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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 22-0202, *Barbara Stine Trivett, Administratrix of the Estate of Jasper Trivett v. Summers County Commission d/b/a Summers County Office of Emergency Management and Carmen Cales*

Armstead, Justice, with whom Hutchison, Justice, joins, concurring, in part, and dissenting, in part:

This case involves the tragic passing of a young child whose mother sought emergency medical services for the child by contacting respondents by dialing 911. The crux of the appeal before us are the questions of (1) what statute of limitations governs Petitioners' complaint and (2) whether Petitioner filed her complaint prior to the expiration of such statute of limitations. Because I firmly believe that Petitioner's claims fit squarely into the scope of the Medical Professional Liability Act, West Virginia Code §§ 55-7B-1-12 ("MPLA"), I also believe her complaint was timely filed under the tolling provisions of the MPLA, as outlined in West Virginia Code § 55-7B-6(i)(1) (2019).[1] Accordingly, I respectfully dissent from the majority's determination that the MPLA does not apply to the Petitioner's complaint.[2]

[1] The Notice of Claim was served on September 10, 2021. Therefore, when referring to this code section I cite to the version of this statute in effect on that date.

[2] I concur in the majority opinion's findings in Part III, I, that the tolling provisions in the Governmental Tort Claims and Insurance Reform Act do not extend the statute of limitations to the executor or administrator of a deceased child's estate. I also do not dissent from the majority's conclusions in Part III, III, that there are questions of fact that would need to be developed to determine if Petitioner knew, or by reasonable diligence should have known, that Respondents' acts or omissions caused the death of baby Jasper,

In Syllabus Point 6, the majority opinion holds:

> "The Medical Professional Liability Act, W. Va. Code §§ 55-7B-1 to -12, applies only when two conditions are satisfied, that is, when a plaintiff (1) sues a "health care provider" or "health care facility" for (2) "medical professional liability" as those terms are defined under the Act. These are separate and distinct conditions. If either of these two conditions is lacking, the Act does not apply." Syl. Pt. 5, *State ex rel. W. Va. Div. of Corr. & Rehab. v. Ferguson*, 248 W. Va. 471, 889 S.E.2d 44 (2023).

Even following the majority's reliance on *Ferguson*, as outlined in Syllabus Point 6, Petitioner's claims fall within the ambit of the MPLA. There can be little dispute that Petitioner's claims fall within the MPLA's definition of "health care:"

> Any *act*, *service, or treatment* performed or furnished, or *which should have been performed or furnished*, by any health care provider or person supervised by or acting under the direction of a health care provider or licensed professional for, to, or on behalf of a patient during the patient's medical care, treatment, or confinement, *including, but not limited to*, staffing, *medical transport*, custodial care, or basic care, infection control, positioning, hydration, nutrition, and similar patient services[.]

W. Va. Code § 55-7B-2(e)(2) (2017)[3] (emphasis added). Importantly, such claims also fall within the MPLA's broad definition of "medical professional liability" which states:

> "Medical professional liability" means any liability for damages resulting from the *death or injury* of a person for any tort or breach of contract *based on health care services*

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but, as discussed herein, I would find that remand on such issue is unnecessary because the complaint was timely filed under the tolling provisions of the MPLA.

[3] *See* footnote 1.

> rendered, or *which should have been rendered*, by a health care provider or health care facility to a patient. It also means other *claims that may be contemporaneous to or related to* the alleged tort or breach of contract or otherwise provided, *all in the context of rendering health care services*.

W. Va. Code § 55-7B-2(i) (2017).[4] It would be difficult to argue that seeking medical services by calling 911 is not a claim based on "health care services … which should have been rendered" or, at the very least, a claim that "may be contemporaneous to or related to" the alleged tort, "all in the context of rendering health care services." *Id*. Clearly, the sole reason Petitioner called Respondents by dialing 911 was in a frantic attempt to seek health care services for the child. Indeed, the majority concedes that "*it is fair to characterize the respondents' alleged failure to dispatch an ambulance as an act or omission falling within the definition of 'medical professional liability.'"* (Emphasis added).

