STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

L. Linda Mays,
Plaintiff Below, Petitioner

vs) No. 14-0788 (Cabell County 13-C-124)

The Marshall University
Board of Governors,
Defendant Below, Respondent

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MEMORANDUM DECISION

Petitioner and plaintiff below (L. Linda Mays) by counsel, Jeffrey V. Mehalic, appeals two orders entered in the Circuit Court of Cabell County.[1] In one order, dated May 23, 2014, the circuit court granted summary judgment in favor of respondent and defendant below (The Marshall University Board of Governors) on petitioner's claim for negligent infliction of emotional distress.[2] In its other order, dated July 15, 2014, the circuit court granted respondent summary judgment on petitioner's three remaining claims: breach of the duty of confidentiality, invasion of privacy, and negligence. Respondent, by counsel, Cheryl Lynne Connelly and W. Nicholas Reynolds, filed a response, to which petitioner filed a reply.

This Court has considered the parties' briefs, oral arguments, and the record on appeal. Upon consideration of the standard of review, the briefs, oral arguments, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision affirming the circuit court's order is appropriate under Rule 21 of the Rules of Appellate Procedure.

Approximately twelve years ago, petitioner underwent a mastectomy and reconstructive surgery on her left breast that included the insertion of an implant. Several years later, petitioner grew concerned about the appearance of the reconstruction and the possibility that the implant had ruptured or shifted. In October of 2010, petitioner consulted with Adel A. Faltaous, M.D., a plastic surgeon employed by respondent, to inquire about whether she should undergo corrective

[1] Petitioner also appeals a third order, dated May 23, 2014, that granted respondent's motion in limine to preclude petitioner from referring to or introducing any evidence relating to emotional distress damages. Because we affirm the circuit court's orders granting summary judgment in favor of respondent, we need not address this assignment of error.

[2] In its May 23, 2014, order granting summary judgment on petitioner's negligent infliction of emotional distress claim, the circuit court also granted summary judgment on petitioner's claims for outrageous conduct and intentional infliction of emotional distress. Petitioner does not appeal the granting of summary judgment as to these two claims.

surgery. As part of petitioner's examination, photographs were taken of her naked breasts, from "just below the breasts to about the neck." Petitioner's face was not photographed, but her name was written on the picture. The purpose of the photographs was, in part, to obtain authorization from petitioner's insurance carrier for the proposed surgery. Petitioner understood that the proposed surgery would have to be preauthorized by her insurance company.

A few days later, one of Dr. Faltaous's employees sent a letter to petitioner's employer seeking preauthorization for petitioner's surgery because the employee mistakenly believed that such requests were to be sent there. The letter included the aforementioned photographs of petitioner and was opened by an assistant in the human resources department at petitioner's work. After reading the letter and viewing the photographs, the assistant showed the photographs and letter to her supervisor, who then asked her own supervisor what she should do with the photographs. The upper-level supervisor did not look at the photographs. Instead, he directed the assistant to return the photographs to petitioner. The photographs were sealed in an envelope, marked "confidential," and hand-delivered to petitioner. When petitioner opened the envelope, the photographs fell face-down on her desk. There is no evidence that anyone saw the photographs after they fell on the desk.

On February 22, 2013, petitioner filed a complaint in the circuit court against respondent alleging, inter alia, negligent infliction of emotional distress, breach of the duty of confidentiality, invasion of privacy, and negligence. Her complaint indicates that all of these claims resulted from the wrongful conduct of Dr. Faltaous's staff in sending the photographs and letter to petitioner's employer. Neither party disputes that Dr. Faltaous's employee made an honest mistake in sending the photographs to petitioner's employer. Further, petitioner does not contend that the events alleged in the complaint caused her to suffer physical or economic injury. Respondent filed an answer denying liability.

On February 27, 2014, respondent filed a motion for partial summary judgment on petitioner's claim for negligent infliction of emotional distress. Petitioner filed a response that included evidence that she is an extremely modest person, was humiliated and embarrassed by the incident, and suffered emotional distress as a result of the events giving rise to this case. A forensic psychiatrist who evaluated petitioner reported:

> [Petitioner] related that it is her perception that some persons view her experience as not being a "big deal." After all, she survived an abusive childhood, three abusive romantic relationships and cancer. Why would a photo of a topless (faceless) woman . . . result in any emotional reaction[?] . . . It was precisely her previous negative life experiences . . . that predisposed [petitioner] to her unique psychological response. . . . Her worldview is that of a person who lives awash in shame while attempting to hide her low self-esteem and guilt from others. However, it was in that moment . . . that her strained psychological defense mechanisms failed, causing her to be emotionally harmed by the event. She continues to be unable to cope with the event and remains troubled on a daily basis by her PTSD-like and depression symptoms.

