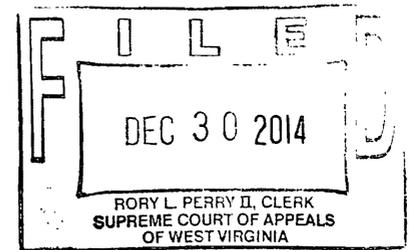


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

L. Linda Mays, Plaintiff Below,
Petitioner

vs.) No. 14-0788

The Marshall University Board of Governors,
Defendant Below, Respondent



**RESPONSE OF THE
MARSHALL UNIVERSITY BOARD OF GOVERNORS
TO PETITION FOR APPEAL**

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I. STATEMENT OF THE CASE

To present a cohesive statement and supplement the facts in Petitioner's Brief, respondent Marshall University Board of Governors (MUBOG) provides the following statement of the case. The facts stated are undisputed.¹ (App. 72). MUBOG does not accept petitioner's characterizations of MUBOG's arguments below or of the circuit court's opinion but addresses these matters in the argument section.

Statement of relevant facts. About twelve years ago, petitioner Linda Mays underwent a mastectomy and reconstructive surgery on her left breast, with the insertion of an implant. Some years later she grew concerned about the appearance of the reconstruction and the possibility that the implant had ruptured or shifted. In October 2010, Mays consulted with a plastic surgeon employed by MUBOG about corrective surgery. During the course of her examination, the surgeon directed his nurse to take photographs of Mays' unclothed chest. Mays has asserted that she believed these photographs would be used solely for the surgeon's reference during surgery and would not be shared with anyone else. Throughout, the surgeon and his staff treated Mays in a friendly and professional manner. (App. 1-2, 22-23, 25-26, 29-30, and 186).

Mays understood that the proposed surgery would have to be pre-authorized by her insurance company. (App. 23-24).

Mays is employed by St. Mary's Medical Center as an administrative assistant. A few days after Mays' appointment with MUBOG's surgeon, an employee of MUBOG's

¹ In accordance with the requirements of W. Va. R. Civ. P. 56, MUBOG assumed, for the purposes of its dispositive motions, the truth of certain facts alleged in the pleadings and discovery. Its assumption does not constitute an admission and MUBOG reserved the right to contest these alleged facts.

plastic surgery department sent a letter to St. Mary's human resources department seeking pre-authorization of Mays' surgery. The letter included photographs of Mays' chest. The letter was opened by human resources assistant Patty Russell; she read the letter and saw the photographs. Uncertain what to do, Russell took them to her supervisor, Teresa Caserta. After Caserta saw the letter and photographs, she told her supervisor, Dan Weaver, about them but did not show them to him. Caserta asked what she should do with them; Weaver directed her to give them to Mays. Caserta placed the original envelope, letter and photographs in another envelope, sealed it, marked it "confidential" and gave it to Russell with instructions to deliver it to Mays; Russell did. Mays recalls Russell handing her the original envelope sealed with a piece of tape. When Mays removed the tape, the photographs fell face down on her desk. (App. 22, 27-28, 34-35, 38-40, and 42-43).

Caserta called the surgeon's office and spoke to an employee. Caserta told the employee that St. Mary's had received photographs of one of St. Mary's employees and that these were not to come to their office; they never receive them. The MUBOG employee said, "I believed that they did." (App. 35).

While Mays contends that the pre-authorization request should not have been sent to St. Mary's, she believes sending the photographs was an honest mistake. She does not believe anyone intended to do her harm. Neither does Mays contend that anyone at MUBOG was rude, dismissive or insensitive to her concerns. (App. 32, 50, and 129).

Mays testified that she is an extremely modest person. She contends that she suffered emotional distress as a result of this incident. Specifically, she asserts that it

has humiliated and embarrassed her. In the discussion section of his report, Mays' forensic psychiatrist, states:

As an aspect of her report of her emotionally traumatic work experience, Ms. Mays related that it is her perception that some persons view her experience as not being a "big deal." After all, she survived an abusive childhood, three abusive romantic relationships and cancer. Why would a photo of a topless (faceless) woman falling out of envelope [sic] onto the floor result in any emotional reaction, much less one that was detected on psychological testing as a PTSD-like reaction? It was precisely her previous negative life experiences and their unhealed emotional wounds that predisposed Ms. Mays to her unique psychological response. Indeed, the clinical interview indicated that Ms. Mays is a person whose personality did not develop in a healthy manner. Her worldview is that of a person who lives awash in shame while attempting to hide her low self-esteem and guilt from others. However, it was in that moment when the image of her disfigured naked body laid exposed on the floor, that her strained psychological defense mechanisms failed, causing her to be emotionally harmed by the event. She continues to be unable to cope with the event and remains troubled on a daily basis by her PTSD-like and depression symptoms.

