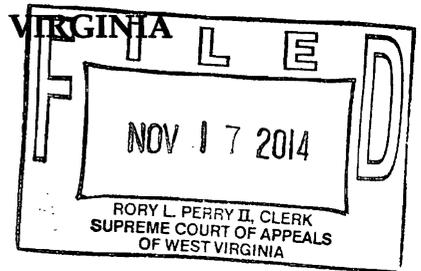


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 14-0788



**L. Linda Mays,
Plaintiff Below, Petitioner**

v.

**Appeal from a final order of the
Circuit Court of Cabell County
Civil Action No. 13-C-124**

**The Marshall University
Board of Governors,
Defendant Below, Respondent**

PETITIONER'S BRIEF

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Assignments of Error

The circuit court erred in granting Respondent The Marshall University Board of Governors' motion for partial summary judgment against Petitioner L. Linda Mays' claim for negligent infliction of emotional distress.¹ The court held incorrectly that, as a matter of law, unless Petitioner had sustained a physical injury or could satisfy the criteria set forth in *Heldreth v. Marrs*, 188 W.Va. 481, 425 S.E.2d 157 (1992) or *Marlin v. Bill Rich Const., Inc.*, 198 W.Va. 635, 482 S.E.2d 620 (1996), she could not present a claim for negligent infliction of emotional distress.

The circuit court also erred in granting Respondent's motion *in limine*, precluding Petitioner from presenting any evidence of emotional-distress damages, on the grounds that she had not sustained a physical injury and could not establish a claim for intentional infliction of emotional distress or negligent infliction of emotional distress.

Finally, the circuit court erred in granting Respondent's motion for summary judgment against Petitioner's claims for negligence, breach of confidentiality, and invasion of privacy. The court ruled that West Virginia law recognized a claim only for breach of confidentiality, but that Petitioner could not pursue it because her only recoverable damages would be for emotional distress,

¹ As reflected by the Notice of Appeal, Petitioner does not appeal the dismissal of her claims for outrageous conduct and intentional infliction of emotional distress in the circuit court's order granting partial summary judgment.

which were not available in the absence of a physical injury or a claim for intentional infliction of emotional distress or negligent infliction of emotional distress.

Statement of the Case

Several years ago, Petitioner L. Linda Mays ("Mays") underwent a mastectomy and thereafter had reconstructive surgery on her left breast, including the insertion of a breast implant. Appendix ("App.") 000001-02. Because the implant had ruptured, on October 20, 2010, Mays went to see Adel A. Faltaous, M.D., a plastic surgeon who practices with University Plastic Surgeons, which is part of University Physicians & Surgeons at Marshall University, for a consultation to determine whether he could repair the rupture and whether the procedure would be covered by her health insurance. App.000001-02. As part of the consultation, Dr. Faltaous, in the presence of a nurse, photographed Mays' breasts and wrote Mays' name on the photograph. App.000002, 000186.

On November 1, 2010, Mays, who is employed by St. Mary's Medical Center ("St. Mary's"), was provided by a co-worker with an envelope containing the photographs taken by Dr. Faltaous during the examination on October 20 and his letter to St. Mary's requesting authorization to perform surgery. App.000002-03.

Mays contacted Dr. Faltaous' office and learned from the office manager

that the photographs and letter had been sent to St. Mary's because the office manager believed mistakenly that such requests were to be sent to St. Mary's. App.000003. Thereafter, Teresa Caserta, the benefits coordinator for St. Mary's, also contacted Dr. Faltaous' office to advise that such requests were never to be sent to St. Mary's, but to the patient's insurance company. App.000004.

On February 22, 2013, Mays filed this action against Respondent The Marshall University Board of Governors ("Marshall") based on Dr. Faltaous' office's wrongful conduct in sending the photographs and letter to her employer and alleged claims for negligence, outrageous conduct, intentional infliction of emotional distress, negligent infliction of emotional distress, breach of confidentiality, and invasion of privacy. App.000001-09. Marshall answered the complaint, in which it admitted that a representative of Dr. Faltaous' office had sent Mays' photographs to St. Mary's, but denied that it was liable to Mays for such conduct. App.000010-20. Thereafter, the parties engaged in discovery.