The majority finds, however, that the Petitioner's claims do not fall with the second requirement of *Ferguson* because "no amount of linguistic acrobatics can turn these respondents … into 'health care providers' as defined in West Virginia Code section 55-7B-2(g)." Respectfully, no "linguistic acrobatics" are required to see that Respondents are, in fact, health care providers under the MPLA. All that is required to make such finding is a plain reading of the broad and expansive definition of "health care provider" under the MPLA, which provides:

[4] *See* footnote 1.

> [A] *person*, partnership, corporation, professional limited liability company, health care facility, *entity* or institution licensed by, or certified in, this state or another state, to provide health care or professional health care services, *including, but not limited to*, a physician, osteopathic physician, physician assistant, advanced practice registered nurse, hospital, health care facility, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, speech-language pathologist, audiologist, occupational therapist, psychologist, pharmacist, technician, certified nursing assistant, emergency medical service personnel, emergency medical services authority or agency, any person supervised by or acting under the direction of a licensed professional, *any person taking actions or providing service* or treatment pursuant to or *in furtherance of* a physician's plan of care, a health care facility's plan of care, *medical diagnosis or treatment*; or an officer, employee, or agent of a health care provider acting in the course and scope of the officer's, employee's or agent's employment.

Id. § 55-7B-2(g) (2017)[5] (emphasis added).

Distilling from the broad and comprehensive definition of "health care provider," Respondents certainly fit within the definition of a "person … [and] entity, . . . taking actions or providing service . . . in furtherance of . . . medical diagnosis or treatment." *Id*. It cannot be denied that the record reflects that Respondents "took action," in the context of furthering medical treatment. Petitioner clearly alleges that such action was negligent. From the exhaustive list of entities and agencies expressly included in the definition of "health care provider," it is clear that the Legislature intended such term to include those who participate in the many and varied components of how medical treatment

[5] *See* footnote 1.

is directed, assessed and implemented in West Virginia. In this vein, the emergency telephone system at issue in this matter is, in emergency situations, the gateway and conduit for obtaining emergency medical services and, thus, falls within the definition of "health care provider." Indeed, 911 calls are routed to a "county answering point," which is defined as:

> [A] facility to which enhanced emergency telephone system calls for a county are initially routed for response and where county personnel respond to specific requests for emergency service by directly dispatching the appropriate emergency service provider, relaying a message to the appropriate provider or transferring the call to the appropriate provider.

W. Va. Code § 24-6-2 (2020).[6] From that statute, "'[e]mergency service provider' means any emergency services organization or public safety unit." *Id*. The definition of "'[e]mergency services organization' means the organization established under article five, chapter fifteen of this code." *Id*. West Virginia Code Chapter 15, Article 5, delineates the functions of emergency services, providing:

> *These functions include, without limitation*, critical infrastructure services, firefighting services, police services, *medical and health services, communications*, emergency telecommunications, radiological, chemical, and other special weapons defense, evacuation of persons from stricken areas, emergency welfare services, emergency transportation, existing or properly assigned functions of plant protection, temporary restoration of public utility services and other functions related to the health, safety, and welfare of the citizens of this state, *together with all other activities necessary or incidental to the preparation for and carrying out of these functions*.

[6] *See* footnote 1.

W. Va. Code § 15-5-2 (2021).[7] Without question, an emergency call center is "necessary or incidental" to providing "medical and health services." This definition specifically includes "communications." The term "communications" is significant because, as the majority recognizes, emergency center dispatchers were, at the time of the events that give rise to this action, required to obtain forty hours of training pursuant to West Virginia Code § 24-6-5 (2020). A dispatcher who receives such training is defined as "emergency telecommunicator" pursuant to West Virginia Code § 24-6-2, which provides, in part:

> "Emergency telecommunicator" means a professional telecommunicator meeting the training requirements set forth in §24-6-5 and is a *first responder* tasked with the gathering of information related to *medical emergencies*, the *provision of assistance and instructions* by voice, prior to the arrival of *emergency medical services (EMS)*, and the dispatching and support of EMS resources responding to an emergency call.

Id. (emphasis added). Clearly, these delineated roles are medical in nature and go to the core of the public's ability to obtain medical services in emergency situations. Based on the role played by Summers County Office of Emergency Management, and Respondent Cales, as dispatchers and gatekeeps of medical services, it is baffling that the majority does not find that they fall within the broad definition of "medical healthcare providers."

