

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 1996 Term

No. 22980

RUTH RIFFE,
Plaintiff Below, Appellant,

v.

WILLIAM ARMSTRONG; DEBORAH NOLLEY;
DR. PHILLIP ROBERTSON; SPRINGHAVEN, INC.,
A WEST VIRGINIA CORPORATION; AND
PRINCETON COMMUNITY HOSPITAL ASSOCIATION, INC.,
A WEST VIRGINIA CORPORATION,
Defendants Below, Appellees

*Appeal from the Circuit Court of Mercer County
Honorable David W. Knight, Judge
Civil Action No. 93-CV-6-K*

REVERSED AND REMANDED

Submitted: March 5, 1996

Filed: July 17, 1996

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JUSTICE ALBRIGHT delivered the Opinion of the Court.

JUSTICE WORKMAN dissents and reserves the right to file a dissenting opinion.

SYLLABUS BY THE COURT

1. In an order dismissing less than all of the parties or less than all the claims in a civil action, the inclusion of the language required by Rule 54(b) of the West Virginia Rules of Civil Procedure makes that order appealable immediately with respect to the dismissed parties and claims.

2. Upon the appeal of an order summarily dismissing less than all of the parties or less than all the claims in a civil action, the trial court's decision to include the language required by Rule 54(b) of the West Virginia Rules of Civil Procedure for finality will be reviewed under an abuse of discretion standard.

3. Upon the appeal of a final order dismissing less than all of the parties or less than all the claims in a civil action, this Court, on the motion of any party or *sua sponte*, may elect to defer consideration of the appeal until an appeal is taken from the order terminating the entire action or the time for the appeal of the terminating order expires.

4. Whether an order dismissing less than all of the parties or less than all the claims in a civil action, which does not contain the express determinations set forth in Rule 54(b) of the West Virginia Rules of Civil Procedure, was intended to be final and is therefore appealable before the entire action is terminated will be determined by this Court from all the circumstances and the terms of the order. The better practice for the circuit courts to follow is to expressly state

or negate their intentions with respect to the finality of such an order within the body of the order.

5. An order dismissing less than all of the parties or less than all the claims in a civil action which contains a determination by a circuit court that the order *not* be considered final will be reviewed by this Court only upon application for a writ of prohibition. The party seeking such a writ must show any such abuse clearly and convincingly, because this Court greatly favors having before it all matters in controversy when reviewing the issues raised before it.

6. "Where an appeal is properly obtained from an appealable decree either final or interlocutory, such appeal will bring with it for review all preceding non-appealable decrees or orders,

from which have arisen any of the errors complained of in the decree appealed from, no matter how long they may have been rendered before the appeal was taken.' Point 2, syllabus, *Lloyd v. Kyle*, 26 W.Va. 534 [1885]." Syllabus point 5, *State ex rel. Davis v. Iman Mining Co.*, 144 W.Va. 46, 106 S.E.2d 97 (1958).

7. "A motion for reconsideration filed within ten days of judgment being entered suspends the finality of the judgment and makes the judgment unripe for appeal. When the time for appeal is so extended, its full length begins to run from the date of entry of the order disposing of the motion." Syllabus point 7, *James M.B. v. Carolyn M.*, 193 W.Va. 289, 456 S.E.2d 16 (1995).

8. An appeal may be taken from a final order disposing of a motion under Rule 59(e) of the West Virginia Rules of Civil Procedure at any time within the appeal period provided by the entry of the order or any proper extension of the appeal period.

9. "A circuit court's entry of summary judgment is reviewed *de novo*." Syllabus point 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

10. The defense of quasi-judicial immunity or privilege is generally available to one participating in the involuntary commitment process in good faith. However, the defense of quasi-judicial immunity or privilege does not apply where it is shown: (1) that a materially false medical certificate was employed to effect

or continue the detention of the plaintiff, (2) that such false medical certificate was necessary to the continued detention of the plaintiff, and (3) that the person made and employed the false medical certificate, or (4) employed such certificate knowing or having reason to know that it was materially false.

11. The lawful temporary commitment of an allegedly mentally ill person to a mental health facility under the provisions of W.Va. Code § 27-5-1, *et seq.*, may only occur when two steps have been accomplished: (1) a facially valid certificate of an examining physician or psychologist exists expressing the judgment that such person is mentally ill and likely to harm himself or herself or others, and (2) a facially valid finding of probable cause has been made to the same effect.

12. ""An intervening cause, in order to relieve a person charged with negligence in connection with an injury, must be a negligent act, or omission, which constitutes a new effective cause and operates independently of any other act, making it and it only, the proximate cause of the injury." Syllabus Point 16, *Lester v. Rose*, 147 W.Va. 575, 130 S.E.2d 80 (1963) [modified on other grounds, *State ex rel. Sutton v. Spillers*, 181 W.Va. 376, 382 S.E.2d 570 (1989)].' Syllabus Point 1, *Perry v. Melton*, 171 W.Va. 397, 299 S.E.2d 8 (1982)." Syllabus point 3, *Wehner v. Weinstein*, 191 W.Va. 149, 444 S.E.2d 27 (1994).

13. "One who engages in affirmative conduct, and thereafter realizes or should realize that such conduct has created an

unreasonable risk of harm to another, is under a duty to exercise reasonable care to prevent the threatened harm." Syllabus point 2, *Robertson v. LeMaster*, 171 W.Va. 607, 301 S.E.2d 563 (1983).

Albright, Justice:

This civil action was brought in the Circuit Court of Mercer County, West Virginia, for money damages arising out of the attempted involuntary commitment of appellant, Ruth Riffe, under the provisions of W.Va. Code, § 27-5-1, et seq. Appellant claims she was falsely imprisoned by appellees William Armstrong, Deborah Nolley, Springhaven, Inc., and Princeton Community Hospital when she was held against her will in the Behavioral Medicine Unit at Princeton Community Hospital and when, against her will, she was subsequently placed in restraints and transported to and held at Beckley Appalachian Regional Hospital. She also claims that appellee Doctor Phillip Robertson committed medical malpractice in providing a physician's certificate for the involuntary commitment proceedings.

Finally, appellant claims that all appellees intentionally inflicted emotional distress on her by their actions.

Doctor Robertson sought and was granted summary judgment on June 28, 1994. The remaining appellees were granted summary judgment by order entered August 1, 1994. After motion made August 5, 1994, the court denied appellant relief from those judgments by order entered November 29, 1994. Appellant filed her appeal on March 29, 1995. Appellant contends that summary judgment was not proper because genuine issues of material fact remain unresolved. We agree and reverse and remand to the circuit court for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL SUMMARY

On January 2, 1992, appellant arrived by ambulance at Princeton Community Hospital, with her son, Robert Riffe, who was to be admitted to the Behavioral Medicine Unit (BMU) there for treatment, following hospitalization at Welch Emergency Hospital for a suicide attempt involving an overdose of drugs. Appellant and her son were discovered outside the BMU by nurse Linda Spangler as she returned from lunch. Appellant was distraught and crying. After attempting to console appellant, Ms. Spangler summoned appellee Deborah Nolley, a clinical psychologist who was familiar with Robert Riffe's case. Appellee Nolley inquired as to the cause of appellant's distress, and appellant replied that she would kill her husband and then kill herself so her son would be fine. Appellant appeared to be mentally confused and claimed she had not eaten or slept for three days.

Appellant and her son moved into the BMU. The parties give conflicting accounts of why this occurred. Appellant claims she was enticed into the unit with an offer of a cup of coffee, while appellees claim appellant entered the unit as a result of her son's encouragement. Nonetheless, shortly after appellant entered the unit and her behavior was observed, appellee Nolley prepared a petition (or application) for involuntary commitment pursuant to W.Va. Code § 27-5-2(a)(2) (1983).

