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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

*Docket No. 11-0924*

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**R. K.,**

*Plaintiff Below, Petitioner,*

v.

**ST. MARY'S MEDICAL CENTER, INC.,  
d/b/a ST. MARY'S MEDICAL CENTER,**

*Defendant Below, Respondent.*

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*RESPONDENT'S BRIEF WITH CROSS-ASSIGNMENT OF ERROR*

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*ST. MARY'S MEDICAL CENTER, INC.  
d/b/a ST. MARY'S MEDICAL CENTER*

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Assignments of Error

1. Petitioner herein, Plaintiff below R.K. ("Petitioner"), contends that the trial court erred in dismissing his state law causes of action for the alleged failure to safeguard Petitioner's medical records while Petitioner was hospitalized with Respondent, St. Mary's Medical Center ("St. Mary's"), on the basis that said causes of action are preempted by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"). Respondent opposes the Petitioner's appeal and asserts that dismissal of Petitioner's state law causes of action was appropriate pursuant to 42 U.S.C. § 1320d-7 and 45 C.F.R. § 160.203(b).

Cross-Assignments of Error

1. The trial court erred in holding that Petitioner's allegations fell outside the definition of "health care" pursuant to W. Va. Code § 55-7B-2(e) and therefore were not governed by the West Virginia Medical Professional Liability Act, codified at W. Va. Code §§ 55-7B-1, *et seq.* ("MPLA").

Statement of the Case

Pursuant to Rule 10(d) of the West Virginia Rules of Appellate Procedure, Respondent incorporates herein Petitioner's Statement of the Case.

Summary of Argument

The Petitioner's Complaint arises from the alleged failure to safeguard confidential health care information. This alleged failure cannot support the Eight (8) state law counts set forth in Petitioner's Complaint because these claims are preempted by federal law. See 42

U.S.C. § 1320d-7 (2010); 45 C.F.R. § 160.203(b) (2002). Petitioner's remedy, if a violation even exists, is set forth by federal statute and regulation. See 42 U.S.C. § 1320d-5 (2010); 45 C.F.R. § 160.300 – 160.552 (2006). As such, the trial court properly dismissed Petitioner's Complaint below.

Petitioner first asserts error against this ruling on the rationale that, since the claims were not labeled claims for failure to safeguard health care information under HIPAA, the claims should not be subjected to HIPAA's preemption provision. Petitioner's Brief, at pp. 8-10. West Virginia courts, however, are not bound by the labels of the drafter when applying the applicable law. See, ex., Blankenship v. Ethicon, Inc., 221 W. Va. 700, 656 S.E.2d 451 (2007) (stating that a cause of action is determined by the factual allegations contained in the pleading, not the type of claim asserted). Otherwise, distinguishing between preempted and non-preempted claims based upon the particular label affixed to them would allow a party to evade preemptive scope and circumvent legislative intent. See Aetna Health Inc. v. Davila, 542 U.S. 200, 124 S. Ct. 2488 (2004). Therefore, Petitioner's first asserted error is misplaced.

Second, Petitioner asserts error on the basis that HIPAA would not preempt his state law causes of action because "the only application of HIPAA to the present facts would be if Petitioner asserted a claim under the West Virginia Unfair Trade Practices Act ("WVUTPA") for a violation of HIPAA." Petitioner's Brief, at p. 13 (paraphrased). This is clearly incorrect, as 45 C.F.R. 160.202 defines preempted "state law" as "constitution, statute, regulation, rule, **common law**, or other State action having the force and effect of law." Id. (emphasis added). To the extent Petitioner further contends that his state law claims are otherwise excepted from preemption by 42 U.S.C. § 1320d-7(a)(2)(B) (1996), he is incorrect because such state law claims are contrary to and less stringent than standards adopted by Sections 1320d-1 through

1320d-3 of HIPAA. Therefore, as the Petitioner's claims fall within the definition of "state law" notwithstanding the absence of a claim under WVUTPA, and as Petitioner's claims fall outside of the exceptions contained in 42 U.S.C. § 1320d-7(a)(2)(B), Petitioner's second assignment of error is incorrect.

