

ORIGINAL

IN THE SUPREME COURT OF OHIO

<p>ProMedica Health System and The Toledo Hospital,</p> <p style="text-align: right;">Appellants,</p> <p>v.</p> <p>Virginia King,</p> <p style="text-align: right;">Appellee.</p>	<p>Supreme Court Case No. 2010-1236</p> <p>On Appeal From The Lucas County Court of Appeals Sixth Appellate District</p> <p>Court of Appeals Case No. L-09-1282</p>
---	---

MERIT BRIEF OF *AMICI CURIAE*
MERCY HEALTH PARTNERS AND CATHOLIC
HEALTHCARE PARTNERS IN SUPPORT OF APPELLANTS

Garrick O. White (0070102) (Counsel of Record)
Richard F. Ellenberger (0016463)
ANSPACH MEEKS ELLENBERGER LLP
300 Madison Ave., Suite 1600
Toledo, OH 43604-2633
Telephone: (419) 246-5757
Facsimile: (419) 321-6979
gwhite@anspachlaw.com

Barry F. Hudgin (0015847)
Vice President & General Counsel
Mercy Health Partners
2200 Jefferson Avenue
Toledo, OH 43604
Telephone: (419) 251-2889
Facsimile: (419) 251-0548
Barry_Hudgin@mhsnr.org

COUNSEL FOR *AMICI CURIAE*
MERCY HEALTH PARTNERS
AND CATHOLIC HEALTHCARE
PARTNERS

(Counsel for Parties Listed on Following Page)

FILED
JAN 09 2011
CLERK OF COURT
SUPREME COURT OF OHIO

Patrick McCarten (0024623)
(Counsel of Record)
Jones Day
North Point, 901 Lakeside Avenue
Cleveland, OH 44114-1190
Telephone: (216) 586- 3939
Facsimile: (216) 579-0212
pmccarten@jonesday.com

Douglas R. Cole (0070665)
Jones Day
325 John H. McConnell Boulevard
Suite 600
Columbus, OH 43216-5017
Telephone: (614) 469-3939
Facsimile: (614) 461-4198
drcole@jonesday.com

Marshall A. Bennett, Jr. (0015845)
Jennifer J. Dawson (0033707)
Marshall & Melhorn, LLC
Four Seagate, Eighth Floor
Toledo, OH 43604
Telephone: (419) 249-7100
Facsimile: (419) 249-7151
bennett@marshall-melhorn.com
dawson@marshall-melhorn.com

COUNSEL FOR APPELLANTS
PROMEDICA HEALTH SYSTEM
AND THE TOLEDO HOSPITAL

John T. Murray (0008793)
(Counsel of Record)
Leslie O. Murray (0081496)
Murray & Murray Co., L.P.A.
111 East Shoreline Drive
Sandusky, OH 44870
Telephone: (419) 624-3000
Facsimile: (419) 624-0707
jotm@murrayandmurray.com

John L. Huffman (0039658)
Mickel & Huffman
520 Spitzer Building
Toledo, OH 43604
Telephone: (419) 242-8461
Facsimile: (419) 242-6866
jhuffman@aol.com

COUNSEL FOR APPELLEE
VIRGINIA KING

Anne Marie Sferra (0030855)
(Counsel of Record)
Bridget Purdue (0082502)
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215
Telephone: (614) 227-2300
Facsimile: (614) 227-2390
asferra@bricker.com
bpurdue@bricker.com

COUNSEL FOR AMICI CURIAE,
OHIO HOSPITAL ASSOCIATION, OHIO
STATE MEDICAL ASSOCIATION, AND
OHIO OSTEOPATHIC ASSOCIATION

Table of Contents

Table of Authorities ii

I. Statement of Facts1

II. Law and Argument3

Propositions of Law II: Ohio Revised Code §1751.60(A) Applies Only When The Insurance Coverage Provided By An Insured Patient’s Health Insuring Corporation Is The Only Coverage Available To An Insured Patient, And It Does Not Supersede Ohio’s Law On The Coordination Of Benefits3

A. The Language Utilized By The General Assembly Within Revised Code §1751.60(A) Is Ambiguous, As It Is Subject To More Than One Reasonable Interpretation4

B. Because Revised Code §1751.60(A) Is Ambiguous, This Court Must Determine The Intent Of The General Assembly When Enacting The Statute Through Well-Established Canons Of Statutory Interpretation14

 1. Object sought to be obtained15

 2. Circumstances under which the Statute was enacted.....18

 3. Legislative history.....18

 4. Common law or former statutory provisions, including laws upon similar subjects19

 5. Consequences of a particular construction22

 6. Administrative construction of the Statute27

C. Revised Code §1751.60, Properly Construed, Does Not Prohibit Medical Providers From Seeking Compensation Under Certain Circumstances From Third-Party Payors.....28

III. Conclusion29

Certificate of Service31

Table of Authorities

	<u>Pages</u>
<u>Blackwell v. Bowman</u> (1948), 150 Ohio St. 34, 80 N.E.2d 493	12
<u>Bosher v. Euclid Income Tax Bd. of Rev.</u> (2003), 99 Ohio St.3d 330, 2003-Ohio-3886	20
<u>Brim v. Rice</u> , 20 Ohio App.2d 293, 253 N.E.2d 820 (1 st Dist., Hamilton Cty. 1969)	21
<u>Cater v. City of Cleveland</u> (1998), 83 Ohio St.3d 24	19
<u>Christie v. GMS Mgt. Co., Inc.</u> (2000), 88 Ohio St.3d 376	5
<u>Clark v. Scarpelli</u> (2001), 91 Ohio St.3d 271	5
<u>Cleveland v. Fisher</u> , 62 Ohio Misc.2d 792, 611 N.E.2d 1016 (Mun. Ct. 1992)	15
<u>Cook v. Village of Paulding</u> , 4 Ohio Misc. 111, 207 N.E.2d 405 (C.P. 1965)	19
<u>D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health</u> (2002), 96 Ohio St.3d 250, 2002-Ohio-4172	19, 20
<u>Deal v. United States</u> , 508 U.S. 129 (1993)	11
<u>Emerson v. Forest City Ry.</u> , 4 Ohio N.P. (n.s.) 493 (C.P. 1906)	27-28
<u>Family Medicine Found, Inc. v. Bright</u> (2002), 96 Ohio St.3d 183, 2002-Ohio-4034	4, 14-15
<u>Forbes v. Bolton</u> , 20 Ohio N.P. (n.s.) 449 (C.P. 1918)	5
<u>Hayberg v. Physicians Emergency Serv. Inc.</u> , 2008-Ohio-6180 (11 th Dist. CA Portage Cty. 2008), appeal not accepted for review (2009), 121 Ohio St.3d 1442, 2009-Ohio-1638	10-11, 23
<u>Hester by Scott v. Rymer</u> , 717 S.W.2d 251 (Mo. Ct. App. S.D. 1986)	11
<u>Holloway v. United States</u> , 526 U.S. 1, 119 S. Ct. 966 (1999)	12
<u>Inglis v. Pontius, Superintendent of Banks</u> (1921), 102 Ohio St. 140, 131 N.E. 509	5
<u>In re Clark's Estate</u> , 74 Ohio L. Abs. 460, 141 N.E.2d 259 (Prob. Ct. 1955)	12
<u>Jones v. Bd. of Ed. Cleveland City School Dist.</u> , 474 F.2d 1232, 68 Ohio Op.2d 286 (6 th Cir. 1973)	27
<u>Jones Metal Products Co. v. Walker</u> (1972), 29 Ohio St.2d 173	8, 27
<u>King v. ProMedica Health System, et al.</u> , 2010-Ohio-2578 (6 th Dist. CA Lucas Cty. 2010)	9-10
<u>MacDonald v. Bernard</u> (1982), 1 Ohio St.3d 85, 438 N.E.2d 410	12
<u>Massillon City School Dist. Bd. of Ed. v. Massillon</u> (2004), 104 Ohio St.3d 518, 2004-Ohio-6775	13
<u>Miami Conservancy Dist. v. Bucher</u> , 87 Ohio App. 390, 95 N.E.2d 226 (2 nd Dist., Montgomery Cty. 1949)	27
<u>Muth v. Maxton</u> , 53 Ohio Op. 263, 119 N.E.2d 162 (C.P. 1954)	12
<u>National Petroleum Pub. Co. v. Bowers</u> , 56 Ohio Op. 133 (B.T.A. 1954)	27, 28
<u>Northern Indiana Public Service Co. v. Citizens Action Coalition of Indiana, Inc.</u> , 548 N.E.2d 153 (Ind. 1989)	11
<u>Northwestern Ohio Bldg. and Construction Trades Council v. Conrad</u> (2001), 92 Ohio St.3d 282, 750 N.E.2d 130	8-9, 27
<u>People v. Petros</u> , 198 Mich. App. 401, 499 N.W.2d 784 (1993)	11
<u>Sarmiento v. Grange Mut. Cas. Co.</u> (2005), 106 Ohio St.3d 403, 2005-Ohio-5410	13