On February 27, 2014, Marshall filed its motion for partial summary judgment in which it alleged that Mays could not establish a *prima facie* case for her claims for outrageous conduct, intentional infliction of emotional distress, and negligent infliction of emotional distress. App.000019-20. Specifically, Marshall argued that under West Virginia law, a plaintiff could recover damages for emotional distress without physical injury under theories of intentional infliction

of emotional distress and negligent infliction of emotional distress, but that here, Mays was unable to satisfy the criteria supporting either theory. App.000055-67.

Mays opposed Marshall's motion and argued that while she had demonstrated her entitlement to damages for emotional distress under applicable case law, even if the trial court found that Marshall had not acted intentionally in causing Mays' emotional distress, the court should find that Mays had established that its actions constituted the negligent infliction of emotional distress. App.000071-82.

The circuit court heard argument on March 14, 2014, at which it granted Marshall's motion as to Mays' claims for outrageous conduct and intentional infliction of emotional distress, but reserved a decision as to the claim for negligent infliction of emotional distress. App.000115, 000125.

Also on February 27, 2014, Marshall filed its Motion *in Limine* No. 1, in which it sought to preclude Mays from referring to or introducing any evidence regarding emotional-distress damages, based on the reasoning contained in its motion for partial summary judgment. App.000069-70.

Mays opposed Marshall's motion on the grounds she was entitled to recover for any aggravation or exacerbation of a preexisting condition and also because her remaining (as of that point) claims entitled her to recover damages resulting from emotional distress. App.000143-46.

On May 5, 2014, Marshall moved for summary judgment as to Mays' remaining claims for negligence, breach of confidentiality, and invasion of privacy. App.000150-57. Marshall asserted that West Virginia law supported only Mays' claim for breach of confidentiality and limited her recoverable damages to those for annoyance and inconvenience, but even those were not available to her because of the nature of her injury.

Mays responded in opposition that her claims for negligence, breach of confidentiality, and invasion of privacy were viable under West Virginia law and entitled her to recover damages for emotional distress even in the absence of a physical injury or a claim for intentional infliction of emotional distress or negligent infliction of emotional distress.

On May 23, 2014, the circuit court granted Marshall's motion for partial summary judgment as to Mays' claims for outrageous conduct, intentional infliction of emotional distress, and negligent infliction of emotional distress² App.000167-79. The court also granted Marshall's motion *in limine* as to Mays' evidence pertaining to damages for emotional distress. App.000180-81.

² At the March 14 hearing, the circuit court took under advisement its ruling as to Mays' claim for negligent infliction of emotional distress. At a hearing on April 10, the court initially indicated that it would deny the motion, then reconsidered its decision during the course of the hearing and granted the motion.

The court held a final hearing on May 28, 2014 at which Mays presented her anticipated trial testimony in person and the court heard argument on Marshall's motion for summary judgment as to Mays' remaining claims. App.000182-209.

On July 15, 2014, the court granted Marshall's motion for summary judgment, finding that her allegations and West Virginia law would support only her claim for breach of confidentiality and therefore her claims for negligence and invasion of privacy failed as a matter of law. App.000211-20. Further, the court held that because Mays' only recoverable damages were for annoyance and inconvenience, on which she did not intend to present evidence, she had no recoverable damages, also as a matter of law.

On August 12, 2014, Mays filed her Notice of Appeal from the circuit court's July 15, 2014 order, as provided by W. Va. R. App. 5 and perfects her appeal as provided by the Scheduling Order entered on September 8, 2014.

Summary of Argument

Mays appeals three separate but interrelated rulings from the circuit court that eliminated her ability to assert a claim and recover damages for emotional distress as a result of Marshall's wrongful conduct. The reversal of the rulings does not require the creation of a new cause of action, but simply the application of well-settled law to these facts.

In dismissing Mays' claim for negligent infliction of emotional distress, the circuit court focused exclusively on the fact patterns in *Heldreth v. Marrs*, 188 W.Va. 481, 425 S.E.2d 157 (1992) and *Marlin v. Bill Rich Const., Inc.*, 198 W.Va. 635, 482 S.E.2d 620 (1996). But this Court had held in *Ricottilli v. Summersville Memorial Hospital*, 188 W.Va. 674, 425 S.E.2d 629 (1992) and in *Marlin* that a plaintiff could recover for the negligent infliction of emotional distress absent a physical injury if the plaintiff could demonstrate that the claim was not spurious and the emotional distress was real and serious. Because these holdings did not tie a claim for negligent infliction of emotional distress to a particular fact pattern, Mays was entitled to present her claim for negligent infliction of emotional distress to the jury.