Third, Petitioner asserts that "even though HIPAA does not preempt R.K.'s claims, HIPAA may be used to establish the duty of care that SMMC owed to him." Petitioner's Brief, at p. 13. Petitioner's third assignment of error is telling because it clearly emphasizes Petitioner's reliance on HIPAA in advancing his purported state law claims against St. Mary's. In response, Petitioner's cited precedent is inapposite to the current situation, as those cases undertake no analysis of HIPAA's preemptive effect. Additionally, Petitioner raises this argument for the first time on appeal. See Appendix, generally. Moreover, the effect of HIPAA's general provisions in establishing a standard of care in non-preempted causes of action is irrelevant to the current appeal. Therefore, Petitioner's third assignment of error is misplaced.

In summary, Petitioner is attempting to sue St. Mary's on state law grounds for an alleged HIPAA violation. HIPAA, however, does not provide for a private cause of action. Standiford v. Rodriguez-Hernandez, 2010 WL 3670721 (N.D. W. Va. 2010) (internal citations omitted); Fields v. Charleston Hosp., Inc., No. 2:06-0492, 2006 WL 2371277 (S.D. W. Va. 2006). Petitioner attempts to cloak his allegations against St. Mary's in terms of state law causes of action in an effort to circumvent legislative intent. Petitioner requests HIPAA be presented to prove a duty owed, although Petitioner would have the Court reject the portions of the Act that are detrimental to his case, such as HIPAA's preemption provision and HIPAA's statutory and regulatory defenses. This is improper and inequitable, and should not be

allowed. For these reasons, as more fully discussed below, St. Mary's requests that the Court affirm the trial court's dismissal of Petitioner's Complaint as preempted by federal law.

Statement Regarding Oral Argument and Decision

Although this is a matter of first impression, this litigation involves a narrow issue of law adequately presented upon briefs and record on appeal. For these reasons, oral argument would not aid in the decision-making process. Respondent requests a Memorandum Decision affirming the trial court's dismissal of Petitioner's Complaint as preempted by federal law pursuant to Rule 21 of the West Virginia Rules of Appellate Procedure.

Argument

**I. Introduction:**

Petitioner has brought suit against St. Mary's for an alleged failure to safeguard his confidential health care information. Specifically, Petitioner alleges that "while hospitalized at St. Mary's," certain employees "inappropriately and improperly accessed the [Petitioner's] medical records [and] then disseminated and disclosed such information..." See Complaint, at ¶¶ 9-10, attached hereto at Appendix p. 2. Stated differently, Petitioner claims that St. Mary's committed what is commonly referred to as a HIPAA violation.

Petitioner's Complaint pleads Eight (8) state common-law causes of action based upon this single factual allegation. Notwithstanding Petitioner's cautious drafting of his Complaint to ensure no mention of HIPAA was contained therein, the nature of his claim falls squarely within the provisions set forth in the Health Insurance Portability and Accountability Act of 1996, Part C, Administrative Simplification Provisions, as codified at 42 U.S.C. § 1320d-

2(d)(2).<sup>1</sup> As such, Petitioner's state-law causes of action are preempted pursuant to 42 U.S.C. § 1320d-7 and 45 C.F.R. § 160.203(b).

The preemption doctrine "has its foundation in the Supremacy Clause of the United States Constitution, and 'invalidates states laws that interfere with or are contrary to federal law.'" Brown v. Genesis Healthcare Corp., --- S.E.2d ---, 2011 WL 2611327 (quoting Syl. Pt. 1, Cutwright v. Metropolitan Life Ins. Co., 201 W. Va. 50, 491 S.E.2d 308 (1997)). State law "is preempted if Congress's command either is expressly stated in the federal statute's language, or is implicitly contained in the statute's structure and purpose." Id. citing Syl. Pt. 4, Morgan v. Ford Motor Co., 224 W. Va. 62, 680 S.E.2d 77 (2009). Express preemption occurs "when Congress has specifically and plainly stated its intent to occupy a given field, and in such cases any state law falling within that field will be completely preempted." Id. citing Syl. Pt. 6, Morgan, 224 W. Va. 62, 680 S.E.2d 77.