By an order entered May 23, 2014, the circuit court granted respondent's partial summary

judgment motion. Meanwhile, on May 5, 2014, respondent filed a motion for summary judgment on petitioner's three remaining claims: breach of the duty of confidentiality, invasion of privacy, and negligence. The circuit court granted respondent's motion on those claims by order entered July 15, 2014. This appeal followed.

This Court's review of a circuit court's order granting summary judgment is de novo. Syl. pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Furthermore,

> A motion for summary judgment should be granted if the pleadings, exhibits and discovery depositions upon which the motion is submitted for decision disclose that the case involves no genuine issue as to any material fact and that the party who made the motion is entitled to a judgment as a matter of law.

Syl. pt. 5, *Wilkinson v. Searls*, 155 W.Va. 475, 184 S.E.2d 735 (1971).

In this appeal, petitioner argues that the circuit court erred in granting summary judgment on her claims for negligent infliction of emotional distress, breach of the duty of confidentiality, invasion of privacy, and negligence. We address each of these four claims in turn.

We first address petitioner's claim for negligent infliction of emotional distress. In its order dated May 23, 2014, the circuit court concluded that petitioner's allegations did not fall within the recognized framework of claims for negligent infliction of emotional distress. Absent a physical injury to the plaintiff, our law has recognized claims for negligent infliction of emotional distress only in limited circumstances. *See, e.g.*, Syl. pt. 1, *Heldreth v. Marrs*, 188 W.Va. 481, 425 S.E.2d 157 (1992) (pertaining to when plaintiff witnesses person closely related to him/her suffer critical injury or death as result of defendant's negligent conduct); Syl. pt. 12, in part, *Marlin v. Bill Rich Constr., Inc.*, 198 W.Va. 635, 482 S.E.2d 620 (1996) (allowing plaintiff to recover when defendant negligently exposes him/her to disease, thus causing plaintiff to experience emotional distress based on "fear of contracting a disease."); *Ricotilli v. Summersville Mem. Hosp.*, 188 W.Va. 674, 425 S.E.2d 629 (1992) (applying "dead body exception" to allow recovery for negligent infliction of emotional distress for negligence in mishandling relative's corpse).

Applying our prior cases, the circuit court noted that petitioner neither witnessed the injury or death of a close relative nor was she exposed to a disease which might be expected to cause her serious disability or death. The circuit court found this was a sufficient basis to conclude that petitioner's claim for negligent infliction of emotional distress was not viable.

The circuit court also relied upon our holding that:

> In determining "seriousness [of negligently inflicted emotional distress]," consideration should be given to whether the particular plaintiff is a "reasonable person, normally constituted." For the purposes of such consideration, *a reasonable person is an ordinarily sensitive person and not a supersensitive person*.

Syl. pt. 14, in part, *Marlin*, 198 W.Va. at 639, 482 S.E.2d at 624 (emphasis added). In its order, the circuit court quoted testimony from petitioner's retained expert, a forensic psychiatrist (the psychiatrist), about petitioner's "unique" reaction to seeing the pictures of herself. The psychiatrist acknowledged that some of petitioner's peers viewed this experience as "no big deal." He continued: "Why would a photo of a topless (faceless) woman . . . result in any emotional reaction[?] . . . It was precisely her previous negative life experiences and their unhealed emotional wounds that predisposed [petitioner] to her unique psychological response." By "previous negative life experiences," the psychiatrist was referring to petitioner surviving an abusive childhood, three abusive romantic relationships, and cancer. The psychiatrist further testified that when petitioner saw the pictures of herself, "her strained psychological mechanisms failed, causing her to be emotionally harmed by the event."

The circuit court further noted that Petitioner was diagnosed with pre-existing dysthymic disorder (depression) and, according to the psychiatrist, this disorder "predisposed her to emotional trauma." The psychiatrist further reported that: (1) "petitioner's character structure was such that she was reactive to emotions of shame;" (2) "in the past, with treatment she was stable and able to work;" and (3) "these records support my explanation of her emotional injury," subsequent to the facts giving rise to this case.