¹West Virginia Code § 27-5-2(a)(2) (1983) states:

(a) When application for involuntary custody for examination may be made. -- Any adult person may make application for involuntary hospitalization for examination of an individual when said person has reason to believe that:

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(2) The individual is mentally ill or mentally retarded and, because of his mental illness or mental retardation, the individual is likely to cause serious harm to himself or others if allowed to remain at liberty while awaiting an examination and certification by a physician or

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I, Phillip B. Robertson, do certify and state
as follows:

(1) I have personally observed and
examined Ruth Riffe on this date, which is the
2nd day of Jan., 1992, at 3:30 o'clock, pm, at
Princeton Community Hospital, West Virginia . .
. .

(2) I find the patient to be mentally ill . .
. .

(3) I further find the patient to likely to
cause harm to himself or others

(4) Based on this finding:

(a) I recommend the following treatment: Involuntary Commitment ASAP for inpt. Psychiatric Treatment

(b) Does this course of treatment require immediate hospitalization? Yes

The certificate also contained specific anecdotal facts and specific diagnoses supporting the conclusions just quoted.

The petition for involuntary commitment, made upon the oath of appellee Nolley, was filed in the Circuit Court of Mercer County with Doctor Robertson's certificate. In reliance on the petition, the court entered an order directing "that the Sheriff of Mercer County, West Virginia, apprehend the [appellant] and take her to Southern Highlands Community Mental Health Center (SHCMHC) or a facility designated by them for an immediate examination." The

order directed that "if the Respondent is medically certified a probable cause hearing shall be held forthwith following said examination before a Court Mental Hygiene Commissioner or Magistrate at a place designated by said official." The order also directed that counsel be appointed for appellant. It appears that the court acted under the authority of W.Va. Code § 27-5-2(b)(4) (1983), which, in pertinent part, stated:

(4) The circuit court . . . may thereupon enter an order for the individual named in such action to be detained and taken into custody, for the purpose of holding a probable cause hearing described in subdivision (5) of this subsection and for the purpose of an examination of the individual by a physician or a psychologist. Such examination shall be provided or arranged by a community mental health center designated by the director of health to serve the county in which the action takes place. The said order shall specify that such hearing be held forthwith and shall appoint

counsel for the individual: Provided, That where a physician or psychologist has performed such examination, the community mental health center may waive this requirement upon approving such examination.

Although appellant was to be taken into custody by the Sheriff under the provisions of the circuit court order and transported to Southern Highlands or a facility designated by it, appellant remained at the BMU, in the actual custody of the personnel there, and no evidence is before us that Southern was contacted or that it designated the BMU as the place for examination. Instead, the prosecuting attorney, representing the State, counsel appointed to represent appellant, and the mental hygiene commissioner were contacted and came to the BMU for the conduct of a probable cause hearing.

In the course of preparing for the hearing, it was learned that the certificate signed by Doctor Robertson was not based on a personal examination of appellant. After some discussion, the attorneys and the commissioner agreed that Doctor Robertson would proceed to examine appellant to determine anew if she was mentally ill and a danger to herself or others. Doctor Robertson proceeded to conduct a psychiatric examination of appellant and wrote a progress note reflecting his findings. On that occasion Doctor Robertson concluded:

Altho pt. is clearly mentally ill at this time as noted above, she does not appear to be an immediate danger to self or others. She has calmed considerably since the initial assessment by several BMC clinicians around 2:00 pm today. Recommend that petition for Involuntary Commitment be dropped on the

condition that a reliable family member assumes responsibility for the patient this evening and will take her home. Psychiatric treatment is recommended.

Doctor Robertson's progress note was made available to the attorneys and the commissioner. Appellant's counsel requested that appellant be released. The mental hygiene commissioner, David Harmon, denied the motion and proceeded to conduct a probable cause hearing, even though the circuit court order required that appellant be "medically certified" prior to a probable cause hearing. It cannot be ascertained from the record whether Doctor Robertson's earlier certification, based on his observation but not his examination of appellant, was thought to fulfill the requirement in the order of the court below that appellant be "medically certified" before a probable cause hearing was to be held, or whether it was thought that Doctor

Robertson's original certification justified waiving the "medically certified" requirement under the authority of the statutory procedure contained in W.Va. Code § 27-5-2(b)(4), as quoted above. In any event, it appears that the attorneys and the mental hygiene commissioner were fully advised of the circumstances under which the original certificate was prepared and considered and were fully advised of Doctor Robertson's subsequent change of opinion, reflected by his progress note.

Appellant was present at the hearing in person and by counsel. Doctor Robertson was not called to testify. Rather, the parties stipulated that the doctor's testimony would be consistent with his progress note. Following the taking of evidence, the commissioner ruled that probable cause existed to believe that

appellant was "likely to injure himself/herself or others because of mental illness" and signed an order so stating. At a deposition taken later in this action, the commissioner testified that his finding at the probable cause hearing was based on appellant's demeanor and manner during her testimony and was not based on Doctor Robertsons's original signed statement.

Under W.Va. Code § 27-5-2(b)(5) (1983), the order signed by the mental hygiene commissioner contains no direction that

²West Virginia Code § 27-5-2(b)(5) (1983), in pertinent part, gave the following additional directions for a probable cause hearing:

(5) A probable cause hearing shall be held before . . . the mental hygiene commissioner . . . of the county of which the individual is a resident or where he was found

a person for whom probable cause is found be held or otherwise restrained. That authority arises under the provisions of W.Va. Code § 27-5-3(a) (1979), which provides for admission to a mental health facility following a probable cause hearing, and W.Va. Code § 27-5-10 (1974), which authorizes the Sheriff to provide transportation to an appropriate mental health facility when the need arises. The authority for admission to a mental health facility arises only upon compliance with both prongs of W.Va. Code § 27-5-3(a) (1979), which reads as follows:

. . . At the conclusion of the hearing the . . .
. mental hygiene commissioner . . . shall find and
enter an order stating whether or not there is
probable cause to believe that such individual as
result of mental illness, mental retardation or
addiction is likely to cause serious harm to
himself or others.

(a) Admission to a mental health facility for examination. -- Any individual may be admitted to a mental health facility for examination upon entry of an order finding probable cause . . . and upon certification by one physician or one psychologist that he has examined the individual and that he is of the opinion the individual is mentally ill . . . and because of his mental illness . . . is likely to cause serious harm to himself or others if not immediately restrained

After the probable cause hearing, appellant was held at the BMU while arrangements were made to transport her to a mental health facility. At some time following the probable cause hearing, appellee Nolley telephoned Beckley Appalachian Regional Hospital (BAR-H) to ascertain that a bed was available and also assembled a packet of documents, including the original involuntary commitment petition, Doctor Robertson's original sworn certificate, the probable

cause finding, and an "Application For Transportation", signed by appellee Nolley, in which she certified herself as being qualified to make such an application to the Sheriff of Mercer County. The packet of documents also contained a handwritten note to BAR-H, which explained the absence of medical records for appellant but did not mention Doctor Robertson's progress note stating his revised opinion. Appellee Nolley testified that she tried to locate the progress note to include in the packet, but that it could not be found.

Appellant was put in restraints and transported to BAR-H by a Mercer County deputy sheriff, pursuant to the written request of appellee Nolley. The packet of documents was taken to BAR-H with appellant. Although the record is not clear on this point, it appears

that BAR-H was a "mental health facility" within the meaning of the statute. BAR-H admitted appellant, having received in the packet sent with appellant evidence of compliance with both requirements for admission, i.e., the mental hygiene commissioner's finding of probable cause and Doctor Robertson's original, inaccurate certificate of a personal examination of appellant. Following the admission of appellant to BAR-H, her counsel filed a *habeas corpus* petition with the circuit court, seeking appellant's release because her detention at BAR-H was unlawful. The petition was heard January 6, 1992, and the writ of *habeas corpus* was granted. Appellant was immediately released from the Beckley facility.