The Health Insurance Portability and Accountability Act of 1996 was enacted by the U.S. Congress as P.L. 104-191 (Aug. 21, 1996). Part C, codified at 42 U.S.C. §§ 1320d-1 through 1320d-9 and known as the Administrative Simplification "Safeguard" Provisions, requires the establishment of national standards for electronic health care transactions and

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<sup>1</sup> Section 1320d-2(d)(2) states:

(2) Safeguards

Each person described in section 1320d-1(a) of this title who maintains or transmits health information shall maintain reasonable and appropriate administrative, technical, and physical safeguards –

(A) to ensure the integrity and confidentiality of the information;

(B) to protect against any reasonably anticipated –

(i) threats or hazards to the security or integrity of the information; and

(ii) unauthorized used or disclosures of the information; and

(C) otherwise to ensure compliance with this part by the officers and employees of such person.

42 U.S.C. § 1320d-2(d)(2) (2010).

national identifiers for providers, health insurance plans, and employers. See 42 U.S.C. §§ 1320d-1 - 1320d-9; see also, Fisher v. Yale Univ., et al., 2006 WL 1075035, at \*2 (Conn. Super. 2006) (emphasis added). An express purpose of the Safeguard Provisions is to "improve...the efficiency and effectiveness of the health care system through the establishment of uniform standards and requirements for the electronic transmission of health information." See 42 U.S.C. § 1320d (2010), at "*Purpose*," (citing Section 261 of Subtitle F of Title II of Pub.L. 104-191, as amended, Pub.L. 111-148, Title I, § 1104(a)).

To accomplish this purpose, the Safeguard Provisions address the security and privacy of individual's medical records and related health information. Fisher, 2006 WL 1075035 at \*2. These safeguards were established "to ensure the integrity and confidentiality" of an individual's health information and "to protect against any reasonably anticipated... unauthorized uses or disclosures of the information." Id. The Safeguard Provisions set forth uniform procedures and penalties for enforcement of these provisions. See 42 U.S.C. § 1320d-5 (2009). Detailed procedures for compliance, investigations and procedures are set forth by regulation in 45 C.F.R. § 160.300 - 160.316 (2006). The Safeguard Provisions further codify a preemption provision that is controlling on the issue before this Court. Section 1320d-7 of Title 42 specifically states, "[A] provision or requirement under this part, or a standard or implementation specification adopted or established under sections 1320d-1 through 1320d-3 of this title, shall supersede any contrary provision of State law . . . ." 42 U.S.C. § 1320d-7 (1996).<sup>2</sup>

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<sup>2</sup> It should be noted that 42 U.S.C. § 1320d-7(a)(2) provides two "exceptions" to the general preemption rule. Neither exemption applies to the present case. See Section IV, below.

Where, as here, Congress has expressly included a broadly worded preemption provision in a comprehensive statute such as HIPAA, the task of discerning congressional intent is considerably simplified. See, ex., Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 138, 111 S.Ct. 478, 482 (1990) (addressing the express preemption provision of the ERISA statute). Moreover, when a comprehensive statute such as HIPAA contains a detailed enforcement scheme, the accompanying preemption provision extends to preempt remedies otherwise available under State law. Id. at 144 (stating that Congress' intent to include certain remedies and exclude others would be completely undermined if claimants were free to obtain remedies under state law that Congress rejected in the statute). In the present case, the Petitioner's averments fall within the preemption provision of Part C, and the Petitioner's purported state law remedies are preempted.

First, there can be little dispute that Petitioner's claim are encompassed within "[A] provision or requirement under [Part C], or a standard or implementation specification adopted or established under sections 1320d-1 through 1320d-3 of [Title 42]..." 42 U.S.C. § 1320d-7. Again, Petitioner contends that St. Mary's failed to safeguard confidential health care information. In this regard, Section 1320d-2(d)(2) of Title 42 applies directly to persons that "maintain[] or transmit[] health information" and require these persons to "maintain reasonable and appropriate administrative, technical, and physical safeguards (A) to ensure the integrity and confidentiality of the information; (B) to protect against any reasonably anticipated – (i) threats or hazards to the security or integrity of the information; and (ii) unauthorized used or disclosures of the information; and (C) otherwise to ensure compliance with this part by the officers and employees of such person." 42 U.S.C. § 1320d-2(d)(2). As such, the Petitioner's allegations fall within the statutory Safeguard Provisions of HIPAA.