Thus, the circuit court concluded:

> It is [petitioner's] hypersensitivity which her forensic psychiatrist opined caused her to suffer emotional distress as a result of an occurrence that others would view as "no big deal." For [a negligent infliction of emotional distress] claim to lie, [petitioner] must establish that a reasonable person would have suffered a real and serious distress; she has established the contrary.

On appeal, petitioner argues that a claim for negligent infliction of emotional distress is not necessarily limited to the factual scenarios presented in *Heldreth* (plaintiff witnesses death of close relative) and *Marlin* (plaintiff fears contracting disease). To support her position, petitioner relies on Syllabus point 11 of *Marlin*:

> A claim for emotional distress without an accompanying physical injury can only be successfully maintained upon a showing by the plaintiffs in such an action of facts sufficient to guarantee that the claim is not spurious and upon a showing that the emotional distress is undoubtedly real and serious.

198 W.Va. at 639, 482 S.E.2d at 623-24. Petitioner maintains that, through her own testimony, she established that her claim is not spurious, and further, that the testimony and report of her forensic psychiatrist established that her emotional distress "is undoubtedly real and serious." Therefore, petitioner argues that she presented a prima facie claim for negligent infliction of emotional distress.

On this record, we cannot say that the circuit court erred in granting summary judgment on petitioner's negligent infliction of emotional distress claim. As the circuit court noted, in

order to have a viable claim for negligent infliction of emotional distress, petitioner must allege that her emotional distress was serious from the point of view of an ordinarily sensitive person, not a supersensitive person. The undisputed testimony of petitioner's psychiatrist highlighted the uniqueness of petitioner's emotional state when the events giving rise to this case occurred. Particularly, this testimony alleged that petitioner was predisposed to emotional distress by her previous life experiences (i.e., surviving an abusive childhood, three abusive romantic relationships, and cancer); as a result of these experiences, petitioner developed psychological defense mechanisms; and the failure of petitioner's defense mechanisms, in response to seeing the pictures of herself, caused her emotional harm.

This Court in no way seeks to minimize petitioner's feelings of embarrassment as a result of the events herein described. However, under the peculiar facts of this case, we cannot say the circuit court erred by finding that the plaintiff failed to establish the elements of negligent infliction of emotional distress.

Petitioner's second claim on appeal concerns respondent's alleged breach of the duty of confidentiality. In Syllabus Point 4 of *Morris v. Consolidation Coal Co.*, 191 W.Va. 426, 446 S.E.2d 648 (1994), we held: "[a] patient does have a cause of action for the breach of the duty of confidentiality against a treating physician who wrongfully divulges confidential information." She contends that emotional distress damages may be recovered when there is a breach of confidentiality.

Petitioner concedes she did not establish that she suffered any physical or economic harm. Furthermore, the circuit court found that petitioner did not allege facts sufficient to support an award of damages for emotional distress. The circuit court observed that prior case law addressing breach of the duty of confidentiality did not specifically address the damages recoverable on that claim. *See, e.g.*, *Morris*, 191 W.Va. 426, 446 S.E.2d 648. The circuit court further stated that our cases do not "indicate[] that the Court intended to depart from long-established authority governing [emotional distress] damages."

In the present case, neither party disputes that respondent's conduct was an "honest mistake" and not intentional. *See Harless v. First Nat'l Bank*, 169 W.Va. 673, 689, 289 S.E.2d 692, 701 (1982) ("[T]he right to recover emotional distress in the absence of some physical injury or a subsequently developed physical injury is ordinarily predicated on some intentional wrong of the defendant."). Furthermore, as to a claim arising out of negligence, courts are "reluctant to permit recovery for [pure] emotional distress particularly where the plaintiff was outside the zone of any physical danger arising from the negligent act and where there is no close relationship with the victim." *Id*., 169 W.Va. at 689, 289 S.E.2d at 702. Additionally, petitioner did not allege that respondent's negligence threatened the personal safety of herself or a close relative. *See Heldreth*, 188 W.Va. 481, 425 S.E.2d 157; *Marlin*, 198 W.Va. 635, 482 S.E.2d 620. The circuit court concluded: "[s]ince [petitioner] may not recover for emotional distress and does not mean to offer any evidence of damages that might be recoverable for wrongful disclosure, she has no damages as a matter of law."

