BEFORE THE
WEST VIRGINIA INTERMEDIATE COURT OF APPEALS

NICHOLAS A. GHAPHERY, D.O.,	:	
As Personal Representative of	:	
the Estate of Austin Ghaphery,	:	**Intermediate Court No. 22-ICA-150**
Plaintiff Below, Petitioner,	:	(Case No. CC-35-2019-C-182)
	:	
v.	:	
	:	
WHEELING TREATMENT CENTER,	:	
LLC and JOHN SCHULTZ, M.D.,	:	
Defendants Below, Respondents	:	

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

1. The Circuit Court erred in finding that Wheeling Treatment Center staff did not owe a duty to conduct Austin Ghaphery's assessment for purposes of determining his eligibility for the Medication Assisted Treatment (MAT) Program in accordance with the standard of care applicable to healthcare providers working in the field of addiction medicine when determining whether a person presenting for treatment services meets the criteria for admission.

2. The Circuit Court erred in finding that Dr. Schultz did not owe a duty to conduct Austin Ghaphery's assessment for purposes of determining his eligibility for the MAT Program in accordance with the standard of care applicable to physicians working in the field of addiction medicine when determining whether a person presenting for treatment services meets the criteria for admission.

3. The Circuit Court erred in finding that Wheeling Treatment Center (WTC) did not owe a duty to conduct Austin Ghaphery's Suicide Risk Assessment in accordance with the standards of care applicable to healthcare providers working in the field of addiction medicine when determining whether a person presenting for treatment services is at an enhanced risk for suicide.

4. The Circuit Court erred in finding that Dr. Schultz did not owe a duty to conduct Austin Ghaphery's Suicide Risk Assessment in accordance with the standards of care applicable to a physician working in the field of addiction medicine when determining whether a person presenting for treatment services is at an enhanced risk for suicide

5. The Circuit Court erred in finding that because Austin Ghaphery was ultimately denied admission to WTC's MAT Program and released from the facility, no healthcare provider-patient relationship existed between Respondents and Austin Ghaphery sufficient to give rise to a duty of care, the breach of which would justify an action under the MPLA.

STATEMENT OF THE CASE

Prior to filing this action Petitioner served a Notice of Claim upon each of the Respondents together with Certificates of Merit in accordance with the MPLA's pre-suit requirements provided for at W.Va. Code §55-7B-6(b). Thereafter the Complaint was filed stating a cause of action entitled Action for Medical Professional Liability Resulting in Wrongful Death (JA 1).

The evidence adduced during the discovery phase of this action demonstrates that in the event Petitioner had been allowed to present his case to a jury, he was prepared to establish the following facts at trial : (1) Austin finished college and was awarded a B.A. degree from West Liberty University during the summer of 2017; (2) on July 13, 2017 Austin's girlfriend called 911 from their apartment after Austin was not making sense with his words, had become non-responsive and his lips were turning blue, she advised the responding patrolman "this is the third time this has happened since November," that Austin's Mother went to Austin's apartment to help out, and that the patrolman and the EMT believed Austin was under the influence of opiate medication (JA 397-98, Vol. 1); (3) an initial appointment was made with Dr. Schmitt, Austin's primary care physician, who saw Austin five days after the 911 incident based on Mrs. Ghaphery's concern about Austin's drug use, but Austin denied having a drug problem (JA 401-

