IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner,

vs.

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.

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

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION

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1. Did the Circuit Court lack subject-matter jurisdiction over Plaintiff's corporate-negligence claims on the grounds that the Medical Professional Liability Act (MPLA) (W. Va. Code § 55-7B-1 *et seq.*) applies to these claims?

Suggested Answer: ***No***

2. Did the Circuit Court exceed its legitimate powers in denying Defendant's Motion to Dismiss?

Suggested Answer: ***No***

3. Did the Circuit Court properly deny Defendant's Petition for Declaratory Judgment?

Suggested Answer: ***Yes***

STATEMENT OF THE CASE

1. Statement of Additional Facts and Procedural History

Eleven hours after birth, Plaintiff, a healthy twin, suffered iatrogenically caused permanent brain damage when air from IV infusion tubing entered her heart, brain, and liver, causing a cardiac arrest and prolonged resuscitation attempts. (See Petitioner's App., p. 16 – 20.) While Defendant Hospital has admitted the cause of Plaintiff's brain damage, it has specifically denied any that negligence caused this "never event"[1] to occur. (See Petitioner's App., p. 32 – 40.)[2]

In discovery, Plaintiff learned that after the event, Defendant purchased air filters for the infusion tubing that are designed to eliminate the risk of a catastrophic air embolism as occurred in this case. (See Respondent's App., p. 7.) Plaintiff also learned that the manufacturer, Braun, in

[1] An air embolism is defined as a "never event" in the medical community—the kind of mistake that should never happen in the field of medical treatment. (See https://en.wikipedia.org/wiki/Never_event.)

[2] Plaintiff, A.F., asserts corporate-negligence claims on her own behalf against Defendant. As used by Respondent in this action, "corporate negligence" means conduct on the part of Defendant that does not constitute "health care" as defined by the MPLA and accordingly, falls outside the statute's purview.

2011, had recommended the use of air filters on its infusion tubing to eliminate the risk of such an event. (See Respondent's App., p. 8.) Plaintiff also learned through one deposition that the Defendant Hospital's policy was to follow the recommendations of manufacturers regarding medical devices. (See Appendix (Carla Spangler deposition transcript)). Furthermore, despite this policy, the Defendant Hospital had not considered purchasing the recommended air filters until after the incident occurred to Plaintiff. (See Respondent's App., pp. 26 – 38.) As such, the corporate structure failed to purchase recommended safety equipment, and no medical judgment or analysis or decision was involved in this failure. Upon learning this, Plaintiff filed an Amended Complaint, setting forth this corporate purchasing failure as corporate negligence.

In addition, once the Defendant Hospital denied any negligence as causing the event, the Amended Complaint added a claim for spoliation. (See Petitioner's App., p. 75.) Plaintiff learned and alleged that the tubing that was used for the infusion was discarded in violation of the Defendant Hospital's sentinel event policy, requiring that all equipment involved in a sentinel event be secured and examined. The reason that this tubing was discarded remains at issue, and to the extent that discovery demonstrates intentional spoliation these claims would not be subject to the MPLA.

Third, the Defendant Hospital did not include the recognized diagnosis of air embolism in its discharge summary or in any listing of problems associated with Plaintiff's hospitalization. (See Petitioner's App., pp. 75 – 76.) Moreover, the Defendant Hospital did not report the air embolism event to the Joint Commission on Hospital Accreditation. (See Petitioner's App., p. 76.) These corporate decisions and actions, again, had nothing to do with the medical treatment and care of A.F. but are alleged to affect the overall functioning of the Defendant Hospital.

SUMMARY OF ARGUMENT

1. Summary of Argument relating to the Circuit Court's denial of Defendant's Motion to Dismiss filed as to Plaintiff's Amended Complaint.

The Circuit Court did not lack subject-matter jurisdiction over the corporate-negligence claims set forth in Plaintiff's Amended Complaint because the alleged facts do not establish that the corporate conduct at issue constitutes "health care" under the MPLA. In her Amended Complaint, Plaintiff sets forth four claims: first, that Defendant made a corporate, nonmedical purchasing decision to forego installation of air filters on its pediatric intravenous (PIV) lines; second, that Defendant decided at the corporate level to omit reference to iatrogenic air embolism from patients' discharge summaries; third, that Defendant discarded the medical equipment at issue post injury (spoliation); and fourth, that Defendant declined to report Sentinel Events to regulatory bodies. (See Petitioner's App., pp. 74 – 76.) Under this Court's precedent, both before and after the 2015 MPLA amendments, these allegations do not constitute "health care" as defined by the Act. Thus, the Circuit Court does not lack subject-matter jurisdiction over these claims.

Additionally, the Circuit Court, having jurisdiction over these claims, did not exceed its legitimate powers in denying Defendant's Motion to Dismiss because *inter alia* first, there was no error in the Circuit Court's decision finding that the allegations did not constitute "health care," and second, any error can be corrected on appeal. For these reasons and those set forth herein, this Court should deny the Petition for Writ of Prohibition as to the Circuit Court's denial of Defendant's Motion to Dismiss.

2. Summary of Argument relating to the Circuit Court's denial of Defendant's Petition for Declaratory Judgment filed as to Plaintiff's original Complaint.

Defendant's Petition for Writ of Prohibition related to the Circuit Court's denial of Defendant's Petition for Declaratory Judgment should be denied for four separate reasons, as

follows: First, the Petition should be denied because it seeks this Court to issue a declaration as to the applicability of the MPLA to Plaintiff's corporate-negligence claims set forth in her original Complaint, contravening this Court established rule that it will not issue advisory opinions or involve itself in the lower courts' issuance thereof; Second, it should be denied because it is an impermissible appeal of an interlocutory order; Third, to the extent that this Court reaches the issue, the Petition should be denied because the Circuit Court did not err in denying Defendant's Petition for Declaratory Judgment; and Fourth, the Circuit Court did not exceed its legitimate powers in denying that Petition.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent requests oral argument under West Virginia Rule of Appellate Procedure 19, on the grounds that the Petition for Writ of Prohibition involves assignments of error in the application of settled law (related to the Circuit Court's denial of Defendant's Petition for Declaratory Judgment) and a narrow issue of law (i.e., whether the Circuit Court had subject matter jurisdiction over Plaintiff's Amended Complaint). Additionally, Respondent requests oral argument under Rule 20, on the grounds that the Petition involves issues of fundamental public importance related to application of the MPLA to corporate, nonmedical conduct and decisions.

ARGUMENT

I. STANDARD OF REVIEW

"[A] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers." State ex rel. Vanderra Res., LLC v. Hummel, 242 W. Va. 35, 40, 829 S.E.2d 35, 40 (2019) (citing W. Va. Code § 53-1-1). Writs of prohibition are not available in routine circumstances. Id. "Rather, this Court will use prohibition ... to correct only substantial,

clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be *completely reversed* if the error is not corrected in advance." Id. (emphasis added).

Against that background, the West Virginia Supreme Court examines the following five factors in determining whether to entertain and issue the 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:

> (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.

Id. (citing Syl. Pt. 4, State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1997)).