Furthermore, the circuit court did not apply the appropriate standard to Mays' motion and ruled as a matter of law that Mays could not present a claim for negligent infliction of emotional distress. Whether Mays has proven her claim is an issue of fact for the jury, however, and the court should have denied the motion so that the jury could determine the issue.

In relying on its order granting partial summary judgment as to Mays' claim for negligent infliction of emotional distress, the circuit court erred in granting Marshall's motion *in limine*, which prevented her from presenting any lay or expert evidence in support of her claim. The evidence excluded under the circuit

court's ruling is the very type that this Court held in *Ricottilli* and *Marlin* is necessary in order to establish a claim for the negligent infliction of emotional distress absent a physical injury.

Finally, the circuit court should have permitted Mays to present her claims for negligence, breach of confidentiality, and invasion of privacy. The circuit court held that West Virginia law does not support Mays' claims for negligence or invasion of privacy under these facts—even though recent case law from this Court indicates otherwise—and that her only cognizable claim was for breach of confidentiality.

The court held further that Mays could not assert even that claim, however, because she sought to recover damages only for emotional distress, which were not available to her, as she had not sustained a physical injury nor had she established a claim for intentional infliction of emotional distress or negligent infliction of emotional distress.

Statement Regarding Oral Argument and Decision

Although this Court has addressed previously the elements of a claim for negligent infliction of emotional distress and when a plaintiff may recover damages for emotional distress, this appeal represents an opportunity for the Court to clarify the law on these issues.

The case is appropriate for argument under W. Va. R. App. 20 because it involves an issue of fundamental public importance regarding a plaintiff's ability to assert claims that entitle her to recover damages for emotional distress in the absence of a physical injury or based on facts that differ from those discussed in existing case law.

Mays believes that the minimum time set for argument under W. Va. R. App. 20(e) will be sufficient and does not ask for additional time.

Argument

Points of Fact and Law Presented

- I. **The circuit court erred in holding that Mays could not establish a *prima facie* claim for negligent infliction of emotional distress because the facts of her claim differed from those in *Heldreth v. Marrs* or *Marlin v. Bill Rich Constr., Inc.***
 - A. ***Ricottilli v. Summersville Memorial Hospital* requires that a claim for negligent infliction of emotional distress not be "spurious," but does not tie the claim to any particular set of facts.**
 - B. ***Marlin v. Bill Rich Constr., Inc.* relied on the holding in *Ricottilli* and added the requirement that a plaintiff's emotional distress be "real and serious," which Mays has established here through her own testimony and Dr. Miller's diagnoses.**
 - C. **The circuit court erred in dismissing Mays' claim for negligent infliction of emotional distress as a matter of law.**
- II. **The circuit court erred in granting Marshall's motion *in limine* because the ruling deprives Mays of any opportunity to present the evidence this**

Court has held is essential to a claim for the negligent infliction of emotional distress.

- III. West Virginia law recognizes Mays' claims for negligence, breach of confidentiality, and invasion of privacy resulting from Marshall's wrongful conduct.**
- A. Mays' recovery in her claims for negligence, breach of confidentiality, and invasion of privacy is not limited to damages for annoyance and inconvenience.**

Standard of Review

The Court reviews *de novo* a circuit court's entry of summary judgment. Syl. pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 455 S.E.2d 751 (1994). The Court explained in *Painter* that "The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Syl. pt. 3, 192 W.Va. at 190, 451 S.E.2d at 756.

A trial court's ruling on a motion *in limine* is reviewed on appeal for an abuse of discretion. Syl. pt. 1, *McKenzie v. Carroll Intern. Corp.*, 216 W.Va. 686, 610 S.E.2d 341 (2004).

- I. The circuit court erred in holding that Mays could not establish a *prima facie* claim for negligent infliction of emotional distress because the facts of her claim differed from those in *Heldreth v. Marrs* or *Marlin v. Bill Rich Constr., Inc.***

- A. ***Ricottilli v. Summersville Memorial Hospital* requires that a claim for negligent infliction of emotional distress not be “spurious,” but does not tie the claim to any particular set of facts.**

The circuit court’s ruling dismissing Mays’ claim for negligent infliction of emotional distress misapplied West Virginia law. Contrary to Marshall’s argument, this Court has not held that witnessing the serious injury or death of a loved one and fearing that she has contracted a serious disease, which were the bases for the claims in *Heldreth v. Marrs*, 188 W.Va. 481, 425 S.E.2d 157 (1992) and *Marlin v. Bill Rich Constr., Inc.*, 198 W.Va. 635, 482 S.E.2d 620, respectively, are the only two scenarios in which a plaintiff may assert a claim for negligent infliction of emotional distress.

