IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, ex rel.,
WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,

Petitioner,

v.

Case No. 21-0230
(Civil Action No. 20-C-101)

THE HONORABLE CINDY S. SCOTT,
Chief Judge of the Seventeenth Judicial Circuit,
and A.F., a minor, by and through her next friends, SARAH FOX and DANIEL FOX, individually,

Respondents.

PETITION FOR WRIT OF PROHIBITION

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QUESTIONS PRESENTED

1. Whether the Circuit Court exceeded its jurisdiction by denying Petitioner's Motion to Dismiss and Strike the Amended Complaint (Count II (h) through (k)).

   (a) Plaintiffs failed to fulfill the mandatory pre-suit notice requirements imposed by the West Virginia Medical Professional Liability Act ("MPLA"), W.Va. Code 55-7B-6, and, therefore, the Circuit Court had no subject matter jurisdiction over the claims asserted in the Amended Complaint.

   (b) The Amended Complaint (Count II (i) through (k)) failed to state a claim because there can be no facts asserted to demonstrate duty or causation as a matter of law.

2. Whether the Circuit Court exceeded its legitimate power and committed clear error when it denied, as premature, declaratory judgment seeking a determination that the MPLA applies to Plaintiffs' "corporate negligence" claims.

STATEMENT OF THE CASE

I. Statement of Facts

For purposes of this original jurisdiction proceeding, the facts as alleged by Plaintiffs are to be accepted as true; however, the characterization of the causes of action arising out of these facts is at the core of this request for extraordinary relief.[1]

A.F. was born at West Virginia University Hospitals, Inc. ("WVUH") in October 2017. [App. 15-16].[2] Plaintiffs allege that a nurse employed by Petitioner WVUH failed to properly prime intravenous tubing, pump and/or equipment and negligently allowed for the introduction of air bubbles into the intravenous equipment which then flowed into a peripheral intravenous line and were introduced into A.F.'s venous blood and delivered to her heart and brain. Plaintiffs further allege that as a result of alleged medical negligence by Petitioner WVUH's agents, servants and employees, A.F. is neurologically impaired and requires 24-hour care [App. 17-22].

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[1] For Petitioner's denial of specific allegations, please see App. 32-40.

[2] Pursuant to Rule 40(e) of the West Virginia Rules of Appellate Procedure, the juvenile plaintiff is identified by initials and a full birth date has been omitted.

Based on the same underlying facts, Plaintiffs allege that A.F. was injured as a result of WVUH's "corporate negligence," particularly WVUH's alleged negligent hiring and/or retaining of agents, servants and/or employees; negligent staffing of the hospital's neonatal intensive care unit ("NICU"); negligent failure to train NICU staff; negligent failure to supervise NICU staff; negligent failure to have proper protocols and procedures in place in the NICU to prevent injuries such as those allegedly suffered by A.F.; failure to protect A.F.; and, failure to prevent, eliminate or correct the intravenous infusion of air [App. 23-24].

With reference to the same underlying facts, Plaintiffs filed an Amended Complaint and alleged that A.F. was injured as a result of WVUH's corporate negligence because WVUH allegedly failed to purchase and utilize air filters for its pediatric peripheral intravenous systems; failed to identify in the discharge summary the iatrogenic air embolism as the cause of A.F.'s cardiac arrest and subsequent injuries; spoliation of peripheral line tubing used at the time of the infusion which resulted in the air embolism; and, failed to report any "sentinel event" to the Joint Commission or West Virginia Department of Health and Human Services [App. 74-78].

II. Procedural History

On or about November 26, 2019, Plaintiffs served Petitioner WVUH with a pre-suit Notice of Claim and Screening Certificate of Merit related to their claims for medical negligence stemming from the hands-on nursing care and treatment of A.F. Pursuant to W.Va. Code §55-7B-6(f), WVUH demanded pre-suit mediation. The mediation was not successful in resolving Plaintiffs' claims and Plaintiffs filed suit in the Circuit Court of Monongalia County, West Virginia on April 6, 2020 [App. 15-26]. In response, Petitioner WVUH filed its Answer and Petition for Declaratory Judgment [App. 32-52; 60-66].

While the Petition for Declaratory Judgment was still pending, Plaintiffs filed an Amended Complaint on or about October 21, 2020 adding several new corporate negligence

claims against WVUH—without first filing any notice of claim or certificate of merit as required by the MPLA [App. 68-70;74-78]. In response to the Amended Complaint, Petitioner WVUH filed its Motion to Dismiss and Strike Plaintiffs' Amended Complaint (Count II (h) through (k)) [App. 79-127].

