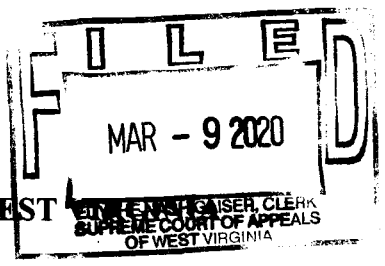

BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DIANA BOONE,

Petitioner (Plaintiff below),

v.

ACTIVATE HEALTHCARE, LLC,
Respondent (Defendant below).

Case No. 19-1007
Civil Action No. 18-C-96 (Jackson County)

RESPONDENT ACTIVATE HEALTHCARE, LLC'S BRIEF

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I. STATEMENT OF THE CASE

Plaintiff Diana Boone ("Petitioner") filed suit against her employer, Constellium Rolled Ravenswood, LLC and two supervisors (collectively "Constellium") alleging that Constellium failed to accommodate her inability to work at elevated heights in the confined space of her employer's overhead cranes and/or discriminated against her based on that limitation. Activate Healthcare, LLC ("Activate") operated a medical clinic at Constellium's Ravenswood, West Virginia facility, primarily as a benefit to employees. When Petitioner sought a work restriction not to work in the facility's overhead cranes, Activate provided Petitioner the exact work restriction she requested—to be excused from working in the facility's overhead cranes, and had no involvement in Constellium's decisions regarding Petitioner's employment following the granting of that restriction. Nonetheless, Petitioner added a frivolous "aiding and abetting" claim against Activate to her lawsuit against Constellium. Her lawsuit against Constellium—based solely on her employer's actions—remains pending.

The allegations in Petitioner's First Amended Complaint ("Amended Complaint") relevant to Activate's summary dismissal motion are as follows: Petitioner was employed by Constellium. (Appendix 69, ¶ 8). On July 3, 2017, Constellium assigned Petitioner to its casting department. (Appendix 69, ¶ 9). In May of 2018, Petitioner's supervisor (Lynch) informed Petitioner she would need to begin training to operate the overhead cranes that operate at the facility. (Appendix 71, ¶ 17).

On May 18, 2018, Petitioner apparently went to the Activate clinic to obtain a Physical Capacities Report ("PCR"). That PCR appears to have approved Petitioner to train to operate overhead cranes. (Appendix 78).[1] Petitioner subsequently indicated to Constellium she would not

[1] Specifically what the May 18, 2018 PCR indicates is unclear but also entirely irrelevant as explained below.

undergo crane training and attempted to provide Constellium a purported restriction from her own physician on June 12, 2017, which indicated Petitioner should be exempted from "training in high positions since she suffers from acrophobia." Constellium allegedly refused to take that medical restriction and instead referred her to Activate. (Appendix 71, ¶ 21; Appendix 79).

Petitioner allegedly attempted to provide her same personal physician restriction (Appendix 79) to Constellium again on June 25, 2018, and was again referred to Activate. (Appendix 72, ¶ 24). Petitioner alleges she presented her physician restriction to Activate on June 25, 2017, but was told it was not needed, and Activate proceeded to provide Petitioner with a new PCR (Appendix 80). Similar to the restriction noted by Petitioner's physician, Activate's PCR provided to Petitioner on June 25, 2017 indicated that "Patient is to avoid heights" and further indicated that the restriction was permanent. (Appendix 80).[2] This PCR operated to keep Petitioner from operating the overhead cranes, as she desired.

When Petitioner took the June 25 PCR to Constellium's human resources department, she was told by Constellium that based on the restriction of not working at heights, Constellium had no work for her. (Appendix 72, ¶ 25).[3] On June 26, 2017, Petitioner returned to Activate and was given a new PCR indicating specifically that Petitioner was restricted from operating a cab operated overhead crane. (Appendix 73, ¶ 30; Appendix 82). Petitioner alleges that "[d]espite

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[2] According to Plaintiff's Amended Complaint and attachments thereto, Activate modified the original PCR provided on June 25 later that day, meaning Activate provided a total of four PCRs to Petitioner. At least the final three of these PCRs restricted Petitioner from working in Constellium's overhead cranes, precisely as she wanted. Importantly, from the time of her first PCR to the last, Petitioner suffered no adverse employment decision, no lost pay and no other injury or harm of any kind.