The majority's determination that the Respondents do not fall within the definition of "health care provider" under the MPLA appears to rest on two factors. First, the majority concludes that Respondents were not "licensed by, or certified in, this state or

[7] *See* footnote 1.

another state to provide health care or professional health care services" and, thus, cannot be "health care providers" W. Va. Code § 55-7B-2(g) (2017).[8] Secondly, the majority finds that, based on its reading of *Ferguson*, "extending the MPLA to include individuals or entities other than those specifically designated by the Legislature would be inconsistent with the statutes purpose . . ." Neither such justification is supported by the clear language of the MPLA or the facts of this case.

First, the majority appears to conflate the terms "licensed" and "certified" and concludes "[o]ur research discloses that West Virginia law does not require licensure or certification of a county's enhanced emergency telephone system. . ." However, the statutory requirements for an E911 enhanced emergency telephone systems, such as that operated by the Summers County Office of Emergency Services, require a 911 enhanced emergency services telephone system plan to be created by the county commission. Following public comment, the county commission must adopt a 911 plan, and such plan must be filed with the West Virginia Public Service Commission ("PSC") so that the PSC can "ensure that its provisions are complied with."

Specifically, West Virginia Code § 24-6-6 (1986), entitled "Enhanced emergency telephone system proposed requirement" states:

> (a) If a county commission decides to adopt an enhanced emergency services telephone system it shall first prepare a proposal on the implementation of the system and shall hold a

[8] *See* footnote 1.

> public meeting on the proposal to explain the system and receive comments from other public officials and interested persons. At least thirty but not more than sixty days before the meeting, the county commission shall place an advertisement in a newspaper of general circulation in the county notifying the public of the date, purpose and location of the meeting and the location at which a copy of the proposal may be examined.
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> (b) The proposal and the final plan adopted by the county commission shall specify:
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> (1) Which telephone companies serving customers in the county will participate in the system;
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> (2) The location and number of county answering points; how they will be connected to a telephone company's telephone network; from what geographic territory each will receive system calls; what areas will be served by the answering point; and whether an answering point will respond to calls by directly dispatching an emergency service provider, by relaying a message to the appropriate provider, or by transferring the call to the appropriate provider;
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> (3) A projection of the initial cost of establishing, equipping and furnishing and of the annual cost of the first five years of operating and maintaining each county answering point;
>
> (4) How the county will pay for its share of the system's cost; and
>
> (5) How each emergency service provider will respond to a misdirected call.
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> (c) Within three months of the public meeting required by this section the county commission may modify the implementation proposal. *Upon completion and adoption of the plan by the commission, it shall send a copy of the plan to the Public Service Commission, who shall file such plan and ensure that its provisions are complied with.*

Id. (emphasis added). Indeed, the Summers County Enhanced 911 Ordinance, adopted by the Summers County Commission on December 28, 2012, is available in the PSC public

database of enhanced emergency telephone system plans, and tracks much of the language of W. Va. Code § 24-6-6. Summers County Enhanced 911 Ordinance, E911 County Commission Plans, West Virginia Public Service Commission, (Dec. 28, 2012) http://www.psc.state.wv.us/E911_Plans/files/E911_Summers.pdf. The requirement that an entity be "licensed by, or certified in, this state or another state" requires that it be certified "in" but not "by" this state or another state. Certainly, the adoption by the Summers County Commission of the ordinance regarding its enhanced emergency telephone system, and its filing of the ordinance with the PSC to allow the PSC to "ensure that its provisions are complied with," constitutes certification.

While the MPLA does not specifically define the term "certified" in the context of W. Va. Code § 55-7B-2(g), Black's Law Dictionary defines "certify" as "[(1)] To authenticate or verify in writing. [(2)] To attest as being true or as meeting certain criteria." *Certify*, BLACK'S LAW DICTIONARY (11th ed. 2019). Accordingly, in light of the medically related role of an enhanced emergency telephone service, as discussed *infra*, respondent Summers County Commission dba Summers County Office of Emergency Management is clearly certified to provide medical services, and respondent Cales, as its employee, is an officer, employee, or agent of a health care provider.