The issues presented by WVUH's Petition for Declaratory Judgment and Motion to Dismiss were fully briefed by the parties [App. 32-52; 53-59; 60-66; 79-127; 132-138; 139-157; 158-164; 165-177]. The Court held a hearing on the Petition for Declaratory Judgment and Motion to Dismiss on February 1, 2021. From the bench and without explanation, the Court denied both the Petition for Declaratory Judgment and Motion to Dismiss. Petitioner WVUH asked the Court to make findings of fact and conclusions of law [App. 9-10]. The Court issued an Order that included findings of fact and conclusions of law on February 19, 2021 [App. 1-8]. It is from this Order which Petitioner WVUH seeks relief pursuant to this Court's original jurisdiction as conferred by W.Va. Code §53-1-1.[3]

SUMMARY OF ARGUMENT

The Circuit Court exceeded its legitimate powers and committed clear error by denying Petitioner WVUH's Motion to Dismiss and Strike Amended Complaint (Count II (h) through (k)). Plaintiffs failed to fulfill the MPLA's mandatory, jurisdictional pre-suit notice and screening certificate of merit requirements before filing their Amended Complaint, and, therefore, the Circuit Court had no subject matter jurisdiction over the new claims asserted in the Amended Complaint. The threshold determination of whether the MPLA governs a claim is not a fact-based inquiry, but rather is an issue of law that must necessarily be decided at the outset of a case. Additionally, the Circuit Court committed clear error when it denied Petitioner's Motion to

[3] "The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers."W.Va. Code §53-1-1.

Dismiss based on the failure to state a claim because the issues presented were purely issues of law regarding the validity of the claims.

The Circuit Court also exceeded its legitimate powers and committed clear error when it denied Petitioner's request for declaratory relief—namely a determination that the MPLA applies to all of Plaintiffs' causes of action. Declaratory judgments are appropriate for, *inter alia*, determining the construction or application of a statute. Here, the determination as to whether the MPLA applies to Plaintiffs' claims is purely an issue of law that is not dependent on the facts outside those included in the Complaint. The determination regarding the MPLA's application affects damages and expert discovery. Petitioner has a right to know the nature and extent of the claims against it vis-à-vis whether the MPLA applies.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petition arises as a result of the Circuit Court's clearly erroneous application of statutory and common law. Therefore, oral argument is not necessary because the issues raised by the Petition have been authoritatively decided by this Court and the facts and legal arguments are adequately presented in the Petition and record on appeal. Because the Petition seeks reversal of the decision of the lower court, this matter is appropriate for an Opinion of the Court pursuant to Rules 21(d) and 22 of the Rules of Appellate Procedure.

ARGUMENT

I. Standard of Review

A *de novo* standard of review applies to the Circuit Court's denial of Petitioner WVUH's Motion to Dismiss and Strike the Amended Complaint (Count II (h) through (k) because the questions are ones of law.[4]

[4] *State ex rel. Primecare Medical of West Virginia, Inc. v. Faircloth*, 242 W.Va. 335, 835 S.E.2d 579 (2019).

A *de novo* standard of review also applies to the Circuit Court's withholding of Declaratory Judgment as requested by Petitioner WVUH. Any determinations of fact made by the Circuit Court in reaching its ultimate resolution are reviewed pursuant to a clearly erroneous standard.[5]

A writ of prohibition lies where the circuit court does not have jurisdiction or, having jurisdiction, exceeds its legitimate powers.[6] In determining whether to entertain and issue a writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.[7] A ruling is clearly erroneous when, even if there is evidence to support the findings, the reviewing court is "left with the definite and firm conviction that a mistake has been committed."[8]

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[5] *Cox v. Amick,* 195 W.Va. 608, 466 S.E.2d 459 (1995).

[6] *State ex rel. Allstate Ins. Co. v. Gaughn,* 203 W.Va. 358, 508 S.E.2d 75 (1998), Syl. Pt. 1.

[7] *State ex rel. Hoover v, Berger,* 199 W.Va. 12, 483 S.E.2d 12 (1997), Syl. Pt. 4.

[8] *In Int. of Tiffany Marie S.*, 196 W. Va. 223, 231, 470 S.E.2d 177, 185 (1996).

II. The Circuit Court Committed Clear Error By Denying Petitioner's Motion to Dismiss and Strike Plaintiffs' Amended Complaint (Count II (h) through (k))

Plaintiffs filed their civil action on April 6, 2020 [App. 15-26]. On October 21, 2020, Plaintiffs filed an Amended Complaint with leave of court [App. 73;74-78]. Plaintiffs asserted additional negligence theories as part of Count II (Corporate Negligence) [App. 74-78]. Specifically Plaintiffs asserted claims based on the hospital's alleged:

(h) failure to purchase air filters which would have prevented the air embolism that A.F. suffered;

(i) post-event failure to document the cause of injuries in A.F's discharge summary;

(j) post-event spoliation of device tubing; and,

(k) failure to report sentinel events to third parties.