[3] The June 25 PCR originally stated, "Patient is to avoid heights (more than 6 feet.)" (Appendix 81), however, after some discussion between Plaintiff and Activate, and Petitioner's protest of the limitation to heights not greater than six feet, the PCR was edited to remove any specific distance and state only that "Patient is to avoid heights." (Appendix 73, ¶ 26-27; Appendix 80 and 81)

presentation of the modified PCR from Activate reflected in Exhibit F on June 26, 2018, Defendants rejected Petitioner's request to return to work pursuant to Exhibit F." (Appendix 73, ¶ 31). It is indisputable that Activate did not and could not reject Petitioner's request.

Constellium clarified its position in the subsequent grievance process pursued by Petitioner, stating that the decision regarding what, if any, job Petitioner would be permitted to perform was a decision made solely by Constellium—"The employee was unable to perform all of the duties associated with her position and the company was (and continues) to accommodate two employees senior to her in the department. Since she was unable to work there is no contractual obligation to pay for duties not performed. Grievance denied." (Appendix 85).[4]

The sole claim against Activate is contained in paragraph 42 of the Amended Complaint, which reads in full as follows:

> 42. Activate Healthcare aided and abetted [Constellium's] refusal to accommodate Plaintiff's disabilities as described above herein by refusing to review Plaintiff's medical documentation and by repeatedly issuing erroneous "PCRs" without interacting with Plaintiff regarding her actual accommodation request.

These empty allegations cannot overcome the undisputed facts evidencing that Petitioner has failed to plead any facts against Activate that could result in a finding of unlawful conduct. As the Circuit Court properly concluded,

> Activate provided Plaintiff a medical restriction from operating an overhead crane. Activate's conclusion mirrored the conclusion reached by Plaintiff's personal physician. Plaintiff alleges other Defendants unlawfully discriminated against her by refusing to accommodate her disability (acrophobia). Plaintiff does not allege Activate had any involvement in Constellium's decisions regarding Plaintiff's employment, which occurred after Activate provided Plaintiff her desired medical restriction.

(Appendix 219, ¶ 18 and 19) (emphasis added).

[4] Incidentally, Petitioner remains employed with Constellium in a different department, and only missed a few weeks of work until her reassignment was effected. (Appendix 74, ¶ 34).

II. SUMMARY OF THE ARGUMENT

The Circuit Court's dismissal of Petitioner's aiding and abetting claim against Activate was proper. Petitioner's claim against Activate is nonsensical. Petitioner sought a medical restriction from working in Constellium's overhead cranes. Activate provided Petitioner the exact restriction she sought. As a result of the restriction, her employer, Constellium, determined that it could not employ her in that department anymore, at which point Petitioner did not work for a few weeks until Constellium placed her in a new position in a different department; so Petitioner continued her employment with Constellium (albeit with other job responsibilities) following the events complained of in her Amended Complaint. There is no allegation that Activate participated in any adverse employment decision regarding Petitioner. And despite the short span of time that passed between the first PCR from Activate and its final PCR, Petitioner never suffered any loss of employment, wages or other adverse employment decision of any kind.

In short, Activate's provision to Petitioner of the very work restriction she requested and sought cannot serve as the basis for a claim of aiding and abetting her employer's decision following that work restriction. Moreover, The Circuit Court correctly concluded that the MPLA governs Petitioner's claim against Activate because the claim is based upon "health care" services from a "health care provider," and thus Petitioner's failure to follow the pleading requirements of the MPLA serve as a second, though unnecessary, basis to deny Petitioner the relief she seeks.

III. STATEMENT REGARDING ORAL ARGUMENT AND DEICISION

Oral argument is unnecessary because the appeal is frivolous, just as the initial claims against Activate were frivolous. In any event, the facts and legal arguments are adequately

presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. There is nothing Petitioner can present in oral argument to cure the glaring deficiencies in her case that warranted dismissal by the Circuit Court and which should be upheld on appeal.

IV. STANDARD OF REVIEW

Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*. *Newton v. Morgantown Mach. & Hydraulics of W. Va., Inc.*, No. 18-0653, 2019 W. Va. LEXIS 595, at *5 (Nov. 19, 2019), citing Syl. pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 461 S.E.2d 516 (1995).