Second, Congress intended for Part C to "supersede any contrary provision of State law" including "common law." 42 U.S.C. § 1320d-7; 45 C.F.R. § 160.202. This is evident by the detailed enforcement mechanism contained in Section 1320d-5 of Title 42 as well as the accompanying regulations set forth in 45 C.F.R. § 160.300 – 160.316. Section 1320d-5(a)(1) provides for the application and determination of general penalties for failure to comply with requirements and standards. Section 1320d-5(d) provides a mechanism for the Attorney General to bring a civil action on behalf of any resident in the appropriate district court "to enjoin further such violation" and "to obtain damages on behalf of such residents...." 42 U.S.C. 1320d-5(d). The detailed regulations contained in 45 C.F.R. § 160.300 – 160.316 encompass pre-hearing conferences, discovery methods, witness lists, witness statements, exhibits, and final hearing procedures. If Congress intended to allow for private causes of action as part of the statute and accompanying regulations, "it could have included it in the legislation or authorized the Secretary to provide for the same by rulemaking." Fisher, 2006 WL 1075035, at \*2. As Congress chose not to do so, it is therefore "not the province of a court to supply what the legislature chose to omit." Id. citing Fed. Aviation Admin. v. Adm'r, 494 A.2d 564 (1985).

Instead, "[n]othing in HIPAA's own provisions or the promulgated regulations authorize a private cause of action" Id. "Indeed, courts have repeatedly held that Congress did not intend to create a private cause of action under HIPAA." Id. citing Logan v. Dep't of Veterans Affairs, 357 F. Supp. 2d 149, 155 (D.D.C. 2004); see also Standiford, 2010 WL 3670721; Fields, No. 2:06-0492, 2006 WL 237127. Thus, to the extent that Petitioner relies upon West Virginia common law to provide a remedy not specifically intended by Congress under HIPAA, such laws constitute a "contrary provision of State law" and are preempted. See

Fisher, 2006 WL 1075035, at \*2. Moreover, allowing Petitioner to advance a common law claim for the alleged failure to safeguard health information outside of the guidelines set forth by the Safeguard Provisions would eviscerate the goal of efficient and effective uniform standards for the transmission of such information. Therefore, the lower court properly dismissed Plaintiff's Complaint as preempted by federal law.

## II. Standard of Review:

Review of questions raised by circuit courts' dismissal orders are reviewed *de novo*. Syl. Pt. 2, State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc., 194 W. Va. 770, 461 S.E.2d 516 (1995). Preemption is a question of law reviewed *de novo*. Syl. Pt. 1, Morgan, 224 W. Va. 62, 680 S.E.2d 77. In conducting a *de novo* review, this Court applies the same standard as the circuit court. Forshey v. Jackson, 222 W. Va. 743, 671 S.E.2d 748 (2008).

Rule 12 of the West Virginia Rules of Civil Procedure allows a defendant to raise the defense of "failure to state a claim upon which relief can be granted" by way of motion prior to responsive pleading. W. Va. R. Civ. P. 12(b)(6) (1998). When reviewing a motion made pursuant to Rule 12, a plaintiff's complaint is "to be read liberally as required by the notice pleading theory underlying the West Virginia Rules of Civil Procedure." McGraw, at 776, 522. A circuit court "in viewing all the facts in a light most favorable to the nonmoving party, may grant the motion only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. citing Syl. pt. 3, in part, Chapman v. Kane Transfer Co., Inc., 160 W. Va. 530, 236 S.E.2d 207 (1977) (internal quotations omitted).

If a claim is not authorized by the applicable law, a "motion to dismiss under Rule 12(b)(6) enables a circuit court to weed out unfounded suits." Id. In the present case, the

Petitioner's claims are preempted by federal law and were properly dismissed below for failure to state a claim upon which relief can be granted. Additionally, as asserted in the cross-assignment of error below, Petitioner's claim should have also been dismissed for failure to comply with the West Virginia Medical Professional Liability Act.

### **III. West Virginia Courts Are Not Bound By The Labels Of The Drafter When Applying The Applicable Law.**

Petitioner first asserts error against the trial court's ruling on the rationale that, since the claims were not specifically labeled claims for failure to safeguard health care information under HIPAA, the claims should not be subjected to HIPAA's preemption provision. Petitioner contends, therefore, that the courts of this State are bound solely to the labels of the drafter when reviewing a Complaint. This is an incorrect statement of established law.