(App. 24, 31, and 45).

Mays stipulated that she does not seek and will not offer evidence of economic damages. She also stipulated that she has not sought or received care or treatment from any psychiatrist, psychologist, behavioral health counselor, or licensed social worker since the events that gave rise to her claim. Petitioner has stated on the record that she does not seek damages for aggravation or inconvenience. The only damages evidence which Mays intends to present in support of her claim is of her idiosyncratic emotional distress. (App. 140-141, 192-193, and 199-205).²

² Contrary to the assertion in Petitioner's Brief (p. 5), MUBOG assumed for the sake of argument that, if successful in establishing liability, Mays would be allowed to recover damages for aggravation and inconvenience, but that was moot since Mays did not seek such damages. (App. 199-205).

Relevant procedural history. In her complaint, Mays asserted that MUBOG's disclosure of her confidential medical information gave rise to six causes of action: 1) negligence, 2) outrageous conduct, 3) intentional infliction of emotional distress, 4) negligent infliction of emotional distress, 5) breach of confidentiality, and 6) invasion of privacy. (App. 1-9). MUBOG moved for partial summary judgment on Mays' demand for pure emotional distress damages – that is, for emotional distress unaccompanied by physical injury. (App. 19-68). On the same legal grounds, MUBOG moved *in limine* that Mays be precluded from referring to or introducing evidence regarding emotional distress damages at trial. (App. 69-70). After giving Mays the opportunity to supplement her authority, both motions were granted by the circuit court. (App. 123-127, 167-179, and 180-181). When it became clear that the only damages evidence which Mays intended to introduce was of her uniquely severe emotional distress, MUBOG moved for summary judgment. (App. 150-157 and 199-205). The circuit court permitted Mays to testify about the nature of her damages at an evidentiary hearing, eliminating any ambiguity regarding what she proposed to present at trial. (App. 147-149). After hearing Mays' testimony, the circuit court granted MUBOG's motion for summary judgment. (App. 182-197 and 211-220). Mays does not appeal the dismissal of counts 2 and 3 of her complaint (outrageous conduct and the identical claim of intentional infliction of emotional distress). (Pet. Br, p. 1, fn. 1).

II. SUMMARY OF ARGUMENT

MUBOG asks this Court to affirm the decisions of the circuit court below because, despite being given every opportunity including an evidentiary hearing, petitioner failed to demonstrate facts that would allow recovery for pure emotional

distress damages – the only damages petitioner seeks – under this Court’s well-established and well-reasoned opinions.

Petitioner alleges that she suffered idiosyncratic emotional distress because an employee of a medical provider seeking pre-authorization to perform services, and without any intent to do harm, revealed confidential medical information in the good faith, but apparently erroneous, belief that the request was being sent to the appropriate entity. Petitioner acknowledges that the incident gave rise to no intentional tort. There is no evidence that petitioner suffered physical injury. The incident threatened neither the health nor the safety of petitioner or her loved ones. There is no evidence that a reasonable person, normally constituted, would have suffered serious emotional distress as a result of the incident. Instead, the evidence petitioner proffers is about alleged distress that the petitioner and her psychiatric expert acknowledge is unique to her. Under well-settled West Virginia authority, MUBOG is entitled to judgment in its favor on all claims petitioner asserted.

Mays’ petition for appeal should be refused and the circuit court’s orders of 23 May 2014 (App. 167-181) and 15 July 2014 (App. 211-220) should be left undisturbed.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant W. Va. R. App. P. 21(c), MUBOG asks this Court to affirm the circuit court’s orders of 23 May 2014 and 15 July 2014 because Mays’ appeal presents no substantial question of law and, upon consideration of the applicable standards of review and the record presented, no prejudicial error exists. The bases for oral argument under W. Va. R. App. P. 20 are not satisfied as the petition does not involve issues of first impression, fundamental public importance, constitutional questions, or

inconsistencies or conflicts among the decisions of lower tribunals. The issues that are dispositive of this appeal have been authoritatively decided by this Court and oral argument is unnecessary. W. Va. R. App. P. 18(a)(3). MUBOG requests that the Court affirm the detailed and well-reasoned orders of the circuit court under Rule 21(c).

IV. ARGUMENT

Standards of Review

“A circuit court’s entry of summary judgment is reviewed *de novo*.” *Painter v. Peavy*, syl. pt. 1, 192 W. Va. 189, 451 S.E.2d 755 (1994). “A trial court’s ruling on a motion *in limine* is reviewed on appeal for an abuse of discretion.” *McKenzie v. Carroll Intern. Corp.*, syl. pt. 1, 216 W. Va. 686, 610 S.E.2d 341 (2004).