Pursuant to W. Va. Code §55-7B-6 and West Virginia Rules of Civil Procedure 12(b)(1), (b)(6), and (f), Petitioner WVUH moved the Circuit Court for an Order dismissing/striking Count II (Negligence), paragraphs (h) through (k) of Plaintiffs' Amended Complaint because:

1. These claims—despite Plaintiffs' characterization as corporate negligence—are claims sounding in professional negligence and are governed by the MPLA. Plaintiffs failed to fulfill the MPLA jurisdictional pre-suit screening certificate of merit requirement before filing the Amended Complaint, particularly with respect to the standard of care applicable to the use of air filters during the administration of clear intravenous fluids [App. 79-84]. Because compliance with the MPLA pre-suit notice requirements is mandatory to confer subject matter jurisdiction, Plaintiffs' failure to meet these requirements deprived the Court of jurisdiction over the claims thereby necessitating dismissal.
2. Plaintiffs asserted a negligence claim based on the alleged failure of Petitioner to document an iatrogenic cause of A.F's injury in her discharge summary. But there is no duty to document causation in a medical record and any alleged failure to document the

alleged injuries – *weeks* after those injuries were sustained – could not have proximately caused said injuries as a matter of law [App. 84-86].

3. Plaintiffs alleged negligent spoliation against Petitioner WVUH. But West Virginia does not recognize an independent tort for negligent spoliation against a party-defendant, and Plaintiffs failed to allege the other essential elements of a valid spoliation claim [App. 86].

4. Plaintiffs alleged negligence due to Petitioner WVUH's failure to report Sentinel Events to the Joint Commission or the State Department of Health (*sic*). But a hospital has no duty to report a Sentinel Event and Plaintiffs can establish no set of facts to prove that an alleged failure to report an event caused A.F.'s cardiac arrest or subsequent injuries [App. 86-111].

A. The Circuit Court Had No Subject Matter Jurisdiction Because Plaintiffs Failed to Fulfill the Mandatory Pre-Suit Notice Requirements of the MPLA

The new claims set forth in Plaintiffs' Amended Complaint (Count II (h) through (k) are inherently governed by the MPLA because the allegedly negligent acts or omissions occurred within the context of Petitioner WVUH rendering health care services to A.F. But the Circuit Court failed to make *any* determination regarding the MPLA's application, ruling, instead, that this purely legal issue requires factual development [App.1-8]. This is a clearly erroneous decision.

1. A Determination of Whether the MPLA Applies is a Threshold Issue of Law

Because "[t]he determination of whether a particular cause of action is governed by the MPLA is a legal question to be decided by the trial court,"[9] and because the failure to comply

[9] *Blankenship v. Ethicon,* 221 W.Va. 700,706, 656 S.E.2d 451, 457, n. 12 (2007).

with the MPLA's pre-suit notice requirements deprives the court of subject matter jurisdiction,[10] a court cannot defer ruling and just allow the case to proceed with discovery. Such an approach is inefficient and undermines the entire purpose of the MPLA's pre-suit notice requirements and the substantial public policy underlying the MPLA. "This Court has, in fact, declared that '[t]he urgency of addressing problems regarding subject matter jurisdiction cannot be understated because any decree made by a court lacking jurisdiction is void.'"[11]

Here, the Circuit Court should have determined that the MPLA applies to Plaintiffs claims, and should have dismissed the Amended Complaint because Plaintiffs failed to comply with the MPLA's pre-suit requirements, thereby depriving the Circuit Court of jurisdiction over the claims set forth in the Amended Complaint.

2. The MPLA Applies to Plaintiffs' Corporate Negligence Claims

The MPLA is the statutory scheme governing medical professional liability actions. "Medical professional liability" means "liability for damages resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient. It also means other claims that may be contemporaneous to or related to the alleged tort or breach of contract or otherwise provided, all in the context of rendering health care services."[12] In turn, "health care" is defined as

> (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;

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[10] *State ex rel. PrimeCare Med. of W. Virginia, Inc. v. Faircloth*, 242 W. Va. 335, 341, 835 S.E.2d 579, 585 (2019).

[11] *Whittaker v. Whittaker*, 228 W. Va. 84, 87, 717 S.E.2d 868, 871 (2011), *quoting State ex rel. TermNet Merchant Services, Inc. v. Jordan*, 217 W.Va. 696, 700, 619 S.E.2d 209, 213 (2005).

[12] W. Va. Code §55-7B-2(i) (emphasis added).

(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.[13]

Every allegation within Plaintiffs' original Complaint and Amended Complaint is factually tied to the medical care and treatment provided to A.F. in October 2017. When health care services rendered by a provider are the integral part of the Complaint, the MPLA applies, regardless of how the plaintiff characterizes the action.[14] All of Plaintiffs asserted claims are torts based on health care services rendered, or which allegedly should have been rendered to A.F., or are "other claims that may be contemporaneous to or related to the alleged tort...all in the context of rendering health care services" to A.F. by Petitioner WVUH and, therefore, are governed by the MPLA.[15]

3. Plaintiffs Failed to Comply with MPLA Pre-Suit Notice Requirements, Thereby Depriving the Court of Subject Matter Jurisdiction

All claims governed by the MPLA must comply with the statute's pre-suit notice requirements. The MPLA very specifically provides that "no person may file a medical professional liability action against any health care provider without complying with the provisions of [W. Va. Code §55-7B-6]."[16] Section 55-7B-6 provides:

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[13] W. Va. Code §55-7B-2(e)(1) (emphasis added).