II. RESPONSE TO DEFENDANT'S PETITION FILED AS TO THE CIRCUIT COURT'S DENIAL OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

A. Petitioner has not established either that the Circuit Court lacked subject-matter jurisdiction over the claims raised by Plaintiff's Amended Complaint or that it exceeded its legitimate powers in denying Defendant's Motion to Dismiss.

1. The Circuit Court does not lack subject-matter jurisdiction over Plaintiff's Amended Complaint because Plaintiff's allegations do not constitute health care under the MPLA.

In its Petition, Defendant seems argue that *any* cause of action for injury sustained by a patient in a healthcare facility is subject to the MPLA regardless of the circumstances. This is not

the status of the West Virginia law. To the contrary, this Court has held that the fact that the conduct at issue occurs in a healthcare facility does not, by itself, make the claim one for malpractice. See See, e.g., Minnich v. MedExpress Urgent Care, Inc.-W. Virginia, 238 W. Va. 533, 539, 796 S.E.2d 642, 648 (2017)[3] (holding that "this Court...[has] recognized that the occurrence of an injury or an action taken by a health care professional within or on the premises of a health care facility is not what determines the applicability of a state's medical malpractice schema."). Further, by holding that whether a claim is subject to the MPLA is a fact-intensive issue, this Court has recognized that there are claims that raise conduct that falls outside the scope of the MPLA's purview. See Manor Care, Inc. v. Douglas, 234 W. Va. 57, 74, 763 S.E.2d 73, 90 (2014) (holding that "this Court has twice recognized that the decision of whether the MPLA applies to certain claims presents a fact-driven query.").

Defendant's Petition does not grapple with the fact-intensive analysis as to whether the MPLA applies to Plaintiff's Amended Complaint. Instead, Defendant glosses over the alleged facts and summarily asserts that "[w]hen 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." (See Defendant's Petition, p. 9.) Defendant's conclusory statement puts the rabbit in the hat by assuming that Plaintiff's allegations constitute "health care" under the MPLA; Defendant provides no examination of the alleged facts of this case or how they relate to this Court's past decisions. Plaintiff acknowledges that she cannot avoid the MPLA's application by characterizing a medical negligence claim as one sounding in ordinary negligence, but this Court's decisions to date—even after the MPLA's amendments—establish that the MPLA does not govern all causes of action that involve a hospital's negligence.

[3] Note that Minnich was decided after the 2015 amendments to the MPLA.

The alleged corporate decisions and conduct at issue in Plaintiff's Amended Complaint do not constitute health-care services rendered by a medical provider; but rather, are corporate-level decisions unrelated to any patient's plan of care. Plaintiff alleges that Defendant made nonmedical decisions that led to her injuries, i.e., that Defendant, at the corporate level, did not consider to order and therefore failed to order air filters on its pediatric PIV systems, decided to omit reference to iatrogenic air embolism from patients' discharge summaries, decided to discard the medical equipment at issue post injury (spoliation), and decided to decline to report Sentinel Events to regulatory bodies. (See Petitioner's App., pp. 74 – 76.) Under this Court's precedent discussed infra, Plaintiff has set forth viable corporate-negligence claims that are not subsumed by the MPLA. Therefore, this Court should deny Defendant's Petition.

Plaintiff acknowledges that, as most recently stated by this Court, "[t]he MPLA defines 'medical professional liability' broadly." State ex rel. PrimeCare Med. of W. Virginia, Inc. v. Faircloth, 242 W. Va. 335, 342, 835 S.E.2d 579, 586 (2019). However broad the MPLA's definition of "medical professional liability" might be, there is still the fundamental question of whether the conduct at issue constitutes health care and is therefore subject to the Act. See Id. (quoting Blankenship v. Ethicon, Inc., 221 W. Va. 700, 656 S.E.2d 451 (2007)) (holding that the MPLA applies to "alleged tortious acts or omissions...committed by a health care provider within the context of the rendering of 'health care' as defined [by the MPLA]."); see also Minnich, 238 W. Va. at 538, 796 S.E.2d at 647 (holding that "[t]he critical inquiry is whether the subject conduct that forms the basis of the lawsuit is conduct related to the provision of medical care.")

Moreover, this Court to this day continues to recognize circumstances where conduct by a health care provider that leads to a patient's injury falls outside the MPLA. See, e.g., Minnich, 238 W. Va. 533, 539, 796 S.E.2d 642, 648 (2017) (citing Manor Care, supra and Boggs v. Camden-

Clark Mem'l Hosp. Corp., 216 W. Va. 656, 609 S.E.2d 917 (2004)) (holding that "this Court...[has] recognized that the occurrence of an injury or an action taken by a health care professional within or on the premises of a health care facility is not what determines the applicability of a state's medical malpractice schema."). This Court has made it clear that for the MPLA to apply, it is not enough that a patient is injured at a hospital—the defendant's medical assessment of the patient must be at issue. See Id.

Thus, Defendant's argument that the MPLA applies in the absence of any clinical assessment related to Plaintiff's condition is unsupported by this Court's jurisprudence, which recognizes a distinction between medical and nonmedical conduct that leads to a patient's injury, even when it takes place in a hospital. Here, the alleged conduct—while admittedly causing injury to Plaintiff "within or on the premises of a health care facility"—does not constitute "health care" under this Court's jurisprudence, as follows:

a. *Plaintiff's allegations related to Defendant's failure to purchase industry-recommended air filters for Defendant's pediatric peripheral intravenous (PIV) systems do not implicate the MPLA.*

As to Defendant's "corporate purchasing decision" to not purchase industry-recommended air filters for its pediatric PIV (peripheral intravenous) systems, Plaintiff alleges that this decision was not made within the context of providing her health care. (See Petitioner's App., pp. 74 – 75.) Plaintiff alleges that this decision was not made upon an individual medical assessment of Plaintiff or even upon a medical determination as to all patients, but rather as a corporate purchasing decision to forego installation of air filters that have been recommended and widely used for years. (Id.) In fact, no "medical" decision or analysis was made at all regarding the purchase of the air filters.[4] The facts of this case are no closer to medical negligence than a hypothetical case related

[4] Note: after the incident, Defendant purchased air filters for all infusion systems.

to improper installation of medical equipment during the initial construction of a hospital unit that leads to a patient's injury—while the hypothetical patient may have been injured as a result of that faulty installation, the conduct at issue is entirely unrelated to "health care." Here, Defendant's corporate, nonmedical conduct led to the faulty installation of the PIV systems within the hospital and Plaintiff was injured as a result. While her injuries occurred within a medical facility, that alone is not enough to implicate the MPLA.

Defendant does not present to this Court any specific argument as to how this corporate-level decision constitutes "health care." Nor does Defendant attempt to analogize the facts of this case to previous decisions of this Court. Rather, Defendant conclusively states, in less than a page of its Petition, that Plaintiff's allegations necessarily constitute health care and that therefore, the MPLA must be applied to this action. (See Defendant's Petition, pp. 8 – 9.)