Thereafter, appellant filed this action seeking money damages and alleging medical malpractice by Doctor Robertson, false

imprisonment, and the intentional infliction of emotional distress or the tort of outrage. Doctor Robertson filed a motion for summary judgment, which was granted by order entered June 28, 1994, on the ground that it had not been shown that Doctor Robertson's acts or omissions were the proximate cause of the injuries of which appellant complained. Appellant apparently took no further action with respect to Doctor Robertson's summary judgment, except to file this appeal on March 29, 1995. The remaining appellees filed motions for summary judgment, which were granted by order

³As noted, Dr. Robertson's motion for summary judgment was granted June 28, 1994. That judgment did not conclude the case below. No motion for relief from that judgment was filed within ten days of its entry. The order granting that summary judgment does not contain "an express determination that there is no just reason for delay" and "an express direction for the entry of judgment", as permitted by Rule 54(b), W.Va.R.Civ.Proc., which provides guidance for dismissal of less than all parties or less than all claims.

entered August 1, 1994. Appellant filed a motion on August 5, 1994, seeking relief from the summary judgments entered August 1, 1994, which was denied by order entered November 29, 1994. Appellant then filed this appeal from that order of denial on March 29, 1995.

JURISDICTION TO HEAR THE APPEAL

Appellees urge us to dismiss this appeal as improvidently granted. They assert that this Court is without jurisdiction to hear the appeal because appellant sought relief from the summary judgments granted by an order entered below on August 1, 1994, and that the motion for relief is in the nature of a motion authorized by Rule 60(b) of the West Virginia Rules of Civil Procedure. They

further claim that the period for appeal is not tolled by a Rule 60(b) motion, but runs from the date of the entry of the order from which relief was sought, in this case, August 1, 1994, and that this appeal was not filed in the circuit court until March 29, 1995, more than four months after the entry of summary judgments addressed by appellant's motion. Doctor Robertson joins in the assertions of the other appellees in regard to this appeal being untimely. Doctor Robertson does appear to concede that, if this appeal is timely, the entry of summary judgment in his favor on June 28, 1994, was not a final order precluding its review as a part of this appeal. We will review the applicable rules to ascertain whether we have jurisdiction here.

First, we agree that a Rule 60(b) motion does not toll the running of the time for appeal. Syl. pt. 2, *Gaines v. Drainer*, 169

⁴Rule 60(b) of the West Virginia Rules of Civil Procedure, in pertinent part, states:

(b) *Mistakes; inadvertence; excusable neglect; unavoidable cause; newly discovered evidence; fraud, etc.* -- On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have

W.Va. 547, 289 S.E.2d 184 (1982) (per curiam); Syl. pt. 1, *Toler v. Shelton*, 157 W.Va. 778, 204 S.E.2d 85 (1974); Rule 72, W.Va.R.Civ.Proc. We note, however, that appellant filed her motion for relief from the summary judgments entered August 1, 1994, on August 5, 1994, within ten days of the entry of judgment. We have held that a motion denominated a motion to "reconsider", "vacate", "set aside" or "reargue" is a Rule 59(e) motion if filed and served

prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), (3), and (6) not more than eight months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation (Emphasis added.)

⁵Rule 59(e) of the West Virginia Rules of Civil Procedure states:

(e) *Motion to alter or amend a judgment.*

within ten days of the entry of judgment. Syl. pt. 2, *Powderidge Unit Owners Association v. Highland Properties, Ltd.*, No. 23105 (W.Va., June 14, 1996); *Savage v. Booth*, ___ W.Va. ___, 468 S.E.2d 318 (1996); Syl. pt. 5, *James M.B. v. Carolyn M.*, 193 W.Va. 289, 456 S.E.2d 16 (1995); Syl. pt. 1, *Lieving v. Hadley*, 188 W.Va. 197, 423 S.E.2d 600 (1992).

Appellant's August 5, 1994 motion asked the court below to "reconsider" the ruling entered August 1, 1994, and, therefore, being filed and served within ten days of that judgment, is to be treated as a Rule 59(e) motion. A Rule 59(e) motion is the proper motion by which a summary judgment may be timely attacked. See

-- A motion to alter or amend the judgment shall be served not later than 10 days after

James M.B. v. Carolyn M., 193 W.Va. 289, 456 S.E.2d 16 (1995).

Moreover, Rule 59 motions suspend the running of the time for appeal, and that time does not begin to run until the entry of an order deciding the issues raised by the motion. Syl. pt. 7, *James M.B. v. Carolyn M.* 193 W.Va. 289, 456 S.E.2d 16 (1995); Rule 72, W.Va.R.Civ.Proc.; Syl. pt. 4, *McCormick v. Allstate Insurance Co.*, 194 W.Va. 82, 459 S.E.2d 359 (1995); *Mooney v. Barton*, 155 W.Va. 329, 184 S.E.2d 322 (1971).

The order denying appellant's August 5, 1994 motion, here treated as a Rule 59(e) motion, was not entered until November 29, 1994. The appeal was filed March 29, 1995, within -- if only barely -- the four-month period ordinarily allowed for appeals to this

entry of the judgment.

Court. W.Va. Code § 58-5-4 (1990). Accordingly, this Court clearly has jurisdiction to hear this appeal and has before it for consideration both the summary judgments rendered August 1, 1994, and the order denying relief from those judgments, entered November 29, 1994.

The early summary judgment in favor of Doctor Robertson presents additional questions. Although Doctor Robertson concedes the issue, some of our cases produce doubt. We have held, on the one hand, that the presence or absence of the language set out in Rule 54(b) to give finality to an order dismissing less than all parties or

⁶Rule 54(b) of the West Virginia Rules of Civil Procedure states:

(b) *Judgment upon multiple claims or involving multiple parties.* -- When more than

claims determines whether such a partial dismissal of parties or claims is indeed a final order with respect to the parties or claims dismissed.

Syl. pt. 3, *Smith v. Buege*, 182 W.Va. 204, 387 S.E.2d 109 (1989); *Wheeling Dollar Saving and Trust Co. v. Singer*, 162 W.Va. 502, 250 S.E.2d 369 (1979); Syllabus, *Wilcher v. Riverton Coal Co.*, 156 W.Va.

one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

501, 194 S.E.2d 660 (1973); *State ex rel. Bank of Ripley v. Thompson*, 149 W.Va. 183, 139 S.E.2d 267 (1964). On the other hand, we have held that the absence of the language required in Rule 54(b) will not be a bar to finality if this Court can determine that finality was intended. Syl. pt. 1, *Sisson v. Seneca Mental Health/Mental Retardation Council, Inc.*, 185 W.Va. 33, 404 S.E.2d 425 (1991), (quoting Syl. pt. 2, *Durm v. Hecks*, 184 W.Va. 562, 401 S.E.2d 908 (1991)); *Taylor v. Miller*, 162 W.Va. 265, 249 S.E.2d 191 (1978). We have also said that if we can determine that finality was intended, although not expressly stated in the words of Rule 54(b), then, although the order is immediately appealable upon its entry, appeal need not be taken, but may be taken at any time until the jurisdictional period established by the entry of the last order terminating the entire action expires. *Eblin v. Coldwell Banker*

Res. Affiliates, 193 W.Va. 215, 455 S.E.2d 774 (1995) (per curiam).

Lastly, we have suggested, on the one hand, that if an appeal is taken from what is indeed the last order disposing of the last of all claims as to the last of all parties, then the appeal brings with it all prior orders. Syl. pt. 5, *State ex rel. Davis v. Iman Mining Co.*, 144 W.Va. 46, 106 S.E.2d 97 (1958) (quoting syl. pt. 2, *Lloyd v. Kyle*, 26 W.Va. 534 (1885)); *Harper v. South Penn Oil Co.*, 77 W.Va. 294, 87 S.E. 483 (1916); *Kelner v. Cowden*, 60 W.Va. 600, 55 S.E. 649 (1906); *Stout v. Philippi Manufacturing and Mercantile Co.*, 41 W.Va. 339, 23 S.E. 571 (1895); *Watson v. Wigginton*, 28 W.Va. 533 (1886); *Steenrod v. Railroad Co.*, 25 W.Va. 133 (1884); *Camden v. Haymond*, 9 W.Va. 680 (1876).