[14] *Blankenship v. Ethicon*, 221 W.Va. 700, 656 S.E.2d 451 (2007). (MPLA governed claims against hospital stemming from placement of improperly sterilized sutures).

[15] W.Va. Code §55-7B-2(i) defining "medical professional liability."

[16] W.Va. Code §55-7B-6(a).

> At least thirty days prior to the filing of a medical professional liability action against a health care provider, the claimant shall serve by certified mail, return receipt requested, a Notice of Claim on each health care provider the claimant will join in litigation... The Notice of Claim shall include a statement of the theory or theories of liability upon which a cause of action may be based, and a list of all health care providers and health care facilities to whom notices of claim are being sent, together with a Screening Certificate of Merit. The Screening Certificate of Merit shall be executed under oath by a health care provider... and shall state with particularity: (A) The basis for expert's familiarity with the applicable standard of care in issue; (B) the expert's qualifications; (C) the expert's opinion as to how the applicable standard of care was breached; and (D) the expert's opinion as to how the breach of the applicable standard of care resulted in injury or death.[17]

Significantly, "pre-suit notice requirements contained in the MPLA are jurisdictional and the failure to provide such notice deprives a circuit court of subject matter jurisdiction."[18] The pre-suit notice requirements equally apply to amended complaints.[19]

"The purposes of requiring a pre-suit Notice of Claim and Screening Certificate of Merit are (1) to prevent the making and filing of frivolous medical malpractice claims and lawsuits; and (2) to promote the pre-suit resolution of non-frivolous medical malpractice claims."[20] The MPLA notice is not merely a perfunctory requirement, but rather is a jurisdictional prerequisite that serves an important purpose of screening out costly claims that strain the health care system, as well as affording the opportunity for early evaluation and mediation. Allowing inappropriate claims to go forward to discovery defeats these purposes and all of the public policy set forth in W. Va. Code §55-7B-1.[21]

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[17] W.Va. Code §55-7B-6(b) (emphasis added).

[18] *State ex rel. PrimeCare Med. of W. Virginia, Inc. v. Faircloth*, 242 W. Va. 335, 341, 835 S.E.2d 579, 585 (2019).

[19] *Id.* at fn. 23.

[20] *Hinchman v. Gillette*, 618 S.E.2d 387 (W. Va. 2005).

[21] Indeed, "[a] circuit court has no authority to suspend the MPLA's pre-suit notice requirements and allow a claimant to serve notice after the claimant has filed suit. To do so would amount to a judicial repeal of W. Va. Code §55-7B-6." *Faircloth*, 242 W. Va. at 345, 835 S.E.2d at 589. As such, while the Court can examine the factual allegations and peek behind the labels offered by the plaintiff, the determination of the MPLA's application is a threshold issue required to be made at the pleading stage for jurisdiction.

Here, there is no dispute that Plaintiffs did not serve a written notice of claim or a screening certificate of merit consistent with W. Va. Code §55-7B-6 [App. 142-144]. As such, the Court lacked subject matter jurisdiction over the Amended Complaint and the Amended Complaint should have been dismissed without prejudice.

B. The Circuit Court Committed Clear Error By Denying Petitioner's Motion to Dismiss Plaintiffs' Amended Complaint (Count II (i) through (k)) because Plaintiffs' Amendments Otherwise Fail to State Claims Upon Which Relief Can be Granted

Aside from Plaintiffs' failure to fulfill the pre-suit notice requirements of the MPLA, Plaintiffs' Amended Complaint should have been dismissed for the independent reason that Petitioner owes no duty to Plaintiffs with respect to the alleged "failures" and there can be no causation under the newly alleged claims as a matter of law.

In order to maintain a negligence action, Plaintiffs must sufficiently plead (and eventually prove) a duty, causation and resulting injury.[22] Although West Virginia has a liberal pleading standard, a plaintiff must still include more than "sketchy generalizations of a conclusive nature unsupported by operative facts."[23] A plaintiff may not 'fumble around searching for a meritorious claim within the elastic boundaries of a barebones complaint'" or maintain a claim "where the claim is not authorized by the laws of West Virginia."[24]

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[22] Syl Pt. 3, *Aikens v. Debow*, 208 W. Va. 486, 541 S.E.2d 576 (2000) ("'In order to establish a *prima facie* case of negligence in West Virginia, it must be shown that the defendant has been guilty of some act or omission in violation of a duty owed to the plaintiff. No action for negligence will lie without a duty broken.' Syl. Pt. 1, *Parsley v. General Motors Acceptance Corp.*, 167 W.Va. 866, 280 S.E.2d 703 (1981)." Syl. Pt. 4, *Jack v. Fritts*, 193 W.Va. 494, 457 S.E.2d 431 (1995)) (emphasis added).

[23] *Newton v. Morgantown Mach. & Hydraulics of W. Virginia, Inc.*, 242 W. Va. 650, 654, 838 S.E.2d 734, 738 (2019) (quoting *Fass v. Nowsco Well Serv., Ltd.*, 177 W. Va. 50, 53, 350 S.E.2d 562, 564 (1986)).