A review this Court's MPLA precedent shows that Defendant's contention that Plaintiff's allegations are governed by the MPLA must be rejected because the corporate conduct at issue is unrelated to the standard of care applicable to Plaintiff's condition and as such does not constitute health care under the Act. Accordingly, given the status of this Court's jurisprudence, the Circuit Court's denial of Defendant's Motion to Dismiss does not amount to the type of "substantial, clear-cut, legal error[] plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and...[with] a high probability that the trial will be *completely reversed* if the error is not corrected in advance" that a writ of prohibition was designed to correct. See Hummel, 242 W. Va. at 40, 829 S.E.2d at 40 (emphasis added). Rather, the Circuit Court's decision is entirely in accord with this Court's guidance on this issue.

This Court's prior decisions show that the MPLA will apply only where there was an individualized medical assessment of the plaintiff's condition and resultant treatment.

For example, in Minnich, supra, the plaintiff asserted *inter alia* a premises-liability negligence claim against a MedExpress Urgent Care facility after the plaintiff's decedent was injured and later died from a fall that occurred while he attempted to get onto an examination table, after the facility staff had performed an initial clinical assessment of the patient's condition. Minnich, 238 W. Va. at 535, 796 S.E.2d at 644. The plaintiff alleged ordinary negligence claims as to this fall. Minnich analyzed whether the alleged negligence involved in decedent's fall was related to the provision of medical care and thus subject to the MPLA, noting that certain claims fall outside of the statute's scope. See Minnich, 238 W. Va. at 538, 796 S.E.2d at 647 (holding that conduct unrelated to providing of medical care, such as "negligence-based claims predicated on corporate budgeting," is not subject to the MPLA.)[5] Minnich found that the plaintiff's allegations (i.e., that a MedExpress employee, who had performed a clinical assessment of decedent's medical condition, failed to provide proper medical assistance and direction) raised the issue "of whether [the employee], armed with the knowledge of Mr. Minnich's recent medical history, complied with the standard of care expected of a health care services provider." Id.

Because of this individualized medical assessment of the plaintiff's decedent and implication of the applicable standard of care, Minnich determined that the claim was subject to the MPLA:

> [the plaintiff] has pled her case in a manner that requires the introduction of expert evidence to address whether Mr. Minnich should have been permitted to climb onto the examination table unassisted. In framing her complaint, the petitioner expressly made an issue of Ms. Hively's clinical judgment in leaving Mr. Minnich

[5] Minnich was decided in 2017, two years after the MPLA's definition of "health care" was expanded to specifically address negligent-staffing claims and yet still refers to the principle from Manor Care, supra that negligence claims based on corporate budgeting decisions are not subject to the MPLA.

> to access the examination table with no supervision or assistance after being advised of his recent hip surgery, his current weakness, and his limited ambulatory status. We agree with the trial court's assessment that the petitioner has raised the issue of whether proper clinical judgment was exercised in the course of Mr. Minnich's health care evaluation. Absent expert witness' testimony, the jury will be unable to determine whether Ms. Hively breached the duty of care she owed as a "health care provider" to Mr. Minnich in connection with his receipt of health care at MedExpress. Accordingly, we find no error in the circuit court's decision that the MPLA applies to this case.

Id. at 539, 796 S.E.2d at 648.

Thus, Minnich based its decision on the fact that the employee's clinical judgment and resultant directive were directly at issue. Id. at 538, 796 S.E.2d at 647 (holding that "[t]his fall occurred while attempting to comply with the directive of that 'health care provider.'"). The fact that the MedExpress employee used her clinical judgment in assessing and directing the plaintiff's decedent in the provision of medical services was determinative—not the mere fact that the plaintiff was in a health-care facility at the time of the injury. See Manor Care, 234 W. Va. at 73, 763 S.E.2d at 89 (holding that the fact that the conduct at issue occurs in a healthcare facility does not, by itself, make the claim one for malpractice).

In Minnich, a medical professional examined the plaintiff and made a clinical judgment that he did not require assistance to get onto the examination table. Here, Plaintiff has not alleged that there was any medical assessment or clinical judgment involved in Defendant's purchasing decision regarding air filters. No one examined Plaintiff to determine whether she needed to be placed on device with an air filter—that decision was made before Plaintiff was born, at the corporate level, and was unrelated to the standard of care.

In Faircloth, supra, the Court addressed whether the plaintiff's claims, pled as general, non-medical negligence, were subject to the MPLA. In that case, the plaintiff's decedent committed

suicide while incarcerated at the Eastern Regional Jail and Corrections Facility. The inmate's estate filed claims against the jail-defendant, the correctional officer who was on duty at the time of the suicide, and PrimeCare Medical of West Virginia, Inc., which provided inmate health care at the jail-defendant, alleging that Defendants were negligent collectively in the supervision, training, and retention of the correctional officer-defendant. Faircloth, 242 W. Va. at 339, 835 S.E.2d at 583. The plaintiff argued that the MPLA did not apply because the inmate's death raised "a nonmedical, administrative, ministerial, or routine care issue" that "was not complex" (e.g., negligent training of jail staff) and, therefore, expert testimony to establish the standard of care was unnecessary. Id. at 340, 835 S.E.2d at 584.

Faircloth held that the claims against PrimeCare were subject to the MPLA because "[a] fair reading of the amended complaint reveals that the [plaintiff] blames PrimeCare for (a) failing to properly assess Mr. Grove's potential for suicide, (b) failing to properly house and monitor Mr. Grove in light of his (allegedly) known potential for suicide, and (c) failing to properly train, monitor, and discipline Officer Zombro, whom the Estate blames, in particular, for failing to properly monitor Mr. Grove." Id. at 343, 835 S.E.2d at 587. Therefore, the Court held that "the acts or omissions in question were 'health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient.'" Id. As in Minnich, Faircloth based its decision to apply the MPLA on the fact that plaintiff's claims depended on an individualized medical assessment and a plan of treatment and supervision, i.e., the failure to properly assess the inmate's potential for suicide at the time of his admission to the facility and to develop an appropriate health care plan for his treatment.

In Faircloth, a health care provider evaluated the inmate and determined the appropriate level of monitoring for his suicide risk. The facts of Faircloth are similar to those in Minnich—

both cases involve a clinical assessment of a patient and a tailored response or plan of treatment. Here, no one evaluated Plaintiff as to her need for a PIV line with an air filter or made any decision in this regard related to her standard of care. Again, the only facts on record are Plaintiff's allegation that Defendant's conduct at issue was a corporate purchasing decision.

A comparison of Minnich and Faircloth to Manor Care, supra, which addresses conduct and decisions similar to those at issue in this case, reveals that nonmedical decisions fall outside the MPLA. In Manor Care, the plaintiff's decedent was admitted to Manor Care in relatively good health for her age (eighty-seven years old) but suffered severe injuries after just nineteen days at the facility and passed away shortly thereafter. Manor Care, 234 W. Va. at 65, 763 S.E.2d at 81. The plaintiff filed certain claims against the corporate entities that operated the facility, under the MPLA and *inter alia* for corporate negligence. Id., at 64, 763 S.E.2d at 80. The plaintiff's corporate-negligence claim was based upon "non-healthcare decisions, such as budgetary constraints, lack of staff, and poor management of the facility, [which] affected all of the residents." Id. at 71, 763 S.E.2d at 87. The case went to trial and the jury returned a verdict for the plaintiff.