On appeal, petitioner argues that the circuit court's ruling regarding the type of damages recoverable was based on an impermissibly narrow reading of our prior cases. To support her

position, she relies on two negligent infliction of emotional distress cases: *Ricotilli*, 188 W.Va. 674, 425 S.E.2d 629, and *Marlin*, 198 W.Va. 635, 482 S.E.2d 620. However, we perceive the petitioner's grievance is not so much that the circuit court gave too narrow a view to the classes of damages recoverable, but rather with the circuit court's finding that the plaintiff's evidence was insufficient to support an award of damages. As we have already stated, on this record, we cannot say the circuit court erred by finding that petitioner failed to establish a claim for emotional distress, particularly negligently inflicted emotional distress. Further, we find that the cases upon which she relies are clearly distinguishable because, unlike the plaintiffs in *Ricotilli* and *Marlin*, petitioner did not allege respondent's conduct threatened the personal safety of herself or a close relative. Accordingly, we cannot say that the circuit court erred in granting summary judgment in favor of respondent as to petitioner's claims of breach of the duty of confidentiality.

The circuit court also relied on *Morris* to dismiss petitioner's third claim on appeal, invasion of privacy. In *Morris*, 191 W.Va. at 434, 446 S.E.2d at 656, this Court discussed the types of claims that a patient may have against a treating physician based on the physician's wrongful disclosure of private healthcare information to the patient's employer. In that case, we declined to recognize a claim for invasion of privacy where a hospital negligently divulged a patient's medical information to his employer. *Id.*, 191 W.Va. at 434, 446 S.E.2d at 656. Instead, this court determined that "the more logical cause of action would be an action for the breach of the duty of confidentiality." *Id.*, 191 W.Va. at 434, 446 S.E.2d at 656.

Relying upon *Morris*, the circuit court found:

> The only cause of action that might arise from the allegations in this action and that is recognized in West Virginia law, is a cause of action for wrongful disclosure of health care information based on alleged breach of a duty of physician confidentiality, as that cause of action is described in *Morris*. Thus, [petitioner's] claim for invasion of privacy . . . fail[s] as a matter of law.

We note that two months before the circuit court issued its order granting summary judgment on invasion of privacy, this Court published a per curiam opinion pertaining to an invasion of privacy claim against a hospital: *Tabata v. Charleston Area Med. Cntr.*, 233 W.Va. 512, 759 S.E.2d 459 (2014). Although the circuit court did not discuss *Tabata* in its order, the parties argue *Tabata*'s applicability to petitioner's case.

Tabata is distinguishable from petitioner's case. In *Tabata*, the defendant hospital negligently published the plaintiffs' names, medical information, contact details, Social Security numbers, and dates of birth on the internet for a period of six months. *Id*., 233 W.Va. at 515 n.1, 759 S.E.2d at 462 n.1. As a result, this information was accessible to anyone using an "advanced internet search," and the plaintiffs were vulnerable to identity theft, economic loss, and unauthorized or malicious use of their information. *Id*. By contrast, in this case, only petitioner's medical information (the letter and pictures of her naked breasts) were disclosed to only two people at her work. Unlike the plaintiffs in *Tabata*, petitioner's medical information was not disclosed to the public at-large.

We have held: "An 'invasion of privacy' includes (1) an unreasonable intrusion upon the seclusion of another; (2) an appropriation of another's name or likeness; (3) unreasonable publicity given to another's private life; and (4) publicity that unreasonably places another in a false light before the public." Syl. pt. 8, *Crump v. Beckley Newspapers, Inc.*, 173 W.Va. 699, 716, 320 S.E.2d 70, 88 (1983). Petitioner argues that respondent invaded her privacy by divulging her medical information to her employer, or in other words, causing "unreasonable publicity [to be] given to [her] private life." "Publicity," in the context of invasion of privacy, entails that disclosure be widespread and not limited to a single person or a small group of people. *See Id.*, 173 W.Va. at 716, 320 S.E.2d at 87-88. Likewise, the Restatement notes that:

> Invasion of the right of privacy . . . depends upon publicity given to the private life of the individual. . . . 'Publicity' . . . means that the matter is made public, by communicating it to the public at large. . . . Thus, it is not an invasion of the right of privacy . . . to communicate a fact concerning the plaintiff's private life to a single person or even to a smaller group of persons.

