court to allow the plaintiff thirty days to secure a certificate of merit.