On appeal, the corporate defendant "argue[d] that the trial court erred in failing to hold that the MPLA provided the exclusive remedy for the plaintiffs' claims against the defendants." Id. at 71, 763 S.E.2d at 87. In evaluating the issue of whether the plaintiff's corporate-negligence claims were centered on the provision of health care, the Court noted that the plaintiff's claims were grounded on "the failure to allocate a proper budget to Heartland Nursing Home to allow it to function properly..." Id. at 74, 763 S.E.2d at 90. Thus, because the conduct and decisions at issue were corporate decisions regarding budget and not individualized medical decisions based upon a patient's condition, the Court held that the plaintiff's corporate-negligence claims were not subject

to the MPLA. Id. at 75, 763 S.E.2d at 91 (holding that "[c]laims related to business decisions, such as proper budgeting...simply do not fall within that statutory scheme.").[6] See also R.K. v. St. Mary's Med. Ctr., Inc., 229 W. Va. 712, 723, 735 S.E.2d 715, 726 (2012) (holding that a claim for improper disclosure of medical records did not constitute health care under the MPLA because there was no medical judgment involved); Boggs, 216 W. Va. at 662–63, 609 S.E.2d at 923–24 (holding that "[t]he Legislature has granted special protection to medical professionals, while they are acting as such.").

Here, Plaintiff alleges that Defendant's corporate-level decision to forego installation of industry-recommended air filters on *all* of its pediatric PIV systems was a corporate purchasing decision, similar to the conduct at issue in *inter alia* Manor Care, R.K., and Boggs, and not a decision involving medical judgment and skill as in Minnich and Faircloth. Plaintiff's allegations establish that the corporate purchasing decision at issue was not based upon Plaintiff's medical condition or upon medical judgment or skill. Defendant did not evaluate Plaintiff's condition and determine that in her case, use of an air filter on Plaintiff's PIV system was medically unsound. In fact, the failure to purchase and install air filters on this infusion equipment in the NICU allowed the risk of a catastrophic air embolism to affect every patient regardless of their condition. Medical expert testimony is not necessary to establish negligence caused by a failure to follow the manufacturer's guidance on installation of the pediatric PIV systems at issue based upon a purchasing decision by a corporate employee or entity. See Minnich, 238 W. Va. at 539, 796

[6] Again, Plaintiff acknowledges that in 2015, the MPLA's definition of "health care" was amended to include "staffing" but asserts that Manor Care continues to be cited for the principle that corporate decisions unrelated to health care fall outside the MPLA. See Minnich, 238 W. Va. at 538, 796 S.E.2d at 647 (holding that conduct unrelated to providing of medical care, such as "negligence-based claims predicated on corporate budgeting," is not subject to the MPLA.).

S.E.2d at 648 (holding that where an action sounds in ordinary negligence where expert testimony is not required to determine a breach of the medical standard of care at issue).

Thus, Plaintiff's allegations related to the absence of air filters on Defendant's PIV system do not implicate the MPLA and Defendant's Petition should be denied as to these claims.

b. Plaintiff's allegations related to Defendant's failure to include iatrogenic air embolism in plaintiff's discharge summary; spoliation of evidence; failure to report sentinel events to regulatory agencies do not implicate the MPLA.

The conduct at issue in Plaintiff's Amended Complaint paragraphs (i) – (k) (see Petitioner's App., pp. 75 – 76) also should be resolved in Plaintiff's favor as being outside the scope of the MPLA. These claims raise Defendant's corporate policies: the policy of not requiring a discharge summary to include reference to a patient's iatrogenic air embolism, thereby precluding regulatory oversight and impacting quality of care hospital-wide; the policy that resulted in Defendant's spoliation of the peripheral line tubing that was used at the time of the subject incident; and the policy that led to Defendant's failure to report sentinel events to regulatory agencies, thereby precluding regulatory oversight and impacting quality of care hospital-wide.

In its Motion to Dismiss and supportive brief to the Circuit Court, Defendant did not offer any argument as to how the MPLA governs these remaining corporate-negligence claims relating to recordkeeping and spoliation, focusing solely on the issue of air filters. (See Petitioner's App., pp. 83 – 84.) Defendant does not present an argument on these claims to this Court. Perhaps the reason for Defendant's failure to specifically address these claims is that they must be resolved in Plaintiff's favor. First, as to Plaintiff's spoliation claim, this Court has held that "spoliation of evidence [is] no more related to 'medical professional liability' or 'health care services' than battery, larceny, or libel. There is simply no way to apply the MPLA to such claims." Boggs, 216 W. Va. at 662, 609 S.E.2d at 923, holding modified by Gray v. Mena, 218 W. Va. 564, 625 S.E.2d

326 (2005).[7] Thus, under Boggs, Plaintiff's spoliation claim is not subject to the MPLA and Defendant's Motion to Dismiss seeking to have the spoliation claim governed by and dismissed under the MPLA should be denied.

Boggs similarly governs Plaintiff's claims relating to Defendant's alleged corporate policy of omitting sentinel events from all discharge summaries and reports to regulatory agencies. See Gray at 568 n. 7, 625 S.E.2d at 330 n. 7 (discussing that the effect of Boggs is to exclude the claims of fraud, destruction of records, and spoliation of evidence from the MPLA's scope). See also R.K., 229 W. Va. at 723, 735 S.E.2d at 726 (holding that "improper disclosure of medical records...does not fall within the MPLA's definition of 'health care,' and, therefore, the MPLA does not apply."). Plaintiff's claims are essentially for the corporate decision to alter records, which is analogous to the claim for destruction of records directly at issue in Boggs or improper disclosure of records at issue in R.K. A claim based upon Defendant's altering records does not implicate medical skill or judgment and therefore falls outside the MPLA.

As set forth at length above, the MPLA governs only those claims where there is a specific medical decision as to a particular patient—here, there was *no* medical decision as to *any* patient. Plaintiff alleges that these decisions were corporate-level recordkeeping and evidentiary decisions that entailed zero medical judgment. The fact that Defendant did not offer any argument, either in its Motion to Dismiss or to this Court, as to these corporate-negligence claims demonstrates that even Defendant does not legitimately view these claims as falling outside the MPLA. Thus, Plaintiff's allegations relating to recordkeeping and spoliation do not implicate the MPLA and Defendant's Petition should be denied as to these claims.