In Blankenship v. Ethicon, the Court previously addressed this issue. In *Ethicon*, patient plaintiffs brought suit against hospitals and products manufacturers to recover damages from improperly sterilized sutures. Id. at 702, 453. The plaintiffs asserted negligence, strict liability, breach of express and implied warranties, violations of the West Virginia Consumer Credit and Protection Act, fraud, and intentional infliction of emotional distress. Id. at 703, 454. Although plaintiffs made no claim under the West Virginia Medical Professional Liability Act, defendants moved to dismiss for failure to provide pre-suit notices and certificates of merit as required by the MPLA. Id. at 704, 455. The lower court held that the MPLA applied and dismissed plaintiffs' claims.

On appeal, the *Ethicon* Court undertook a review of plaintiffs' factual allegations to determine the applicable law: "While it is true that none of the appellants' claims were asserted under the MPLA, the question we must answer is whether those claims should have been

brought under the MPLA." *Id.* at 705, 456. In doing so, the Court looked past the labels of the drafter and determined whether statutory law applied "regardless of how the claims have been pled." *Id.* at 707, 458. The *Ethicon* Court was not bound by the labels of the drafter when applying the applicable law, but focused instead upon the salient facts as pled in the Complaint.

The same is true in this matter of first impression. HIPAA's preemption provision cannot be circumvented by the artful pleading of the drafter. In the present case, Petitioner clearly asserts a claim for failure to safeguard confidential health care information. This factual averment falls directly within the preemption provision of Part C and is preempted. Otherwise, distinguishing between preempted and non-preempted claims based upon the particular label affixed to them would allow a party to evade preemptive scope and circumvent legislative intent. *See, ex., Davila*, 542 U.S. 200, 124 S. Ct. 2488; *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272 (6th Cir. 1991). Therefore, the trial court committed no error below.

#### **IV. HIPAA's Preemption Analysis Applies To The Current Litigation, And Preempts Petitioner's State Common Law Causes of Action.**

Petitioner next assigns error again on the contention that HIPAA's preemption analysis applies only if a claim for HIPAA is specifically asserted. In response, St. Mary's again refers this Court to the *Ethicon* decision for the proposition that West Virginia courts look past the labels of the drafter to determine whether statutory law applies "regardless of how the claims have been pled." *Id.* at 707, 458. Therefore, HIPAA's preemption analysis applies to the current situation because the salient facts assert that St. Mary's failed to safeguard confidential health care information. To the extent Petitioner further contends that his state law claims are

otherwise exempted from preemption by 42 U.S.C. § 1320d-7(a)(2)(B) (1996), he is incorrect because such state law claims are contrary to and less stringent than standards adopted by Sections 1320d-1 through 1320d-3 of HIPAA.

When applying HIPAA's preemption provision, courts must be mindful of two exceptions to the general preemption rule. Neither exception is applicable to the present case; however, Respondent explains these exceptions to prevent any uncertainty as to the application of the general preemption rule. The first exception pertains to provisions of state law that have been determined by the Secretary of Health and Human Services to be necessary for, *inter alia*, the prevention of fraud and abuse. 42 U.S.C. § 1320d-7(a)(2)(A). There is no such determination present in this case, and this exception can be quickly dismissed as inapplicable.

The second exception states:

A provision or requirement under this part, or a standard or implementation specification adopted or established under sections 1320d-1 through 1320d-3 of this title, shall not supersede a contrary provision of State law, if the provision of state law - - subject to section 264(c)(2) of the Health Insurance Portability and Accountability Act of 1996, relates to the privacy of individually identifiable health information.

42 U.S.C. § 1320d-7(a)(2)(B). This statutory preemption provision has been explicated by regulations promulgated by the Secretary of Health and Human Services. The structure of these regulations "mirrors the general rule and two exceptions to the statute, but adds definitions and substantive elaboration upon the exceptions." Fisher, at \*2. This exception does not apply for two distinct and independent reasons.