<u>Security Ben. Life Ins. Co. v. Robinson</u> , 79 Ohio L. Abs. 97, 154 N.E.2d 649 (10 th Dist. Franklin Cty. 1958).....	12
<u>Sengel v. Maddox</u> , 31 Ohio Op. 201, 16 Ohio Supp. 137 (C.P. 1945)	12
<u>Stanton v. Frankel Brothers Realty Co.</u> (1927), 117 Ohio St. 345, 158 N.E. 868	21
<u>State ex rel. Cincinnati Enquirer, Division of Gannett Satellite Information Network, Inc. v. Joyce</u> (2002), 97 Ohio St.3d 192	14
<u>State ex rel. Cincinnati Post v. Cincinnati</u> (1996), 76 Ohio St.3d 540	14
<u>State ex rel. Clark v. Great Lakes Construction Co.</u> (2003), 99 Ohio St.3d 320.....	27
<u>State ex rel. Gains v. Rossi</u> (1999), 86 Ohio St.3d 620.....	19
<u>State ex rel. Hunt v. Fronziner</u> , 2 Ohio N.P. (n.s.) 373 (C.P. 1904).....	27
<u>State ex rel. Moss v. Ohio State Highway Patrol Retirement System</u> (2002), 97 Ohio St.3d 198, 777 N.E.2d 259	14
<u>State ex rel. Pratt v. Weygandt</u> (1956), 164 Ohio St. 463	19, 20
<u>State ex rel. Shaffer v. Defenbacher</u> (1947), 148 Ohio St. 465.....	12
<u>State ex rel. Thompson v. Spon</u> (1998), 83 Ohio St.3d 551	11
<u>State ex rel. U.S. Steel Corp. v. Zaleski</u> (2003), 98 Ohio St.3d 395.....	14
<u>State ex rel. Van Dyke v. Public Employment Retirement Bd.</u> (2003), 99 Ohio St.3d 430.....	14
<u>State v. Anthony</u> (2002), 96 Ohio St.3d 173, 772 N.E.2d 1167.....	14
<u>State v. Jackson</u> (2004), 102 Ohio St.3d 380, 2004-Ohio-3206	13
<u>State v. Jordan</u> (2000), 89 Ohio St.3d 488.....	4-5
<u>State v. Reineke</u> , 27 Ohio App.3d 382, 501 N.E.2d 683 (10 th Dist., Franklin Cty. 1986).....	21
<u>State v. Wilson</u> (1997), 77 Ohio St.3d 334.....	11-12
<u>Suez Co. v. Young</u> , 118 Ohio App. 415, 195 N.E.2d 117 (6 th Dist., Lucas Cty. 1963)	12, 19
<u>Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Auto., Aerospace, Agricultural Implement Workers of America, International Union,</u> 523 U.S. 653, 118 S. Ct. 1626 (1998)	11
<u>Volan v. Keller</u> , 20 Ohio App.2d 204, 253 N.E.2d 309 (7 th Dist., Jefferson Cty. 1969)	19
<u>Wadsworth v. Damback</u> , 99 Ohio App. 269 (6 th Dist., Ottawa Cty. 1954)	28
<u>Weiss v. Public Utility Commission</u> (2000), 90 Ohio St.3d 15	8, 27
<u>Wiesenthal v. Wickersham</u> , 64 Ohio App. 124 (2 nd Dist., Franklin Cty. 1940)	12
<u>Yonkings v. Wilkinson</u> (1999), 86 Ohio St.3d 225	19
<u>Black's Law Dictionary</u> (6 th Ed. 1991)	11, 13, 23
Ohio Department of Insurance, <u>Bulletin 2010-03</u>	6, 7, 9, 17, 28
Ohio Department of Insurance, <u>Bulletin 2010-06</u>	7, 8, 9, 17, 28
Ohio Legislative Service Commission, <u>122nd Final Bill Analysis for Am. Sub. S.B. 67</u> ...	15-16, 18
Medicare & You 2009, U.S. Dept. of Health & Human Services, Centers for Medicare & Medicaid	20
42 U.S.C. §1395.....	23
42 U.S.C. §1395y	20
42 U.S.C. §1395w-22.....	20
Revised Code §1.49.....	14-15
Revised Code §1742.....	18
Revised Code §1751.60.....	i, 1, 3-10, 13-29
Revised Code §3902.11.....	2, 11, 19, 20, 23, 29

I. Statement of Facts

The Ohio Supreme Court has accepted discretionary jurisdiction on an important proposition of law in order to properly interpret, construct and apply an ambiguous Ohio Statute, Revised Code §1751.60(A), utilizing well-delineated canons of statutory interpretation. The proper interpretation and construction of Revised Code §1751.60(A), as set forth herein, significantly impacts medical providers, health insuring corporations, other insurance carriers, and individual patients throughout the State of Ohio, and further ensures that the legislative intent of the General Assembly when Revised Code §1751.60(A) was enacted is preserved and followed. *Amici Curiae*, Mercy Health Partners and Catholic Healthcare Partners, defer to the Statement of Facts provided within the Merit Brief of Appellants, ProMedica Health System and The Toledo Hospital.

The basis of Appellee Virginia King's claims in the underlying action is the allegation that Appellants, ProMedica Health System and The Toledo Hospital, violated Revised Code §1751.60(A) when Appellants billed Ms. King's automobile insurance carrier and not her health insurance carrier for medical services provided to her in connection with an automobile accident. On June 4, 2010, the 6th District Court of Appeals for Lucas County issued a Decision and Judgment erroneously interpreting Revised Code §1751.60(A) and holding that when a hospital or other health care provider that contracts with a health insuring corporation provides covered medical services to a patient who is an enrollee or subscriber of the health insuring corporation, the hospital or other health care provider is prohibited from billing any entity or individual other than the health insuring corporation, even when other applicable primary coverage, such as automobile insurance, is available. *See Decision & Judgment dated June 4, 2010 from the 6th District Court of Appeals for Lucas County, Ohio.*

The Decision and Judgment dated June 4, 2010 from the 6th District Court of Appeals fails to address the ambiguities within Revised Code §1751.60(A), lacks appropriate legal analysis, ignores the statutory objective of protecting enrollees and subscribers from payment seekers, is in conflict with Ohio's coordination of benefits law, Revised Code §§3902.11 *et seq.*, fails to consider the administrative construction of the statute by the Ohio Department of Insurance, and adversely eliminates the long-established, uniform, efficient and mandated billing practices of health care providers throughout the State of Ohio which allow providers to obtain reimbursement for medical services provided from all potential third-party payors.

The undersigned *amici curiae*, Mercy Health Partners and Catholic Healthcare Partners, as operators of health care facilities and healthcare systems within the State of Ohio, have significant interest in the determination of the correct statutory interpretation, construction and application of Revised Code §1751.60 by the Ohio Supreme Court. The potential impact of the statutory interpretation on the billing and registration practices and procedures for Mercy Health Partners and Catholic Healthcare Partners, as well as all medical providers throughout the State of Ohio, is significant.

Mercy Health Partners is involved in ongoing litigation in a companion case captioned *Dorothy Streeter v. Mercy Health Partners, et al.*, currently pending on the docket of Judge Gene Zmuda of the Lucas County Court of Common Pleas, Case No. CI 200903601. In the *Dorothy Streeter* case, the issues and allegations against Mercy Health Partners are virtually identical to those raised against ProMedica Health System and The Toledo Hospital within the *Virginia King* case.¹ Both companion actions are purported class actions filed by the same counsel against the two (2) largest healthcare providers in Northwest Ohio. Both cases are based on allegations that

¹ The *Dorothy Streeter* case is currently stayed pending the determination of Proposition of Law II by this Court.

the respective healthcare providers violated Revised Code §1751.60 through their respective billing procedures when they sought compensation from a third-party payor, such as an automobile liability insurance carrier.