[7] Gray modifies Boggs by clarifying that there is no bright-line distinction between negligent and intentional torts for purposes of the MPLA's application, a distinction that is not at play in this case.

c. *At the very least, Plaintiff's allegations create issues of fact as to the application of the MPLA, supporting the Circuit Court's decision to deny Defendant's Motion to Dismiss pending discovery.*

It is Plaintiff's position that the Amended Complaint, on its face, demonstrates the inapplicability of the MPLA to the allegations at issue. But at the very least, Plaintiff's allegations create issues of fact as to whether Defendant's corporate-level conduct constitutes health care under the Act. Plaintiff acknowledges that this Court has granted writs of prohibition on the application of the MPLA at the motion-to-dismiss stage and that this case's procedural posture does not automatically preclude Defendant's Petition. However, there is solid support for postponing the determination of this factually intensive question (i.e., application of the MPLA) on a motion to dismiss where there are issues of fact as to whether the conduct at issue constituted medical negligence.

First, as set forth above, this Court has repeatedly held that the resolution of whether the MPLA governs a particular cause of action is a fact-intensive issue to be resolved by the court. See Manor Care, 234 W. Va. at 74, 763 S.E.2d at 90 (holding that "this Court has twice recognized that the decision of whether the MPLA applies to certain claims presents a fact-driven query.").

Second, while not binding, Lakeland Reg'l Med. Ctr. v. Pilgrim, 107 So. 3d 505, 506 (Fla. Dist. Ct. App. 2013) is instructive.[8] In Pilgrim, the plaintiff underwent an endoscopic procedure during which a piece of a "cytology brush" broke off and became lodged in her pancreatic duct, causing injury. Pilgrim, 107 So. 3d at 506. The plaintiff filed suit, pleading ordinary negligence. Id. at 507. The defendant filed a motion to dismiss, arguing that the conduct at issue was medical

[8] The West Virginia Supreme Court has recognized that Florida cases are *instructive and persuasive* as to the application of the MPLA. See Gray, 218 W. Va. at 569, 625 S.E.2d at 331 (noting that the West Virginia Supreme Court has recognized that Florida has "a similar statute for medical malpractice claims" and that "[t]he Florida courts have addressed a number of issues arising under their statute, and their analyses are instructive and persuasive.") Plaintiff cited to Pilgrim in her brief opposing Defendant's Motion to Dismiss.

malpractice subject to Florida's medical malpractice statute, which, like the MPLA, contains a pre-suit certification requirement. The Florida court held that resolution of the issue of whether the conduct constituted ordinary negligence or medical negligence was premature at the motion-to-dismiss stage, because there were no facts on record to establish whether maintenance of the cytology brush was a medical issue. See Id. at 509 (noting that there was no evidence to establish whether failure to maintain the brush was based upon a medical judgment or evaluation).

Here, Plaintiff's Amended Complaint alleges that Defendant made nonmedical decisions that led to her injuries. At the Motion to Dismiss stage of this case, as in Pilgrim, there had been no discovery and therefore no facts on record as to the conduct at issue, except for Plaintiff's allegations. Discovery may reveal that Defendant had the same systemic problems in the management of its hospitals that led to the plaintiff's injuries in Manor Care, or that the decision to omit Sentinel Events from reports to regulatory issues was made outside the health-care context for corporate reasons (e.g., reduction of expenses related to regulatory oversight). The unresolved issues of fact provide separate support for the Circuit Court's decision.

2. The Circuit Court, having subject-matter jurisdiction, did not exceed its legitimate powers in denying Defendant's Motion to Dismiss.

In its Petition to this Court, Defendant does not address the issue of whether the Circuit Court, having subject-matter jurisdiction, exceeded its legitimate powers in denying Defendant's Motion to Dismiss. Plaintiff's position, as stated above, is that the Circuit Court has subject-matter jurisdiction over Plaintiff's negligence claims. Therefore, Plaintiff will address the five factors set forth by this Court to evaluate whether a trial court exceeded its legitimate powers, i.e.:

> (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.

Hummel, 242 W. Va. at 40, 829 S.E.2d at 40.

First, it is acknowledged that Defendant may not file an interlocutory appeal of the Circuit Court's denial of Defendant's Motion to Dismiss, any error is correctable on appeal. Thus, this factor weighs in favor of Plaintiff.

Second, Defendant is not damaged or prejudiced by the Circuit Court's denial of its Motion to Dismiss in a way that is not correctable on appeal. In Manor Care, supra, the defendant appealed the trial court's denial of its motion for judgment as a matter of law, filed after a jury verdict that was in excess of the MPLA's limits. Manor Care, 234 W.Va. at 64 – 66, 763 S.E.2d at 80 – 82. An issue on appeal was whether the MPLA was the exclusive remedy for the plaintiff's negligence claims. Id. at 64, 763 S.E.2d at 80. Thus, this factor must be resolved in Plaintiff's favor.

Third, as set forth at length above, given this Court's decisions on the applicability of the MPLA, the Circuit Court's denial of Defendant's Motion to Dismiss was not erroneous, let alone clearly erroneous. Plaintiff alleged that there were corporate-level decisions relating to the air filters, spoliation, discharge summaries, and regulatory reports that had nothing to do with Plaintiff's standard of care. This Court's prior decisions, discussed above, demonstrate that this Court recognizes claims as falling outside the MPLA where there was no exercise of clinical judgment as to a patient's medical treatment or standard of care. Thus, this factor falls to Plaintiff.

Fourth, there is no suggestion that this Court's decision to deny Defendant's Motion to Dismiss was an "oft repeated error or [one that] manifests persistent disregard for either procedural or substantive law." This fifth factor also falls to Plaintiff.

Fifth, the Circuit Court's denial of Defendant's Motion to Dismiss does not raise any new issue or resolve a matter of first impression. Rather, the Circuit Court applied well-established precedent in denying that Motion. Therefore, this factor, like the others must be resolved in Plaintiff's favor.

B. Defendant's Petition as it relates to its Motion to Dismiss for failure to state claims of negligence is an improper attempt at an interlocutory appeal of the Circuit Court's Order.

1. The Circuit Court's order denying Defendant's Motion to Dismiss for failure to state claims is interlocutory and not subject to immediate appellate review.

In its Petition, Defendant argues that the Circuit Court erred in denying its Motion to Dismiss as to Plaintiff's claims related to Defendant's recordkeeping and spoliation of evidence. (Defendant's Petition at pp. 13 – 15.) At its essence, this is an attempt to use the writ-of-prohibition process to advance an improper interlocutory appeal of the Circuit Court's nonfinal order. Unlike Defendant's arguments related to application of the MPLA, there is no subject-matter jurisdictional "hook" that would suggest interlocutory review by this Court of the Circuit Court's denial of Defendant's Motion to Dismiss.

This Court has repeatedly explained that its appellate jurisdiction extends only to final judgments. See McDaniel v. Kleiss, 198 W.Va. 282, 284, 480 S.E.2d 170, 172 (1996) (holding that "[s]ince the circuit court's order…is interlocutory and not subject to appeal, we find the petition for appeal was improvidently granted and accordingly dismiss the same for lack of appellate jurisdiction."). This Court's jurisdictional authority to address the ruling of a circuit court

was set out in syllabus point 3 of James M.B. v. Carolyn M, 193 W.Va. 289, 456 S.E.2d 16 (1995), as follows:

> Under W. Va.Code, 58-5-1, appeals only may be taken from final decisions of a circuit court. A case is final only when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.