[24] *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995).

1. Count II (i): A Hospital Has No Duty to Require that a Physician Include Cause of Injury in the Discharge Summary, and Any Such Failure Could Not Have Caused the Injury of Which Plaintiffs Complain

Plaintiffs allege negligence against the hospital for an alleged "corporate policy" not requiring A.F.'s physician to document the cause of A.F.'s condition/diagnosis in the discharge summary [App.75]. Fatal to this claim, however, is a lack of duty and causation.

Negligence requires the violation of a legal duty owed to the plaintiff.[25] The existence of a duty is a question of law.[26] A hospital has no duty to have a corporate policy requiring a non-employee physician to document the cause of a patient's medical condition or diagnosis in the patient's discharge summary. Plaintiffs' novel duty would essentially require medical providers to include in discharge summaries information beyond that required by state law[27] and to engage in speculation when the cause of an injury was unclear or where a provider may have incomplete information.

Additionally, to establish any *prima facie* negligence claim, Plaintiffs must allege—and eventually prove—the essential elements of proximate cause and harm.[28] Here there can be no proximate cause as a matter of law: the failure to *document the cause* of the injury cannot *be the cause* of said injury. While a plaintiff need not plead facts with specificity, an analysis under Rule 12 of the West Virginia Rules of Civil Procedure nonetheless evaluates whether or not there is a set of facts that if proven, could support the claim.[29] There are no set of facts which could support a claim that the failure to document an iatrogenic cause of Plaintiff A.F.'s cardiac arrest

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[25] *Aikens*, 208 W. Va. at 490, 541 S.E.2d at 580.

[26] *Id.*

[27] W. Va. Code St. R. § 64-12-7.2.j (listing the required contents of inpatient medical record).

[28] *Aikens v. Debow*, 208 W. Va. 486, 541 S.E.2d 576 (2000).

[29] *See Highmark W. Virginia, Inc. v. Jamie*, 221 W. Va. 487, 488, 655 S.E.2d 509, 510 (2007).

in a discharge summary *caused or contributed to* her cardiac arrest and subsequent neurologic injuries.[30] Because the Amended Complaint lacks sufficient allegations to support the essential elements of duty and causation, Count II(i) of the Amended Complaint should have been dismissed.

2. Count II (j): Spoliation Is Not an Independent Cause of Action

Plaintiffs also added a spoliation claim against Petitioner for failing to retain equipment tubing following A.F.'s cardiac arrest. [App. 75]. However, negligent spoliation is not an independent tort against a party-defendant and, therefore, Plaintiffs' claim fails as a matter of law.[31] Indeed, Plaintiffs' Counsel admitted at oral argument that they did not have any evidence sufficient to support this claim, but urged the court to allow them discovery in the hopes of finding evidence to support a claim that they had no good faith basis to bring in the first place. [App. 184; transcript requested but not yet available]. Additionally, the failure to retain medical equipment after the injury could not have caused the injury to A.F. Lacking allegations to support the essential elements of duty and causation, Count II(j) of the Amended Complaint should have been dismissed.

3. Count II (k): A Hospital Has No Duty to Report Sentinel Events to Outside Agencies and Any Such Failure to Report Could Not Have Caused A.F.'s Injury As a Matter of Law

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[30] Moreover, the innuendo that the failure to include the cause of a condition/diagnosis in a medical record likely impacts the regulatory status, possible financials and fundraising, and reimbursement is the type of "impertinent" and "scandalous" matter that should be stricken from the complaint. Alternatively, such allegations sound in fraud—and thus must be pled with requisite particularity under Rule 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."). Additionally, the WVUH medical records for A.F. make several references to the nature and presumed cause of A.F.'s injuries [App. 85].

[31] *See Hannah v. Heeter*, 213 W.Va. 704, 710, 584 S.E.2d 560, 566 (2003) ("West Virginia does not recognize spoliation of evidence as a stand-alone tort when the spoliation is the result of the negligence of a party to a civil action.").

Plaintiffs allege that the hospital committed negligence by failing to report sentinel events[32] to either the Joint Commission or the State Department of Health. (*sic*). [App. 76]. However, the hospital has no duty to report sentinel events to either the Joint Commission[33] or to the West Virginia Department of Health and Human Resources ("DHHR").[34,35] Additionally, W. Va. Code § 55-7B-7a specifically provides that there is a rebuttable presumption against admissibility of state reports regarding health care providers and facilities and accreditation reports unless specific to the injured party or if it is substantially similar conduct that occurred within one year of the incident involved. It is incongruous to recognize a duty in support of a negligence claim where the reports at issue are inadmissible as evidence.