Restatement (Second) of Torts § 652D cmt. a (1977).

Petitioner did not allege that Dr. Faltaous's employee divulged the pictures of her to the public at-large, as the information was divulged in *Tabata*. Rather, she asserts that the pictures were disclosed only to her employer. The pictures were received by an assistant in the human resources department at petitioner's work. After looking at the pictures, the assistant asked her supervisor what to do with the pictures. The assistant's supervisor (who saw the pictures) asked an upper-level supervisor what to do with them. The upper-level supervisor did not look at the pictures. Instead, he directed that they be hand-delivered to petitioner. Accordingly, the assistant sealed the pictures in an envelope, marked them "confidential," and returned them to petitioner. Given that the pictures were only seen by two people, we cannot say the circuit court erred when it found that petitioner does not have a viable claim for invasion of privacy.

As for the remaining negligence claim, petitioner failed to adequately brief her argument on that issue for our review. Therefore, we decline to address petitioner's negligence claim. *See Ohio Cellular RSA Ltd. P'ship v. Bd. of Pub. Works of W.Va.*, 198 W.Va. 416, 424 n.11, 481 S.E.2d 722, 730 n.11 (1996). *See also State of W.Va. Dep't of Health and Human Res. v. Robert Morris N.*, 195 W.Va. 759, 765, 466 S.E.2d 827, 833 (1995) (finding that "'[a] skeletal "argument," really nothing more than an assertion, does not preserve a claim. . . .'" (quoting *U.S. v. Dunkel*, 927 F.2d 955, 956 (7th Cir.1991)); *State v. Lilly*, 194 W.Va. 595, 605 n.16, 461 S.E.2d 101, 111 n.16 (1995) (noting that "appellate courts frequently refuse to address issues that appellants . . . fail to develop in their brief.").

Accordingly, on this record, we cannot say the circuit court erred in granting summary judgment in respondent's favor.

For the foregoing reasons, we affirm the circuit court's summary judgment orders.

Affirmed.

ISSUED: October 20, 2015

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Menis E. Ketchum
Justice Allen H. Loughry II

CONCURRING IN PART AND DISSENTING IN PART AND WRITING SEPARATELY:

Justice Brent D. Benjamin

I agree with the majority's decision to affirm the circuit court's grant of summary judgment on Ms. Mays' claims for negligent infliction of emotional distress, breach of the duty of confidentiality, and negligence. I disagree, however, with the majority's determination that Ms. Mays does not have a cognizable, albeit nominal, claim for invasion of privacy.

It has long been the law of this Court that "[t]he right of privacy, including the right of an individual to be let alone and to keep secret his private communications, conversations and affairs, is a right the unwarranted invasion or violation of which gives rise to a common law right of action for damages." Syl. pt. 1, *Roach v. Harper*, 143 W. Va. 869, 105 S.E.2d 564 (1958). Also, a plaintiff does not have to prove special damages in order to maintain an invasion of privacy claim. "A declaration in an action for damages founded on an invasion of the right of privacy, to be sufficient on demurrer, need not allege that special damages resulted from the invasion." Syl. pt. 2, *Id.* Finally, this Court has indicated that "[a]n 'invasion of privacy' includes (1) an unreasonable intrusion upon the seclusion of another; (2) an appropriation of another's name or likeness; (3) unreasonable publicity given to another's private life; and (4) publicity that unreasonably places another in a false light before the public." Syl. pt. 8, *Crump v. Beckley Newspapers, Inc.*, 173 W. Va. 699, 320 S.E.2d 70 (1984).

In the instant case, I believe that Ms. Mays can prove the elements of a claim for invasion of privacy under our law. Ms. Mays had a right to prevent photographs of her naked breasts from being published to her coworkers. Further, the defendant's publication of photographs of Ms. Mays' naked breasts among her coworkers, although unintentional, was unreasonable.[3] Ms. Mays consented to the photographs being taken of her breasts only for the purpose of obtaining authorization from her insurance carrier for proposed surgery. She could not have imagined that these photographs would be made available to persons with whom she worked on a daily basis. Finally, although Ms. Mays may be unable to prove special damages,

[3] To the extent the majority contends that the invasion of Ms. Mays' privacy was reasonable, I must disagree. By way of comparison, the Transportation Security Administration recently scrapped a system whereby *strangers* in a remote location could view intimate body images of travelers because the public considered such a system to be an *unreasonable* invasion of personal privacy – despite the national security issues involved. That being unreasonable, this is plainly unreasonable.

under our long-established law she may receive nominal damages for the invasion of her privacy. In view of the circumstances in this case, it would appear that her damages, if any, would be, at best, nominal.