On the other hand, we have said that if a Rule 59(e) motion addresses only some claims, but not all, then the time for appeal is extended only for the claims addressed by the Rule 59(e) motion. Syl. pt. 4, *Kentucky Fried Chicken of Morgantown, Inc. v. Sellaro*, 158 W.Va. 708, 214 S.E.2d 823 (1975) (quoting syl. pt. 6, *Dixon v. American Indus. Leasing Co.*, 157 W.Va. 735, 205 S.E.2d 4 (1974)). All of these rules have been developed within the general rubric that an appellate court ought to usually have before it all of the controversy that was brought to the court below. Cf. *Gooch v. W.Va. Dept. of Public Safety*, 195 W.Va. 357, 465 S.E.2d 628 (1995) (quoting *United States v. Hollywood Motor Car Co., Inc.*, 458 U.S. 263, 102 S.Ct. 3081, 73 L.Ed.2d 754 (1982) (rule of finality is to prohibit piecemeal appellate review of trial court decisions which do not terminate the litigation); *Wilcher v. Riverton Coal Co.*, 156 W.Va.

501; 194 S.E.2d 660 (1973) (this Court will not decide cases piecemeal).

It is appropriate to now reconcile these cases as best as we can, recognizing that we also have said that our practice may properly depart from the federal practice because, as a court of discretionary jurisdiction, we may later hear an appeal that earlier we declined to hear. *Durm v. Hecks*, 184 W.Va. 562, 401 S.E.2d 908 (1991); *Parsons v. Consolidated Gas Supply Corp.*, 163 W.Va. 464, 256 S.E.2d 758 (1979). In discussing these issues, we note that we do not address or disturb the requirements of Rule 59(a)

⁷Rule 59(a) of the West Virginia Rules of Civil Procedure states:

(a) *Grounds.* -- A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons

regarding motions for new trial and the requirement for such a motion upon the trial of a case if an appeal is to be taken. *State v. Bragg*, 140 W.Va. 585, 87 S.E.2d 689 (1955). Nor will we answer finally, and again "leave for another day just what limits we place on Rule 54(b) where there is no express certification by the circuit court and the continuing vitality of our trilogy of cases (*McGraw*, *Sisson*, and *Durm*)", as reserved in *Province v. Province*, No. 22689

for which new trials have heretofore been granted in actions at law; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(W.Va., May 17, 1996). However, to give some guidance on the issues left in flux by the array of cases cited, we hold:

1. In an order dismissing less than all of the parties or less than all the claims in a civil action, the inclusion of the language required by Rule 54(b) of the West Virginia Rules of Civil Procedure makes that order appealable immediately with respect to the dismissed parties and claims.

2. Upon the appeal of an order summarily dismissing less than all of the parties or less than all the claims in a civil action, the trial court's decision to include the language required by Rule 54(b) for finality will be reviewed under an abuse of discretion standard.

10 C. Wright, A. Miller, M. Kane, *Federal Practice & Procedure* § 2655 at 43 (1983).

3. Upon the appeal of a final order dismissing less than all of the parties or less than all the claims in a civil action, this Court, on the motion of any party or *sua sponte*, may elect to defer consideration of the appeal until an appeal is taken from the order terminating the entire action or the time for the appeal of the terminating order expires.

4. Whether an order dismissing less than all of the parties or less than all the claims in a civil action, which does not contain the express determinations set forth in Rule 54(b) of the West Virginia Rules of Civil Procedure, was intended to be final and is therefore appealable before the entire action is terminated will be determined by this Court from all the circumstances and the terms of the order.

The better practice for the circuit courts to follow is to expressly state or negate their intentions with respect to the finality of such an order within the body of the order.

5. An order dismissing less than all of the parties or less than all the claims in a civil action which contains a determination by a circuit court that the order *not* be considered final will be reviewed by this Court only upon application for a writ of prohibition. The party seeking such a writ must show any such abuse clearly and convincingly, because this Court greatly favors having before it all matters in controversy when reviewing the issues raised before it.

6. "Where an appeal is properly obtained from an appealable decree either final or interlocutory, such appeal will bring

with it for review all preceding non-appealable decrees or orders, from which have arisen any of the errors complained of in the decree appealed from, no matter how long they may have been rendered before the appeal was taken.' Point 2, syllabus, *Lloyd v. Kyle*, 26 W.Va. 534 [1885]." Syl. pt. 5, *State ex rel. Davis v. Iman Mining Co.*, 144 W.Va. 46, 106 S.E.2d 97 (1958).

7. "A motion for reconsideration filed within ten days of judgment being entered suspends the finality of the judgment and makes the judgment unripe for appeal. When the time for appeal is so extended, its full length begins to run from the date of entry of the order disposing of the motion." Syl. pt. 7, *James M.B. v. Carolyn M.*, 193 W.Va. 289, 456 S.E.2d 16 (1995).

8. An appeal may be taken from a final order disposing of a motion under Rule 59(e) of the West Virginia Rules of Civil Procedure at any time within the appeal period provided by the entry of the order, or any proper extension of the appeal period.

In accord with these guidelines, the order granting summary judgment to Doctor Robertson is brought here before us by the appeal of the order granting summary judgment to the other appellees, since the appeal here was filed within the appeal period provided by the entry of the final order denying appellant's Rule 59(e) motion with respect to the summary judgment granted the other appellees.

SCOPE OF REVIEW

The controlling issue in this appeal is whether the trial court appropriately granted summary judgment to appellees. "A circuit court's entry of summary judgment is reviewed *de novo*." Syl. pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Summary judgment is proper under Rule 56(c) of the West Virginia Rules of Civil Procedure where the moving party shows there is no genuine issue as to any material fact and that he or she is entitled to judgment as a matter of law. The standard for granting summary judgment is stated as follows: ""A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).' Syllabus Point 1, *Andrick v. Town of*

Buckhannon, 187 W.Va. 706, 421 S.E.2d 247 (1992)." Syl. pt.. 2,

Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994).

In determining on review whether there is a genuine issue of material fact between the parties, this Court will construe the facts in a light most favorable to the losing party. *Alpine Property Owners Association, Inc. v. Mountaintop Development Co.*, 179 W.Va. 12, 365 S.E.2d 57 (1987). "A party who moves for summary judgment has the burden of showing that there is no genuine issue of fact and any doubt as to the existence of such issue is resolved against the movant for such judgment." Syl. pt. 6, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

APPELLEES' RELATIONSHIP

As we understand the record, only Doctor Robertson and the employees or agents of Springhaven, Inc., were actively involved in the facts giving rise to this appeal. The involvement of Princeton Community Hospital, under the pleadings before us, appears to be wholly passive. As a consequence, appellee Princeton Community Hospital appears to have only such derivative liability in this matter as may be created by its status as a contracting party with Doctor Robertson or Springhaven, Inc., and the operation of the BMU by Springhaven as an integral part of the hospital, with Doctor Robertson on staff. Likewise, any liability of Springhaven, Inc., appears to arise out of the actions of its employees, appellees Armstrong and Nolley, its operation of the BMU, and any relationship it may have with Doctor Robertson. We, therefore, treat any liability of Princeton Community Hospital as being wholly derivative from the

actions of Doctor Robertson or Springhaven, Inc., and the liability of Springhaven as arising from its relationships with the other appellees.

Any such liability is treated, in turn, as dependent upon the proof ultimately adduced and legal principles relied upon to establish any such derivative liability. For convenience, we will hereafter collectively refer to all of the appellees other than Doctor Robertson as the "Springhaven appellees".

FALSE IMPRISONMENT ISSUES

Appellant argues that summary judgment in favor of the Springhaven appellees on her claim of false imprisonment was inappropriate. Her contentions can be summarized in four points:

(1) That her detention for two hours while the involuntary commitment petition was being processed is not justifiable restraint and is actionable; (2) that the probable cause hearing, being unlawful, provides appellees no protection and is not *res judicata* as to her mental condition at the time; (3) that once Doctor Robertson reversed his judgment and prepared his progress note, the remaining appellees are liable for her continued detention and transfer to BAR-H under physical restraints; and (4) that the mental hygiene commissioner did not order her further detention at the conclusion of the probable cause hearing, and the Springhaven appellees had no

authority to cause her further detention, physical restraint, transportation, and admission to BAR-H.