First, this exception does not apply to the case at bar because the phrase "relates to the privacy of individually identifiable health information" means "that the state law has the specific purpose of protecting the privacy of health information or affects the privacy of health

information in a direct, clear, and substantial way." 45 C.F.R. 160.202 (2009) (emphasis added). In the present case, Petitioner's state law common law causes of action do not possess such a specific purpose. Instead, these claims are general in nature and encompass a multitude of applications wholly unrelated to the safeguarding of health care information. Therefore, Petitioner's state common law causes of action do not fall within this exception because those causes of action do not have the specific purpose of protecting, or clear and substantial affect upon, the privacy of health care information. For this reason alone, the second exception is wholly inapplicable and Petitioner's assignment of error is misplaced.

Moreover, 45 C.F.R. § 160.203(b) provides that contrary provisions of state law are preempted unless "[t]he provision of state law relates to the privacy of individually identifiable health information and is more stringent than a standard, requirement, or implementation specification adopted under B of part 164 of this chapter." 45 C.F.R. 160.203(b) (emphasis added). Petitioner's state common law claims are not more stringent because they do not meet the definition of "more stringent" provided by the applicable regulations. See 45 C.F.R. § 160.202. Instead, these claims are general in nature and, again, not designed specifically for the protection of individualized health care information. Simply because a cause of action would otherwise provide a secondary recovery outside of the federal enforcement scheme does not make such cause of action more stringent under HIPAA's Administrative Simplifications provision. Other courts agree.

In Fisher v. Yale University, the plaintiff, Jeannine Fisher, was a patient of defendant, Yale New Haven Hospital. During this relationship, defendant procured and maintained confidential information while providing health care to plaintiff. Thereafter, an employee of Yale New Haven Hospital, Ramon Delgado-Brooks, allegedly accessed Ms. Fisher's

confidential information in effort to threaten and harass her. As a result, Ms. Fisher suffered emotional distress and filed suit against the defendant Hospital. Plaintiff's Complaint in *Fisher* asserted a violation of the Connecticut Unfair Trade Practices Act ("CUTPA"). Defendant moved to dismiss this allegation on the basis that the claim was preempted by HIPAA. The *Fisher* Court agreed and stated:

While the plaintiff appears to concede that HIPAA did not create the right to a private cause of action for violation of HIPAA and none has been recognized by the courts, plaintiff does seem to argue that because stricter state laws that address a patient's right of privacy are permitted, that this court should create such an action at common law by recognizing a cause of action under CUTPA for HIPAA. The court rejects this argument.

Fisher at \*4.

The *Fisher* analysis holds true in the current situation. The Petitioner herein also attempts to circumvent the settled rule that HIPAA creates no private cause of action. Similar to *Fisher*, Petitioner cloaks his alleged HIPAA violations in the shroud of otherwise valid state common law causes of action. These claims necessarily fail, however, because the second exemption of the general preemption rule only applies to more stringent laws created with the specific purpose of protecting confidential information. Petitioner's common law claims simply do not meet those requirements. To hold otherwise would create an exception that would envelop the rule and leave it without any plausible application. Such interpretation would lead to an absurd and inconsistent result undermining a prevailing purpose of HIPAA, which is to "improve the efficiency and effectiveness of the health care system through the establishment of uniform standards and requirements for the electronic transmission of health information." See Section 261 of Subtitle F of Title II of Pub.L. 104-191, as amended, Pub.L.

111-148, Title I, § 1104(a); 42 U.S.C. 1320d. Therefore, the second exception is again inapplicable and the trial court properly dismissed Petitioner's Complaint below.

Petitioner further appears to assert error on the basis that HIPAA would not preempt his state law causes of action because "the only application of HIPAA to the present facts would be if Petitioner asserted a claim under the West Virginia Unfair Trade Practices Act ("WVUTPA") for a violation of HIPAA." See Petitioner's Brief, at p. 13 (paraphrased). This is clearly incorrect, as 45 C.F.R. 160.202 defines preempted "state law" as "constitution, statute, regulation, rule, **common law**, or other State action having the force and effect of law." Id. (emphasis added). Again, Petitioner's second assignment of error is incorrect and the trial court's order of dismissal should be affirmed.