In fact, the language in the Court’s decisions addressing the existence of a claim for negligent infliction of emotional distress is far broader than Marshall argued or the circuit court recognized. In *Ricottilli v. Summersville Memorial Hospital*, 188 W.Va. 674, 425 S.E.2d 629 (1992), which was decided a few days after *Heldreth*, the Court stated in Syllabus Point 2 that “An individual may recover for the negligent infliction of emotional distress absent accompanying physical injury upon a showing of facts sufficient to guarantee that the emotional damages claim is not spurious.”

Ricottilli involved claims for outrageous conduct or negligent infliction of emotional distress and medical negligence based on errors made by the defendant hospital in performing an autopsy on a young girl and failing to preserve tissue samples so as to enable a determination of the cause of death, which would affect the ability of the child's surviving siblings to receive treatment for potentially the same condition.

In considering plaintiff's claim for emotional distress, the Court declined to extend the "dead body exception" recognized in *Whitehair v. Highland Memory Gardens, Inc.*, 174 W.Va. 458, 327 S.E.2d 438 (1985), for a claim for negligent infliction of emotional distress resulting from negligent embalming, negligent shipment of a corpse, etc. because discovery had not started, but stated that "if the record below ultimately demonstrates facts sufficient to guarantee that the emotional damage claim is not spurious, Appellant may be able to recover damages for her alleged emotional disturbance arising from the alleged negligence surrounding the autopsy and extraction of tissue samples." 188 W.Va. at 680, 425 S.E.2d at 635.

The Court then reiterated its holding that "an individual may recover for the negligent infliction of emotional distress upon a showing of facts sufficient to guarantee that the emotional damage claim is not spurious." *Id.*

- B. *Marlin v. Bill Rich Constr., Inc.* relied on the holding in *Ricottilli* and added the requirement that a plaintiff's emotional distress be "real and serious," which Mays has established here through her own testimony and Dr. Miller's diagnoses.**

In *Marlin*, the Court relied on its holding *Ricottilli* in addressing plaintiffs' claims for negligent infliction of emotional distress resulting from their exposure to asbestos and the associated risk of developing asbestosis or another disease or illness as a result of the exposure. Although the trial court had held that plaintiffs must establish a physical injury, this Court pointed out that *Ricottilli* "represent[ed] a transition from our earlier law requiring that a claim for negligent infliction of emotional distress be accompanied by demonstrable physical injuries." 198 W.Va. at 651, 482 S.E.2d at 636.

The Court also overruled its holding in *Monteleone v. Co-Operative Transit Co.*, 128 W.Va. 340, 36 S.E.2d 475 (1945), to the extent it held that a claim for negligent infliction of emotional distress must be accompanied by a physical injury. *Id.* at 651, 636.

The plaintiffs in *Marlin* relied primarily on *Ricottilli*, which the circuit court had declined to apply because its holding was limited to cases involving the "dead body exception" to the rule prohibiting claims for emotional distress without a physical injury. *Id.* at 652, 637.

However, while the Court acknowledged that *Ricottilli* dealt with the "dead body exception," the Court described its holding, as expressed in Syllabus Point 2,

as “clearly indicat[ing] a progression by this Court away from the requirement of a precedent physical injury in order to recover in cases involving negligent infliction of emotional distress.” *Id.* Accordingly, the Court held that the principle in Syllabus Point 2 of *Ricottilli* “is applicable in a cause of action for negligent infliction of emotional distress.” *Id.*

The Court went on to “emphasize the requirements that a claim for emotional distress without an accompanying physical injury can only be successfully maintained **upon a showing by the plaintiffs** in such an action of **facts sufficient to guarantee that the claim is not spurious and** upon a showing **that the emotional distress is undoubtedly real and serious.**” *Id.* (Emphasis added.)