402, Vol. 1); (4) in late September 2017, Austin finally admitted to his father (Dr. Ghaphery) that he did have a drug problem, asked for help with his drug problem, and Dr. Ghaphery called WTC to set up an appointment for his son to be evaluated (JA 405-410, Vol. 1); (5) on September 28, 2017 Austin appeared for his appointment at WTC for help with his drug problem, and at that time, counselor Coen-Pickens determined Austin did not meet the criteria for treatment on the basis that Austin's urine drug screen was not positive for opiates, and that Austin was not demonstrating signs of withdrawal (JA 413, Vol. 1); (6) the urine drug screen given to Austin was not capable of detecting the presence of fentanyl (JA 421-423, 426-428, Vol. 1) such that Austin could have used fentanyl prior to his visit to WTC, not tested positive for opiates, not shown symptoms of withdrawal, and still had an opioid use disorder; (7) after determining that Austin was not an appropriate candidate for admission based only on the absence of a positive urine test for opiates and the absence of a visible display of withdrawal symptoms, Ms. Coen-Pickens made no further pre-admission assessment of Austin for appropriateness of admission to the MAT Program despite the facility's own Patient Screening Procedure which expressly required staff to complete a Patient Screening Form designed to elicit information necessary to appropriately conduct a pre-admission assessment (JA 435-439, Vol. 1); (8) Ms. Coen-Pickens also failed to comply with West Virginia state regulations requiring the performance of a pre-admission initial assessment to determine admission eligibility by using accepted medical criteria (JA 441, Vol. 1) including the failure to make any determination of Austin's use of substances of abuse, current substance use disorder, length of substance use disorder, readiness to participate in treatment (JA 443, 446-447, 449-450, 453, 458, Vol. 1); (9) following Austin's Pre-Admission Initial Assessment and the Respondents' determination that Austin was not eligible for the MAT Program he was released from WTC (JA 461, Vol. 1); (10) 36 days after WTC Staff and Dr. Schultz determined Austin was not eligible for admission to the

MAT Program Austin was found dead lying on the hallway floor outside his bedroom in his father's home. His death was determined on autopsy to have resulted from a drug overdose due to fentanyl, nor-fentanyl, heroin, amphetamines, and cocaine intoxication (JA 167, Vol. 1).

Based on his consideration of the foregoing facts, Petitioner's Expert, Dr. Santoro (an addiction medicine specialist; JA 19, 46, Vol. 1), testified at deposition that Ms. Coen-Pickens and Dr. Schultz breached the applicable standard of care by failing to properly conduct Austin's pre-admission initial assessment to determine whether he met the criteria for admission to the MAT Program. (JA 426-430, Vol. 1).

The Respondents asserted below they were entitled to summary judgment (notwithstanding their alleged failure to meet the standard of care in conducting Austin's pre-admission initial assessment) on the ground that because Austin was not ultimately admitted to the MAT Program, no healthcare provider-patient relationship was formed such as to give rise to a duty the breach of which would justify an action under the MPLA. (JA 270; JA 488, Vol. 1; JA, 491, JA 493, Vol. 2). The Respondents' "no duty" argument is premised on their contention that "no physician-patient relationship was formed and at no time did the Defendants, either individually or collectively, agree to provide any medical service to Austin Ghaphery". (JA 493, Vol. 2)

In addition to Petitioner's action arising out of the Respondents' alleged failure to meet the required standard of care in conducting Austin's pre-admission initial assessment, Petitioner is also pursuing a theory of liability premised upon Respondents' alleged failure to meet the requisite standard of care in assessing Austin's suicidality. Here, Petitioner contended below that in the event an assessment of Austin's suicidality been undertaken and conducted in accordance with the applicable standard of care, arrangements would have been made for Austin to be admitted to a psychiatric facility where his depression, suicidal ideation, and substance use

disorder could have been appropriately evaluated and treated; and such intervention would, more probably than not, have prevented Austin's death by drug overdose 36 days after his visit to WTC. Respondents sought summary judgment on this theory of liability based upon the argument that because no healthcare provider-patient relationship existed between Austin and Respondents the Circuit Court may determine as a matter of law that Respondents were under no duty to Austin at the time they claim to have conducted his suicide risk assessment. In granting summary judgment on this issue the Circuit Court adopted Respondents' legal position regarding the absence of a healthcare provider-patient relationship between Austin and WTC/Dr. Schultz. (JA 886-888 at 887, Vol. 2).

Questions related to the extent and nature of Austin's suicidality, and what, if anything, was done by Respondents for purposes of assessing such suicidality are the subject of conflicting testimony such as to clearly present genuine issues of material fact. Further, although, Austin's patient record is completely devoid of any documentation supporting the conclusion that any suicide risk assessment was conducted during his visit to the WTC, both Ms. Coen-Pickens and Dr. Schultz claimed to have performed some assessment of Austin's suicidality (JA 418, 479, Vol. 1).