It has been held that "[t]he required finality is a statutory mandate, not a rule of discretion." Province v. Province, 196 W.Va. 473, 478, 473 S.E.2d 894, 899 (1996). "This rule, commonly referred to as the 'rule of finality,' is designed to prohibit piecemeal appellate review of trial court decisions which do not terminate the litigation[.]" James M.B., 193 W.Va. at 292, 456 S.E.2d at 19. When there is no finality of the judgment, this Court generally does not have authority to review the merits of a case. See Coleman v. Sopher, 194 W.Va. 90, 94, 459 S.E.2d 367, 371 (1995) (holding that "[t]he usual prerequisite for our appellate jurisdiction is a final judgment, final in respect that it ends the case.").

In this case, the Circuit Court's order denying Petitioner's Motion to Dismiss for failure to state a claim was not a final judgment disposing of the case. Unlike the issue of subject-matter jurisdiction under the MPLA, this portion of the Circuit Court's order remains interlocutory and is not subject to review by this Court.

This Court has repeatedly held that a defendant cannot use the writ-of-prohibition process as a vehicle to obtain otherwise disallowed interlocutory review. See State ex rel. Arrow Concrete Co. v. Hill, 194 W. Va. 239, 245, 460 S.E.2d 54, 60 (1995) (holding that "the denial of a motion for failure to state a claim upon which relief can be granted made pursuant to West Virginia Rule of Civil Procedure 12(b)(6) is interlocutory and is, therefore, not immediately appealable. Thus, the defendants may not indirectly raise this issue by seeking a writ of prohibition in order to

preclude the trial judge from compelling discovery."). See also State ex rel. Gallagher Bassett Servs., Inc. v. Webster, 242 W. Va. 88, 102, 829 S.E.2d 290, 304 (2019) (denying the defendant's petition for writ of prohibition on the grounds that it is "essentially an [interlocutory] appeal of the circuit court's denial of its Rule 12(b)(6) motion, dressed up as a petition for a writ of prohibition.").

Defendant is flouting this Court's clear rulings on this matter by seeking appellate review of an interlocutory order. Defendant's Petition should be denied as it relates to its Motion to Dismiss for failure to state claims, as this portion of the Circuit Court's Order remains interlocutory. As in Hill, Defendant is improperly attempting to use the writ-of-prohibition process to preclude the Circuit Court from ordering discovery. This Court should deny Defendant's Petition on these grounds.

2. The Circuit Court properly denied Defendant's Motion to Dismiss because Plaintiff alleges the elements of corporate-negligence claims.

To the extent that this Court entertains Defendant's improper interlocutory appeal, Plaintiff alleges the elements of the claims in question and Defendant's Petition should be denied for this independent reason. Generally, "[i]n 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." Syl Pt. 3, Wheeling Park Comm'n v. Dattoli, 237 W. Va. 275, 787 S.E.2d 546 (2016). As set forth below, Plaintiff's allegations satisfy this standard as to her amended causes of action for corporate negligence.

a. *Defendant had a duty to exercise reasonable care in rendering hospital services and breached that duty in maintaining corporate policies of negligent recordkeeping, thereby precluding regulatory oversight and impacting quality of care hospital-wide.*

Defendant had a duty to Plaintiff to exercise reasonable care in rendering hospital services to its patients.[9] See Utter v. United Hosp. Ctr., Inc., 160 W. Va. 703, 709, 236 S.E.2d 213, 216 (1977) (holding that "[i]t is now a well established principle of law in this jurisdiction that…'[a] hospital owes to one who is a patient therein a duty to exercise reasonable care in rendering hospital services to the patient,…'"). Plaintiff alleges that Defendant breached that duty in maintaining a corporate policy of excluding reference to iatrogenic air embolism in discharge summaries and by making corporate-level decisions to withhold reporting of sentinel events to regulatory agencies, thereby precluding regulatory oversight and impacting quality of care hospital-wide. (See Petitioner's App., pp. 75 – 76.) Where corporate non-medical decisions impact facility-wide hospital services, a corporate negligence claim may lie against the corporate entity that made those decisions. See Minnich, 238 W. Va. at 538, 796 S.E.2d at 647 (citing Manor Care, supra) (holding that conduct unrelated to providing of medical care, such as "negligence-based claims predicated on corporate budgeting," is not subject to the MPLA.) Here, Plaintiff alleges the existence of such a corporate decision that impacted Defendant's services, hospital-wide. Therefore, no writ of prohibition should issue as to these claims.

[9] The Petition for Writ of Prohibition mischaracterizes the nature of the alleged duty at issue in Plaintiff's corporate-negligence claim relating to the discharge summaries. Plaintiff does not, contrary to Defendant's argument, allege the existence of a duty that would require "medical providers…to engage in speculation when the cause of an injury was unclear…." (See Petition, p. 12.) Rather, the duty is imposed by law, and requires Defendant to exercise reasonable care in rendering hospital services. See Utter, supra. Plaintiff alleges that Defendant had a duty to record medical events, such as iatrogenic air embolisms, in such a manner as to ensure that hospital services are rendered appropriately—to ensure that any regulatory oversight is triggered and to ensure proper hospital-wide responses to these medical events. (See Petitioner's App., p. 75.)

Further, Plaintiff alleges causation and harm as to these claims, i.e., that Defendant's "corporate policy of not requiring a discharge summary to include the iatrogenic air embolism in the patient's diagnosis is negligent," which ultimately affects "the quality of patient care." (See Petitioner's App., p. 75.) Similarly, Plaintiff alleges that "[t]he lack of reporting to regulatory agencies reduces the likelihood of regulatory investigations, remedial requirements, and has a direct effect on the quality of care." (See Id., p. 76.) Thus, Plaintiff alleges causation and harm.[10] As discussed above, the present circumstances are similar to those in Manor Care, supra, where corporate negligence was found where corporate-level decisions impacted facility-wide quality of care. See Manor Care,234 W. Va. at 71, 763 S.E.2d at 87 (noting that the plaintiff's corporate-negligence claim was based upon "non-healthcare decisions, such as budgetary constraints, lack of staff, and poor management of the facility, [which] affected all of the residents.").

It is Plaintiff's contention that the alleged corporate policies at issue impacted hospital-wide quality of care by preventing the kind of oversight that might have prevented this tragic event from taking place. Defendant had a duty to exercise reasonable care in the delivery of hospital services to its patients and breached that duty in making corporate decisions that impacted quality of care. At this stage in the pleadings, no writ of prohibition should issue and discovery should be permitted on this issue to uncover evidence as to how Defendant's corporate policy impacted the quality of care for all patients.[11]

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[10] Plaintiff alleges as to each of her corporate-negligence claims that "[a]s a direct and proximate result of these breaches, [A.F.]...suffered resultant [harm]." (See Petitioner's App., p. 24.) Plaintiff's allegations are to be taken as true at this point in the litigation.