- 1. The circuit court correctly held that the only cause of action that might be available to Mays under the facts alleged is a cause of action for wrongful disclosure of health care information as that cause of action is described in *Morris v. Consolidation Coal Co.***

Although plaintiff asserts that the facts she alleges give rise to three claims – negligence, invasion of privacy, and wrongful disclosure of health care information – the circuit court correctly held that the only cause of action that might be available to her is a cause of action for wrongful disclosure of health care information as that cause of action is described in *Morris v. Consolidation Coal Co.*, syl. pt. 4, 191 W. Va. 426, 446 S.E.2d 648 (1994).

Morris presented this Court with the certified question of whether a workers’ compensation claimant and patient has a cause of action against his treating physician who had *ex parte* oral discussions with the claimant-patient’s employer. The Court noted the emergence in other jurisdictions of four theories upon which recovery might

be based: 1) breach of the duty of confidentiality, 2) invasion of privacy, 3) violation of statutes concerning physician conduct; and 4) breach of implied contract. The *Morris* Court concluded that “the more logical cause of action would be an action for the breach of the duty of confidentiality. After all, when a physician wrongfully discloses information, the right which is violated is the patient’s right to have the information kept confidential.” *Id.* 191 W. Va. at 434, 446 S.E.2d at 656. This new cause of action was recognized by the *Morris* Court in its syllabus points, consistent with West Virginia’s constitution. *Walker v. Doe*, syl. pt. 2, 210 W. Va. 490, 558 S.E.2d 290 (2001)(“New points of law ... will be articulated through syllabus points as required by our state constitution.”); and W. Va. Const., Art. VIII, § 4.

Petitioner relies upon *R.K. v. St. Mary’s Medical Center, Inc.*, 229 W. Va. 712, 735 S.E.2d 715 (2012), to support her contention that she is not limited to a *Morris* breach of confidentiality claim, but may also assert causes of action for negligence and invasion of privacy. Her reliance is misplaced. In *R.K.* each party raised a single assignment of error: the hospital asked this Court to hold that the circuit court erred when it determined R.K.’s claims were not subject to the W. Va. Medical Professional Liability Act, W. Va. Code §55-7B-1, *et seq.*; R.K. asked this Court to conclude that the circuit court erred when it dismissed his private causes of action based on HIPAA pre-emption, Health Insurance Portability and Accountability Act of 1996, 42 U.S.C. § 1320d-7, 45 C.F.R. § 160.203(b). These were the two questions the *R.K.* Court addressed. If the *R.K.* Court intended to recognize new causes of action, it was constitutionally required to issue a syllabus point doing so; it did not. Instead, the Court noted *Morris*’s continuing vibrancy:

Although it pre-dates the enactment of HIPAA, West Virginia has likewise adopted a cause of action for breach of confidentiality against a physician who wrongfully discloses confidential information. See Syl. pt. 4, *Morris v. Consolidation Coal Co.*, 191 W.Va. 426, 446 S.E.2d 648 (1994) (“A patient does have a cause of action for the breach of the duty of confidentiality against a treating physician who wrongfully divulges confidential information.”).

R.K. v. St. Mary’s Medical Center, Inc., *supra* at fn. 10. Accord, *Tabata v. Chas. Area Med. Center, Inc.*, 233 W. Va. 512, 759 S.E.2d 459 (2014)(*per curiam*).

As the circuit court properly determined, nothing in *R.K.* indicates that this Court intended to depart from its holding in *Morris*. But, even if there were merit to Mays’ argument, MUBOG would still be entitled to judgment in its favor as Mays seeks no compensable damages, whatever her cause of action.

- 2. Regardless of the cause of action being considered, Mays must demonstrate that she meets the elements of a negligent infliction of emotional distress claim to recover pure emotional distress damages.**

This Court has recognized two pathways by which a tort claimant may recover for pure emotional distress damages: 1) intentional or reckless infliction of emotional distress (IIED), *Travis v. Alcon Labs, Inc.*, 202 W. Va. 369, 504 S.E.2d 419 (1998); and 2) negligent infliction of emotional distress (NIED), *Marlin v. Bill Rich Const., Inc.*, 198 W. Va. 635, 482 S.E.2d 620 (1996). See, *Allen v. Smith*, 179 W. Va. 360, 363, 368 S.E.2d 924 (1988). Mays does not contend on appeal that she has an IIED claim. While Mays contends that she has a NIED claim, about which more is said below, she argues that even if she cannot establish the elements necessary for NIED, the torts of negligence, breach of confidentiality, and invasion of privacy themselves allow her to recover for her idiosyncratic emotional distress. This contention is implicit in each of Mays’ assignments of error, yet she cites no authority supporting it.