Moreover, there can be no causation as a matter of law: any alleged failure to report sentinel events to these agencies did not cause or contribute to Plaintiff A.F.'s injuries or

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[32] Sentinel events are unanticipated patient safety events (i.e., not related to the natural course of a patient's illness or condition) that result in death, permanent harm, or severe temporary harm. *See* Joint Commission Comprehensive Accreditation Manual for Hospitals, Sentinel Event (pp. 1-2) [App. 93-100]; https://www.jointcommission.org/resources/patient-safety-topics/sentinel-event/sentinel-event-policy-and-procedures/.

[33] Petitioner WVUH is accredited by the Joint Commission. "The Joint Commission on Accreditation of Hospitals, with headquarters in Chicago, Illinois, establishes standards and conducts voluntary accreditation programs for [accredited] West Virginia hospitals, psychiatric facilities, mental health services, long-term care facilities, ambulatory health care facilities, and hospice programs." *Daily Gazette Co. v. W. Virginia Bd. of Med.*, 177 W. Va. 316, 321, n. 10 352 S.E.2d 66, 71 (1986). The Joint Commission does not require that its member hospitals report sentinel events. Rather, reporting is voluntary: "Each accredited organization is strongly encouraged, but not required, to report sentinel events to The Joint Commission." Joint Commission Comprehensive Accreditation Manual for Hospitals, Sentinel Event, p. 7 (emphasis added) (https://www.jointcommission.org/resources/patient-safety-topics/sentinel-event/sentinel-event-policy-and-procedures/) [App. 93-100].

[34] *See* W. Va. Code St. R. § 64-12-15.7 ("the hospital shall make available to the Department [WV DHHR] the results of peer review and quality assessments and performance improvement information, upon the Department's request.").

[35] Even if there was a statutory obligation to report to the state—which there is not—a violation thereof does not give rise to a private cause of action. *CSX Transp. Inc. v. PKV Ltd. P'ship*, 906 F. Supp. 339, 343 (S.D.W. Va. 1995) (outlining the test whether statute implies a private right of action: "(1) the plaintiff must be a member of the class for whose benefit the statute was enacted; (2) consideration must be given to legislative intent, express or implied, to determine whether a private cause of action was intended; (3) an analysis must be made of whether a private cause of action is consistent with the underlying purpose of the legislative scheme; (4) such private cause of action must not intrude into an area delegated exclusively to the federal government."); *Iacangelo v. Georgetown Univ.*, 595 F. Supp. 2d 87, 93 (D.D.C. 2009) (no negligence *per se* claim where the regulatory provision at issue, namely FDA approval prior to marketing, was merely an "administrative requirement—not a substantive standard of care").

damages. Plaintiffs merely speculate that the lack of reporting "reduces the likelihood of regulatory investigations, remedial requirements, and has a direct effect on the quality care, including the quality of care provided to the minor Plaintiff." [App. 76]. One cannot infer that the affirmative reporting of any other hypothetical sentinel events would have prevented the air embolism and alleged harm that Plaintiff A.F. suffered in 2017. Rather, such a leap would require abject speculation that cannot support a finding of proximate cause.[36] As such, because there are no facts to support a claim based on the failure to report sentinel events to the State or Joint Commission, this claim should have been dismissed.

III. The Circuit Court Exceeded Its Legitimate Powers and Committed Clear Error by Denying Declaratory Judgment Regarding the Application of the MPLA to Plaintiffs' So-Called Corporate Negligence Claims

Well before Plaintiffs filed their Amended Complaint, WVUH petitioned the Circuit Court to declare that the MPLA applies to the allegations asserted by Plaintiffs in Count II of the Complaint, despite Plaintiffs' artful attempt to characterize the claims as "corporate negligence" [App. 40-43; 44-52]. Petitioner sought declaratory judgment in order to clarify the legal rights and duties of the parties based on the construction or application of the MPLA.[37]

The Circuit Court committed clear error when it denied WVUH's Petition for Declaratory Judgment, found that the request was premature and that unspecified discovery is necessary to develop facts. But the Petition for Declaratory Judgment presented a pure issue of law and no amount of discovery will change the analysis necessary to determine whether Plaintiffs' claims are governed by the MPLA. The Circuit Court had an obligation to decide the MPLA's application as a threshold issue. *See* discussion, *supra*.

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[36] *Dellinger v. Pediatrix Med. Grp., P.C.*, 232 W. Va. 115, 124, 750 S.E.2d 668, 677 (2013) (given lack of expert testimony regarding causation, jury would have only been left with speculation).

[37] *Mongold v. Mayle,* 192 W.Va. 353 (1994).

A. Declaratory Judgment is Procedurally Proper and Not Premature

Under the Uniform Declaratory Judgments Act, any person whose rights or legal relations are affected by a statute may have the question of statutory construction determined.[38] "A declaratory judgment action is a proper procedural means for adjudicating the legal rights of parties to an existing controversy that involves the construction and application of a statute."[39] A justiciable controversy exists when a legal right is claim by one part and denied by another.[40] Declaratory relief is procedurally appropriate here because there is an existing controversy within active litigation regarding the application of a statute—namely, the MPLA—and its impact on the parties' legal rights. Petitioner maintains that the MPLA, including its damages limitations and expert witness requirements, applies to all of Plaintiffs' claims. Plaintiffs disagree. And as the Circuit Court acknowledged, resolution of this issue would indeed be of practical assistance [App. 7].