V. ARGUMENT

A. THE CIRCUIT COURT DID NOT APPLY THE WRONG STANDARD OF REVIEW OR APPLY IT INCORRECTLY.

Petitioner's assertion that Activate misstated the applicable standard of review in its motion to dismiss is wrong. Activate recited controlling and well-established law on this point—"Dismissal of a civil action pursuant to Rule 12(b)(6) is proper where 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle [her] to relief.' Syl. Pt. 3, *Chapman v. Kane Transfer Co.*,160 W. Va. 530 (1977). The Court must construe 'the factual allegations in the light most favorable to the plaintiff[ ].' *Murphy v. Smallridge*, 196 W. Va. 35, 36 (1996) (citing *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W. Va. 770, 775-76 (1995))."

The case Petitioner relies upon and contends provides some different standard actually contains identical language to that cited by Activate and cites the same earlier state Supreme Court

case (*Chapman v. Kane Transfer Co., supra*) cited by Activate: "Thus, in syllabus point three of *Chapman v. Kane Transfer Co.*, 160 W. Va. 530, 236 S.E.2d 207 (1977), this Court held that '[t]he trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Roth v. Defelicecare, Inc.*, 226 W. Va. 214, 219, 700 S.E.2d 183, 188 (2010).

The additional authority cited by Activate remains applicable law and germane to the meritless case Petitioner pursues against Activate:

> The purpose of a motion to dismiss under Rule 12(b)(6) is to weed out meritless claims by 'test[ing] the formal sufficiency of the complaint.' *John W. Lodge Distributing Co. v. Texaco, Inc.*, 161 W. Va. 603, 604-05 (1978). Especially in the wrongful discharge context, sufficient facts must be alleged which outline the elements of the plaintiff's claim. Our Supreme Court of Appeals has stated that:
>
> [D]espite the allowance in Rule 8(a) that the Plaintiff's statement of the claim be 'short and plain,' a Plaintiff may not 'fumble around searching for a meritorious claim within the elastic boundaries of a barebones complaint [,]' *see Chaveriat v. William Pipe Line Co.*, 11 F.3d 1420, 1430 (7th Cir. 1993), or where the claim is not authorized by the laws of West Virginia. A motion to dismiss under Rule 12(b)(6) enables a circuit court to weed out unfounded suits.

Williamson v. Harden, 214 W. Va. 77, 79 (2003) (quoting *State ex rel. McGraw*, 194 W. Va. at 776).

Petitioner's assertion that the Circuit Court's Order bears no evidence that it applied the proper standard of review is baseless. The Circuit Court's Order demonstrates that it carefully and thoroughly reviewed and considered the allegations and the record before it.[5] Contrary to

[5] The Circuit Court only considered the pleadings and not matters outside the pleadings that would convert the underlying motion filed by Activate to one under Rule 56. The only documents other than the Amended Complaint itself considered by the Circuit Court in its ruling were all attachments to Plaintiff's Amended Complaint.

Petitioner's desire, the Circuit Court's conclusion that "Plaintiff does not allege Activate had any involvement in Constellium's decisions regarding Plaintiff's employment, which occurred after Activate provided Plaintiff her desired medical restriction[.]" is not incorrect. That statement is entirely correct and perfectly summarizes the most glaring, fatal deficiency in Petitioner's case against Activate.

B. THE MPLA APPLIES TO THIS CASE BECAUSE ACTIVATE'S ACTIONS AT ISSUE UNQUESTIONABLY INVOLVE HEALTH CARE SERVICES FURNISHED BY A HEALTH CARE PROVIDER.[6]

Petitioner makes various arguments as to why her claim against Activate should not be governed by the MPLA, but she does little to explain why clear statutory language and controlling cases should be ignored. In short, regardless of Petitioner's speculation about statutory intent, the MPLA applies to all tort cases where the alleged unlawful action "occurred within the context of rendering medical services[.]" *Gray v. Mena*, 218 W. Va. 564, 570, 625 S.E.2d 326, 332 (2005); *Blankenship v. Ethicon, Inc.*, 221 W. Va. 700, 702, 656 S.E.2d 451, 453 (2007). The *Blankenship* Court distilled this construction into its fourth syllabus point:

> The failure to plead a claim as governed by the Medical Professional Liability Act, W. Va. Code § 55-7B-1, *et seq.*, does not preclude application of the Act. Where the alleged tortious acts or omissions are committed by a health care provider within the context of the rendering of "health care" as defined by W. Va. Code § 55-7B-2(e) (2006) (Supp. 2007), the Act applies regardless of how the claims have been pled.