The Judgment Entry dated October 1, 2009 from Judge Ruth Ann Franks of the Lucas County Court of Common Pleas and the Decision and Judgment dated June 4, 2010 from the 6th District Court of Appeals for Lucas County in the *Virginia King* case are both of direct significance in the *Dorothy Streeter* litigation. Specifically, Mercy Health Partners contests the interpretation and applicability of Revised Code §1751.60(A) being asserted by counsel for Appellee in the *Virginia King* case and the 6th District Court of Appeals. To the contrary, Mercy Health Partners contends that a proper interpretation, construction and application of Revised Code §1751.60(A) occurs when an individual patient's only available insurance benefits are provided by a health insuring corporation, a position similarly asserted by Appellants/Defendants in the *Virginia King* case and the Ohio Department of Insurance, as detailed below.

II. Law and Argument

Proposition Of Law II: Revised Code §1751.60(A) Applies Only When The Insurance Coverage Provided By An Insured Patient's Health Insuring Corporation Is The Only Coverage Available To An Insured Patient, And It Does Not Supersede Ohio's Law On The Coordination Of Benefits

Counsel for Appellants in the *Virginia King* case filed a Notice of Appeal, Motion for Stay of Court of Appeals Judgment, and Memorandum in Support of Jurisdiction with this Court on July 15, 2010 asserting two (2) separate propositions of law for determination. *See Notice of Appeal, Motion for Stay of Court of Appeals Judgment, and Memorandum of Appellants in Support of Jurisdiction*. This Court, after full briefing on the issue of whether the *Virginia King* case presented a matter of such public and great general interest so as to warrant the exercise of

the Court's discretionary jurisdiction, accepted jurisdiction on Proposition of Law II, set forth in its entirety above, on October 13, 2010. *See this Court's Decision dated October 13, 2010.*

Revised Code 1751.60(A), titled "Provider or Facility to Seek Compensation for Covered Services Solely from Health Insuring Corporation," states as follows:

Except as provided for in divisions (E) and (F) of this section, every provider or health care facility that contracts with a health insuring corporation to provide health care services to the health insuring corporation's enrollees or subscribers shall seek compensation for covered services solely from the health insuring corporation and not, under any circumstances, from the enrollees or subscribers, except for approved copayments and deductibles.

The only prohibition expressly set forth and provided for within Revised Code §1751.60(A) is that a provider or health care facility may not seek compensation directly from the enrollees or subscribers of a health insuring corporation for anything other than approved copayments and deductibles. Revised Code §1751.60(A) does not, through the express language included in the statute, prohibit a provider or health care facility from seeking compensation from a third-party payor, such as an automobile liability insurance carrier, automobile medical payment carrier, and/or homeowners insurance carrier. If we are strictly analyzing the language utilized within the statute, a simple review of such language clearly reveals that no such prohibition against seeking compensation from a third-party payor is found anywhere within such language, contrary to any such assertions by Appellee herein.

A. The Language Utilized By The General Assembly Within Revised Code §1751.60(A) Is Ambiguous, As It Is Subject To More Than One Reasonable Interpretation

It is well-established under Ohio law that a statute is ambiguous when its language is subject to more than one reasonable interpretation. *Family Medicine Foundation, Inc. v. Bright* (2002), 96 Ohio St.3d 183, 2002-Ohio-4034, at ¶8 (citing *State v. Jordan* (2000), 89 Ohio St.3d

488, 492). See also, Clark v. Scarpelli (2001), 91 Ohio St.3d 271; Christie v. GMS Mgt. Co., Inc. (2000), 88 Ohio St.3d 376; and, Forbes v. Bolton, 20 Ohio N.P. (n.s.) 449 (C.P. 1918).

Stated another way, as was set forth in pertinent part by this Court in Inglis v. Pontius, Superintendent of Banks, in determining that the statute at issue in the case was in fact ambiguous, “[v]ery few statutes are so perfectly framed and so carefully worded as to be free from criticisms when analyzed and expounded by able and ingenious counsel...”. Inglis v. Pontius, Superintendent of Banks (1921), 102 Ohio St. 140, 151, 131 N.E. 509.

In the *Virginia King* case, the statute at issue, Revised Code §1751.60(A), is subject to more than one reasonable interpretation and is, therefore, ambiguous. Accordingly, the well-delineated canons of statutory construction should be employed by this Court in determining the legislative intent when enacting the statute, thereby affirmatively setting forth the proper interpretation and construction of Revised Code §1751.60(A).

The first reasonable interpretation of the statute is that it only applies when the only insurance coverage available to a patient is through the individual’s health insuring corporation and that it does not apply when other insurance coverage is available to the individual. Stated another way, Revised Code §1751.60(A) merely provides protection for individual enrollees and subscribers of a health insuring corporation from a medical provider seeking compensation directly from the individual for anything other than co-payments and/or deductibles. Revised Code §1751.60(A) provides no other protection for any entity or entities other than individual enrollees and/or subscribers. This interpretation, construction and application of the statute is, in fact, the position being forwarded by Appellants in the *Virginia King* action, as well as the undersigned *amici curiae*, other *amici curiae* participating in the *Virginia King* action and, more importantly, the Ohio Department of Insurance.

This interpretation is also consistent with the remaining subsections of the statute, which provide that a patient with medical care benefits provided by a health insuring corporation is not liable to a contracting medical provider for covered health services if the patient has provided evidence of coverage² and which permit the Superintendent of Insurance in Ohio to waive any requirements found within subsections (A) and (B) of Revised Code §1751.60 if the Superintendent is satisfied that the health insuring corporation has given the medical provider financial guarantees covering the cost of the services provided to the patient³.

In Bulletin 2010-03 entitled “*Guidance Governing Interpretation of O.R.C. 1751.60*” effective July 16, 2010, the Ohio Department of Insurance, in pertinent part, sought to provide “guidance to insurance companies and health care providers regarding interpretation of O.R.C. 1751.60”. See *Notice of Relevant Authority Issued After the Filing of Jurisdictional Memorandum of Appellants, referencing Ohio Department of Insurance Bulletin 2010-03*. As further expounded upon by the Ohio Department of Insurance within Bulletin 2010-03, “[t]he Department is seeking to clarify the meaning of the statute in the context of Chapter 1751 of the Ohio Revised Code in order to avoid confusion regarding the statute and the Department’s authority.” See *Ohio Department of Insurance Bulletin 2010-03*. The Ohio Department of Insurance went on to state as follows:

Chapter 1751 of the Ohio Revised Code governs the licensure and operation of health insuring corporations, including contracting between health insuring corporations and health care providers. Section 1751.60 only applies to provider contracts involving health insuring corporations. It does not apply to providers in relation to coverage offered by sickness and accident insurers licensed under Title 39 of the Revised Code, self-insured health benefit plans, or third-party administrators or carriers that administer self insured plans on “administrative services only” basis.

² Ohio Revised Code §1751.60(B).

³ Ohio Revised Code §1751.60(E).

Section 1751.60 requires that a contract between a health insuring corporation and a health care provider or health care facility include a provision that holds harmless the health insurance corporation's subscriber from provider or facility charges for covered services, except for approved copays and deductibles. This statute prohibits a health care provider or health care facility from balance billing, or seeking compensation from, a subscriber except for approved copayments and deductibles. *See Ohio Department of Insurance Bulletin 2010-03.*

Most importantly, within Bulletin 2010-03, the Ohio Department of Insurance provided some clarification and guidance as to the limitations of Revised Code §1751.60. Specifically, the Department of Insurance stated as follows:

Section 1751.60 does not prohibit a health care provider or health care facility from seeking and receiving full payment from a third-party or a third-party's liability insurer which may be liable for the debt. Rather, Section 1751.60 applies to compensation sought from a subscriber and provides the Department with authority to take action if a violation with respect to a subscriber occurs.