The Springhaven appellees respond that their initial detention of appellant was clearly justified by the statutory plan for involuntary commitments and judicial process, that appellant's initial detention was justified to enable the judicial process to commence, that the probable cause determination justified appellant's continued detention in good faith compliance with judicial orders, and that the Springhaven appellees enjoy quasi-judicial immunity for their efforts to give effect to the decision of the mental hygiene commissioner. The Springhaven appellees contend that their initial detention of appellant was justified by her upset condition and that the finding in the probable cause hearing -- that by reason of mental illness

appellant was a danger to herself or others -- forecloses further inquiry into the propriety of her detention after that time.

We turn first to a review of authorities on false imprisonment. This Court has said that the gist of the action for false imprisonment is illegal detention of a person without lawful process or by an unlawful execution of such process. *Vorholt v. Vorholt*, 111 W.Va. 196, 160 S.E. 916 (1931); *Finney v. Zingale*, 82 W.Va. 422, 95 S.E. 1046 (1918). In *Vorholt*, a lunacy proceeding was brought in Kanawha County. Under the procedure then in place, the defendant procured a warrant for the arrest of the plaintiff for the purpose of having the "lunacy commission" inquire into the sanity of the plaintiff. The plaintiff was arrested, and a hearing was held. The plaintiff was released when he was determined sane by the

commission. Thereafter, he brought an action alleging both false imprisonment and malicious prosecution, the latter count alleging that the defendant had a malicious purpose in procuring the warrant and arrest of the plaintiff. This Court affirmed the dismissal below of the false imprisonment count, because the arrest and detention occurred pursuant to lawful process, but reversed the dismissal of a malicious prosecution count otherwise properly pleaded, since it averred that the procuring of the warrant and arrest was achieved for a malicious purpose. In its opinion, the Court adopted the following definition of the distinction between the two actions:

"An action for false imprisonment may be maintained where the imprisonment is without legal authority. But, where there is a valid or apparently valid power to arrest, the remedy is by an action for malicious prosecution. The want of lawful authority is an essential element in an action for false imprisonment. Malice

and want of probable cause are the essentials in an action for malicious prosecution."

Vorholt v. Vorholt, 111 W.Va. at 199, 160 S.E. at 918 (citing *Roberts v. Thomas*, 135 Ky. 63, 121 S.W. 961, 962 (1909)).

However, not every order or warrant for arrest, even though apparently valid on its face, will insulate those who instigate the issuance of the warrant from an action for false imprisonment resulting from the execution of the warrant. In *Ogg v. Murdock*, 25 W.Va. 139 (1884), a defendant's lawyer procured a warrant for the arrest of a debtor. The warrant was regular on its face and was issued under the authority of a statute authorizing the arrest of a debtor under certain circumstances. The defendant was held liable for false imprisonment when it was shown that, although the statute

authorized the issuance of the warrant, there was no suit pending against the debtor at the time the warrant was issued, and, in the absence of a pending suit, the statute did not operate to authorize the issuance of the warrant. Also, in *Williamson v. Glen Alum Coal Co.*, 72 W. Va. 288, 78 S.E. 94 (1913), a coal company which arrested and procured the trial of a man for a "misdemeanor", for conduct which did not constitute any crime, was held liable for false imprisonment resulting from the arrest and the trial, even though the judicial officer, a justice of the peace, who conducted the trial, was a duly constituted public officer entitled to arrest and try accused persons for a misdemeanor without a warrant. More recently, in *Winters v. Campbell*, 148 W.Va. 710, 137 S.E. 2d 188 (1964), a party who instigated an arrest under a "Mary Doe" warrant issued by a justice of the peace that did not contain a legally sufficient

description of the alleged defendant was held liable for false imprisonment.

With the principles enunciated in these cases in mind, we look first to the claim of the Springhaven appellees that their early detention of appellant, from the time of her arrival at the BMU, was justified. The evidence available in the record suggests that, upon arrival at the BMU, appellant was extremely upset and that appellees feared for her safety and were even concerned that she might do harm to others in the psychiatric unit. We note that there is no material dispute of the facts regarding appellant's apparent state of mind and general condition when she arrived at the BMU, and we regard the few divergences in the testimony before us as inconsequential. In those circumstances, the doctrine of justification

is applicable. The common law has long provided justification for the temporary and reasonable restraints of insane persons, even without legal proceedings, when they are dangerous to themselves or others. 32 Am.Jur.2d *False Imprisonment* § 72 (1995). Accordingly, the early detention of appellant, to protect her from harm and prevent harm to others and to prepare, properly document, and file a petition for involuntary commitment, can be seen as acts taken in good faith and for good reason, all fully justified in law.

Difficulty arises at the point where the Springhaven appellees Armstrong and Nolley proceeded to inform Doctor Robertson of the situation and take from him a certificate representing that Doctor Robertson had examined appellant. The Springhaven appellees contend that since everything they did from

that time to the time of appellant's release from BAR-H under a writ of *habeas corpus* was done in aid of the involuntary commitment procedure set forth by statute, they are immune from damages as acting in a quasi-judicial capacity. They rely on the filing of the initial petition for involuntary commitment, the issuance by the circuit court of its order directing the Sheriff of Mercer County to take appellant into custody, the probable cause hearing, and the finding by the mental hygiene commissioner of probable cause to believe that appellant was likely to harm herself or others by reason of mental illness.

To address the issues thus raised, we must consider the law of quasi-judicial immunity or privilege in relation to involuntary commitment proceedings. Our discussion will necessarily touch on

the potential liability of Doctor Robertson to the charge of negligence under another count in appellant's complaint below. We will discuss that count more fully later in this opinion, noting here only that appellant did not charge Doctor Robertson under the false imprisonment count.

The defense of quasi-judicial immunity has been described as follows:

An exemption similar to that of judges from personal liability for their judicial acts is extended to officers in the other departments of government whenever they are entrusted with the exercise of discretionary power and their determinations or decisions are, by their nature judicial This immunity exists only where the officer has jurisdiction of the particular case and is authorized to determine it; if the officer transcends the limits of authority the officer

ceases, in the particular case, to act as judge,
and is responsible for all the consequences

32 Am.Jur. 2d *False Imprisonment* § 109 (1995) (footnotes
omitted).

There is a view, suggested by the cases collected by R. F.
Chase, Annotation, *Liability for False Imprisonment Predicated Upon
Institution of, or Conduct in Connection with, Insanity Proceedings*,
30 A.L.R 3d 523, 536 (1970 & Supp.), that "[e]xamining physicians
who testify or otherwise give evidence in proceedings to determine
sanity [are] . . . immune from liability for false imprisonment . . ." and
applying that principle even where the physician failed to follow
statutory directions or made false statements. The cases supporting
that view appear to rest on the theory that, as necessary participants

in the commitment procedure, the physicians are judicial officers and are therefore immune.

In a few cases cited and others decided more recently, that view has been applied in cases involving a failure to follow statutory directions. Without exhaustively reviewing those cases, we touch on three. In *Hurley v. Towne*, 155 Me. 433, 156 A.2d 377 (1959), the physician, as in this case, falsely certified without in fact examining the plaintiff. The court upheld immunity for the physician, although it is noted that the actual incarceration occurred on an order entered by the hearing tribunal. In *Niven v. Boland*, 177 Mass 11, 58 N.E. 282 (1900), the court reached the same result, emphasizing the quasi-judicial nature of the physician's certificate, even though it was false. In *Carter v. Landy*, 163 Ga.