[6] Activate addresses this Assignment of Error before the fatal deficiencies of Petitioner's "aiding and abetting" claim only because this is the order in which Petitioner sets forth her arguments. Activate contends, however, that the Court need not even reach and decide the MPLA issue because Petitioner's appeal can be easily rejected based on the failure to plead a claim that can survive summary dismissal, whether governed by the MPLA or not.

Syl. Pt. 4, *Blankenship,* 656 S.E.2d at 453 (emphasis added). The critical inquiry is whether the subject conduct that forms the basis of the lawsuit is conduct related to the provision of medical care. *Minnich v. MedExpress Urgent Care, Inc.*, 238 W. Va. 533, 538, 796 S.E.2d 642, 647 (2017).

W. Va. Code § 55-7B-2(g) provides the following definition for a health care provider:

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

The MPLA also defines health care at W. Va. Code § 55-7B-2(e) to including the following:

> (e) "Health care" means:
>
> (1) Any act, service or treatment provided under, pursuant to or in the furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis or treatment;
>
> (2) Any act, service or treatment performed or furnished, or which should have been performed or furnished, by any health care provider or person supervised by or acting under the direction of a health care provider or licensed professional for, to or on behalf of a patient during the patient's medical care, treatment or confinement, including, but not limited to, staffing, medical transport, custodial care or basic care, infection control, positioning, hydration, nutrition and similar patient services;

The subject action of assessing an employee's physical capabilities and/or limitations for the purpose of providing work restrictions squarely falls within the MPLA's definition of "health

care." The subject PCRs each evidence that the work associated with the development of the report was performed by either a physician or physician's assistant. Importantly, both physicians and physician's assistants are specifically set forth as "health care providers" in the MPLA. (*See* Appendix 78, 80-82). Petitioner alleges Activate is liable to her solely for "refusing to review Petitioner's medical documentation and by repeatedly issuing erroneous 'PCR's' without interacting with Petitioner regarding her actual accommodation request." (Appendix 76, ¶ 42). Also, petitioner claims Activate failed to act as an "appropriate professional." Professional negligence is the purview of the MPLA. (Petitioner's Br. at 13). This allegation concedes that Petitioner's claim is based upon Activate's "professional" conduct—i.e., the delivery of health care services.

In short, the applicability of the MPLA is not dependent on how Petitioner labeled her causes of action or described them in the Amended Complaint's narrative; rather, as this Court has made clear, applicability of the MPLA is dependent upon whether the underlying facts giving rise to Petitioner's claims involve health care.[7] In *Blankenship*, the Supreme Court of Appeals of West Virginia found that the MPLA governed the plaintiffs' stated claims for product liability, consumer protection, fraud, and intentional infliction of emotional distress because they arose "from the same factual event, the 'implantation' of contaminated sutures into the various [plaintiffs]." *Blankenship,* 221 W. Va. at 707, 656 S.E.2d at 458.

There are no allegations against Activate except those related to the PCR's it provided to Petitioner indicating her work restrictions. Straining to overcome the clear statutory language and case law opposing her position, Petitioner argues that somehow her aiding and abetting claim is

[7] As recognized by the *Blankenship* Court, "[w]hile it is true that none of the appellants' claims were asserted under the MPLA, the question we must answer is whether those claims should have been brought under the MPLA." *Blankenship,* 656 S.E.2d at 456.

not "based solely upon Activate's actions in assessing and issuing work restrictions in the PCR's", as the Circuit Court correctly concluded. (Appendix 220, ¶ 28). Instead, Petitioner points to her allegation that the aiding and abetting claim is based on Activate's "refusing to review Petitioner's medical documentation and by repeatedly issuing erroneous PCR's without interacting with Plaintiff regarding her actual accommodation request." (Petitioner's Br. at 10-11).

There is no substantive distinction between the Circuit Court's description of the conduct at issue and Petitioner's desperate rephrasing of the operative facts. Under Petitioner's rationale, a claim would not fall under the MPLA if a plaintiff were alleging medical negligence based on a surgery alleging that the doctor refused to review all of the patient's relevant records or failed to interact with the patient before a surgery. Such wordsmithing does nothing to alter the fundamental fact that the "subject conduct that forms the basis of the lawsuit is conduct related to the provision of medical care." *Minnich v. MedExpress Urgent Care, Inc.*, 238 W.Va. 533, 538, 796 S.E.2d 642, 647 (2017).