Additionally, declaratory relief is not premature because this is purely an issue of law: "[t]he determination of whether a particular cause of action is governed by the MPLA is a legal question to be decided by the trial court."[41] Discovery is not necessary, and, as discussed above, cannot be conducted in those cases where the MPLA applies and where the plaintiffs failed to comply with the pre-suit notice requirements. The determination of the MPLA's application is a threshold issue and to defer a ruling and allow the case to proceed would "amount to a judicial

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[38] W. Va. Code §55-13-2.

[39] *City of Bridgeport v. Matheny*, 675 S.E.2d 921, 926 (W.V. 2009) (citing W.Va. Code §§ 55-13-1, 55-13-2).

[40] *W. Virginia Util. Contractors Ass'n v. Laidley Field Athletic & Recreational Ctr. Governing Bd.*, 164 W. Va. 127, 131, 260 S.E.2d 847, 850 (1979).

[41] *Blankenship*, 221 W.Va. 700,706, 656 S.E.2d 451, 457, n. 12.

repeal of W. Va. Code §55-7B-6" and violate the substantial public policy underlying the MPLA.[42]

B. The Circuit Court Should Have Determined that the MPLA Applies because the MPLA's Broad Definitions of "Health Care" and "Medical Professional Liability" Include the So-Called Corporate Negligence Claims Asserted By Plaintiffs

Regardless of how Plaintiffs have denominated their allegations, Plaintiffs' claims for negligent hiring, training, and supervision (Complaint Paragraphs 55 (a) – (g)) clearly fall within the definition of "health care" as defined by the W.Va. Code §55-7B-2(e). Indeed, the MPLA's definition of "health care" expressly includes the process for employing [i.e., hiring] and supervising health care providers—the exact claims that Plaintiffs assert.

Plaintiffs' restrictive application of the MPLA only to direct medical care is contradicted by the statute itself. Indeed, the current, expanded definition of "health care" set forth in W.Va. Code §55-7B-2(e) was adopted by the Legislature in 2015 to specifically abrogate the restrictive reading urged by Plaintiffs. In 2014, this Court issued a decision in *Manor Care, Inc. v. Douglas* —a case involving alleged negligent nursing home budgeting and staffing. As Plaintiffs argued below, *Manor Care* held that the MPLA only applied to cases based on direct medical treatment to a patient and did not apply to "to other claims that may be contemporaneous to or related to the alleged act of medical professional liability."[43] After the *Manor Care* decision, the Legislature amended the MPLA and expanded the definition of "health care" to expressly include "matters related to staffing."[44] The MPLA definition of "health care" now also expressly

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[42] *Faircloth*, 242 W. Va. at 345, 835 S.E.2d at 589; W.Va. Code §55-7B-1.

[43] *Manor Care v. Douglas,* 234 W.Va. 57, 763 S.E.2d 73 (2014). In *Manor Care*, the Plaintiff alleged that the nursing home's managing entity failed to properly budget for adequate staffing and that inadequate staffing caused or contributed to the decedent's injuries. Plaintiffs also alleged that the entities responsible for the nursing home's budget did not meet the definition of a health care provider.

[44] *Williams v. CMO Mgmt., LLC,* 239 W.Va. 530, f.n. 8 (2016).

includes the employment and supervision of health care providers[45] —claims that Plaintiffs assert but label as corporate negligence.

The amendments to the MPLA undertaken in the wake of *Manor Care* likewise broadened the definition of "medical professional liability" to include torts based on health care services rendered to a patient or "other claims that may be contemporaneous to or related to the alleged tort...all in the context of rendering health care services."[46] This language was not included in prior versions of the MPLA.[47] Such a change has significance.[48]

As this Court emphasized, "[t]he critical inquiry" in whether the MPLA applies to a cause of action is "whether the subject conduct that forms the basis of the lawsuit is conduct related to the provision of medical care."[49]

Without question, WVUH is a "health care facility" as that term is defined by the MPLA.[50] And the alleged conduct which forms the basis of this lawsuit is conduct related to the provision of medical care by a nurse to A.F [App. 16-49].[51] Moreover, the MPLA expressly includes the very claims that Plaintiffs brought here: staffing, employment, supervision.

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[45] *See* W. Va. Code §55-7B-2(e) (eff. June 29, 2015); W. Va. Code §55-7B-10 (amended MPLA applies to actions accruing after July 1, 2015).

[46] W. Va. Code §55-7B-2 (i) (eff. June 29, 2015).

[47] *See* W. Va. Code §55-7B-2(i) (eff. until Mar. 9, 2015).