App. 509, 295 S.E.2d 177 (1982), the statute required a physician's examination, but the physician merely "observed" the person. On the facts of that case, the court affirmed the grant of summary judgment in favor of the doctor in a false imprisonment case, saying that the issue presented was to be determined on medical standards, not legal ones. In *Williams v. Smith*, 179 Ga. 712, 348 S.E.2d 50 (1986), the Georgia court overruled the "medical standards" test, saying:

[T]o the extent that *Carter v. Landy*, supra, could be construed as establishing a medical negligence standard for determining the "unlawfulness" of an involuntary detention pursuant to OCGA § 37-3-40 et seq., it must be overruled. We hold the following to be the applicable legal principles: Where one is taken into custody pursuant to a procedurally valid certificate of a physician authorizing involuntary mental treatment, the resulting detention is not "unlawful." Although such detention may give rise to other claims, a cause of action for false imprisonment is not among them. Where one

is held in custody pursuant to a void or defective physician's certificate, there is a viable claim for false imprisonment, but only if the certificate was not issued in "good faith." Where . . . the detention is not evidenced by some form of objective compliance by the physician with all applicable procedural process requirements, there is a viable claim for false imprisonment.

Id. at 716, 348 S.E.2d at 54 (emphasis in original).

Williams v. Smith, with its reliance on good faith, appears to be in accord with the more modern view expressed in 32 Am.Jur.2d, *False Imprisonment* § 115 (1995), where a distinction is drawn between cases in which a physician has falsely certified that an examination has been conducted and cases where the examination is faulty or inadequate. The emerging general rule seems to suggest that all such cases turn on their respective merits and that recovery

can be had on a false certificate but will usually be denied on the basis of immunity or privilege grounds where the examination is simply faulty or inadequate. In *McLean v. Sale*, 38 N.C.App. 520, 248 S.E. 2d 372 (1978), a summary judgment in favor of the physician was reversed and the cause remanded for trial in a false imprisonment case. The court said a material issue of fact existed as to whether the doctor intentionally or negligently violated his duty to make an examination before signing a certificate of commitment and that any such violation is not covered by immunity. In *Sukeforth v. Thegen*, 256 A. 2d 162 (Me. 1969), the court held squarely that a certification that a physician has made an examination in a mental hygiene proceeding, when none has been made, is false imprisonment.

However, the court recited that observation in lieu of examination would meet the statutory requirement, where the condition and

actions of the ill person prevented a full fledged examination. A similar result obtained in *Delatte v. Genovese*, 228 So.2d 252 (La.App. 1969). *Fair Oaks Hospital v. Pocrass*, 266 N.J. Super. 140, 628 A. 2d 829 (1993), confronts the issue of immunity for physician misconduct in a case where the commitment statute was not followed but no false certificate was employed to restrain the allegedly ill person. In *Fair Oaks*, a physician transported the allegedly mentally ill person to a mental health facility. Under a recently enacted applicable statute, such a person had either to be first taken to a screening service or two physicians' certificates had to be presented and a court order obtained. The patient was not taken to the screening service but was admitted to a mental health facility on the say so of this doctor, who furnished one certificate, but the second certificate and the order were not obtained until after admission was

achieved. It appears that under the prior statute the procedure employed would have been appropriate. The court said that the failure to follow the statutory procedure presented an issue of negligence for the jury. The court reasoned that, while the doctor was charged with knowledge of the new procedure, the jury might not find negligence because the doctor was familiar with the old statute. However, the court also ruled that the physician was liable to the patient for false imprisonment because motive was not an issue, the elements in false imprisonment being the intent to imprison and the absence of lawful process.

Although we find no West Virginia cases dealing specifically with the employment of false medical certificates that fail to comport with statutory requirements for involuntary commitments, we believe

that the cases reviewed which permit a finding of liability where the certificate is false are directly consistent with the principles enunciated in the West Virginia false imprisonment cases we reviewed in this opinion. As the Court stated in *Williamson v. Glen Alum Coal Co.*, *supra*, the elements of false imprisonment are (1) the detention of the person, and (2) the unlawfulness of the detention and restraint. And, as suggested in *Vorholt*, *supra*, an action may be sustained on the unlawful execution of otherwise lawful process, and neither malice nor want of probable cause are elements the plaintiff must prove to prevail in the action. See *Johnson v. Norfolk & Western Railroad*, 82 W.Va. 692, 97 S.E. 189 (1913). Moreover, the detention and restraint may be shown to be unlawful, as in *Ogg v. Murdock* and *Winters v. Campbell*, even though the detention is carried out under facially valid authority or, as in *Williamson v. Glen*

Alum Coal Co., with the assistance of validly constituted authority, acting beyond this authority. We, therefore, conclude that the defense of quasi-judicial immunity or privilege is generally available to one participating in the involuntary commitment process in good faith. However, the defense of quasi-judicial immunity or privilege does not apply where it is shown: (1) that a materially false medical certificate was employed to effect or continue the detention of the plaintiff, (2) that such false medical certificate was necessary to the continued detention of the plaintiff, and (3) that the person made and employed the false medical certificate, or (4) employed such certificate knowing or having reason to know that it was materially false.

In the case before us, the Springhaven appellees, as well as Doctor Robertson, knew or clearly should have known that the medical certificate originally signed by Doctor Robertson contained the representation that he had examined the appellant and knew or should have known that that representation was false. That representation appears to be not only material, but crucial, to executing the temporary involuntary commitment procedure employed against appellant. Under the evidence thus far developed, it may be concluded that the employment of that certificate at various stages in the events giving rise to this action, in the particular circumstances of this case, resulted in the detention of appellant from the time of the making of the certificate to the time appellant was released from BAR-H. The evidence, it appears, will also support the conclusion that the Springhaven appellees caused or participated in

causing that detention and that the false medical certificate was crucial to the continued detention of appellant at several distinct stages in the detention process. We will proceed to review particular circumstances that bear, to a greater or lesser extent, on the matter at issue.

Appellees are not in fact officers of the government but would enjoy limited immunity or privilege because of the delicate nature of involuntary commitment and mental health problems, in which their faithful participation is critical and welcome. Nevertheless, the right to detain another must be exercised with due regard to the provisions of law permitting it and faithful compliance with legal requirements. When reviewing a motion for summary judgment, we, like the court below, must examine the pleadings,

depositions, and admissions on file, together with the affidavits, if any, to determine if there is a genuine issue as to any material fact. In doing so, we view the evidence available in the light most favorable to the non-moving party and must decide whether the moving party is entitled to judgment as a matter of law. If there is a genuine issue for trial, the judgment sought will not be rendered. See *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). We now review the circumstances appearing in this case under those standards, leaving for a jury the actual determination of the facts.

Preparing and filing the involuntary commitment petition.

Appellant's evidence would support a finding that appellees Robertson, Armstrong, and Nolley, and by derivation appellee Springhaven, fully participated in obtaining Doctor Robertson's original medical

certificate and that the certificate was known from the beginning to be false and misleading. As discussed above, that set off a chain of events resulting in appellant's continued detention.

Detention after the court order, pending the probable cause hearing. The circuit court's order in the involuntary commitment proceeding, issued after appellee Nolley completed her petition and caused it to be presented to the court, authorized appellant's detention by the Sheriff of Mercer County. The evidence suggested by the record before us is that, after the issuance of the circuit court order, the Springhaven appellees, rather than the Sheriff, detained appellant at the BMU while arrangements were being made for a probable cause hearing.

Further, in an apparent effort to provide for medical certification and full compliance with the requirements for temporary involuntary commitment, the order of the circuit court required that appellant be examined at Southern Highlands Community Mental Health Center or a facility designated by it. Alternatively, the statute upon which appellees rely authorized the use of an examination done elsewhere, if the examination was approved by Southern Highlands. The record does not indicate that the BMU was designated by Southern Highlands to conduct the examination and does not indicate that any other examination of appellant approved by Southern was ever conducted. In short, it may be concluded, relying on the false medical certificate alone, that appellees made no effort to obtain a valid, approved medical examination conforming to the requirements of the circuit court order.

Finally, it is noted that the circuit court order further provided for a probable cause hearing if -- and only if -- the appellant was "medically certified". The evidence would support a conclusion that the Springhaven appellees, having made no effort to comply with the precise terms of the circuit court order or to provide the substitute approved examination allowed by statute, next caused the probable cause hearing to be convened, with the prosecuting attorney, appellant's appointed counsel and the mental hygiene commissioner coming to the BMU for that purpose. All that time, it may be concluded, appellant remained unlawfully detained at the BMU, in the custody of Springhaven, not the Sheriff.