Neither Chapter 1751, nor Section 1751.60, references a private right of action. *See Ohio Department of Insurance Bulletin 2010-03.*

Similarly, in Bulletin 2010-06 entitled "*Guidance Governing Interpretation of R.C. 1751.60*" effective November 9, 2010⁴, which by its own language rescinds, replaces and supersedes Bulletin 2010-03, the Ohio Department of Insurance, clarified the Department's authority and provided "guidance to insurance companies, health insuring corporations (sometimes called HMOs), health care providers and health care facilities regarding interpretation of Section 1751.60 of the Revised Code...". *See Ohio Department of Insurance Bulletin 2010-06.* As further expounded upon by the Ohio Department of Insurance within Bulletin 2010-06, "[t]he Department is seeking to clarify the meaning of the statute in the context of R.C. Chapter 1751 in order to avoid confusion regarding the statute and the Department's

⁴ Bulletin 2010-06, because it was not issued until November 9, 2010, was not previously placed in the record before this Court. A copy of Bulletin 2010-06 may be found at: <http://www.insurance.ohio.gov/Legal/Bulletins/Pages/BulletinIndex.aspx>

authority.” See *Ohio Department of Insurance Bulletin 2010-06*. The Ohio Department of Insurance, within Bulletin 2010-06, continues, as follows:

Chapter 1751 of the Ohio Revised Code governs the licensure and operation of health insuring corporations, including contracting between health insuring corporations and health care providers. The term “health insuring corporation” is specifically defined in R.C. 1751.01(P). R.C. 1751.60 only applies to provider contracts involving health insuring corporations. It does not apply to providers in relation to coverage offered by sickness and accident insurers licensed under R.C. Title 39, self-insured health benefit plans, or third-party administrators or carriers that administer self insured plans on “administrative services only” basis.

R.C. 1751.60 requires that a contract between a health insuring corporation and a health care provider or health care facility include a provision that holds harmless the health insurance corporation’s subscriber from provider or facility charges for covered services, except for approved copays and deductibles. This statute prohibits a health care provider or health care facility from balance billing, or seeking compensation from, a subscriber, except for approved copayments and deductibles. See *Ohio Department of Insurance Bulletin 2010-06*.

Accordingly, the agency authorized by the Ohio General Assembly with the task of regulating the insurance industry, the Department of Insurance, has reviewed and analyzed the statute at issue in the *Virginia King* case, Revised Code §1751.60, and determined the correct and proper interpretation, construction and application of the statute. This correct and proper interpretation, construction and application of Revised Code §1751.60 is reasonable and is consistent with the position being advanced by Appellants and the undersigned *amici curiae* in the *Virginia King* case.

Courts are required to give due deference to an administrative interpretation formulated by an agency that has accumulated substantial expertise and to which a legislative body has delegated such responsibility, when interpreting statutes. *Weiss v. Public Utility Commission* (2000), 90 Ohio St.3d 15, 17-18. See also, *Northwestern Ohio Bldg. and Construction Trades Council v. Conrad* (2001), 92 Ohio St.3d 282, 750 N.E.2d 130; and, *Jones Metal Products Co. v. Walker* (1972), 29 Ohio St.2d 173. This Court in *Northwestern Ohio Bldg. and Construction*

Trades Council v. Conrad went on to hold that a court must give due deference to the agency's reasonable interpretation of the legislative scheme that provides the authority for the agency to act. Northwestern, supra at 287.

Here, due deference and great weight and respect must be given to the interpretation, construction and application of Revised Code §1751.60 from the Ohio Department of Insurance, as the agency which has accumulated substantial expertise with the insurance industry and which has been delegated with the responsibility of implementing rules and regulations over the insurance industry. Thus, Bulletin 2010-03 and Bulletin 2010-06, from the Department of Insurance, both of which set forth the Department's interpretation, construction and application of Revised Code §1751.60 clearly constitute a reasonable interpretation of the statute at issue in the *Virginia King* case.

To the contrary, Appellee's interpretation of Revised Code §1751.60(A) is that the statute precludes medical providers from seeking compensation from any entity other than an individual patient's health insuring corporation. This is the statutory interpretation, construction and application which were erroneously and incorrectly adopted by the 6th District Court of Appeals for Lucas County in the *Virginia King* appeal. Assuming *arguendo*, that such an interpretation is reasonable given the entire statute at issue, the simple fact that Revised Code §1751.60(A) is subject to more than one interpretation establishes that the statute is ambiguous and, therefore, judicial determination of the correct and proper interpretation and construction of the statute is appropriate and warranted in the *Virginia King* case.

Specifically, the 6th District Court of Appeals for Lucas County in the *Virginia King* appeal held as follows:

Given the preferred provider contract in place between appellant's healthcare insurer and the healthcare provider from whom treatment was received, the billing

activity in connection to the treatment were subject to the statutory limitations established by R.C. 1751.60(A). The crux of R.C. 1751.60(A) is that in preferred provider scenarios, compensation, and therefore billing, may solely be pursued from the contracting health insurer.” See *Decision and Judgment dated June 4, 2010 from the 6th District Court of Appeals for Lucas County, Ohio*, ¶5.

* * *

The key, determinative word utilized in R.C. 1751.60(A) is ‘solely.’ The commonly understood meaning of the term is reflected in the definition set forth in Black’s Law Dictionary (6 Ed. 1991) which defines sole as, “Without another or others.” In applying that unambiguous term to the instant case, we find that the term ‘solely’ clearly and plainly means to the exclusion of others.” See *Decision and Judgment dated June 4, 2010 from the 6th District Court of Appeals for Lucas County, Ohio*, ¶12.

* * *

“Based upon the foregoing, the plain and unambiguous meaning of R.C. 1751.60(A) is that health care providers and facilities who execute preferred provider agreements with health insurance corporations can solely bill the health insurance corporation subject to the agreement for covered services furnished to enrollees or subscribers covered by the agreement to the exclusion of any and all other potential payors. As such, we interpret R.C. 1751.60(A) consistent with *Hayberg* and contrary to the mistaken, non-exclusive payor interpretation proffered by appellees.” See *Decision and Judgment dated June 4, 2010 from the 6th District Court of Appeals for Lucas County, Ohio*, ¶13.

The statutory interpretation by the 6th District Court of Appeals lacks sufficient and adequate analysis and further leaves Revised Code §1751.60 in conflict with other Ohio and Federal Statutes involving the same subject matter. The 6th District Court of Appeals’ construction and interpretation of Revised Code §1751.60 further ignores the clear intent of the statute to provide protection for individual enrollees and subscribers, fails to perceive the ambiguity present within the statute, rejects the fundamental inconsistency between its decision and other Ohio and Federal statutes including Revised Code §3902.11, focuses myopically on the single word “solely” within the statute, and cites for authority only the 11th District Court of Appeals’ decision in the *Hayberg v. Physicians Emergency Serv. Inc.* case⁵, which is clearly not

⁵ 2008-Ohio-6180 (11th Dist. CA Portage Cty. 2008), appeal not accepted for review (2009), 121 Ohio St.3d 1442, 2009-Ohio-1638.

controlling precedent⁶, and the secondary authority of *Black's Law Dictionary*. The decision from the 6th District Court of Appeals mandating that medical providers seek compensation only from the health insuring corporation subject to a contract for covered services and expressly prohibiting medical providers from seeking compensation from any other potentially responsible entity is in inherent conflict with Ohio's coordination of benefits statutes, Revised Code §§3902.11, *et seq.*, and Federal Medicare statutes.

As was held by this Court in *State v. Wilson*, “a court should not pick out one sentence and disassociate it from the context but, rather, should look at the four corners of the enactment and determine the intent of the enacting body.” *State v. Wilson* (1997), 77 Ohio St.3d 334, 673 N.E.2d 1347. This principle was further expanded by this Court and by the United States Supreme Court the following year. See *Textron Lycoming Reciprocating Engine Div., Avco Corp. v. United Auto., Aerospace, Agricultural Implement Workers of America, International Union* (1998), 523 U.S. 653, 657, 118 S. Ct. 1626 (“More basically, however, it is a fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.” citing *Deal v. United States*, 508 U.S. 129, 132 (1993)); and, *State ex rel. Thompson v. Spon* (1998), 83 Ohio St.3d 551, 554, 700 N.E.2d 1281 (“In reviewing a statute, a court cannot pick out one sentence and disassociate it from the context, but must look to the four corners of the enactment to determine the intent of the enacting body.”) citing *State v. Wilson*

⁶ As an opinion of one judge with a concurrence in judgment only and not as to the opinion by another judge and a dissenting opinion by the third judge, the decision rendered is entitled to no precedential value beyond the parties involved therein. See, *People v. Petros*, 198 Mich.App. 401, 499 N.W.2d 784 (1993); *Hester by Scott v. Rymer*, 717 S.W.2d 251 (Mo. Ct. App. S.D. 1986); and, *Northern Indiana Public Service Co. v. Citizens Action Coalition of Indiana, Inc.*, 548 N.E.2d 153 (Ind. 1989).

(1997), 77 Ohio St.3d 334, 336, 673 N.E.2d 1347; MacDonald v. Bernard (1982), 1 Ohio St.3d 85, 89, 438 N.E.2d 410).

