



In the Circuit Court of Putnam County, West Virginia

J.M.A., )  
 Plaintiff, )  
 vs.) )  
 MARSHALL UNIVERSITY JOAN C. )  
 EDWARDS SCHOOL OF MEDICINE, )  
 MARSHALL UNIVERSITY BOARD OF )  
 GOVERNORS, )  
 RADIOLOGY, INC, )  
 CABELL HUNTINGTON HOSPITAL, )  
 INC., )  
 MARK JASON AKERS, M.D. ET AL, )  
 Defendants )

Case No. CC-40-2019-C-75

**Order Denying Defendants Radiology, Inc. and Mark Jason Akers, M.D.'s Motions to Dismiss**

COMES NOW, the Plaintiff, J.M.A., by counsel, The Giatras Law Firm, PLLC, and Defendants, Radiology, Inc. and Mark Jason Akers, M.D. by counsel, Moore and Biser, PLLC, upon the Defendants' Motions to Dismiss the Amended Complaint.

The Court, after careful review of the file, the Defendants' Motion to Dismiss the Amended Complaint and memoranda in support, the Plaintiff's response thereto, a review of the record, full hearing taking place on November 7, 2019, and June 29, 2020, and for good cause shown, it is Hereby **ORDERED, DECREED, and ADJUDGED** that this Court **DENIES** the Motion to Dismiss and makes the following Findings of Fact and Conclusions of Law:

**Findings of Fact**

1. The Plaintiff's Complaint alleges was a patient at Cabell Huntington Hospital in or around 2011 where he received a procedure that required radiological images to be taken.

2. The Plaintiff's Complaint alleges that, in or around 2018, the Plaintiff became aware that those images, which had not been de-identified, had been viewed by his peers at the Defendant university's medical school.

3. The Plaintiff's Complaint alleges that the Plaintiff learned about this embarrassing disclosure of his sensitive medical information at his residence in Putnam County, West Virginia.

4. The Plaintiff's Complaint alleges that the Plaintiff is a student at the Defendant University and medical school.

5. The Plaintiff's Complaint alleges that the Plaintiff's sensitive medical information was disseminated amongst his peers without being de-identified which caused him severe humiliation.

6. The Plaintiff's Complaint alleges that the cause of action, the harm caused to the Plaintiff, occurred in Putnam County, West Virginia.

7. The Plaintiff's Complaint alleges that the cause of action in this case did not arise contemporaneously with the medical care provided, but years later.

8. The Plaintiff has brought several claims against the Hospital, including breach of the duty of confidentiality, unjust enrichment, negligence per se, breach of contract, reckless indifference, negligent supervision, breach of the covenant of good faith and fair dealing, invasion of privacy, negligence, and violations of the West Virginia Consumer Credit and Protection Act (WVCCPA).

9. Nowhere in his Complaint does the Plaintiff allege medical negligence on the part of the Defendants.

10. The Plaintiff's claims extend from allegations that the Hospital's failures in allowing his sensitive information - that is, the records resulting from the medical treatment provided to him by the Hospital - to be disseminated without his permission and to his detriment.

### Conclusions of Law

1. The West Virginia Supreme Court of Appeals (WVSCA) has examined whether claims arising from a healthcare provider's unauthorized disclosure of confidential medical information is governed by the Medical Professional Liability Act (MPLA) such that a notice of claim and screening certificate of merit were required - and ruled in the negative. See *R.K. v. St. Mary's Med. Ctr., Inc.*, 229 W. Va. 712, 735 S.E.2d 715 (2012).

2. The Defendant Hospital relies on a subsequent, 2015 amendment of the MPLA which amended the definition of "medical professional liability" to include, "other claims which are contemporaneous to or related to tort or breach of contract or otherwise provided all in the context of rendering health care services." W. Va. Code 55-7B-2(i).

3. However, in *R.K.*, the WVSCA unequivocally stated that the "allegations asserted in [that] case, which pertain to the improper disclosure of medical records, [do] not fall within the MPLA's definition of 'health care,' and, therefore, the MPLA does not apply."

4. "Health care," as defined by the MPLA, 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; and

(3) The process employed by health care providers and health care facilities for the appointment, employment, contracting, credentialing, privileging and supervision of health care providers.

W.Va. Code § 55-7B-2(e).

5. Nowhere in any of those possible definitions of healthcare is the maintenance and safeguarding of patient information listed. Nor did the improper disclosure of this Plaintiff's data occur contemporaneously with his treatment, or in a manner related to it at the time.

6. The amended definition of "medical professional liability" does not affect the R.K. case, and it still stands that, in this State, claims arising from the unauthorized disclosure of confidential medical information are not governed by the MPLA.

7. Even were the amended definition of "medical professional liability" found to impact this issue, the breach alleged in this case did not occur "contemporaneously" to the health care provided - the Complaint alleges that it occurred years later. Therefore, the amendment to this definition is ineffectual to the breach at issue.

8. Maxims of statutory construction render any argument that the MPLA applies to medical data breaches invalid. See Syl. Pt. 5, *State v. Snyder*, 64 W. Va. 659, 63 S.E. 385, 386 (1908) ("A statute should be so read and applied as to make it accord with the spirit, purposes, and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law applicable to the subject-matter, whether constitutional, statutory, or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith.").

9. It should not be presumed that the West Virginia legislature intended to absolve all health care providers of any duty to safeguard patient information.

10. Regarding venue, W. Va. Code § 46A-5-107 states, in its entirety:

Any civil action or other proceeding brought by a consumer to recover actual damages or a penalty, or both, from creditor or a debt collector, founded upon illegal, fraudulent or unconscionable conduct, or prohibited debt collection practice, or both, shall be brought either in the circuit court of the county in which the plaintiff has his or her legal residence at the

time of the civil action, the circuit court of the county in which the plaintiff last resided in the state of West Virginia, or in the circuit court of the county in which the creditor or debt collector has its principal place of business or, if the creditor or debt collector is an individual, in the circuit court of the county of his or her legal residence. With respect to causes of action arising under this chapter, the venue provisions of this section shall be exclusive of and shall supersede the venue provisions of any other West Virginia statute or rule.

11. The Plaintiff's Complaint properly alleges that he is a resident of Putnam County, West Virginia.

12. While the Defendants have argued that the general venue provision, W. Va. Code § 56-1-1, is applicable to this case, the Plaintiff has properly alleged consumer violations against the Defendant, invoking the WVCCPA and its exclusive and superseding venue provision, W. Va. Code § 46A-5-107.

13. Because W. Va. Code § 46A-5-107 allows a Plaintiff to sue in his or her county of residence, and the Plaintiff resides in Putnam County, venue is proper before this Court.

In light of all the above findings, and for good cause shown consistent with the principals of justice, the Court hereby DENIES the Defendants' Motion to Dismiss the Amended Complaint.

The objection of any party aggrieved to this ruling is hereby noted and preserved.

The Clerk is hereby DIRECTED to send certified copies to all counsel of record at no cost.

Prepared by:

/s/ Troy N. Giatras

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**/s/JudgeName**  
Circuit Court Judge  
29th Judicial Circuit

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