The Court reiterated that in the case before it, “the trial court must be concerned with both the guarantee against a spurious action and a showing of real and serious emotional distress. The burden rests on appellants to meet these requirements.” *Id.*

Here, Mays has satisfied both factors identified by the Court in *Marlin* as necessary to prove a claim for emotional distress without injury. First, Mays has shown through her testimony “facts sufficient to guarantee that the claim is not spurious”:

Mays testified as follows in her deposition:

Q. ... Anything else you'd like to say about this at all?

A. Yes. I'm a little introverted, so it's very intimidating for me to be here in front of all of you-all today, so it's hard for me to remember everything that has happened and the dates and all of that.

But I know you probably are having trouble understanding why this has stopped me kind of in my tracks, as far as getting more treatment, as far as getting more surgery. But one of the aspects of depression is things seem to be—it's hard to get motivated.

Things seem insurmountable to you when have some depression going on, and anxiety. And for me to know that I'll have to take off work and try to find a doctor, maybe in Charleston, and research and make sure he's a good doctor, and then go there for the appointment.

And it's just—there's going to be some anxiety associated with that, too, because, of course, things did not go well here. But that's one of the things that has stopped me from being further along and getting past this to go ahead and have the surgery that you were talking about today.

App.000086.

Further, Mays' testimony at the hearing on May 28 also confirmed that her claim is not spurious:

Q. So does how you feel or the feelings you have, have they changed or do you feel any differently now than you did when this first happened?

- A. Well, some of the shock has worn – the initial shock has worn off, but I just feel very anxious. That’s kind of replaced the shock part. The embarrassment is every bit as much now when I have to walk down the hallway at work and run into any of these people that were involved in the incident. Especially if I have to ride in an elevator with them. If I see them, I just turn around and walk the other way, it’s embarrassing. I don’t want to think about the incident or my conversations with them or what they may or may not have seen. But, of course, they’re – the HR department is very close to where I work, so there are times when I’m in the elevator alone and one of the HR people gets in, and it’s a very quiet ride, and very uncomfortable.

App.000190-91.

Mays has also satisfied the second element in *Marlin* that her emotional distress “is undoubtedly real and serious” through Dr. Miller’s opinion, which included the following diagnoses:

1. Dysthymic Disorder (pre-existing but exacerbated)
2. Subthreshold Posttraumatic Stress Disorder (DSM-IV Anxiety Disorder NOS)
3. Borderline Personality (traits)

App.000094.

In a letter of January 6, 2014 in which Dr. Miller supplemented his opinion based on his review of records received after he examined Mays, he opined that:

1. Ms. Mays’ previous psychiatric illness predisposed her to emotional trauma.

2. Her character structure was such that she was reactive to emotions of shame.
3. In the past, with treatment she was stable and able to work.
4. These records support my explanation of her emotional injury and subsequent psychiatric condition, defined as subthreshold Posttraumatic Stress Disorder, consequent to her emotionally traumatic event at the workplace on November 1, 2010.

App.000098.

Dr. Miller's opinions illustrate that Mays' emotional distress is real and serious, and is also consistent with the Court's recognition in *Heldreth* that "serious emotional distress can be diagnosed even in the absence of any physical manifestation, and can be proven with medical and psychiatric evidence." *Marlin*, 198 W.Va. at 653, 482 S.E.2d at 638 (quoting *Heldreth*, 199 W.Va. at 490, 425 S.E.2d at 166 (quoting *Paugh v. Hanks*, 451 N.E.2d 759, 765 (Oh. 1983))).

Thus, the fact that Mays did not sustain a physical injury is not an impediment to her ability to bring a claim for negligent infliction of emotional distress.

Further, based on *Ricottilli* and *Marlin* and the progression they represent away from the traditional model of evaluating claims for emotional distress, Mays submits that the circuit court erred in granting Marshall's motion for partial summary judgment as to her claim for negligent infliction of emotional distress.

C. The circuit court erred in dismissing Mays' claim for negligent infliction of emotional distress as a matter of law.

In a claim for intentional infliction of emotional distress, the circuit court has the affirmative duty of determining, as a matter of law, whether the defendant's alleged conduct may be considered outrageous or to constitute the intentional infliction of emotional distress. *Travis v. Alcon Labs., Inc.*, Syl. Pt. 4, 202 W.Va. 369, 504 S.E.2d 419, 425 (W. Va. 1998).