Although it is acknowledged by the undersigned that the language utilized within a statute is generally considered the most natural expositor of the intent of the legislature, an important caveat to the general principle exists in circumstances where a reasonable and proper construction of the language used within the statute is not possible. See State ex rel. Shaffer v. Defenbacher (1947), 148 Ohio St. 465. See also, Wiesenthal v. Wickersham, 64 Ohio App. 124 (2nd Dist., Franklin Cty. 1940); Security Ben. Life Ins. Co. v. Robinson, 79 Ohio L. Abs. 97, 154 N.E.2d 649 (10th Dist., Franklin Cty. 1958), judgment affirmed, 170 Ohio St. 217, 163 N.E.2d 352 (1959); and, Sengel v. Maddox, 31 Ohio Op. 201, 16 Ohio Supp. 137 (C.P. 1945).

In addition, it is clear from case precedent from the 6th District Court of Appeals that too much emphasis ought not be given to particular words used within a statute and that an entire statute must be considered in determining the spirit and meaning of the statute. See Suez Co. v. Young, 118 Ohio App. 415, 195 N.E.2d 117 (6th Dist., Lucas Cty. 1963). As stated by the court in In re Clark's Estate, "to overemphasize one word or phrase of a statute at the expense of the others would be to give the statute a stunted meaning." In re Clark's Estate, 74 Ohio L. Abs. 460, 141 N.E.2d 259 (Prob. Ct. 1955), judgment aff'd, 102 Ohio App. 200 (4th Dist., Ross Cty. 1956).

As stated very simply by the United States Supreme Court in Holloway v. United States, 526 U.S. 1, 119 S. Ct. 966 (1999), "the meaning of statutory language, plain or not, depends on context." Stated another way by this Court in Blackwell v. Bowman (1948), 150 Ohio St. 34, 80 N.E.2d 493, "an act under consideration should be construed in its entirety." See also, Muth v. Maxton, 53 Ohio Op. 263, 119 N.E.2d 162 (C.P. 1954). In the Virginia King case, not only did the 6th District Court of Appeals for Lucas County focus entirely on a single provision of the

statute, the Court of Appeals specifically focused on a single word (“solely”) found within that sentence in making its determination of the meaning of the entire statute. Such focus is clearly not mandated and, in fact, specifically criticized by this Court.

It is well established that a court must examine a statute in its entirety rather than focusing on an isolated word or phrase within the statute. See *Massillon City School Dist. Bd. of Ed. v. Massillon* (2004), 104 Ohio St.3d 518, 2004-Ohio-6775, at ¶37. A court should not “pick out one sentence and disassociate it from the context, but must look at the four corners of the enactment to determine the intent of the enacting body.” *State v. Jackson* (2004), 102 Ohio St.3d 380, 2004-Ohio-3206, at ¶34. In contrast, the 6th District Court of Appeals for Lucas County merely examined and defined a single word from Ohio Revised Code §1751.60 within its Decision and Judgment dated June 4, 2010, and then extrapolated an interpretation of the entire statute from that word.

As stated by this Court in *Sarmiento v. Grange Mut. Cas. Co.* (2005), 106 Ohio St.3d 403, 2005-Ohio-5410, at ¶25, “... none of the language employed in a statute should be disregarded.” However, a simple review of the statutory interpretation of Revised Code §1751.60(A) found within the decision of the 6th District Court of Appeals reveals that the court clearly disregarded the remaining language of the statute when it myopically focused on the single term “solely” and utilized *Black’s Law Dictionary* (6th Ed. 1991), a secondary source, for its definition. The interpretation of the statute by the 6th District Court of Appeals is clearly erroneous and, more importantly for this Court, contrary to the interpretation of the statute by the Ohio Department of Insurance, thereby establishing that Revised Code §1751.60(A) is ambiguous.

B. Because Revised Code §1751.60(A) Is Ambiguous, This Court Must Determine The Intent Of The General Assembly When Enacting The Statute Through Well-Established Canons Of Statutory Interpretation

Having established that the statute at issue, Revised Code §1751.60, is ambiguous, it becomes the duty and responsibility of this Court to determine the proper interpretation, construction and application of the statute by first determining the legislative intent of the General Assembly when the statute was enacted, utilizing the factors described under Revised Code §1.49.

As this Court has set forth on numerous occasions, “the primary and paramount rule in the interpretation or construction of statutes is to ascertain, declare and give effect to the intention of the legislature if it is possible to do so.” State ex rel. U.S. Steel Corp. v. Zaleski (2003), 98 Ohio St.3d 395. See also, State v. Anthony (2002), 96 Ohio St.3d 173, 772 N.E.2d 1167; State ex rel. Moss v. Ohio State Highway Patrol Retirement System (2002), 97 Ohio St.3d 198, 777 N.E.2d 259; State ex rel. Cincinnati Enquirer, Division of Gannett Satellite Information Network, Inc. v. Joyce (2002), 97 Ohio St.3d 192; and, State ex rel. Van Dyke v. Public Employment Retirement Bd. (2003), 99 Ohio St.3d 430. In fact, as this Court held in State ex rel. Cincinnati Post v. Cincinnati (1996), 76 Ohio St.3d 540, when construing a statute a court must avoid adopting a construction of a statute that would circumvent the evident purpose of its enactment.

In order to determine legislative intent, the court may consider a host of factors. Family Medicine Foundation, Inc. v. Bright (2002), 96 Ohio St.3d 183. Pursuant to Revised Code §1.49(A) through (F), when a statute is ambiguous, the Court, in determining the intention of the legislature, may consider, among other matters: the object sought to be obtained, the circumstances under which the statute was enacted, the legislative history, the common law or

former statutory provisions including laws upon same or similar subjects, the consequences of a particular construction, and the administrative construction of a statute. *See Revised Code §1.49(A) through (F)*. *See also, Family Medicine Foundation, Inc. v. Bright (2002), 96 Ohio St.3d 183*. Although it is clear that courts are bound by the rules of statutory construction, at least one court has recognized the fact that such rules of statutory construction are not so stringent as to impose upon a court the requirement that it ignore common sense and the clear intent of the legislative authority in interpreting legislative enactments. *See Cleveland v. Fisher, 62 Ohio Misc.2d 792, 611 N.E.2d 1016 (Mun. Ct. 1992)*.

Each of the factors set forth under Revised Code §1.49 will be addressed separately below and each such factor clearly favors the interpretation, construction and application of Revised Code §1751.60(A) being asserted by Appellants, the various *amici curiae* including the undersigned, and the Ohio Department of Insurance. Specifically, that Revised Code §1751.60(A) applies only when the insurance coverage provided by an individual's health insuring corporation is the only coverage available to the individual and the statute does not prohibit medical providers from seeking compensation from other available third-party payors.

1. Object sought to be obtained

Pursuant to the 122nd Final Bill Analysis from the Ohio Legislative Service Commission which relates to Am. Sub. Senate Bill 67, the Senate Bill which enacted Revised Code §1751.60, the Senate Bill enacted a new chapter, Chapter 1751, in order to provide for the establishment, operation and regulation of health insuring corporations and to provide uniform regulation of providers of managed health care. *See Ohio Legislative Service Commission, 122nd Final Bill Analysis, Am. Sub. S.B. 67⁷*. The Ohio Legislative Service Commission, in describing the

⁷ The Legislative Service Commission 122nd Final Bill Analysis can be found at:

operation of the new chapter, states that the Senate Bill “regulates the operations of health insuring corporations, in relation both to the health insuring corporation’s contracts with subscribers and enrollees and to its contracts with providers, health care facilities, insurers, intermediary organizations, and other companies rendering services to the health insuring corporation.” *See Ohio Legislative Service Commission, 122nd Final Bill Analysis, Am. Sub. S.B. 67.* An additional objective of the revisions was to provide consumer protections to enrollees and subscribers. The Final Bill Analysis of Am. Sub. S.B. 67 from the Ohio Legislative Service Commission further states as follows:

The act also contains several provisions focusing on protection for subscribers and enrollees, including: anti-discrimination provisions; a requirement to provide notice of restrictions on the choice of providers; providing access to applications, filings, and reports of health insuring corporations; providing confidential status to diagnoses and other health information pertaining to enrollees; and restricting the authority of providers and health care facilities to seek compensation for covered services from enrollees. *See Ohio Legislative Service Commission, 122nd Final Bill Analysis, Am. Sub. S.B. 67.*

It is apparent that the Ohio Legislative Service Commission, an entity that reviews and analyzes statutes, regulations, and bills enacted by the General Assembly as part of its primary function, determined that Revised Code §1751.60 merely restricted the authority of providers and health care facilities from seeking compensation directly from the enrollees and subscribers of a health insuring corporation. As set forth earlier in greater detail, the language utilized within Revised Code §1751.60 does not prohibit a provider and/or health care facility from seeking compensation from a third-party payor, such as an automobile liability insurance carrier. Similarly, the Ohio Legislative Service Commission, in reviewing and analyzing Revised Code §1751.60, determined that the statute only provided protection to an enrollee and/or subscriber

from the provider or health care facility attempting to seek compensation directly from the enrollee and/or subscriber.