[48] *Cf. Stone v. I.N.S.*, 514 U.S. 386, 397, 115 S. Ct. 1537, 1545, 131 L. Ed. 2d 465 (1995) (presumption that statutory amendments are intended to have "real and substantial effect"); *Butler v. Rutledge,* 174 W.Va. 752, 329 S.E. 2d 118 (1985) ("The Legislature must be presumed to know the language employed in former acts, and, if in a subsequent statute on the same subject it uses different language in the same connection, the court must presume that a change in the law was intended." Syl. Pt. 2, *Hall v. Baylous,* 109 W.Va. 1, 153 S.E. 293 (1930).

[49] *Minnich v. Med Express Urgent Care, Inc. – West Virginia,* 238 W.Va. 533, 796 S.E.2d 642 (2017).

[50] W.Va. Code §55-7B-2(f).

[51] In the "Facts" section of the Complaint, Plaintiffs set forth a series of events which occurred when a nurse employed by WVUH was changing an intravenous (IV) line during her care of A.F. Shortly after the IV was changed, A.F. experienced a change in her heart rate and then a cardiovascular collapse. Plaintiffs allege that A.F. suffered severe neurologic injury as a result of the cardiopulmonary arrest. Plaintiffs assert that one of A.F.'s

In deciding whether a claim falls within a statutory medical malpractice cause of action, this Court has also looked to whether expert testimony will be necessary to aid in the jury's determination of duty and causation.[52] In the instance case, the standard of care required of a hospital with a neonatal intensive care unit ("NICU"), treating patients in the same or similar circumstances to A.F., is not within the ordinary knowledge or experience of lay persons. Expert witness testimony will be required to establish the 1) standard of care applicable to WVUH with respect to the hiring, training and retention of NICU nurses, the staffing of a NICU and the appropriate policies and protocols to be adopted by a NICU; 2) a breach of said standards of care; and, 3) a causal connection between alleged breaches of the standard of care by WVUH and A.F.'s alleged injuries and damages.[53] This analysis further compels the conclusion that Plaintiffs' so-called corporate negligence claims are governed by the MPLA.

Plaintiffs cannot plead their way out of the MPLA. 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), the Act applies regardless of how the claims have been pled.[54] Thus, the Circuit Court had before it all the information it needed to determine that the MPLA applies to Plaintiffs' claims, regardless of how those claims were characterized. Petitioner properly asked the Circuit Court to resolve the dispute between the parties about what

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physician's determined that the cardiopulmonary arrest "was likely due to an air embolism from the [IV infusion] which is being investigated" [App. 19].

[52] *Minnich*, 238 W. Va. 533, 539, 796 S.E.2d 642, 648 (2017).

[53] *See Farley v. Shook,* 218 W.Va. 680 (2006), Syl. Pt. 3, " 'It is the general rule that in medical malpractice cases negligence or want of professional skill can be proved only by expert witnesses.' *Roberts v. Gale,* 149 W.Va. 166, 139 S.E.2d 272 (1964), Syl Pt. 2." *See also, Farley v. Meadows,* 185 W.Va. 48, 404 S.E.2d 537 (1991), Syl. Pt. 1; *Dellinger v. Pediatrix Medical Group, P.C.,* 232 W.Va. 115 (2013), "In a medical malpractice case, the plaintiff must not only prove negligence but must also show that such negligence was the proximate cause of the injury."

[54] *Blankenship v. Ethicon,* 221 W.Va. 700, 656 S.E. 2d 451 (2007), Syl, Pt. 4.

law applies to this case. Petitioner has a due process right to know the nature of the claims brought against it and the extent of damages to which Plaintiffs may be entitled.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court issue a writ of prohibition (1) dismissing the Amended Complaint without prejudice and directing that Plaintiffs comply with the MPLA's pre-suit notice requirements prior to refiling the Amended Complaint; and (2) declaring that the MPLA applies to all of Plaintiffs' causes of action, even those characterized as "corporate negligence" by Plaintiffs.

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VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF MONONGALIA, TO WIT:

I, Christine S. Vaglienti, individually and as counsel of record for West Virginia University Hospitals, Inc. d/b/a/ Ruby Memory Hospital, after first being duly sworn upon oath, state that I have read the foregoing ***Petition for Writ of Prohibition*** and that all facts and allegations contained therein are true and correct to the best of my knowledge and belief except where allegations are specifically denied.

Christine S. Vaglienti (W.Va. State Bar ID #4987)

Taken, sworn to, and subscribed before me this _____ day of March, 2021.

My Commission expires: _____.

(SEAL)

Notary Public

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA, ex rel.,
WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,

Petitioner,

v.

Case No. _____
(Civil Action No. 20-C-101)

THE HONORABLE CINDY S. SCOTT,
Chief Judge of the Seventeenth Judicial Circuit,
and AVA FOX, a minor, by and through her next friends, SARAH FOX and DANIEL FOX, individually,

Respondents.

CERTIFICATE OF SERVICE

I, Christine S. Vaglienti, do hereby certify that I have caused to be served this 19th day of March, 2021, the foregoing, **"PETITION FOR WRIT OF PROHIBITION"** and **"APPENDIX IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION,"** upon counsel of record by electronic mail and by depositing a true and accurate copy of same in the U.S. Mail, postage paid, in envelopes addressed as follows:

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