Regardless of the tort asserted, a plaintiff may only recover the damages that tort damages law permits. For example, in *Harless v. First Nat'l Bank in Fairmont*, 169 W. Va. 673, 289 S.E.2d 692 (1982), having for the first time recognized the tort of retaliatory discharge, this Court considered what damages might be recoverable: "We have earlier pointed out that a cause of action for retaliatory discharge is a tort and we must therefore utilize our tort damage law in determining the extent of recovery." *Id.*, 169 W. Va. at 688, 289 S.E.2d at 701.³ See also *Heldreth v. Marrs*, 188 W. Va. 481, 489, 425 S.E.2d 157, 165 (1992)("To impose liability for any emotional consequence of negligent conduct would be unreasonable; ..." Quoting with approval, *Portee v. Jaffee*, 84 N.J. 88, 101, 417 A.2d 521, 528 (1980)).

MUBOG therefore turns to West Virginia's tort damages law.

A. Petitioner has failed to demonstrate any circumstances that support an award for pure emotional distress under West Virginia's tort damages law and this Court's NIED opinions.

In *Harless v. First National Bank in Fairmont*, *supra*, this Court reflected on the right to recover for emotional distress caused by the wrongful acts of another. That right, the Court noted, was traditionally recognized in three circumstances:

First, those mental disturbances that accompany or follow an actual physical injury caused by impact upon the occurrence of the tort; second, where there is no impact and no physical injury at the time, but a physical injury afterwards results as the causal effect of a nervous shock which in turn was the proximate result of the defendant's wrong; and third, where there was no impact and no physical injury caused by the defendant's wrong, but an emotional or mental

³ Consider, for example the following cases which are discussed *infra* and which were all analyzed under an NIED framework. *Heldreth v. Marrs*, 188 W. Va. 481, 425 S.E.2d 157 (1992) (negligence); *Marlin v. Bill Rich Const., Inc.*, 198 W. Va. 635, 482 S.E.2d 620 (1996) (negligence); and *Brown v. City of Fairmont*, 221 W. Va. 541, 655 S.E.2d 563 (2007)(*per curiam*)(invasion of rights of privacy).

disturbance is shown to have been the result of the defendant's intentional or wanton wrongful act. In any of the foregoing classifications we believe that the plain weight of authority sustains a recovery.

Harless v. First National Bank in Fairmont, *supra*, 169 W. Va. at 688, 289 S.E.2d at 701, quoting *Monteleone v. Co-Operative Transit Co.*, 128 W. Va. 340, 347, 36 S.E.2d 475, 478 (1945). The first two recognized categories involve physical injury – either causing or resulting from the emotional distress – and thus are not relevant here or to the *Harless* Court's analysis. The *Harless* Court focused on the third category: emotional distress resulting from the defendant's intentional wrong. It observed that:

Conceptually, it is difficult to draw a precise line that will serve to accurately define those torts which are deemed "intentional" and, therefore, permit a recovery for emotional distress in the absence of any physical injury. The clearest categories are those of the traditional nonphysical torts such as false imprisonment, libel and slander, malicious prosecution and wrongful attachment or debt collecting processes. Prosser, *Torts* § 12 (1972 ed.); Annot., 87 A.L.R.3d 201 (1978); Annot., 64 A.L.R.2d 100 (1959). *In these situations, the severity of the underlying act is utilized to support the reasonableness of the claim for emotional distress.*

Id. 169 W. Va. at 689, 289 S.E.2d at 701, emphasis supplied. The *Harless* Court noted that courts were reluctant to allow emotional distress damages when a negligent act produced no physical injury but caused emotional distress. Despite this hesitation, the Court found enough similarity between *Monteleone's* third category and the tort of retaliatory discharge to conclude that the new tort would support a claim of emotional distress: "We believe that the tort of retaliatory discharge carries with it a sufficient indicia of intent, thus, damages for emotional distress may be recovered as a part of the compensatory damages." *Id.* 169 W. Va. at 689, 289 S.E.2d at 702.

Pure emotional distress – that is, distress untethered to any physical injury – "is a slippery beast, which can easily get out of hand without firm judicial oversight." *Johnson*

v. Hills Dept. Stores, Inc., 200 W. Va. 196, 201, 488 S.E.2d 471, 476 (1997), quoting *Keyes v. Keyes*, 182 W. Va. 802, 805, 392 S.E.2d 693, 696 (1990)(discussing IIED). As with false imprisonment, libel, slander, and malicious prosecution, it was the severity of the underlying act – the retaliatory discharge – which gave the *Harless* Court sufficient assurance that serious emotional distress was reasonable and therefore compensable.