Accordingly, it is clear that the object sought to be obtained by the General Assembly with the passage of Am. Sub. S.B. 67, which enacted Revised Code §1751.60, was merely the protection of individual enrollees and subscribers of a health insuring corporation from being billed directly for covered medical services from a provider and/or health care facility. The General Assembly clearly did not intend to provide similar protection to third-party payors, such as automobile insurance carriers.

Further evidence of the object sought to be obtained by the General Assembly with the passage of Am. Sub. S.B. 67, which enacted Revised Code §1751.60, can be found in the analysis of the statute by the Ohio Department of Insurance within Bulletin 2010-03 and Bulletin 2010-06, as detailed earlier. The Ohio Department of Insurance has determined that Revised Code §1751.60 does not apply to providers in relation to coverage provided by sickness and accident insurers licensed under Revised Code Title 39, self-insured health benefit plans, or third-party administrators. *See Ohio Department of Insurance Bulletin 2010-03 and Ohio Department of Insurance Bulletin 2010-06.* In reviewing and analyzing the statute at issue, the Ohio Department of Insurance has determined that the purpose of Revised Code §1751.60 was to prohibit a health care provider or health care facility from balance billing, or seeking compensation from, an enrollee and/or subscriber except for approved copayments and deductibles. *See Ohio Department of Insurance Bulletin 2010-03 and Ohio Department of Insurance Bulletin 2010-06.*

2. Circumstances under which the Statute was enacted

In the early 1990's, many new forms of managed health care were emerging. To address a variety of concerns and issues relating to this new world of health care, the General Assembly in 1997 enacted Am. Sub. Senate Bill 67, which created a new comprehensive Revised Code chapter, Chapter 1751, in order to provide for the establishment, operation, and regulation of "health insuring corporations" and to provide uniform regulation of providers of managed health care. This new chapter, Revised Code Chapter 1751, replaced the former Health Maintenance Organization Law, Revised Code Chapter 1742, but is structured in essentially the same manner. Revised Code Chapter 1751 does, however, include various consumer protections, including Revised Code §1751.60(A) which provides that enrollees and subscribers are liable only for deductibles and co-payments and for non-covered medical services. *See Legislative Service Commission, 122nd Final Bill Analysis for Am. Sub. S.B. 67.*

3. Legislative history

A review of the legislative history of Revised Code Chapter 1751 and specifically of Revised Code §1751.60 reveals no pertinent analysis of the statute and reveals no substantive changes or revisions to the various permeations of the statute as it passed through the House and Senate of the General Assembly. The legislative history clearly establishes that there is no provision prohibiting a health care provider and/or health care facility from seeking compensation from a third-party payor, such as an automobile insurance carrier. In fact, nothing is found within the legislative history of Revised Code §1751.60 which references or analyzes the billing practices and/or procedures undertaken by health care providers and/or health care facilities, such as are being discussed within the *Virginia King* and *Dorothy Streeter* cases.

4. Common law or former statutory provisions, including laws upon similar subjects

There is clearly no controlling precedent within the decisions of this Court providing any proper interpretation, application and/or construction of Revised Code §1751.60(A). By exercising its discretionary jurisdiction, the Ohio Supreme Court, as the highest Court in Ohio, will provide the 6th District Court of Appeals and all other appellate courts in Ohio with an authoritative determination of the rights, duties, and obligations of medical providers in seeking compensation for covered medical services provided to patients throughout the State of Ohio under Revised Code §1751.60.

It is well established that statutes relating to the same matter or subject, although passed at different times and making no reference to each other, are *in pari materia*. See D.A.B.E., Inc. v. Toledo-Lucas Cty. Bd. of Health (2002), 96 Ohio St.3d 250; State ex rel. Gains v. Rossi (1999), 86 Ohio St.3d 620; Yonkings v. Wilkinson (1999), 86 Ohio St.3d 225; and, Cater v. City of Cleveland (1998), 83 Ohio St.3d 24. It is also a fundamental rule of statutory construction that sections and acts that are *in pari materia* should be construed together. See State ex rel. Pratt v. Weygandt (1956), 164 Ohio St. 463; Suez Co. v. Young, 118 Ohio App. 415, 195 N.E.2d 117 (6th Dist., Lucas Cty. 1963); Volan v. Keller, 20 Ohio App.2d 204, 253 N.E.2d 309 (7th Dist., Jefferson Cty. 1969); and, Cook v. Village of Paulding, 4 Ohio Misc. 111, 207 N.E.2d 405 (C.P. 1965).

Here, the statute at issue, Revised Code §1751.60(A), clearly relates to the same matter or subject as Revised Code §§3902.11, *et seq.*, Ohio's statutes and regulations on the coordination of benefits. Accordingly, these statutes are *in pari materia* and this Court, in construing the proper interpretation and application of Revised Code §1751.60(A), must reference and take into account Ohio's statutes on the coordination of benefits.

The application of the statute, as interpreted by the 6th District Court of Appeals, is in conflict with several Ohio and Federal Statutes. Specifically, the coordination of benefits statutes under Ohio law, Revised Code §§3902.11, *et seq.*, are clearly in conflict with Revised Code §1751.60, as that statute is interpreted by the 6th District Court of Appeals. Because Revised Code §1751.60 and Revised Code §§3902.11, *et seq.* relate to the same subject matter, the statutes are *in pari materia* and the statutes must be read together in order to ascertain and effectuate the legislative intent. See D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health (2002), 96 Ohio St.3d 250, 2002-Ohio-4172; and, State ex rel. Pratt v. Weygandt (1956), 164 Ohio St. 463, ¶2 of the Syllabus. Statutes relating to the same subject matter should be read together as if a single statute. Bosher v. Euclid Income Tax Bd. of Rev. (2003), 99 Ohio St.3d 330, 2003-Ohio-3886, at ¶14. Under the statutory interpretation contained within the 6th District Court of Appeals' decision, Revised Code §1751.60 cannot be effectively read in concert with the coordination of benefits statutes under Ohio law, even though such statutes are *in pari materia* with Revised Code §1751.60.

In addition, the statutory interpretation contained within the 6th District Court of Appeals decision is fundamentally inconsistent with the Medicare statutes under Federal law. See 42 U.S.C. §§1395y⁸ and 1395w-22⁹. As explained within the handbook *Medicare & You 2009* from the U.S. Department of Health & Human Services, “the following types of coverage always pay first: no-fault insurance (including automobile insurance), liability (including automobile insurance), Black Lung benefits, and workers’ compensation.” *Medicare & You 2009*, U.S. Dept. of Health & Human Services, Centers for Medicare & Medicaid, §2 – Decide How to Get Your Medicare, p.74 under *How Your Bills Get Paid If You Have Other Health Insurance*. It is

⁸ Titled: *Exclusion from Coverage and Medicare as Secondary Payor.*

⁹ Titled: *Benefits and Beneficiary Protections.*

clear that the in those circumstances where a patient receives medical benefits from Medicare and from a secondary source, such as a health insuring corporation, Medicare guidelines mandate that any other insurance pay before Medicare is responsible for medical expenses. In order for the other insurance carrier to pay, that other insurance carrier must receive a bill from the medical provider.

However, under the statutory interpretation contained in the 6th District Court of Appeals' decision in the *Virginia King* case, medical providers within the State of Ohio are expressly prohibited from seeking compensation from other insurance carriers, such as automobile insurance carriers. Again, it is clear that the interpretation of Revised Code §1751.60 from the 6th District Court of Appeals cannot be read in concert with the Federal Medicare statutes, yet the statutes relate to the same or similar subject matter. This disconnect, and in fact conflict, between the statute at issue and *in pari materia* statutes under Ohio and Federal law, clearly demonstrate that the interpretation, construction and application of Revised Code §1751.60(A) being asserted by Appellees and adopted by the 6th District Court of Appeals for Lucas County in the *Virginia King* case is erroneous.