**V. HIPAA Does Not Establish Duty Of Care And The Trial Court Has Not Ruled On This Issue; Petitioner's Cited Cases Are Inapposite To The Current Litigation.**

Petitioner further asserts, for the first time on appeal, that "even though HIPAA does not preempt R.K.'s claims, HIPAA may be used to establish the duty of care that SMMC owed to him." See Petitioner's Brief, at p. 13. In support, Petitioner refers the Court to the case of Acosta v. Byrum, 180 N.C. App. 562, 638 S.E.2d 246 (2006), and Bonney v. Stephens Memorial Hospital, et al., 17 A.3d 123 (2011). Petitioner claims that these cases stand for the proposition that HIPAA does not preempt state law causes of action and that HIPAA can be used to establish legal duty in tort actions. Both cases, however, undertake no analysis of HIPAA's preemptive effect and have no bearing on the issues before the Court.

In Acosta, plaintiff brought suit against her psychiatrist alleging negligent infliction of emotional distress ("NIED"). Id. at 249, 564. In so pleading, plaintiff asserted the elements of this cause of action, which included the alleged breach of a duty. Id. at 250, 567. To

establish the existence of this duty, plaintiff pled that psychiatrist "violated the rules and regulations established by University Health Systems, Roanoke Chowan Hospital, and HIPAA." Id. at 565, 249. Defendant psychiatrist moved to dismiss the Complaint for failure to state a cause of action, not upon HIPAA's preemption provision but upon the factual allegations contained in plaintiff's complaint. Id. at 566-571, 250-253. To the extent defendant asserted HIPAA in support of dismissal, it was upon the general principal that HIPAA does not provide for a private cause of action. Id. The trial court agreed and dismissed the action.

On appeal, the *Acosta* court reversed the lower court's dismissal and held that plaintiff adequately stated a claim for NIED. Id. As an ancillary matter, the *Acosta* court held that HIPAA, as well as the other rules and regulations cited, could be used to establish the duty element of a NIED claim in North Carolina. Id. at 568, 251. Emphatically, neither the defendants nor the court in *Acosta* engaged in a preemption analysis under HIPAA's preemption provision. The wholesale failure of the litigants in *Acosta* to address the application of HIPAA's preemption provision cannot be used as an implicit ruling that such preemption does not apply. Therefore, the *Acosta* decision has no bearing on the issues presently before the Court.

The *Bonney* litigation is substantially similar. In *Bonney*, plaintiffs brought suit against hospital and security guard after guard reported to police that plaintiffs had been assaulted, which led to plaintiffs' convictions for drug trafficking. Id. at 124-125. Plaintiffs alleged that the information pertaining to the assault was confidential, and asserted violations of 22 M.R.S. § 1722-C(2) and HIPAA. Id. Defendants moved for dismissal, asserting that 30-A M.R.S. § 287(3) immunized health care providers when reporting assaults resulting in serious bodily

injury. Defendants further asserted that HIPAA did not establish a private cause of action. Id. at 126. The trial court agreed and dismissed plaintiffs' case.

On appeal, the *Bonney* court reversed the trial court's dismissal on the grounds that 30-A M.R.S. § 287(3) did not immunize a health care provider under the facts of that case. Id. at 126-127. The *Bonney* court affirmed the dismissal of plaintiffs' claims under HIPAA because HIPAA provided no private cause of action. Id. at 127-128. However, as in *Acosta*, neither the defendants nor the court questioned whether HIPAA preempted plaintiffs claims under 22 M.R.S. § 1722-C(2). The failure to address this issue prevents the *Bonney* decision from being persuasive on the issue, and carries no precedential value in relation to the current litigation.

Moreover, the thrust of Petitioner's third assignment of error – that HIPAA can establish a duty of care – has been raised by Petitioner for the first time on appeal. In West Virginia, "nonjurisdictional questions not raised at trial court level, but raised for first time on appeal, will not be considered." Barney v. Auvil, 195 W. Va. 733, 466 S.E.2d 801 (1995) (citing Whitlow v. Bd. Of Educ. of Kanawha County, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993); Shrewsbury v. Humphrey, 183 W. Va. 291, 395 S.E.2d 535 (1990); Cline v. Roark, 179 W. Va. 482, 370 S.E.2d 138 (1988)). Therefore, as this issue is not jurisdictional, and as this issue has not been presented to the trial court for consideration, it cannot be raised for the first time on appeal. For the reasons set forth above, Petitioner's third assignment of error is without merit and the trial court properly dismissed Petitioner's Complaint below.