In conclusion, I concur with the majority's decision to affirm the circuit court's award of summary judgment to the defendant on Ms. Mays' claims for negligent infliction of emotional distress, breach of the duty of confidentiality, and negligence. I respectfully dissent, however, to the majority's decision to affirm the circuit court's award of summary judgment to the defendant on Ms. Mays' claim for invasion of privacy. Ms. Mays has a colorable claim for nominal damages for the invasion of her privacy. Therefore, I concur in part and dissent in part.

DISSENTING AND WRITING SEPARATELY:

Justice Robin Jean Davis

Linda Mays, a breast cancer survivor who had undergone a mastectomy and reconstruction, consulted Dr. Faltaous regarding further reconstructive surgery. During this medical consultation, photographs were taken of Ms. Mays' exposed torso to be used for the limited purpose of medical treatment. However, Dr. Faltaous' office sent those confidential photographs to Ms. Mays' employer, where they were viewed by two of Ms. Mays' coworkers. Because Ms. Mays regularly sees those coworkers, she is frequently reminded of the disclosure of her private and confidential medical photographs. It is not this Court's role to decide whether these actions constitute emotional distress or rise to the level of tortious conduct. Instead, a jury should have been allowed to consider these facts and determine whether Ms. Mays is entitled to recover for her embarrassment and resulting injuries. Because the majority upheld the circuit court's summary dismissal of Ms. Mays' claims rather than letting a jury determine the factual issues presented, I resolutely dissent.

A. Negligence

Summary judgment was not proper in this case because Ms. Mays clearly presented genuine issues of material fact regarding her negligence claim. Therefore, a jury should have been permitted to consider that claim. It is well established that

> "[q]uestions of negligence, due care, proximate cause and concurrent negligence present issues of fact for jury determination when the evidence pertaining to such issues is conflicting or where the facts, even though undisputed, are such that reasonable men may draw different conclusions from them." Syl. Pt. 5, *Hatten v. Mason Realty Co.*, 148 W. Va. 380, 135 S.E.2d 236 (1964).

Syl. pt. 4, *Aikens v. Debow*, 208 W. Va. 486, 541 S.E.2d 576 (2000). Further,

> [i]n a negligence suit, a plaintiff is required to show four basic elements: duty, breach, causation, and damages. The plaintiff must prove that the defendant owed the plaintiff some duty of care; that by some act or omission the defendant breached that duty; and that the act or omission proximately caused some injury to the plaintiff that is compensable by damages.

Hersh v. E-T Enters., Ltd. P'ship, 232 W. Va. 305, 310, 752 S.E.2d 336, 341 (2013) (footnotes omitted), *superseded by statute on other grounds as stated in Tug Valley Pharmacy, LLC v. All Plaintiffs Below in Mingo Cty.*, 235 W. Va. 283, 773 S.E.2d 627 (2015). While the majority declined to address Ms. Mays' negligence claim, it is abundantly clear from the record that Ms. Mays presented sufficient evidence to allow a jury to decide whether the respondent was negligent in sending confidential photographs of her exposed torso to her place of employment.

To establish a claim for negligence, the plaintiff must show that the defendant owed a duty to the plaintiff. It goes without saying that Dr. Faltaous and his employer, the Marshall University Board of Governors, owed Ms. Mays a duty of confidentiality. *See* Syl. pt. 1, *State ex rel. Kitzmiller v. Henning*, 190 W. Va. 142, 437 S.E.2d 452 (1993) ("A fiduciary relationship exists between a physician and a patient."). *See also* Syl. pt. 4, *Morris v. Consolidation Coal Co.*, 191 W. Va. 426, 446 S.E.2d 648 (1994) ("A patient does have a cause of action for the breach of the duty of confidentiality against a treating physician who wrongfully divulges confidential information."). Ms. Mays consulted Dr. Faltaous as a medical professional with the expectation that he would keep her medical records, including her private, medical photographs, confidential. That did not occur in the instant matter. Instead, Dr. Faltaous, through his office, breached his duty to Ms. Mays by placing her photographs in the mail addressed to Ms. Mays' place of employment. Because Ms. Mays presented sufficient evidence of the elements of negligence to defeat the respondent's motion for summary judgment, a jury should have been permitted to consider whether Ms. Mays was entitled to damages for her doctor's alleged negligence.