“An error that is manifest beyond doubt, either on the face of the statute or when read in connection with other statutes *in pari materia*, may be corrected by a court if the true intention of the legislature can be ascertained.” *Stanton v. Frankel Brothers Realty Co.* (1927), 117 Ohio St. 345, 158 N.E. 868. See also, *Brim v. Rice*, 20 Ohio App.2d 293, 253 N.E.2d 820 (1st Dist., Hamilton Cty. 1969); and, *State v. Reineke*, 27 Ohio App.3d 382, 501 N.E.2d 683 (10th Dist., Franklin Cty. 1986).

Here, this Court has the authority and ability to correct such an error, through the proper and correct interpretation, construction and application of Revised Code §1751.60(A), as set forth herein and within the Merit Brief of Appellants.

5. Consequences of a particular construction

Medical providers throughout the State of Ohio currently seek compensation for covered medical services through long-standing and industry-recognized billing practices that allow such providers to seek payment from any and all potentially responsible payors, taking into account Ohio's coordination of benefits statutes. If the 6th District Court of Appeals' erroneous decision is permitted to stand, medical providers may only seek compensation from a patient's health insuring corporation, to the exclusion of other entities. Should the patient's health insuring corporation determine, pursuant to Ohio's coordination of benefits statutes, that the health insuring corporation does not provide primary coverage for the covered services provided to the patient, the health insuring corporation may properly refuse to remit payment to the medical provider until such time as the primary coverage is exhausted. Under the 6th District Court of Appeals' decision, that same medical provider which provided covered medical services to the patient is prohibited from seeking compensation from any other entity and, thus, the primary coverage is never exhausted, the health insuring corporation never has to remit payment as the secondary insurance coverage, and the medical provider never receives any payment. Whatever the Supreme Court ultimately decides is the correct interpretation and application of Revised Code §1751.60, it is undeniable that the General Assembly, at the time of the passage and enactment of the statute, did not anticipate such a scenario and clearly did not intend such an impact on medical providers throughout the State of Ohio.

The 6th District Court of Appeals' decision in the *Virginia King* case clearly changes and redefines the intent and scope of Revised Code §1751.60(A). Specifically, the 6th District Court of Appeals' interpretation of Revised Code §1751.60(A) prohibits all medical care providers from seeking compensation for covered services from any entity other than a patient's health insuring corporation. The only authority cited in support of the above interpretation is the non-precedential decision by the 11th District Court of Appeals in the *Hayberg v. Physicians Emergency Serv. Inc.* case and the secondary authority of *Black's Law Dictionary*. The 6th District Court of Appeals' decision does not contain any other detailed and/or adequate analysis of Revised Code §1751.60(A), yet its decision substantially and significantly impacts the current practices and procedures of all medical care providers throughout the State of Ohio.

As a result of the decision from the 6th District Court of Appeals, medical providers throughout the State of Ohio have been placed in a position of great uncertainty regarding the ability to continue established and uniform billing practices and procedures for seeking compensation for medical services provided to patients. Medical providers are also left with a significant quandary regarding the interplay between various Revised Code statutes, including Revised Code §1751.60 and Ohio's coordination of benefits statutes, Revised Code §3902.11, *et seq.*, as well as the interplay between Ohio statutes and various Federal statutes such as the Medicare statutes, 42 U.S.C. §§1395, *et seq.*, as detailed previously.

Health insuring corporations doing business within the State of Ohio are left with potentially significant increases in the number of claims presented by medical providers, as the health insuring corporations become the only entities from whom the medical providers may seek compensation. In contrast, insurance carriers, such as automobile insurance carriers, who have accepted premiums and written policies containing primary medical payment coverage, are

now insulated from having to remit payment to the medical providers for medical services provided to their insured.

Finally and most importantly, patients throughout the State of Ohio are left with significant changes to the medical care benefits available to the patient and to the manner in which the individual patient can navigate the health care benefits available. Patients with medical benefits provided through a health insuring corporation and additional medical benefits coverage through a policy of insurance written by another insurance carrier, such as an automobile insurance policy with medical payment coverage, have now lost the ability to have their medical bills submitted to the primary insurance carrier and will be confronted with confusing and unintelligible Explanation of Benefits statements.

In summary, the interpretation of Revised Code §1751.60 contained within the Decision and Judgment dated June 4, 2010 from the 6th District Court of Appeals leaves all of Ohio in a climate of confusion regarding the ability of medical providers to seek compensation for covered medical services provided to patients.

In addition to the interest of Mercy Health System resulting from the ongoing litigation of the *Dorothy Streeter* case, Mercy Health System operates seven (7) facilities within four (4) different counties, which are in-turn under the jurisdiction of both the 6th and the 3rd Appellate Districts. Mercy Health Partners operates Mercy St. Vincent Medical Center¹⁰, Mercy St. Charles Hospital¹¹, Mercy St. Anne Hospital¹², and Mercy Children's Hospital¹³ within Lucas

¹⁰ Located in Toledo, Ohio, Mercy St. Vincent Medical Center has 880 physicians on staff and employs 3,578 individuals.

¹¹ Located in Oregon, Ohio, Mercy St. Charles Hospital has 540 physicians on staff and employs 1,286 individuals.

¹² Located in Toledo, Ohio, Mercy St. Anne Hospital has 573 physicians on staff and employs 750 individuals.

¹³ Located in Toledo, Ohio, Mercy Children's Hospital has a 72 bed inpatient unit and 207

County, and Mercy Willard Hospital¹⁴ within Huron County, all of which are within the jurisdiction of the 6th Appellate District. Mercy Health Partners also operates Mercy Tiffin Hospital¹⁵ within Seneca County and Mercy Hospital of Defiance¹⁶ within Defiance County, both of which are within the jurisdiction of the 3rd Appellate District. Mercy Health Partners, as an entity, employs over five thousand (5,000) individuals and has over fifteen hundred (1,500) physicians on staff at its various facilities.

In addition, Mercy Health Partners and, in fact, all medical providers throughout the State of Ohio, have well-established, long-standing, and functional registration and billing practices and procedures for medical services provided to individuals, all of which would require amendment and revision, at a significant expenditure of time, energies and resources, should this Court follow the erroneous interpretation, construction and application of Revised Code §1751.60(A) being advanced by Appellees and which was adopted by the 6th District Court of Appeals for Lucas County in the *Virginia King* case.

Similarly, Catholic Healthcare Partners, the parent company of Mercy Health Partners, is a mission-driven, non-profit health system which operates acute care hospitals, long-term care facilities, housing sites for the elderly, home health agencies, hospice programs, wellness centers and other healthcare organizations. Catholic Healthcare Partners is the largest health system in the State of Ohio and one of the largest non-profit health systems in the United States. As the fourth largest employer in the State of Ohio and a company that operates over one hundred (100)

physicians on staff.

¹⁴ Located in Willard, Ohio, Mercy Willard Hospital has 133 physicians on staff and employs 194 individuals.

¹⁵ Located in Tiffin, Ohio, Mercy Tiffin Hospital has 167 physicians on staff and employs 431 individuals.

¹⁶ Located in Defiance, Ohio, Mercy Hospital of Defiance has 91 physicians on staff and employs 139 individuals.

healthcare organizations meeting the healthcare needs of the people of Ohio, Kentucky, Tennessee and Pennsylvania, Catholic Healthcare Partners clearly has a significant interest in the issues raised by ProMedica and the Toledo Hospital within the appeal taken in the *Virginia King* case, as the determination of those issues will undoubtedly impact all of the healthcare organizations and facilities operated by Catholic Healthcare Partners throughout the entire State of Ohio.

In addition to the facilities operated by Mercy Health Partners on its behalf, Catholic Healthcare Partners operates additional facilities and healthcare organizations located in Hamilton County¹⁷ within the 1st Appellate District, Clermont County¹⁸ and Butler County¹⁹ within the 12th Appellate District, Mahoning County²⁰ within the 7th Appellate District, Allen County²¹ within the 3rd Appellate District, Lorain County²² within the 9th Appellate District, Clark County²³ and Champaign County²⁴ within the 2nd Appellate District, and Trumbull County²⁵ within the 11th Appellate District. Clearly, as a significant employer within the State of Ohio which provides a wide range of health care services to patients throughout all of Ohio, Catholic Healthcare Partners has a vested interest in the determination by the Ohio Supreme Court of the proper interpretation and application of Revised Code §1751.60(A), an Ohio statute that is in need of clarification and uniformity of application.