A decade after deciding *Harless*, this Court outlined the parameters that support a claim for NIED in *Heldreth v. Marrs, supra*. Mr. and Mrs. Heldreth were walking to their car, Mr. Heldreth in the lead. While he placed a package in the trunk, he heard his wife scream as she was stuck by the defendant's automobile. Plaintiffs alleged that defendant's negligence caused Mrs. Heldreth to suffer physical injury and emotional distress and Mr. Heldreth to suffer extreme emotional distress. After considering authority from other jurisdictions, this Court recognized one form of NIED:

A plaintiff's right to recover for the negligent infliction of emotional distress, after witnessing a person closely related to the plaintiff suffer critical injury or death as a result of defendant's negligent conduct, is premised upon the traditional negligence test of foreseeability. A plaintiff is required to prove under this test that his or her serious emotional distress was reasonably foreseeable, that the defendant's negligent conduct caused the victim to suffer critical injury or death, and that the plaintiff suffered serious emotional distress as a direct result of witnessing the victim's critical injury or death. In determining whether the serious emotional injury suffered by a plaintiff in a negligent infliction of emotional distress action was reasonably foreseeable to the defendant, the following factors must be evaluated: (1) whether the plaintiff was closely related to the injury victim; (2) whether the plaintiff was located at the scene of the accident and is aware that it is causing injury to the victim; (3) whether the victim is critically injured or killed; and (4) whether the plaintiff suffers *serious* emotional distress.

Id., syl. pt. 2, emphasis in original.

The *Heldreth* Court considered a close relationship between the plaintiff and the victim to be an essential requirement, observing “[i]t is the very nature of the relationship

between the plaintiff and the victim which makes the emotional reaction experienced by the plaintiff so poignant.” *Id.*, 188 W. Va. at 487, 425 S.E.2d at 163. It adopted the requirement that the plaintiff be at the scene of the injury producing event because it gave “[g]reater certainty and a more reasonable limit on the exposure to liability for negligent conduct ...” *Id.*, 188 W. Va. at 488, 425 S.E.2d at 164, quoting with approval *Thing v. La Chusa*, 257 Cal. Rptr. 865, 879, 771 P.2d 814 (1989). The Court held that the emotional trauma alleged by the plaintiff must be the direct result of either a critical injury to or death of a person closely related to the plaintiff, because “[t]o impose liability for any emotional consequence of negligent conduct would be unreasonable; it would also be unnecessary to protect a plaintiff’s basic emotional stability.” *Id.*, 188 W. Va. at 489, 425 S.E.2d at 165, quoting with approval, *Portee v. Jaffee*, 84 N.J. 88, 101, 417 A.2d 521, 528 (1980). Finally, the *Heldreth* Court held the plaintiff bears the burden of demonstrating that the event would cause a reasonable person, normally constituted – not a supersensitive, “eggshell psyche” plaintiff – to suffer serious emotional distress. This factor, the Court observed “yet provides another safeguard against boundless liability.” *Id.*, 188 W. Va. at 491, 425 S.E.2d at 167.

Each element mandated by the *Heldreth* Court gives objective assurance – arising out of the nature of the underlying event itself – that it is reasonably foreseeable defendant’s conduct would give rise to serious emotional distress. Several years later, when this Court addressed NIED arising out of a different factual scenario, the Court again demanded such objective assurances.

In *Marlin v. Bill Rich Construction, Inc.*, 198 W. Va. 635, 482 S.E.2d 620 (1996), plaintiffs alleged that the defendants’ negligent conduct caused them to be exposed to

asbestos fibers; as a result they suffered emotional distress brought on by their fear of contracting an asbestos-related illness in the future. The *Marlin* Court held that when a plaintiff seeks to recover for serious emotional distress based upon fear of contracting a disease, he or she must first prove actual exposure to the disease through the negligent conduct of the defendant. Other essential elements of this NIED claim are that the exposure raise a medically established possibility of contracting a disease, and that the disease will produce death or substantial disability requiring prolonged treatment to mitigate and manage, or promising imminent death. Finally, this Court reiterated what it previously said in *Heldreth*: the seriousness of the emotional distress is to be considered from the viewpoint of a reasonable person, normally situated – not the supersensitive, eggshell psyche plaintiff.

