

## **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?**

*Westmoreland v. Vaidya* was originally reported on in the June 20, 2007 edition of Court Watch. On January 22, 2008, the West Virginia Supreme Court of Appeals heard the parties' oral arguments.

In *Westmoreland*, the plaintiff, a physician, alleged that his urologist failed to follow the standard of care when removing a stent from his ureter. Plaintiff further alleged that during the procedure, he withdrew his consent and asked that the defendant urologist stop the procedure. Plaintiff claims that the defendant committed battery by failing to stop the procedure when asked to do so.

Plaintiff filed a notice of claim with the defendant, but did not file a screening certificate of merit. Section 55-7B-6 of the MPLA requires plaintiffs to file a notice of claim and screening certificate of merit with the health care professional prior to filing the lawsuit. The defendant moved to dismiss the plaintiff's case, alleging that the plaintiff had not complied with the MPLA's pre-suit requirements. The Mason County Circuit Court agreed with the defendant's argument and dismissed the case.

On January 22, 2007, the plaintiff argued to the West Virginia Supreme Court of Appeals that the MPLA's pre-suit requirements are unconstitutional. Plaintiff claims that he tried to obtain a screening certificate of merit from twelve urologists, but only two were willing to sign the certificate for a fee of \$40,000. Plaintiff argues that he tried to comply with the pre-suit requirements, but was unable to do so because of the high cost. Plaintiff maintains that the pre-suit requirements are unconstitutional because it restricts or denies citizen's access to the court system by requiring plaintiffs to pay an exorbitant amount of money in order to file suit.

Defendant maintains that the MPLA's pre-suit requirements are not unconstitutional because the requirements complement the pre-suit rules already set-forth by the West Virginia Rules of Civil Procedure. According to the defendant, because the pre-suit requirements do not change the Rules of Civil Procedure implemented by the Supreme Court, the requirements do not invade the Supreme Court's rule making ability<sup>1</sup>. Defendant further argued that the MPLA's

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<sup>1</sup> According to the Separation of Powers doctrine, the ability to promulgate rules lies with the judiciary, and the other branches of government—executive and legislative—may not encroach on this duty.

pre-suit requirements do not serve to restrict citizens' access to the courts, but instead serve to carry out the legislative policy of screening out frivolous lawsuits and defenses.

In addition to plaintiff's constitutionality claims, plaintiff argues that his claims of battery, fraud, and slander should not have been dismissed because these claims are outside the scope of "healthcare" and, therefore, not governed by the MPLA. Plaintiff alleges that the MPLA only governs claims related to health care rendered or not rendered to a patient. Defendant asserts that, as decided by the West Virginia Supreme Court of Appeals in *Grey v. Mena*, the facts should determine whether the MPLA governs a case. In *Grey*, the Supreme Court found that the facts indicated that the battery occurred during the rendering of healthcare, and therefore, the MPLA applied. Defendant argues that in this case, like *Grey*, the alleged misconduct occurred during the physician's treatment of the plaintiff.

The West Virginia Supreme Court of Appeals should render a decision during this term of court. Additional Court Watch summaries will be provided as this case develops.