A claim for negligent infliction of emotional distress does not impose a similar obligation on the trial court, however. Whether a plaintiff has proven a claim for negligent infliction of emotional distress is a question of fact to be determined by the jury. *Marlin*, Syl. Pt. 14, 198 W.Va. 635, 482 S.E.2d 620 (1996).

Here, the circuit court incorrectly applied the standard appropriate for a claim for the intentional infliction of emotional distress and dismissed Mays' claim for the negligent infliction of emotional distress as a matter of law, which also requires the reversal of the circuit court's ruling.

II. The circuit court erred in granting Marshall's motion *in limine* because the ruling deprives Mays of any opportunity to present the evidence this Court has held is essential to proving a claim for the negligent infliction of emotional distress.

In this appeal, the circuit court's ruling on Marshall's motion *in limine* is of the same importance as its rulings on Marshall's dispositive motions because of

the effect of the court's ruling. Thus, even though the Court reviews the ruling for an abuse of the circuit court's discretion, under these circumstances, the Court should find that the circuit court abused its discretion and should reverse the ruling.

In barring Mays from referring to or introducing any evidence regarding emotional distress damages, including her own testimony or the testimony of any lay or expert witnesses, such as Dr. Miller, the forensic psychiatrist who examined her, App.000180-81, the court has deprived Mays of any opportunity to present evidence that her emotional-distress claim is "real and serious," as required by this Court's holding in *Marlin*.

Further, for the same reasons the circuit court misapplied applicable law in granting Marshall's motion for partial summary judgment by focusing on the fact patterns in *Heldreth* and *Marlin*, rather than on the holdings in *Ricottilli* and *Marlin*, the circuit court erred in granting Marshall's motion *in limine*, which was based on the same reasoning as in the motion for partial summary judgment. App.000069.

III. West Virginia law recognizes Mays' claims for negligence, breach of confidentiality, and invasion of privacy resulting from Marshall's wrongful conduct.

The circuit court erred in holding that of Mays' claims for negligence, invasion of privacy, and breach of confidentiality—the latter of which Marshall

characterized as “wrongful disclosure of health care information,” “the only cause of action that might arise from the allegations in this action and that is recognized in West Virginia law, is a cause of action for wrongful disclosure of health care information based on alleged breach of a duty of physician confidentiality, as that cause of action is described in *Morris [v. Consolidation Coal Co., 191 W.Va. 426, 446 S.E.2d 648 (1994)]*” . App.000217.

However, even though the circuit court also acknowledged that this Court “has not specifically articulated the damages recoverable on a claim of wrongful disclosure of health care information[,]” App.000218, the court asserted that nothing in either *Morris* or *R.K. v. St. Mary’s Medical Center, Inc., 229 W.Va. 712, 735 S.E.2d 715 (2012)*, “intended to depart from long-established authority governing damages.” App.000218.

Although the circuit court is technically correct that this Court has not specifically articulated the damages recoverable on a claim for “wrongful disclosure of health care information,” the circuit court’s grant of summary judgment is based on an impermissibly narrow reading of both *Morris* and *R.K.*

In *R.K.*, plaintiff appealed from the dismissal of his state-law claims, including negligence and invasion of privacy, against a healthcare provider alleged to have disclosed his protected health information without his permission. The circuit court dismissed all claims on the grounds they were preempted by the

Health Insurance Portability and Accountability Act of 1996 (HIPAA). This Court reversed and held that HIPAA did not preempt the claims, which plaintiff could prosecute in state court.

Nowhere in *R.K.* did the Court suggest that its decision was intended to restrict or eliminate the causes of action available to a plaintiff who alleges an improper—whether intentional or unintentional—disclosure of protected health information. That would have been illogical, considering that the import of *R.K.* expanded a plaintiff’s ability to sue a healthcare provider for improperly disclosing PHI.

Under Marshall’s analysis, which the circuit court adopted in its order, although the Court held in *R.K.* that HIPAA did not preempt a plaintiff’s state-law claims arising from the improper disclosure of PHI, the Court, without saying so, intended its decision to bar a plaintiff from asserting state-law claims of negligence and invasion of privacy. Nothing in *R.K.* supports such an assertion.

A. Mays’ recovery in her claims for negligence, breach of confidentiality, and invasion of privacy is not limited to damages for annoyance and inconvenience.

The circuit court also held that if Mays could recover any damages—assuming she could articulate some claim against Marshall—they could only be

for annoyance and inconvenience, as she could not recover any damages for emotional distress.