Because Petitioner's claim against Activate is under the jurisdiction of the MPLA, all of Petitioner's claims are subject to the MPLA's filing prerequisites set forth in W. Va. Code § 55-7B-6. Paragraph (a) of that statute reads: "Notwithstanding any other provision of this code, no person may file a medical professional liability action against any health care provider without complying with the provisions of this section." W. Va. Code § 55-7B-6(a).

W. Va. Code § 55-7B-3(a)'s recitation of the required elements to prove a medical negligence claim under the MPLA make obvious that the claim Petitioner seeks to assert against Activate is one for medical negligence:

> (a) The following are necessary elements of proof that an injury or death resulted from the failure of a health care provider to follow the accepted standard of care:

> (1) The health care provider failed to exercise that degree of care, skill and learning required or expected of a reasonable, prudent health care provider in the profession or class to which the health care provider belongs acting in the same or similar circumstances; and
>
> (2) Such failure was a proximate cause of the injury or death.

Notably, Petitioner failed to allege, let alone assert facts to support, either of these required elements of a medical negligence claim under the MPLA (nor could Petitioner credibly do so because she suffered no financial injury or other harm as a result of Activate's actions).

Additionally, W. Va. Code § 55-7B-2(h) provides that "Medical injury" means "injury or death to a patient arising or resulting from the rendering of or failure to render health care." The specific definition of "injury" is not provided by the MPLA but is generally applied in regard to tort law as the "invasion of any legally protected interest of another."[8] Here, the statute logically would require Petitioner to have put forth an expert who opined that Activate (1) failed to exercise that degree of care, skill and learning required or expected of a reasonable, prudent health care provider in the profession or class to which the health care provider belongs acting in the same or similar circumstances in assessing Petitioner's work restrictions; and (2) such failure was a proximate cause of an adverse employment decision affecting Petitioner. Failure to abide by the statutory procedural requirements can support dismissal, and there is no reason to disturb the Circuit Court's ruling in that regard. As this Court has cautioned plaintiffs:

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[8]The word "injury" is used throughout the Restatement of this Subject to denote the invasion of any legally protected interest of another. Harm, like injury, is not necessarily actionable. Both, to be actionable, must be legally caused by the tortious conduct of another. In addition, harm, which is merely personal loss or detriment, gives rise to a cause of action only when it results from the invasion of a legally protected interest, which is to say an injury. *Restatement 2d of Torts,* § 7 (2nd 1979). Black's law Dictionary defines "injury" as "any wrong or damage done to another, either in his person, rights, reputation, or property." Black's also cites the Restatement's definition above.

> Again, we emphasize that while we would strongly encourage litigants to err on the side of caution by complying with the requirements of the Act if any doubt exists, we cannot favor dismissal of this particular civil action where adjustments can readily by made to permit adjudication on the merits. We cannot, however, assure future litigants who fail to comply with the requirements of the Act that dismissal can be avoided.

Gray, 218 W. Va. at 564, 625 S.E.2d at 333 (emphasis added).

Petitioner's final attempt to overcome MPLA jurisdiction is reliance upon a completely inapplicable case, *Messer v. Huntington Anesthesia Group, Inc.* 218 W. Va. 4, 620 S.E.2d 144 (2005), that neither addresses the MPLA nor makes any valid point of analogy. That case, holding simply that an employer can't evade a failure to accommodate claim by arguing that the injury to be accommodated was a workplace injury and thus subject to workers' compensation immunity, bears no resemblance to the issue facing this Court.

In sum, the Circuit Court correctly determined that the facts plead in Petitioner's Amended Complaint fall within the jurisdiction of the MPLA, and Petitioner has offered no meritorious argument or authority to the contrary.

C. PETITIONER HAS FAILED TO PLEAD FACTS SUFFICIENT TO SUPPORT A CLAIM THAT ACTIVATE "AIDED AND ABETTED" CONSTELLIUM IN AN ADVERSE EMPLOYMENT DECISION OR CAUSED PETITIONER ANY INJURY OR HARM.