Each element the *Marlin* Court deemed essential provides objective assurance from the nature of the underlying event that a claim of pure emotional distress is reasonably foreseeable. This Court has not deviated from that pathway as is evident in its decision ten years later in *Brown v. City of Fairmont*, 221 W. Va. 541, 655 S.E.2d 563 (2007)(*per curiam*). *Brown*, a retired firefighter, alleged that his rights of privacy were invaded when the city and officials from the fireman's pension and relief fund met privately with plaintiff's ex-wife and her counsel to discuss information relevant to plaintiff's pension rights, and communicated private information about plaintiff's pension benefits to members of the fire department. He sought damages for NIED. The *Brown* Court affirmed the trial court's grant of summary judgment:

The appellant also brought a cause of action for negligent infliction of emotional distress. In the case of *Lipton v. Unumprovident Corp.*, 10 A.D.3d 703, 783 N.Y.S.2d 601 (N.Y.App.Div.2004), the plaintiff, a

commodities broker, sued a firm through which he cleared his trades and the firm's parent company, seeking to recover damages for breach of contract, negligent representation, negligent infliction of emotional distress, and breach of fiduciary duty, in connection with the insurer's denial of coverage under a group insurance policy which the firm procured for the benefit of the plaintiff. The trial court dismissed the complaint for failure to state a claim. On appeal, the court found that the plaintiff did not state a claim for negligent infliction of emotional distress. The court explained,

Although physical injury is no longer a necessary element of a negligent infliction of emotional distress claim, such a cause of action generally must be premised on conduct that unreasonably endangers the plaintiff[']s physical safety or causes the plaintiff to fear for his or her physical safety. No such conduct is alleged in this case.

Lipton, 783 N.Y.S.2d at 603–604. We agree with this reasoning under the specific circumstances of this case insofar as the underlying facts of this case, like *Lipton*, do not pertain to the threatened health or safety of the plaintiff or a loved one of the plaintiff. Thus, we conclude that the circuit court correctly granted summary judgment to the appellees on the appellant's negligent infliction of emotional distress claim.

Id., 221 W. Va. at 547, 655 S.E.2d at 569.

The *Brown* Court explicitly recognized that a NIED claim requires an underlying event that threatens the health or safety of the plaintiff – such as in *Marlin* – or a loved one – such as in *Heldreth* and *Ricottilli v. Summersville Mem. Hosp.*, 188 W. Va. 674, 425 S.E.2d 629 (1992).⁴ In each instance in which recovery for NIED has been permitted, the facts of the underlying event gave objective assurance that serious emotional distress is reasonably foreseeable and therefore compensable.⁵ Such

⁴As discussed *infra*, *Ricottilli* alleged her surviving children might be at risk of a genetic illness because of the defendant hospital's negligence.

⁵This is what MUBOG asserted below and what the circuit court's order reflects. While petitioner argues that MUBOG and the circuit court took a regimented approach to the NIED analysis (Pet. Br. at 1 and 10-11), the record and the court's order demonstrate otherwise. (App. 115-117 and 176-178).

objectively reassuring facts do not exist here; Mays has not established a basis upon which to recover pure emotional distress damages.

In her brief, petitioner raises several reasons why she should not be held to this well-established and rational standard. None of them survives scrutiny.

B. Contrary to petitioner's argument, *Ricottilli v. Summersville Mem. Hosp.* does not signal a departure from *Heldreth* and *Marlin*.

Ricottilli v. Summersville Mem. Hosp., 188 W. Va. 674, 425 S.E.2d 629 (1992), was decided four days after *Heldreth*; this temporal relationship alone indicates that it was not intended as a departure from the *Heldreth* Court's NIED analytical framework. Review of the opinion makes that clear.

In her complaint, Ricottilli alleged that her six-year old daughter died under circumstances suggesting an inborn error in metabolism. CAMC removed liver tissue post- rather than pre-embalming, making it impossible to perform biochemical studies. Ricottilli alleged that as a result she suffered severe mental and emotional anguish because her surviving children might be at risk of the same genetic illness and, without the tissue samples, doctors did not know where to search for a possible disease. CAMC's motion to dismiss was granted by the circuit court and Ricottilli appealed. In relevant part, CAMC argued that NIED claims were not recognized in West Virginia in the absence of an intentional tort, and that the "dead body exception" did not apply because Ricottilli had not been impeded in connection with her daughter's burial. The Court observed that CAMC's argument was correct when it was made, but that the Court had just decided *Heldreth* and overruled *Monteleone* to the extent it was inconsistent.