B. Negligent Infliction of Emotional Distress

Ms. Mays' claim for negligent infliction of emotional distress also should have been presented to a jury for determination. When the Court first recognized a plaintiff's ability to recover for negligent infliction of emotional distress without an accompanying physical injury, it stated that, "in addition to showing that the plaintiff's emotional distress was reasonably foreseeable, and that a cause and effect relationship between the emotional distress and the accident existed, the plaintiff must also prove the *seriousness* of the emotional distress through the use of medical and psychiatric

evidence." *Heldreth v. Marrs*, 188 W. Va. 481, 491, 425 S.E.2d 157, 167 (1992) (emphasis in original). Ms. Mays satisfied this requirement by presenting Dr. Miller's reports, which support her claim and were sufficient to defeat the respondent's motion for summary judgment on this issue. Specifically, Dr. Miller found that "when the image of [Ms. Mays'] disfigured naked body laid exposed on the floor . . . [it] caus[ed] her to be emotionally harmed by the event. She continues to be unable to cope with the event and remains troubled on a daily basis by her PTSD-like and depression symptoms." This evidence is sufficient to raise a genuine issue of material fact to be determined by a jury.

Further, as this Court set forth in Syllabus point 2 of *Ricottilli v. Summersville Memorial Hospital*, 188 W. Va. 674, 425 S.E.2d 629 (1992), "[a]n individual may recover for the negligent infliction of emotional distress absent accompanying physical injury upon a showing of facts sufficient to guarantee that the emotional damages claim is not spurious." *See also* Syl. pt. 9, *Marlin v. Bill Rich Constr., Inc.*, 198 W. Va. 635, 482 S.E.2d 620 (1996) ("The principle set forth in syllabus point 2 of *Ricottilli* . . . is applicable in a cause of action for negligent infliction of emotional distress."). The *Marlin* Court held further that

> [a] claim for emotional distress without an accompanying physical injury can only be successfully maintained upon a showing by the plaintiffs in such an action of facts sufficient to guarantee that the claim is not spurious and upon a showing that the emotional distress is undoubtedly real and serious.

Syl. pt. 11, 198 W. Va. 635, 482 S.E.2d 620.

The majority opinion largely ignores these settled principles of law, impermissibly limiting Ms. Mays' claim of negligent infliction of emotional distress to specific incidents involving disease exposure, a close relative's death or injury in the affected plaintiff's presence, and mishandling of a loved one's corpse. *See Marlin v. Bill Rich Constr., Inc.*, 198 W. Va. 635, 482 S.E.2d 620; *Ricottilli v. Summersville Mem. Hosp.*, 188 W. Va. 674, 425 S.E.2d 629; *Heldreth v. Marrs*, 188 W. Va. 481, 425 S.E.2d 157. While the majority espouses the view that claims for negligent infliction of emotional distress are limited to only the type of facts set forth in *Heldreth*, *Ricotilli*, and *Marlin*, I strongly disagree. It is impossible for this Court to anticipate every scenario in which a claim of negligent infliction of emotional distress may be sustained. Instead, this Court can, and should, apply the legal principles set forth in our established precedent.

Moreover, both the circuit court and the majority of this Court incorrectly determined the reasonableness of Ms. Mays' reaction. The majority's decision to uphold the circuit court's grant of summary judgment on Ms. Mays' negligent infliction of emotional distress claim directly contradicts prior decisions from this Court. "The

reasonableness of the plaintiff's reaction to the event will normally be a jury question . . . ." *Heldreth v. Marrs*, 188 W. Va. at 491, 425 S.E.2d at 167. Thus, a jury should have determined whether Ms. Mays' embarrassment and alleged emotional injury as a result of Dr. Faltaous' office sending pictures of her exposed torso was reasonable. Nevertheless, in the instant matter, the circuit court erred by invading the province of the jury, and the majority improperly upheld that intrusion.