¹⁷ Mercy Hospital Anderson located in Anderson, Ohio, and The Jewish Hospital, Mercy Hospital Mt. Airy, and Western Hills all of which are located in Cincinnati, Ohio.

¹⁸ Mercy Hospital Clermont located in Batavia, Ohio.

¹⁹ Mercy Hospital Fairfield located in Fairfield, Ohio.

²⁰ St. Elizabeth Boardman Health Center located in Boardman, Ohio, and St. Elizabeth Health Center located in Youngstown, Ohio.

²¹ St. Rita's Medical Center located in Lima, Ohio, and Allen Community Hospital located in Oberlin, Ohio.

²² Catholic Healthcare Partners Regional Medical Center located in Lorain, Ohio.

²³ Springfield Regional Medical Center located in Springfield, Ohio.

²⁴ Mercy Memorial Hospital located in Urbana, Ohio.

²⁵ St. Joseph Health Center located in Warren, Ohio.

6. Administrative construction of the Statute

In the *Virginia King* case, this Court should look to and place significant reliance upon the interpretation, construction and application of Revised Code §1751.60(A) from the Ohio Department of Insurance, the administrative agency empowered with the authority and responsibility to implement rules and regulations relating to the insurance industry.

As was established earlier, when interpreting statutes, courts are required to give due deference to an administrative interpretation formulated by an agency that has accumulated substantial expertise and to which agency the legislative body has delegated the responsibility of implementing the command of such body. *Weiss v. Public Utility Commission* (2000), 90 Ohio St.3d 15, 17-18. See also, *Northwestern Ohio Bldg. and Construction Trades Council v. Conrad* (2001), 92 Ohio St.3d 282, 750 N.E.2d 130; and, *Jones Metal Products Co. v. Walker* (1972), 29 Ohio St.2d 173. This Court held that a reviewing court must give due deference to an agency's reasonable interpretation of the legislative scheme that provides the authority for the agency to act. *Northwestern, supra*, at 287.

This Court cemented the importance of giving due deference in *State ex rel. Clark v. Great Lakes Construction Co.* (2003), 99 Ohio St.3d 320, 321. In that case, this Court held that "an agency's interpretation of a statute that it has the duty to enforce will not be overturned unless the interpretation is unreasonable." *State ex rel. Clark, supra* at 321.

The construction placed upon a statute by executive departments or bureaus is not only persuasive,²⁶ but is also entitled to great weight,²⁷ great respect,²⁸ and is not to be disregarded or

²⁶ *State ex rel. Hunt v. Fronizer*, 2 Ohio N.P. (n.s.) 373 (C.P. 1904).

²⁷ *Miami Conservancy Dist. v. Bucher*, 87 Ohio App. 390, 95 N.E.2d 226 (2nd Dist., Montgomery Cty. 1949); *National Petroleum Pub. Co. v. Bowers*, 56 Ohio Op. 133 (B.T.A. 1954); and, *Jones v. Bd. of Ed. Cleveland City School Dist.*, 474 F.2d 1232, 68 Ohio Op.2d 286 (6th Cir. 1973).

²⁸ *Emerson v. Forest City Ry.*, 4 Ohio N.P. (n.s.) 493 (C.P. 1906), *aff'd*, 18 Ohio C.D. 683 (Ohio

set aside unless judicial construction makes it imperative to do so.²⁹ In the *Virginia King* case, the interpretation, construction and application of Revised Code §1751.60(A) by the Ohio Department of Insurance, as evidenced by Bulletin 2010-03 and Bulletin 2010-06, as clarification from the administrative agency responsible for regulation of the insurance industry, must be considered by this Court as persuasive and is, accordingly, entitled to great weight and great respect by this Court.

C. Revised Code §1751.60(A), Properly Construed, Does Not Prohibit Medical Providers From Seeking Compensation Under Certain Circumstances From Third-Party Payors

All of the above canons of statutory interpretation clearly favor the interpretation and application of Revised Code §1751.60(A) consistent with the legislative intent at the time of enactment of the statute, such that Revised Code §1751.60(A) permits a medical provider to seek compensation from available third-party payors. The above analysis clearly demonstrates that the intent of the General Assembly in enacting Revised Code §1751.60(A) was merely to prohibit medical providers from seeking compensation directly from individual enrollees and/or subscribers of a health insuring corporation for anything other than co-payments and deductibles and non-covered medical services.

Even acknowledging the fact that the United States Supreme Court has held that canons of statutory construction, such as those delineated above, are not mandatory rules, when all of the well-established doctrines of statutory construction, applied to the statute at issue, fall in favor of the interpretation and construction of Revised Code §1751.60(A) being advanced by Appellants and the undersigned *amici curiae*, the evidence is overwhelming and conclusive. To interpret

Cir. Ct. 1906), aff'd, 77 Ohio St. 596 (1907).

²⁹ *Wadsworth v. Dambach*, 99 Ohio App. 269 (6th Dist., Ottawa Cty. 1954); and, *National Petroleum Pub. Co. v. Bowers*, 56 Ohio Op. 133 (B.T.A. 1954).

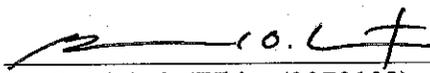
and/or construct Revised Code §1751.60(A) in any other manner would be directly at odds with the well-established canons of statutory interpretation, as well as the interpretation and construction of the statute from the Ohio Department of Insurance, the entity in whom authority is vested for the passage of administrative rules and regulations affecting the insurance industry.

III. Conclusion

Because Revised Code §1751.60(A) can be interpreted in more than one reasonable manner, the statute is, by definition, ambiguous and thus subject to a determination of the legislative intent utilizing the factors detailed previously, all of which weigh heavily in favor of a determination that the General Assembly did not intend to prohibit medical providers from seeking compensation from available third-party payors. Accordingly, the proper interpretation and/or construction of Revised Code §1751.60(A) holds that the statute only precludes a medical provider from seeking compensation, other than deductibles and co-payments, directly from an individual enrollee and/or subscriber of a health insuring corporation for covered medical services and that the statute does not preclude a medical provider from seeking compensation from available third-party payors. In fact, it is clear that Revised Code §1751.60(A) has no applicability in such circumstances wherein an individual has other applicable insurance available to provide medical benefits to the individual, such as automobile liability insurance, automobile medical payment coverage, homeowners' insurance, and/or comprehensive insurance coverage. In those situations where an individual has other applicable insurance available for the provision of medical benefits to the individual, Ohio's coordination of benefits statutes, Revised Code §§3902.11, *et seq.*, are applicable and determine the entities that are responsible for the payment of such medical bills.

Respectfully submitted,

ANSPACH MEEKS ELLENBERGER LLP

By: 
Garrick O. White (0070102)
Counsel of Record

*Counsel for Amici Curiae Mercy Health
Partners and Catholic Healthcare Partners*

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Merit Brief of *Amici Curiae* Mercy Health Partners and Catholic Healthcare Partners in Support of Jurisdiction** was served via regular U.S. mail, postage prepaid, on this 3rd day of January, 2011, on the following:

Patrick McCarten (0024623)
Jones Day
North Point, 901 Lakeside Avenue
Cleveland, OH 44114-1190

Douglas R. Cole (0070665)
Jones Day
325 John H. McConnell Boulevard
Suite 600
Columbus, OH 43216-5017

Marshall A. Bennett, Jr. (0015845)
Jennifer J. Dawson (0033707)
Marshall & Melhorn, LLC
Four Seagate, Eighth Floor
Toledo, OH 43604

COUNSEL FOR APPELLANTS

John T. Murray (0008793)
Leslie O. Murray (0081496)
Murray & Murray Co., L.P.A.
111 East Shoreline Drive
Sandusky, OH 44870

John L. Huffman (0039658)
Mickel & Huffman
520 Spitzer Building
Toledo, OH 43604

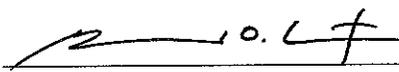
COUNSEL FOR APPELLEE

Anne Marie Sferra (0030855)
Bridget Purdue (0082502)
Bricker & Eckler LLP
100 South Third Street
Columbus, OH 43215

COUNSEL FOR AMICI CURIAE,
OHIO HOSPITAL ASSOCIATION, OHIO
STATE MEDICAL ASSOCIATION, AND
OHIO OSTEOPATHIC ASSOCIATION

Respectfully submitted,

ANSPACH MEEKS ELLENBERGER LLP

By: 
Garrick O. White (0070102)
Counsel of Record

*Counsel for Amici Curiae Mercy Health
Partners and Catholic Healthcare Partners*