As the Circuit Court properly held, Petitioner's single cause of action against Activate fails as a matter of law because the Amended Complaint's allegations, even if accepted as true, fail to allege any conduct by Activate from which a rational trier of fact could conclude that Activate aided and abetted Constellium's failure to accommodate or discriminate against Petitioner, assuming such discrimination occurred. Petitioner cannot dispute the fact that Activate provided Petitioner exactly what she requested—a medical restriction from operating overhead cranes. Moreover, Petitioner does not even allege that Activate had any involvement in Constellium's

decisions regarding Petitioner's employment that occurred after Activate provided Petitioner her desired medical restriction.

The failure of Petitioner's claim against Activate is demonstrated by a few straightforward and uncontested facts. Petitioner alleges Constellium unlawfully discriminated against her by refusing to accommodate her claimed inability to work at the height and confined spaces required to operate Constellium's overhead cranes. (Appendix 75, ¶ 40). Petitioner's Brief sets forth the following statements as the sum total of the facts pled and relied upon by Petitioner to support her "aiding and abetting" claim against Constellium:

- Activate "refused to interact with the Petitioner with regard [to] accommodations regarding her employment..."
- Activate was "ignoring Petitioner and repeatedly writing incorrect PCR's in collaboration with Constellium..."
- Activate "interacted with and took direction from Defendant Constellium."

(Petitioner's Br., pp.12, 14-15).

First, Petitioner's brief arguments improperly add to the factual allegations that are actually contained in the Amended Complaint. Second, and more problematic for Petitioner, her Amended Complaint concedes that Activate provided Petitioner the exact accommodation she sought—a restriction from working in overhead cranes. It was that, and only that requested restriction that resulted in Constellium making the adverse employment decision about which Petitioner complains. By providing Petitioner the very accommodation request she wanted, Activate cannot under any circumstance be found to have aided and abetted any *subsequent* employment decisions made by her employer regarding the granting of such accommodation. There is no allegation, nor could there credibly be one, that Activate had the authority to make any actual accommodation, termination, reassignment or other employment decision.

Specific to claims under the West Virginia Human Rights Act, W. Va. Code § 5-11-9(7)(A) provides:

> (7) For any person, employer, employment agency, labor organization, owner, real estate broker, real estate salesman or financial institution to:
>
> (A) Engage in any form of threats or reprisal, or to engage in, or hire, or conspire with others to commit acts or activities of any nature, the purpose of which is to harass, degrade, embarrass or cause physical harm or economic loss or aid, abet, incite, compel or coerce any person to engage in any of the unlawful discriminatory practices defined in this section.

W. Va. Code § 5-11-9(7)(A) (emphasis added).

Civil claims for aiding and abetting torts in West Virginia require proof that the alleged aider and abetter (1) had knowledge that the other's conduct would constitute the breach of a duty; and (2) gave "substantial assistance or encouragment" to the other to enable that breach. *See* Syl. Pt. 5, *Courtney v. Courtney,* 186 W. Va. 597, 413 S.E.2d 418 (1991);[9] *See also,* Syl. Pt. 2 *Barath v. Performance Trucking Co.,* 188 W. Va. 367, 424 S.E.2d 602 (1992); *Price v. Halstead*, 177 W. Va. 592, 597, 355 S.E.2d 380, 386 (1987).

Applying these elements to the instance case, there are no allegations, nor could there credibly be, alleging that Activate had knowledge that Constellium would unlawfuly discriminate against Petitioner based on the medical restriction provided, assuming it did so. Even more apparent, there is no allegation, and there could be none, that Activate's act of providing Petitioner

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[9] Comment (d) of Section 876(b) of the *Restatement* identifies six criteria to use when determining whether a person shall be liable for assisting or encouraging a tort. The Supreme Court of Appeals adopted these factors in *Courtney v. Courtney*, 186 W. Va. 597, 605, 413 S.E.2d 418, 426 (1991):

"a. the nature of the act encouraged;
"b. the amount of assistance given by the defendant;
"c. the defendant's presence or absence at the time of the tort;
"d. the defendant's relation to the other tortfeasor;
"e. the defendant's state of mind; and
"f. the foreseeability of the harm that occurred."

the exact medical restriction she wanted, stating she was restricted from working in overhead cranes, "gave substantial assistance or encouragment" to Constellium to discriminate against Petitioner. Examination of these required elements reveals that Petitioner's claim against Activate travels beyond illogical to nonsensical. As the Circuit Court recognized, Petitioner's claim against Activate is devoid of merit.