The majority also alleges that "extending the MPLA to include individuals or entities other than those specifically designated by the Legislature would be inconsistent with the statute's purpose . . ." Such a determination simply ignores the express language

of the MPLA's definition of "health care provider" which, before listing several specific providers such as physicians, dentists, pharmacists, etc., states: "[A] person, partnership, corporation, professional limited liability company, health care facility, entity, or institution licensed by, or certified in, this state or another state, to provide health care or professional health care services, *including, but not limited to* . . ." such delineated providers. W. Va. Code § 55-7B-2(g) (emphasis added). By using the phrase, "including but not limited to," the Legislature obviously included the specific providers listed as examples of providers, not an exhaustive and exclusive list.

Indeed, this Court has previously recognized that entities not expressly listed may, nonetheless, be healthcare providers under the MPLA. In *Short v. Appalachian OH-9, Inc.*, 203 W. Va. 246, 507 S.E.2d 124 (1998), we held that "[e]mergency medical services, regulated pursuant to the West Virginia Emergency Medical Services Act, *W.Va. Code,* 16–4C–1 [1996], *et seq.,* are also subject to the provisions of the West Virginia Medical Professional Liability Act, *W.Va. Code,* 55–7B–1 [1986], *et seq.*" *Id.,* Syl. Pt. 2.[9] The significance of *Short* to the matter at hand is the fact that this Court held that a private ambulance agency fell within the scope of the MPLA despite the fact that the list of health

[9] The facts in *Short* are very similar to the facts here. In Summers County, Appalachian OH-9, Inc., provided emergency medical services. *Id.*, 203 W. Va. at 248, 507 S.E.2d at 126. Christopher Edward Short, an infant, was found unresponsive by his parents and they called for an ambulance to take their child to the hospital. *Id.* When the ambulance arrived, ambulance personnel determined that further attempts to resuscitate the child were not warranted and simply transported the infant to the Summers County Hospital, where he was pronounced dead. *Id.* However, the parents argued that the infant "could have been resuscitated, but for the actions of" Appalachian OH-9, Inc. *Id.*

care providers contained in the MPLA did not yet expressly list either "emergency medical service personnel" or "emergency medical services agenc[ies]." Following *Short*, the term "[e]mergency medical services authority or agency" was added to the definition by the Legislature in 2003. *See* W. Va. Code § 55-7B-2(g) (2003). Likewise, "[e]mergency medical service personnel" was later added to the definition in 2015. *See* W. Va. Code § 55-7B-2 (2015). Therefore, this Court has already determined that health care providers that are not expressly enumerated in W. Va. Code § 55-7B-2(g), may, nonetheless, fall within the inclusive definition of "health care provider" rendering them subject to the MPLA.

For the reasons stated herein, I believe the Petitioner's claims are, in fact, within the scope of the MPLA. The majority, in Footnote 9 of its decision, recognizes that "[i]t is undisputed that if the petitioner's claims against these respondents fall within the MPLA, the complaint was timely filed." Indeed, the Petitioner's call seeking medical assistance occurred on September 15, 2019. Therefore, the two-year statute of limitations that would have expired, (absent any other tolling or discovery exceptions), on September 15, 2021, was extended by the tolling provisions of the MPLA. On September 10, 2021, Petitioner served her notice of claim together with a screening certificate of merit as required by the MPLA. Accordingly, she was entitled to the tolling provisions contained in West Virginia Code § 55-7B-6(i)(1), which provide:

> [A]ny statute of limitations applicable to a cause of action against a health care provider upon whom notice was served for alleged medical professional liability shall be tolled from

> the date of mail of a notice of claim to 30 days following receipt of a response to the notice of claim, 30 days from the date a response to the notice of claim would be due, or 30 days from the receipt by the claimant of written notice from the mediator that the mediation has not resulted in a settlement of the alleged claim and that mediation is concluded, whichever last occurs.

Id. Therefore, her complaint, filed on October 12, 2021, was timely. For these reasons, I respectfully dissent as to the majority's conclusion that the Petitioner's claim does not fall within the scope of the MPLA and that, as a result of such finding, she cannot avail herself of the tolling provisions of the MPLA. I am authorized to state that Justice Hutchison joins in this separate opinion.