Proceeding, the Court noted that while it had not formally recognized the “dead body exception”, in *Whitehair v. Highland Memory Gardens, Inc.*, 174 W.Va. 458, 463, 327 S.E.2d 438, 443 (1985), it observed that:

In two special groups of cases, however, there has been some movement to ... allow recovery for mental disturbance alone.... The other [second] group of cases has involved the negligent mishandling of corpses. Here the traditional rule has denied recovery for mere negligence without circumstances of aggravation. There are by now, however, a series of cases allowing recovery for negligent embalming, negligent shipment, running over the body, and the like, without such circumstances of aggravation. *What all of these cases appear to have in common is an especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious.*

Id. 188 W. Va. at 679-680, 425 S.E.2d at 634-635. Emphasis in original.

Again, it was the underlying events – such as negligent embalming, negligent shipment, and running over the body – which the Court felt provided “*an especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious.*” *Id.* This observation is completely consistent with this Court’s insistence in *Heldreth* and *Marlin* that the nature of the underlying event provide objective assurance that serious emotional distress is reasonably foreseeable. This consistent approach is also reflected in the *Ricottilli* Court’s instructions on remand:

Given that this case is still in the early stages of litigation insofar as no discovery appears to have been taken, we find ourselves in a difficult situation. On the record before us, we cannot conclude that the appropriate guarantees against spuriousness are present sufficient to warrant an extension of the “dead body exception” to this case. However, we do suggest 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. Accordingly, we hold 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. As Prosser & Keeton note,

[w]here the guarantee can be found, and the mental distress is undoubtedly real and serious, there may be no good reason to deny recovery. But cases will obviously be infrequent in which 'mental disturbance,' not so severe as to cause physical harm, will clearly be a serious wrong worthy of redress and sufficiently attested by the circumstances of the case.

Keeton et al., supra, § 52, at 362.

Id. 188 W. Va. at 680, 425 S.E.2d at 635. On remand, Ricottilli was being allowed the opportunity to demonstrate that 1) the facts that gave rise to her claim – e.g., the handling of the autopsy, extraction of tissue samples, and the health risk to her surviving children – were sufficient to guarantee that an emotional distress claim was not spurious, and 2) the mental distress was real and serious.

Five years later when this Court decided *Marlin*, it reached back to *Ricottilli* and its second syllabus point,⁶ which the Court found applicable, continuing: “[h]owever, we 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.” As previously discussed, the *Marlin* Court found the first part of the formulation could be met if the plaintiff proved actual exposure to the disease through the negligent conduct of the defendant, that the exposure raised a medically established possibility of

⁶ “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.”

contracting a disease, and that the disease will produce death or substantial disability. *Heldreth*, *Marlin*, and *Ricottilli*, all utilize the same framework.

Whether considering *Heldreth*, *Marlin*, or *Ricottilli*, the *prima facie* case for NIED damages requires the plaintiff to demonstrate underlying facts of such import – e.g., abuse of a corpse, exposure to a deadly disease, or witnessing the death or critical injury of a family member – that they guarantee an emotional distress claim is not spurious. Mays has presented no such facts. To the contrary, the facts demonstrate that a MUBOG employee revealed confidential health information in an effort to obtain pre-authorization for a procedure Mays wanted and knew would have to be approved, using the process the employee believed to apply, in good faith, and without any intent to do harm. These facts do not provide the objective assurances which this Court's NIED opinions demand.

C. Petitioner has failed to present evidence of either element of the *Ricottilli* formulation.

Mays relies heavily upon *Ricottilli*. She contends that she has met both elements of its formulation because 1) she testified that her emotional distress is real, and 2) her forensic psychiatrist diagnosed her with psychiatric disorders. (Pet. Br. at 15-16). At most, this evidence goes to *Ricottilli*'s second element – that the mental distress is real and serious. As previously discussed, *Ricottilli*'s first element is entirely missing. In actuality, however, Mays' proffered evidence goes to neither element.

Ricottilli came before the Court on a motion to dismiss – without discovery or factual development. There was no evidence before the Court about the severity of *Ricottilli*'s emotional distress beyond the bare allegations in the complaint. In *Marlin*, the

Court fleshed out the *Ricottilli* formulation. Addressing the second element – that the mental distress is undoubtedly real and serious – the Court observed that serious emotional distress can be proved with medical and psychiatric evidence (which Mays has endeavored to do). However, the holding of the *Marlin* Court, as reflected in syllabus point 14, is that serious emotional distress is to be proved by reference to the reasonable person:

In determining “seriousness”, consideration should be given to whether the particular plaintiff is a “reasonable person, normally constituted”. For the purposes of such consideration, a reasonable person is an ordinarily sensitive person and not a supersensitive person.

Marlin v. Bill Rich Constr., Inc., supra at syl. pt. 14.