C. Invasion of Privacy and Breach of Confidentiality

Finally, Ms. Mays should have been given the opportunity to present her claims for invasion of privacy and breach of confidentiality to a jury. This Court has long held that "[t]he right of privacy, including the right of an individual to be let alone and to keep secret his private communications, conversations and affairs, is a right the unwarranted invasion or violation of which gives rise to a common law right of action for damages." Syl. pt. 1, *Roach v. Harper*, 143 W. Va. 869, 105 S.E.2d 564 (1958). In *Roach*, the Court also recognized that "'the "right of privacy" has been defined as the right of an individual to be let alone, to live a life of seclusion, or to be free from unwarranted publicity.' 77 C.J.S. Right of Privacy Section 1." *Roach* at 876, 105 S.E.2d at 568. Further, this Court has explained that while "[p]ublication or commercialization may aggravate, . . . the individual's right to privacy is invaded and violated nevertheless in the original act of intrusion." *Roach* at 877, 105 S.E.2d at 568 (citations omitted).

Ms. Mays' claims unquestionably allege "an unreasonable intrusion upon the seclusion of another" and "unreasonable publicity given to another's private life[.]" Syl. pt. 8, in part, *Crump v. Beckley Newspapers, Inc.*, 173 W. Va. 699, 320 S.E.2d 70 (1983). While the respondent did not present such argument, the majority cites *Crump* for the proposition that publicity requires widespread disclosure. However, the Court in *Crump* required widespread publicity only for a false light invasion of privacy claim – a claim Ms. Mays does not assert. *Crump* at 716, 320 S.E.2d at 87-88. With respect to Ms. Mays' claims, Black's Law Dictionary defines "publication" as, "[g]enerally, the act of declaring or announcing to the public" and further defines "public" as "[a] place open or visible to the public." *Black's Law Dictionary* 1422-23 (10th ed. 2014). The photographs at issue herein were received by Ms. Mays' coworker who opens mail in a public place – a hospital where patients and employees are constantly present. It is abundantly clear from the record that Ms. Mays' confidential photographs, which were taken for private, medical purposes, were improperly released by her doctor and viewed by her coworkers in a public place.

The Court recently set forth in *Tabata v. Charleston Area Medical Center, Inc.*, 233 W. Va. 512, 759 S.E.2d 459 (2014) (per curiam), that,

> [a]pplying our law on standing to the petitioner's breach of confidentiality claim, we find that the petitioners, as

> patients of CAMC, have a legal interest in having their medical information kept confidential. In addition, this legal interest is concrete, particularized, and actual. When a medical professional wrongfully violates that right, it is an invasion of the patient's legally protected interest. Therefore, the petitioners[] . . . have standing to bring a cause of action for breach of confidentiality against the respondents.

Tabata, 233 W. Va. at 517, 759 S.E.2d at 464. Further, the Court stated in *Morris* that "if a physician does breach his fiduciary relationship to a patient, the patient should have a remedy." *Morris*, 191 W. Va. at 433, 446 S.E.2d at 655.

This Court has explained this specific remedy as follows: "[a] patient . . . ha[s] a cause of action for the breach of the duty of confidentiality against a treating physician who wrongfully divulges confidential information." Syl. pt. 4, *Morris,* 191 W. Va. 426, 446 S.E.2d 648. In *Tabata*, this Court found that the plaintiffs had such a claim based upon the *mere possibility* that patient information was seen by the public after a hospital accidentally placed one of its databases on the internet. *Tabata* at 515, 759 S.E.2d at 462. However, in the case *sub judice*, Ms. Mays has actual knowledge that two coworkers she sees on a regular basis *actually* viewed the photographs of her exposed torso with her name emblazoned on them. Dr. Faltaous' office admits that it erroneously sent these photographs to Ms. Mays' employer. Therefore, contrary to the majority's opinion, Ms. Mays should have been given the opportunity to present her claims for invasion of privacy and breach of confidentiality to a jury. Notwithstanding all of the supporting law to the contrary, the majority erroneously affirmed the circuit court's grant of summary judgment to the respondent, effectively foreclosing Ms. Mays' right to recover for the respondent's egregious conduct.

For the foregoing reasons, I respectfully dissent.