[11] Defendant argues that "[o]ne cannot infer that affirmative reporting of any other hypothetical sentinel events would have prevented the air embolism," and that "such a leap would require abject speculation that cannot support a finding of proximate cause." (See Petition, p. 15.) Defendant ignores that this case is at the pleading stage, where Plaintiff's allegations are to be taken as true and "[a] court reviewing the sufficiency of a complaint should view the motion to dismiss with disfavor, should presume all of the plaintiff's factual allegations are true, and should construe those facts, and inferences arising from those

b. Plaintiff's spoliation claim should be permitted to advance to determine whether the spoliation at issue was negligent or intentional.

Plaintiff alleges that Defendant "committed spoliation of the peripheral line tubing that was used at the time of the infusion which resulted in the air embolism." (See Petitioner's App., p. 75.) This Court should deny Defendant's Petition so that Plaintiff may take discovery on whether the spoliation at issue was intentional or negligent.

Plaintiff recognizes that while a negligent-spoliation claim cannot be advance against a party to the litigation under West Virginia law, a claim for intentional spoliation may lie against a party to the case or a third party. See Hannah v. Heeter, 213 W. Va. 704, 715, 584 S.E.2d 560, 571 (2003) (holding that "West Virginia recognizes intentional spoliation of evidence as a stand-alone tort when done by either a party to a civil action or a third party."). At this stage in the pleadings, without any discovery, Plaintiff's claim for spoliation should be allowed to proceed to ascertain whether there is evidence that the spoliation was intentional. In the event the corporate-level decision to discard the peripheral line tubing was intentional, Plaintiff will amend her Complaint. Thus, Defendant's Petition as to Plaintiff's spoliation claim should be denied.

III. RESPONSE TO DEFENDANT'S PETITION FILED AS TO THE CIRCUIT COURT'S DENIAL OF DEFENDANT'S DECLARATORY JUDGMENT ACTION

Plaintiff's original Complaint sets forth a second count (Count II—Corporate Negligence), which states claims against Defendant for its own corporate conduct and decisions, separate from the individualized health care provided to Plaintiff. Plaintiff alleges that Defendant committed corporate negligence in making overarching corporate decisions that affected hiring, staffing, and training and which led to a lack of proper protocols and procedures. (See Petitioner's App., pp. 23 – 24.) Plaintiff alleges that the corporate conduct at issue did not involve medical judgment

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facts, in the light most favorable to the plaintiff. Mountaineer Fire & Rescue Equip., LLC v. City Nat'l Bank of W. Virginia, 2020 WL 7223357, at *7 (W. Va. 2020).

and skill as related to Plaintiff's medical condition, but rather was corporate-level conduct outside of her care. (Note that Defendant's Petition for Declaratory Judgment does *not* address the allegations set forth in Plaintiff's Amended Complaint.)

The Circuit Court denied Defendant's Petition for Declaratory Judgment and Defendant now seeks an advisory opinion from this Court declaring that each of the above claims are subject to the MPLA. (See Defendant's Petition, p. 20.) Defendant, in its Petition for Writ of Prohibition does not argue that the Circuit Court lacked jurisdiction in declining to issue the requested advisory opinion. While Defendant does state, in conclusory fashion, that the Circuit Court exceeded its legitimate powers, Defendant does not present any analysis to support that offhand conclusion, let alone analysis of the relevant factors. Rather, Defendant seeks an advisory opinion from this Court after not getting the desired advisory opinion from the Circuit Court. For reasons that follow, Defendant's Petition should be denied.

A. Defendant's Petition, as it relates to the Circuit Court's decision to deny Defendant's Petition for Declaratory Judgment, improperly seeks an advisory opinion from this Court.

Defendant's Petition for Writ of Prohibition should be denied as to the Circuit Court's denial of Defendant's Petition for Declaratory Judgment because this Court has made it clear that ""[t]he writ of prohibition cannot be invoked to secure from this Court an advisory opinion." See State ex. rel. Perdue v. McCuskey, 242 W. Va. 474, 479, 836 S.E.2d 441, 446 (2019); see also State ex rel. Morrisey v. W. Virginia Off. of Disciplinary Couns., 234 W. Va. 238, 245, 764 S.E.2d 769, 776 (2014) (holding that "[t]he writ of prohibition is not designed to accord relief to a person who merely receives a requested advisory opinion with which he or she disagrees.").

Defendant filed its Petition for Writ of Prohibition as to Plaintiff's original Complaint only, seeking an advisory opinion from the Circuit Court as to whether Plaintiff's claims, pled as

corporate negligence claims, were in fact subject to the MPLA. The Circuit Court denied Defendant's Petition for Declaratory Judgment, refusing to issue the requested declaration pending the development of the record. Now, Defendant blatantly seeks to have this Court issue an advisory opinion, in violation of established precedent holding that the writ of prohibition cannot be used in that manner. See McCuskey, supra. In fact, Defendant goes so far as to include in its Petition's Conclusion a request that this Court "declar[e] that the MPLA applies to all of Plaintiffs' causes of action, even those characterized as 'corporate negligence' by Plaintiffs." (Defendant's Petition, p. 20.) To grant the requested relief would be to go against established West Virginia Supreme Court precedent regarding advisory opinions from this Court.

Defendant does not have the same subject-matter jurisdictional hook that allows Defendant to invoke this Court's original jurisdiction (under a writ of prohibition) as to the Circuit Court's denial of Defendant's Motion to Dismiss, because at issue is the advisory opinion that Defendant sought from the Circuit Court. Defendant improperly utilizes the writ-of-prohibition process to have this Court provide an advisory opinion. See McCuskey, supra. Accordingly, Defendant's Petition should be denied.

B. Defendant's Petition, as it relates to the Circuit Court's decision to deny Defendant's Petition for Declaratory Judgment, violates the rule of finality.

Defendant's Petition for Writ of Prohibition, as it relates to the Circuit Court's denial of Defendant's Petition for Declaratory Judgment, violates the rule of finality by seeking an appeal of an interlocutory order. See syllabus point 3 of James M.B., supra (holding that "[u]nder W. Va. Code, 58–5–1, appeals only may be taken from final decisions of a circuit court. A case is final only when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined."). As stated above, "[t]he required finality is a statutory mandate, not a rule of discretion." Province, 196 W.Va. at

478, 473 S.E.2d at 899; see Coleman, 194 W.Va. at 94, 459 S.E.2d at 371 (holding that "prerequisite for our appellate jurisdiction is a final judgment, final in respect that it ends the case.").

Defendant's Petition seeks to have this Court issue an advisory opinion that violates the rule of finality, in that it does not terminate the litigation between the Parties. Defendant's Petition is merely an attempt to appeal an interlocutory order, and again, to grant this Petition would be to contradict West Virginia Supreme Court precedent.

C. To the extent that this Court reaches (by whatever route) an analysis of the issue of whether the MPLA applies to the corporate negligence claims set forth in Plaintiff's original Complaint, there are issues of fact that preclude the issuance of an advisory opinion.

The Circuit Court properly denied Defendant's Petition for Declaratory Judgment because issues of fact precluded a determination of the legal question before the lower court at that time.