The probable cause hearing. Appellees contend that, in any event, the finding of the commissioner in the probable cause hearing justified the continued detention of appellant. They suggest that the commissioner's finding absolves them of liability because appellant was indeed found to be mentally ill and likely to harm herself or others. It is noted that the commissioner made that finding based on his own observation and not on Doctor Robertson's original certificate or subsequent progress note.

However, it appears that the probable cause hearing was not authorized in law, there apparently being no valid examination and medical certificate as required by the circuit court order and the applicable statute. Moreover, the commissioner's order, standing alone, makes no reference to continued detention of the appellant and

provides no authority to hold and restrain her. In a properly conducted mental hygiene proceeding, appellees would necessarily have had before them a physician's or psychologist's certificate which they reasonably believed constituted an "examination" meeting the statutory requirements. Here, a fair, reasonable inference can be drawn that the Springhaven appellees knew or should have known otherwise. The existence of a finding of probable cause validly made by the mental hygiene commissioner can be seen in these circumstances to be more or less irrelevant. The finding of probable cause serves one office, the physician's certificate serves another, and the employment by the Springhaven appellees of a false physician's certificate perpetuated the appellant's confinement.

An inference may also be drawn that the Springhaven appellees disregarded the changed opinion of Doctor Robertson, and, in cooperation with the attorneys and mental hygiene commissioner, facilitated an unlawful probable cause hearing. We believe that a jury could properly conclude that appellant's detention throughout the probable cause hearing occurred because of the Springhaven appellees' employment of the false medical certificate and their failure to comply or, in some instances, even attempt to comply with statutory requirements.

Appellant's transportation and admission to BAR-H.

Doubt may be raised as to the authority of the Springhaven authorities to arrange for the transportation of appellant to BAR-H. To be sure, there is a mimeographed form, signed by appellee Nolley,

requesting that the Sheriff transport appellant to BAR-H. We assume that the form was one frequently used in commitment cases. It may be concluded that the use of the form simply evidences the continued detention of appellant under appellee's asserted authority, rather than the authority of law. As noted before, we do not find in the record that the Sheriff of Mercer County ever had custody of appellant under the order of the circuit court directing the Sheriff to take appellant into custody. It is reasonable to infer that the Sheriff, in transporting appellant to BAR-H, did not act under the authority of the circuit court order. One may conclude that the Sheriff took custody of appellant only after the probable cause hearing under the purported authority conferred by the request for transportation executed by appellee Nolley, supported by the finding of probable cause by the mental hygiene commissioner and the original certificate

signed by Doctor Robertson. Again, the Springhaven appellees are implicated by such inferences.

The admission of appellant to BAR-H can also be seen to flow from the employment of the false certificate. The evidence is that Springhaven sent along to BAR-H Doctor Robertson's original certificate, facially sufficient to gain appellant's admission to BAR-H, and a handwritten note explaining the absence of medical records for appellant. The record discloses that Springhaven appellees claim that at that time, Doctor Robertson's later progress report had been misplaced or lost, though effort was made to locate it and send it along to BAR-H with appellant. We note, however, that it appears that no specific mention of Doctor Robertson's progress note, or that it had been misplaced or lost, was contained in the handwritten note

to BAR-H explaining the absence of medical records. Moreover, appellee Nolley called BAR-H to be certain a bed was available but apparently did not advise BAR-H that the progress note had been misplaced or lost or that it negated in large measure the findings appearing on the face of Doctor Robertson's original certificate. Lastly, we note, for what bearing it might have, that the record does not disclose that BAR-H is a "mental health facility" authorized by statute to receive a person involuntarily committed if all the legal requirements are met. We believe that adverse inferences, contrary to the assertions of appellees, may properly be drawn from these factors.

We note again that the lawful temporary commitment of an allegedly mentally ill person to a mental health facility under the

provisions of W.Va. Code § 27-5-1, *et seq.*, may only occur when two steps have been accomplished: (1) a facially valid certificate of an examining physician or psychologist exists expressing the judgment that such person is mentally ill and likely to harm himself or herself or others, and (2) a facially valid finding of probable cause has been made to the same effect. In short, the medical or psychological discipline and the legal discipline must concur in the judgment. In our procedure, there is no confirming court order made expressly committing the allegedly mentally ill person to the mental health facility. It may be concluded that appellant's admission to and incarceration at BAR-H flowed directly from the employment by the Springhaven appellees of the original medical certificate, knowing or having reason to know it to be false.

Summary. We conclude that a jury, on proper instruction of the elements of false imprisonment, could conclude that Springhaven possessed no legal authority to detain appellant, at least from the time the Sheriff was first ordered to apprehend appellant. The jury may also conclude that Springhaven, through its employees, intentionally falsely imprisoned appellant at any time from and after the original Robertson certificate was solicited until she was released from BAR-H. In the light most favorable to appellant, the evidence thus far developed supports the conclusion that appellant simply was not a candidate for a probable cause hearing or for admission to a mental health facility and that the legal procedure which the Springhaven employees attempted to employ to gain her admission there, seen in that light, was simply not applicable to her circumstances. Under such an analysis, the Springhaven appellees

are liable to appellant for such damages as the evidence may show and a jury may find. As regards the claim of immunity or privilege, we are persuaded by that line of cases which grants immunity or privilege to those necessary participants in the temporary commitment process, even in the event of simple error, but denies immunity or privilege with respect to the natural consequences of the making and employment of a materially false certificate that an allegedly mentally ill person has been examined, when in fact no such examination occurred, because a facially valid certificate of that type is a critical requirement for commitment. Appellant is entitled to prove her case, to show to what extent the Springhaven appellees employed such a certificate to restrain her freedom, knowing or having reason to know it was false, and to have such recovery

therefor as the law and the evidence permit in cases of false imprisonment.

DOCTOR ROBERTSON'S SUMMARY JUDGMENT

Appellant claims that it was error to grant summary judgment to Doctor Robertson on the ground that Doctor Robertson's alleged malpractice was not a proximate cause of her injuries. She claims there had been sufficient evidence developed to place the issue before the jury. Doctor Robertson responds that appellant has failed to show that his conduct, if negligent, was the proximate cause of appellant's injury because the mental hygiene commissioner did not rely on Doctor Robertson's opinions in finding probable cause and appellant's confinements proceeded from the finding of probable cause on other factors not involving Doctor Robertson. We find that the question of proximate cause in this claim presents a jury issue and, accordingly, reverse the summary judgment in favor of Doctor Robertson.

First, we apply to the negligence count against Doctor Robertson the rule applied to the other appellees that although the defense of quasi-judicial immunity or privilege is generally available to one participating in the involuntary commitment process in good faith, it is not available in the defense of a negligence charge to one who makes and employs or knowingly employs a materially false medical certificate.

We move to the consideration of the basis upon which the summary judgment was granted, the asserted lack of proximate cause. In considering whether an event is a proximate cause of the injury, the bellweather test is foreseeability. If the injury occurring could have been reasonably foreseen to flow from a negligent act or omission, absent an intervening cause, then that negligent act or

omission may well be the proximate cause of the injuries. *Thrasher v. Amere Gas Utilities Co.*, 138 W.Va. 166, 75 S.E.2d 376 (1953), appeal dismissed, 347 U.S. 910, 74 S.Ct. 478, 98 L.Ed. 1067 (1954); *Fields v. Director General of Railroads*, 86 W.Va. 707, 104 S.E. 767 (1920); *Donald v. Long Branch Coal Co.*, 86 W.Va. 249, 103 S.E. 55 (1920).