That ruling disregarded this Court's holdings in *Ricottilli* and *Marlin*, however, which addressed when an individual could recover damages for emotional distress absent a physical injury. Because Mays has discussed those holdings in Section I and explained how she has satisfied them, she will not repeat that argument here.

Just as *R.K.* did not restrict or eliminate Mays' ability to recover damages for emotional distress caused by Marshall's wrongful conduct, neither is there any language in *Morris* or *R.K.* to suggest that in a case involving the improper disclosure of confidential healthcare information, a plaintiff's recoverable damages for state-law claims, including negligence, invasion of privacy, and breach of confidentiality, are limited to annoyance and inconvenience.

As noted above, *Ricottilli*, and *Marlin* describe the applicable standard of proof for a claim for emotional-distress damages and the type of evidence necessary to meet the standard. In the absence of any authority supporting Marshall's position that Mays cannot recover damages for emotional distress under these facts, the Court should reverse the circuit court's order granting Marshall's motion for summary judgment.

Conclusion

The circuit court erred in granting Marshall's motion for partial summary judgment as to Mays' claim for the negligent infliction of emotional distress because this Court's holdings in *Ricottilli* and *Marlin* make clear that a cognizable claim for negligent infliction of emotional distress need not be accompanied by a physical injury or fit within two or three established fact patterns. Rather, an individual can pursue the claim if the facts the claim, but rather may go forward if the plaintiff demonstrates facts sufficient to guarantee that the claim is not spurious and shows that the emotional distress is undoubtedly real and serious.

In this case, Mays has satisfied both factors and demonstrated that her claim is completely legitimate and, through her own testimony and Dr. Miller's diagnoses, that her emotional distress is real and serious. Accordingly, the Court should reverse the May 23, 2014 order dismissing her claim for the negligent infliction of emotional distress.

The circuit court also erred in granting Marshall's motion *in limine* as that ruling was based on the same reasoning as the ruling granting its motion for partial summary judgment and denied Mays any opportunity to present the type of evidence that *Heldreth*, *Ricottilli*, and *Marlin* have identified as necessary to proving a valid claim for the negligent infliction of emotional distress.

Accordingly, the Court should reverse the May 23, 2014 order granting Marshall's motion *in limine*.

Finally, the circuit court erred in granting Marshall's motion for summary judgment as to Mays' claims for negligence, breach of confidentiality, and invasion of privacy. Existing case law, including *Morris* and *R.K.*, demonstrates that this Court has elected to expand, not restrict, the causes of action available to a plaintiff whose confidential medical information has been wrongfully or inappropriately disclosed.

Similarly, even though the court acknowledged that neither *Morris* nor *R.K.* addressed the damages recoverable in a claim such as this one, it accepted Marshall's argument that Mays' only recoverable damages would be for annoyance and inconvenience, based once again on an incorrect interpretation of the law governing her claim for the negligent infliction of emotional distress. Neither decision supports such a limitation on Mays' recoverable damages. Accordingly, the Court should reverse the July 15, 2014 order granting Marshall's motion for summary judgment.

WHEREFORE, Petitioner L. Linda Mays prays that this Honorable Court reverse the May 23, 2014 and July 15, 2014 orders of the Circuit Court of Cabell County and remand this action to that court for further proceedings, and grant any other relief the Court deems just and proper.

L. LINDA MAYS
By Counsel

A handwritten signature in black ink, appearing to read "Jeffrey V. Mehalic", is written over a solid horizontal line.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. 14-0788

**L. Linda Mays,
Plaintiff Below, Petitioner**

v.

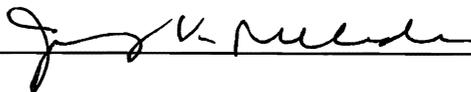
**Appeal from a final order of the
Circuit Court of Cabell County
Civil Action No. 13-C-124**

**The Marshall University
Board of Governors,
Defendant Below, Respondent**

CERTIFICATE OF SERVICE

I, Jeffrey V. Mehalic, hereby certify that on this 17th day of November, 2014,
I served the foregoing **PETITIONER'S BRIEF** upon the following counsel of
record by electronic mail and/or facsimile and/or depositing a true copy thereof in
the United States mail, postage prepaid, addressed to them at their last known
office address as listed below:

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