The very evidence Mays proffers defeats her NIED claim.

D. Petitioner’s evidence is of her unique psychological response,⁷ not one which would be shared by a reasonable person, normally constituted.

In *Heldreth*, this Court held that in order to “safeguard against boundless liability,” damages for NIED will only be permitted if the plaintiff demonstrates that the harm alleged could have been expected to befall the ordinary reasonable person. 188 W. Va. at 491, 425 S.E.2d at 167. This objective standard was formalized in *Marlin’s* syllabus points, as discussed in the preceding section.

Mays asserts that she suffered distress from the incident because she is an unusually modest person. It is her hypersensitivity which her forensic psychiatrist opined caused her to suffer emotional distress as a result of an occurrence that others would view as “no big deal.” For a NIED claim to lie, Mays must establish that a reasonable

⁷ See, Statement of the Case, p. 3 above.

person would have suffered real and serious distress; she has established the contrary. Her NIED claim fails as a matter of law.

3. The circuit court properly determined that petitioner failed to present a *prima facie* case of NIED and appropriately dismissed her claim.

Petitioner contends that it is a jury question whether or not she proved a NIED claim, citing *Marlin*, syl. pt. 14. (Pet. Br. at 18). That is not what syllabus point 14 says; it states that whether the plaintiff has suffered serious emotional distress – only one part of a NIED claim – is a question of fact to be determined by the jury considering that matter from the viewpoint of a reasonable person, normally situated. The *Marlin* Court did not discard extensive authority which makes it the providence of the court to determine whether or not a plaintiff has alleged a *prima facie* case entitling her to relief. See for example, syl. pt. 2, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995) (“Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove.”); syl. pt. 2, *Conaway v. Eastern Associated Coal Corp.*, 178 W.Va. 164, 358 S.E.2d 423 (1986) (“To successfully defend against a motion for summary judgment, the plaintiff must make some showing of fact which would support a *prima facie* case for his claim.”). Moreover, the *Heldreth* Court noted that the reasonableness of the plaintiff’s reaction is normally a jury question, “unless the court can conclude as a matter of law that the reaction was unreasonable.” *Heldreth v. Marrs, supra*, 188 W. Va. at 491, 425 S.E.2d at 167. This is just such a situation.

Any doubt on this point is extinguished by *Brown v. City of Fairmont, supra*, in which this Court affirmed the circuit court's grant of summary judgment on the plaintiff's NIED claim.

As demonstrated above, Mays failed to establish any of the elements of the *prima facie* case. Summary judgment was properly entered in favor of MUBOG.

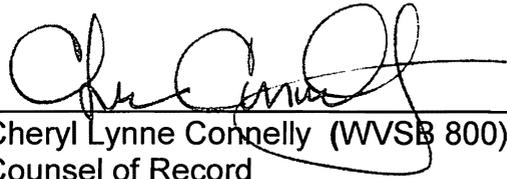
4. Since petitioner's claim for uniquely severe emotional distress is not compensable, granting MUBOG's motion *in limine* was appropriate.

Since Mays failed to articulate any basis recognized by this Court which would permit her to be compensated for her unique emotional distress, the evidence of her emotional distress was irrelevant, inadmissible and properly excluded by the circuit court. W. Va. R. Evid. 402.

V. CONCLUSION

As discussed above, the only cause of action which might be available to petitioner under the facts alleged, is a cause of action for wrongful disclosure of health care information as that cause of action is described in *Morris v. Consolidation Coal Co.* However, regardless of the cause of action, petitioner seeks no damages that might be recoverable and has failed to demonstrate circumstances that support an award for pure emotional distress under West Virginia's tort damages law. The circuit court properly granted respondent's motions for partial summary judgment, *in limine*, and for summary judgment. For these reasons, respondent Marshall University Board of Governors asks this Court to affirm the detailed and well-reasoned orders of the circuit court under Rule 21(c).

MARSHALL UNIVERSITY BOARD
OF GOVERNORS, by counsel,

A handwritten signature in black ink, appearing to read 'Cheryl Connelly', written over a horizontal line.

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

L. Linda Mays, Plaintiff Below,
Petitioner

vs.) No. 14-0788

The Marshall University Board of Governors,
Defendant Below, Respondent

CERTIFICATE OF SERVICE

I, Cheryl Lynne Connelly, hereby certify that I served the foregoing **Response of The Marshall University Board of Governors to Petition for Appeal** upon counsel for the Petitioner by electronic mail and by depositing a true copy thereof in the United States mail, first-class postage prepaid, addressed to counsel at the address given on the petition for appeal as follows:

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Done this 29th day of December, 2014.



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