Here, it may be forcefully argued that the making of the medical certificate, representing falsely that appellant had been examined by Doctor Robertson, could easily have been foreseen to result in the initiation of an involuntary commitment proceeding, appellant's apprehension for a probable cause hearing, and appellant's subsequent restraint, transportation to, and admission to BAR-H, against her will. Doctor Robertson is a psychiatrist, practicing in a

mental health unit, who was consulted by appellees Armstrong and Nolley about obtaining a certificate for use in an involuntary commitment proceeding. Doctor Robertson's particular expertise in the matter of mental hygiene matters is strongly suggested by the record.

Moreover, we note that the order filing the involuntary commitment petition expressly required that a probable cause hearing only be held if appellant was "medically certified." In addition, W.Va. Code § 27-5-3(a) authorizes the admission of appellant to a mental health facility only upon certification of the patient by a physician or psychologist. One might well reasonably infer from the evidence that neither the probable cause hearing nor the admission to BAR-H could have occurred but for Doctor Robertson's original medical certificate

and that he could reasonably be expected to fully appreciate the significance of his certificate. The filing of the petition for involuntary commitment, the holding of appellant for a probable cause hearing, the hearing, and the subsequent incarceration of appellant at BAR-H could be reasonably foreseen as flowing naturally from the making and delivery of Doctor Robertson's certificate.

It can be argued that Doctor Robertson could not have foreseen that the mental hygiene commissioner would proceed with a hearing after receiving the doctor's progress note expressing opinions contrary to those expressed in the original certificate, and it could also be argued that it could not have been foreseen that appellant would be taken to BAR-H without both of Doctor Robertson's

expressed opinions. However, we cannot say, as a matter of law and on the record before us, that either of these events rise to the level of a new effective cause, which, operating independently of Doctor Robertson's failure to make an examination, became the sole proximate cause of appellant's alleged injury. See *Costoplos v. Piedmont Aviation, Inc.*, 184 W.Va. 72, 399 S.E.2d 654 (1990) (per curiam); *Evans v. Farmer*, 148 W.Va. 142, 133 S.E.2d 710 (1963); *Smith v. Penn Line Service, Inc.*, 145 W.Va. 1, 113 S.E.2d 505 (1960); *Hartley v. Crede*, 140 W.Va. 133, 82 S.E.2d 672 (1954); *Wilson v. Edwards*, 138 W.Va. 613, 77 S.E.2d 164 (1953). "One

⁸It appears that alleged medical malpractice in the preparation for and processing of involuntary commitment cases has been recognized as a cause of action separate from a claim of false imprisonment in such cases. See 32 Am.Jur.2d *False Imprisonment* § 115 (1995); R. F. Chase, Annotation, *Liability for False Imprisonment Predicated upon Institution of, or Conduct in Connection with,*

who has committed a breach of duty is liable for its natural and proximate effects, which may be immediate or through the subsequent media of natural forces or other innocent causes.' Point 1, Syllabus, *Mills v. Indemnity Insurance Company of North America*, 114 W.Va. 263 [171 S.E. 532]." Syl. pt. 7, *Frye v. McCrory Stores Corporation*, 144 W.Va. 123, 107 S.E.2d 378 (1959). Suffice it to say that summary judgment in Doctor Robertson's favor for lack of proximate cause was, at best, premature and inappropriate.

We believe that the jury, under proper instruction, may conclude that Doctor Robertson's negligence was the proximate cause of appellant's alleged injuries, from the time of her detention after his original certificate was prepared until her release. The jury may also

Insanity Proceedings, 30 A.L.R.3d 523, 553 (1970).

be called upon to consider the assertion that later actions by the mental hygiene commissioner or the Springhaven appellees, or both, constitute a supervening or intervening cause, relieving him of liability for the events occurring thereafter. We have defined an intervening cause as follows:

""An intervening cause, in order to relieve a person charged with negligence in connection with an injury, must be a negligent act, or omission, which constitutes a new effective cause and operates independently of any other act, making it and it only, the proximate cause of the injury." Syllabus Point 16, *Lester v. Rose*, 147 W.Va. 575, 130 S.E.2d 80 (1963) [modified on other grounds, *State ex rel. Sutton v. Spillers*, 181 W.Va. 376, 382 S.E.2d 570 (1989)].' Syllabus Point 1, *Perry v. Melton*, 171 W.Va. 397, 299 S.E.2d 8 (1982)."

Syl. pt. 3, *Wehner v. Weinstein*, 191 W.Va. 149, 444 S.E.2d 27 (1994).

We do not decide that Doctor Robertson would be entitled to an instruction invoking the defense of intervening cause but leave the matter for further consideration by the trial court when the evidence is in. We do note that this Court has spoken, in a somewhat different context, about the concept of the duty to act where one's affirmative conduct has raised the possibility of harm to another:

One who engages in affirmative conduct, and thereafter realizes or should realize that such conduct has created an unreasonable risk of harm to another, is under a duty to exercise reasonable care to prevent the threatened harm.

Syl. pt. 2, *Robertson v. LeMaster*, 171 W.Va. 607, 301 S.E.2d 563 (1983).

In *Robertson*, the Court further noted that in determining the scope of the duty, the foreseeability of the risk being considered is an important consideration. 301 S.E. 2d 563, at 567, cited with approval in *Miller v. Whitworth*, 193 W.Va. 262, 455 S.E. 2d 821 (1995). Here, there is little doubt that Doctor Robertson's original certificate set in motion the chain of events that culminated in appellant's confinement at BAR-H. When Doctor Robertson set out to correct his original statement, he did so by way of a progress note but did not recall or reclaim possession of his original certificate. That original certificate played a role in the subsequent events, right up to the time of appellant's release under a writ of *habeas corpus*. That reality clearly connects all of those subsequent events to the original certificate. One conclusion fairly drawn from the present record is that Doctor Robertson's conduct is a proximate cause of any

subsequent injury to appellant. However, it may be concluded that, at some stage in the process, other causes intervened so as to end Doctor Robertson's responsibility for events subsequent to that point. We leave that for the court below and, if appropriate, the jury to resolve.

TORT OF OUTRAGE

The tort of intentional infliction of emotional distress or outrage has been defined by this Court as follows: "One who by extreme or outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for bodily harm." Syllabus pt. 6, *Harless v. First National Bank in Fairmont*, 169 W.Va. 673, 289 S.E. 2d 692 (1982)." Syl. pt. 1, *Dzinglski v.*

Weirton Steel Corporation, 191 W.Va. 278, 445 S.E.2d 219 (1994).

We have recognized that the tort of outrage is subject to the defense of qualified privilege, which we defined as follows: "A defendant's conduct is subject to a qualified privilege when he acts to protect or advance his own legitimate interests, the legitimate interests of other or the legitimate interests of the public." Syl. pt. 5, *Dzinglski v. Weirton Steel Corporation*, *supra*. We have also recognized that damages awarded in such cases, where there is no proof of physical trauma, are essentially punitive damages, and thus, further punitive damages in addition to those assessed as compensatory are not to be awarded, but the award of compensatory damages in such cases serves the same policy of deterrence underlying the allowance of punitive damages. *Dzinglski v. Weirton Steel Corporation*, *supra*. As we understand the record, appellant was placed in physical restraints

for her transportation to BAR-H. We do not know what, if any, physical harm that may have caused and are likewise unadvised as to whether appellant's incarceration at BAR-H was uneventful in terms of whether any physical trauma occurred there. On the record before us, it is difficult to find sufficient facts to support the claim of outrage, as we have limited and defined it in the recent cases cited above. Likewise, it is very doubtful that further discovery and even trial will develop sufficient evidence for this claim to go to the jury. But, given the state of the record on the claim of false imprisonment and the necessity of further development of the record on that claim, we cannot say, as a matter of law, that the claim of intentional infliction of emotional distress was properly dismissed below.

CONCLUSION

We conclude that there remain unresolved material questions of fact that preclude a summary judgment. We further conclude that the issues of Doctor Robertson's negligence and the issue of proximate cause are for the jury, as is the matter of false imprisonment, assuming the evidence we have reviewed is admitted. Likewise, the evidence regarding the tort of outrage may be further developed. The summary judgments granted below were improper, and we, therefore, reverse and remand this cause for further proceedings consistent with this opinion.

Reversed and remanded.