Cross-Appeal

St. Mary's asserts error on the trial court's ruling that Petitioner's allegations fell outside the definition of "health care" pursuant to W. Va. Code § 55-7B-2(e) and therefore were not governed by the MPLA. In his Complaint, Petitioner alleges that "while hospitalized at St. Mary's," certain employees "inappropriately and improperly accessed the [Petitioner's] medical records [and] then disseminated and disclosed such information...." See Complaint, at ¶¶ 9-10, attached hereto at Appendix p. 2. (emphasis added). Petitioner contends that this allegation does not fall within the definition of "health care" promulgated by Section 55-7B-2(e) of the West Virginia Code. Id. As such, Petitioner did not comply with the pre-suit filing requirements of the MPLA. See Order Granting in Part and Denying in Part Defendant's Motion to Dismiss, attached hereto at Appendix p. 97. This was inappropriate and warranted dismissal below.

The West Virginia Medical Professional Liability Act ("MPLA"), codified at W. Va. Code 55-7B-1, *et seq.*, "applies only to claims resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient." Syl. Pt. 2, Ethicon, 221 W. Va. 700, 656 S.E.2d 451 (citing Syl. Pt. 3, Boggs, 216 W. Va. 656, 609 S.E.2d 917). The MPLA "does not apply to other claims that may be contemporaneous to or related to the alleged act of medical professional liability." Id. at Syl. Pt. 2. In the present case, Petitioner's claims stem directly from health care services rendered and fall squarely within the definition of "health care" promulgated by the legislature.

Health care is defined as "any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to or on behalf of a patient

during the patient's medical care, treatment or confinement." W. Va. Code § 55-7B-2(e). In the present case, the act at issue was the safeguarding of confidential health care information. The gathering, utilization and protection of medical records has always been an integral part of health care. This is an act performed or furnished, or which should have been performed or furnished, by a health care provider. This is an act that is performed or furnished for, to or on behalf of a patient. Moreover, in the present case, this is an act that St. Mary's allegedly failed to furnish "while [Petitioner] was hospitalized at St. Mary's." This act is clearly health care under the MPLA. Therefore, Petitioner's failure to comply with the applicable pre-suit filing requirements was improper and warranted dismissal below.

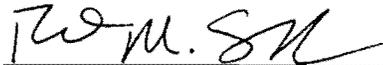
#### Conclusion

The trial court properly dismissed Petitioner's Complaint as preempted by HIPAA. Petitioner's factual allegation fall squarely within the provisions set forth in the Health Insurance Portability and Accountability Act of 1996, Part C, Administrative Simplification Provisions, as codified at 42 U.S.C. § 1320d-2(d)(2) (2010). Petitioner's assignments of error are meritless and inapplicable. First, West Virginia courts are certainly not bound by the labels of the drafter when applying the applicable law. Second, HIPAA's preemption provision encompasses state law, including common law, by its very definition, and HIPAA's exceptions to preemption are wholly inapplicable to Petitioner's claims. Third, Petitioner's cited case law has no bearing on the issues before the Court, and Petitioner further failed to raise these issues below. Therefore, the trial court properly dismissed Petitioner's Complaint as preempted by HIPAA, and that ruling should be affirmed. In the alternative, Petitioner's

claims fall squarely within the definition of "health care" promulgated by the MPLA, and  
Petitioner should have been required to follow the pre-suit filing requirements of the MPLA.

*ST. MARY'S MEDICAL CENTER, INC.  
d/b/a ST. MARY'S MEDICAL CENTER*

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 11-0924

R.K.,  
Plaintiff Below, Petitioner,

v.

Appeal from a final order of the  
Circuit Court of Cabell County  
Civil Action No. 10-C-694

ST. MARY'S MEDICAL, INC.,  
d/b/a ST. MARY'S MEDICAL CENTER,  
Defendant Below, Respondent

**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that the foregoing "*Respondent's Brief with Cross-Assignment of Error*" was served upon the following individuals by mailing true copies thereof by regular manner in the United States mail, postage prepaid, at Huntington, West Virginia, on the 28<sup>th</sup> day of October 2011 to:

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