Merely repeating the phrase "aiding and abetting" over and over is insufficient to state a cause of action for that tort. As indicated in the controlling statute (W. Va. Code § 5-11-9(7)A)) and as expressly stated in case law cited by Petitioner, to conceivably be liable for "aiding and abetting" one must "engage" in "acts or activities" that can be deemed "aiding and abetting." *Michael v. Appalachian Heating, LLC*, 226 W. Va. 394, 395, 701 S.E.2d 116, 118 (2010); *see also, St. Peter v. Ampak-Division of Gatewood Prods.*, 199 W. Va. 365, 373-74, 484 S.E.2d 481, 489-0- (1997) (also incorrectly relied upon by Petitioner).

Petitioner's many efforts to find support in West Virginia statutes and case law fall flat. Petitioner's discussion of *Skaggs*[10] is wholly misplaced. Her lengthy quote is rebuffed by the first sentence—"The employer must make a reasonable effort to determine the appropriate accommodation." (emphasis added). The discussion that follows relates solely to the duties of the employer, Constellium.

The futility of Petitioner's "aiding and abetting" claim against Activate is further demonstrated by the fact that she begins her argument to this Court by arguing about "reasonable accommodation" required by her employer." Petitioner asks this Court to ignore her own words. She summarizes her claim against Activate as follows: "What is alleged by the Petitioner herein is that, rather [than] acting as 'an appropriate professional' Activate aided and abetted Constellium

[10] *Skaggs v. Elk Run Coal Co.*, 198 W. Va. 51, 67-68, 479 S.E.2d 561, 577-78 (1996).

in removing the Petitioner from her position without justification, when, in fact, the Petitioner was fully qualified to perform the duties of her position and male co-workers with identical restrictions as those imposed upon the Petitioner had been accommodated." (Petitioner Br., p. 13) (emphasis added). The key phrase here is "in removing the Petitioner from her position[.]"—an act that was and only could be done by Petitioner's employer, Constellium. Activate's only action related to that decision was to provide Petitioner the specific work restriction she requested, which ultimately resulted in Constellium alone determining it had no position for Petitioner. That is no more aiding and abetting than the action of her own personal physician, who gave her a nearly identical work restriction. If Petitioner were logically consistent, she would have named her own personal physician as a defendant as well. [11]

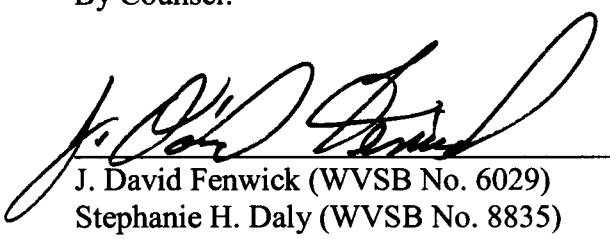
VI. CONCLUSION

For the reasons explained, herein, the decision of the Circuit Court should be affirmed. Petitioner's attempt to plead an aiding and abetting claim against a medical provider that gave her the precise work restriction she requested is bizarre. It certainly doesn't state a meritorious cause of action. Any decisions by her employer, Constellium, to accommodate or not accommodate the restriction she claimed she had, were decisions of Constellium alone. Petitioner doesn't even allege that Activate was involved in any such decisions, nor could she credibly do so. Finally, separate and apart from the lack of any factual allegations to support a legal claim against Activate, Petitioner also failed to meet the procedural and pleading prerequisites of the governing MPLA,

[11] The amicus brief submitted by the West Virginia Employment Lawyers Association and West Virginia Association for Justice makes no arguments in addition to or different from Petitioner identifying any basis for overturning the Circuit Court's ruling or warranting any further response.

which serve as a second basis for dismissal. Accordingly, Activate respectfully requests this Court affirm the lower court's decision.

ACTIVATE HEALTHCARE, LLC
By Counsel:



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CERTIFICATE OF SERVICE

I, J. David Fenwick, do hereby certify that a copy of the foregoing **RESPONDENT ACTIVATE HEALTHCARE, LLC'S BRIEF** has been served on counsel of record on the 9th day of March, 2020, via U.S. Mail, postage prepaid, upon the following:

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