Before a court can grant declaratory relief pursuant to the Uniform Declaratory Judgment Act, "there must be an actual, existing controversy" between adverse parties. Hustead v. Ashland Oil, Inc., 475 S.E.2d 55, 61, 475 S.E.2d 55 (W.Va.1996). In determining the sufficiency of a justiciable controversy, West Virginia courts consider four factors: (1) whether the claim involves uncertain and contingent events that may not occur at all; (2) whether the claim is dependent upon the facts; (3) whether there is adverseness among the parties; and (4) whether the sought after declaration would be of practical assistance in setting the underlying controversy to rest. Syl. Pt. 4, Hustead, 475 S.E.2d 55. Notably, the existence of a justiciable controversy "depends upon the facts existing at the time the proceeding is commenced" and may not rest on any "future, contingent event[s]" or abstract questions. See Town of South Charleston v. Bd. Of Ed. Of Kanawha Cnty., 132 W. Va. 77, 50 S.E.2d 880, 883 (1948); see also Farley v. Graney, 146 W. Va. 22, 119 S.E.2d 833, 838 (1960).

A review of the four Hustead factors demonstrates that the Circuit Court properly denied Defendant's Petition for Declaratory Judgment.

First, Plaintiff acknowledges that the underlying facts of this case have already occurred. However, as discussed below, all the facts necessary for the Court's resolution of whether Plaintiff's corporate-negligence claims are subject to the MPLA are not yet on the record in this case. Therefore, this first Hustead factor must be resolved in Plaintiff's favor, because all the relevant facts were not before the Circuit Court. Similarly, the second Hustead factor precludes declaratory relief in this case, because a resolution of whether Plaintiff's corporate-negligence claims address conduct that constitutes "health care" under the MPLA is a "fact-driven question," Blankenship, supra, and there has been no discovery taken in this case. Thus, the facts upon which the determination depends as to the MPLA's applicability were not yet before the Circuit Court, and therefore declaratory relief is improper. See, e.g., Farley, supra (holding that the existence of a justiciable controversy may not depend on facts not available at the time the proceeding is commenced).

As set forth above, the MPLA governs claims where the conduct at issue involves a medical assessment and decision, or lack thereof, as to a patient's condition. See, e.g., Minnich, 238 W. Va. 533, 538, 796 S.E.2d 642, 647 (2017) (holding that the conduct underlying the plaintiff's claim constituted "health care" under the MPLA, because it involved an individualized assessment and directive relating to the patient at issue). Here, Plaintiff's corporate-negligence claims center on corporate-level conduct that had nothing to do with Plaintiff's condition or plan of care. As alleged, Plaintiff's claims do not fall within the MPLA's definition of "health care."

Further, the West Virginia Supreme Court has recognized that where the conduct at issue involves corporate-level decisions that impact a facility's systemic delivery of services, such

claims do not necessarily fall within the MPLA. See Manor Care, 234 W. Va. at 74, 763 S.E.2d at 90 (holding that "[c]laims related to business decisions, such as proper budgeting and staffing...simply do not fall within that [MPLA] statutory scheme.").

Plaintiff acknowledges that in 2015, the MPLA's definition of "health care" was amended to include "staffing." However, Manor Care continues to be cited for the principle that claims based upon corporate budgetary decisions unrelated to health care fall outside the MPLA. See Minnich, 238 W. Va. at 538, 796 S.E.2d at 647 (holding that conduct unrelated to providing of medical care, such as "negligence-based claims predicated on corporate budgeting," is not subject to the MPLA.). Minnich was decided in 2017, two years after the effective date of the amendments, and yet still cites to Manor Care's principle as valid.

Moreover, Plaintiff's allegations do not focus solely on "staffing," and include conduct that led to a lack proper protocols and procedures. (See Petitioner's App., p. 23.) Under Manor Care, a claim that centers on corporate conduct that prevents the facility from functioning properly is not "health care" under the MPLA. Given that resolution of whether the MPLA applies to Defendant's conduct is a fact-intensive question, and that Plaintiff's allegations fall outside the MPLA's definition of "health care" as per Minnich and Manor Care, supra, declaratory judgment is improper at this stage in the proceeding.

As to the third Hustead factor Plaintiff concedes that there is "adverseness" among the parties. However, the fourth Hustead factor further precludes declaratory relief in this case. Defendant's use of the Uniform Declaratory Judgment Act is improper at this point because a determination of the Petition would not resolve this case. See W. Va. Code § 55-13-6 (providing that "[t]he court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy

giving rise to the proceeding."). Defendant's Petition for Declaratory Judgment makes it clear that it is seeking resolution of this issue for the sole purpose of giving it leverage in negotiating a settlement, and not for the purpose of resolving the controversy giving rise to this proceeding. (See Petitioner's App., p. 45, stating that "Plaintiff's valuation of the damages in this matter depends heavily on a faulty interpretation of the law....")

Defendant cites to Mongold v. Mayle, 192 W.Va. 353, 452 S.E.2d 444 (1994) for the principle that its declaratory-judgment action is the proper procedure for the adjudication as to whether the MPLA applies to Plaintiff's corporate-negligence claims. (See Petition, p. 15.) Defendant ignores that the declaratory judgment at issue in Mongold resolved the entire dispute, i.e., whether the petitioner had the legal right to take an elective share of the decedent's estate under the probate code. Mongold, 192 W. Va. at 358, 452 S.E.2d at 449. Once that determination was made, the entire dispute regarding the inheritance was resolved. Id. Here, resolving Defendant's Petition would have no effect on the underlying dispute, except to assist Defendant in the "valuation of damages" for settlement purposes. (See Petitioner's App., p. 45.) This is not the reason behind the UDJA, and therefore the Circuit Court properly denied Defendant's Petition for Declaratory Judgment.

D. The Circuit Court did not exceed its legitimate powers in denying Defendant's Petition for Declaratory Judgment.

Defendant offers a brief conclusory statement that this Court exceeded its legitimate powers but does not analyze the relevant five factors under Hustead. Plaintiff argues that those factors should be resolved in favor of Plaintiff, for largely the same reasons as those set forth above (relative to the Circuit Court's denial of Defendant's Motion to Dismiss). Therefore, Defendant's Petition should be dismissed because Defendant did not argue, let alone establish, that the Circuit Court exceeded its legitimate powers.

CONCLUSION

For the reasons set forth above, Respondent, A.F., a minor, by and through her next friends, Sarah Fox and Daniel Fox, individually, respectfully requests that this Honorable Court deny Petitioner's Petition for Writ of Prohibition, in its entirety and with prejudice.

Respectfully submitted,

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VERIFICATION

I, undersigned counsel for Respondent, do hereby certify that the facts and allegations contained in the Response in Opposition to Petition for Writ of Prohibition and Appendix are true and correct to the best of my belief and knowledge.

Dated: May 12, 2021 By: _____

Alan H. Perer, Esquire
(Attorney for Respondent)

CERTIFICATE OF SERVICE

I, undersigned counsel for Respondent, do hereby certify that a true and correct copy of the foregoing **RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION** and **APPENDIX IN SUPPORT OF RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION** was served via email, on this 12th day of May, 2021, upon all counsel of record.

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