No. 32507 *Vicky Lynn Gray v. Ashraf Mena Kamel Mena, M.D., Princeton Endocrinology, P.L.L.C., and Princeton Community Hospital Association, Inc., d/b/a Princeton Community Hospital.*

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OF WEST VIRGINIA

Davis, J., concurring:

I fully concur with the majority's Opinion in this case. Nevertheless, I feel compelled to write separately to clarify the intent and meaning of the Court's prior opinion in *Boggs v. Camden-Clark Memorial Hospital Corp.*, 216 W. Va. 656, 609 S.E.2d 917 (2004), upon which opinion the Court relies in rendering its decision in the case *sub judice*.

In new Syllabus point 4 of the majority's opinion, the Court held that

> [t]his Court's opinion in *Boggs v. Camden-Clark Memorial Hospital Corp.*, 216 W. Va. 656, 609 S.E.2d 917 (2004), is clarified by recognizing that the West Virginia Legislature's definition of medical professional liability, found in West Virginia Code § 55-7B-2(i) (2003) (Supp. 2005), includes liability for damages resulting from the death or injury of a person for *any* tort based upon health care services rendered or which should have been rendered. To the extent that *Boggs* suggested otherwise, it is modified.

Despite the majority's assertion and ultimate conclusion that our prior opinion in *Boggs* is unclear and in need of clarification, I do not share this assessment of *Boggs*. Rather, I think the dicta language relied upon by the majority in reaching this determination speaks for itself:

> Fraud, spoliation of evidence, or negligent hiring are no more related to "medical professional liability" or "health care services" than battery, larceny, or libel. There is simply no way

> to apply the MPLA to such claims. The Legislature has granted special protection to medical professionals, while they are acting as such. *This protection does not extent to intentional torts or acts outside the scope of "health care services."* If for some reason a doctor or nurse intentionally assaulted a patient, stole their possessions, or defamed them, such actions would not require application of the MPLA any more than if the doctor or nurse committed such acts outside of the health care context.

Boggs, 216 W. Va. at ___, 609 S.E.2d at 923-24 (emphasis added).

The difficulty apparently arises with the phrase "intentional torts or acts." In its analysis of this language, the majority suggests that the reference to "intentional torts" implies that *Boggs*' interpretation of the MPLA was that it did not apply to intentional torts despite the MPLA's express language stating that it applies to "any tort." *See* W. Va. Code § 55-7B-2(i) (2003) (Supp. 2005). Reading the entire sentence from *Boggs* containing this phrase, however, demonstrates that such was not the construction intended by the *Boggs* Court.

In full, the relevant sentence provides: "This protection does not extend to intentional torts or acts outside the scope of 'health care services.'" *Boggs*, 216 W. Va. at ___, 609 S.E.2d at 924. From this language, it is clear that *Boggs* did not exclude intentional torts from the protections of the MPLA. The phrase "intentional torts" is modified by the phrase "outside the scope of 'health care services'". *Id.* Thus, it is clear that the only type of intentional torts the *Boggs* Court found to be outside the rubric of the MPLA were those

intentional torts that do not pertain to the rendering of "health care services".

Arguably, the language relied upon by the majority could have been more artfully stated by the *Boggs* Court, but, be that as it may, it is not so lacking as to warrant the creation of a new syllabus point to clarify that which is not facially unclear.

For the foregoing reasons, I respectfully concur with the Opinion of the Court. I am authorized to state that Justice Maynard joins me in this concurring opinion.