Evidence related to the legal question of whether Respondents were under a duty to assess Austin's suicidality in a manner consistent with the standard of care includes the case note written by Ms. Coen-Pickens after Austin's visit which states that "concern was noted that Pt was having suicidal ideations and had a plan to follow through with utilizing a gun"; that "Pt reported being depressed"; that a discussion was had with the clinical director and medical director about the patient being "in need of a further assessment elsewhere"; and that calls were made to the "Patient's emergency contact to inform the clinic was requesting further evaluation" but, that no one was able to be contacted (see JA 460, Vol. 1). Deposition testimony also shows

that during his visit to WTC Austin placed a telephone call to his father stating "Dad, they want to admit me to Northwood. I saw the counselor, but I have to go see the doctor next."

Petitioner's expert psychiatrist/addiction specialist, Dr. Goldberg (JA 31, Vol. 1), testified at deposition that once the counselor reported her concern about Austin's suicidality to Dr. Schultz, the standard of care in the field of addiction medicine required Dr. Schultz to conduct a suicide risk assessment; and that when a suicide risk assessment supports the conclusion that a person who presents to a drug treatment is at an elevated risk for harm, the standard of care requires the physician to make a referral to a psychiatric facility for further assessment (JA 465, Vol. 1). Petitioner was also prepared to offer proof at trial that in the event an appropriate suicide risk assessment had been conducted, such assessment would have demonstrated many factors which placed Austin at an elevated risk for harm. These risk factors include that: (1) Austin admitted he was having suicidal ideations; (2) Austin admitted to having a lethal plan to use a gun; (3) Austin appeared at WTC for help with a drug use problem; (4) Austin had been diagnosed with a psychiatric disorder; and (5) the presence of multiple risk factors combined in a single person placed Austin at an enhanced for harm (JA 461, 465-467, Vol. 1). While the Respondents argued below that they were under no duty to take any steps to arrange for Austin's admission to a psychiatric facility, the expert opinion evidence was that given the many risk factors present at the time of Austin's visit to WTC, an appropriate assessment of Austin's suicidality was required by the standard of care; and such assessment, if properly conducted, would have resulted in the determination that Austin's elevated risk for harm required a referral to a psychiatric facility where his suicidal ideation with a plan, substance use disorder, and depression could be appropriately evaluated and treated (JA 468-469, Vol. 1).[1]

[1] Defendants mischaracterize Petitioner's evidence as to the required standard of care as mandating involuntary commitment. The testimony, however, was that the required referral to a psychiatric facility certainly included a

Although both the WTC counselor and Dr. Schultz acknowledged that their concerns about Austin resulted in their decision to undertake a suicide risk assessment, in opposition to Petitioner's MPLA claim premised upon the alleged failure to conduct such suicide risk assessment in a manner consistent with the applicable standard of care, Respondents argued that "the Defendants had no duty to seek commitment of Austin Ghaphery and the evidence shows he would not have qualified if he they had...on the basis that ...he was not having a "psychiatric emergency", was not mentally ill, and was not deemed likely to commit harm to himself. (JA 493, Vol. 2).

By Order of July 27, 2021 the Court not only denied Respondents' Motion for Summary Judgment due to the existence of genuine issues of material fact, but also expressly found that "some of Defendants' allegations and conclusions are inconsistent with the records in the Court file and with West Virginia civil law." (JA 622-623, Vol. 2).

Following the Circuit Court's denial of the Respondents' Amended Motion for Summary Judgment, Petitioner moved the Circuit Court for a pre-trial ruling that Austin was a "patient" for purposes of bringing the instant action under the MPLA (JA 632-637, Vol. 2). Respondents opposed the motion and reiterated their contention that "no physician-patient relationship was formed and at no time did the Defendants either individually or collectively, agree to provide *any* medical service(s) to Austin Ghaphery." (JA 699-704, Vol. 2). Petitioner replied by asserting that Austin must be found to be a "patient" of the Respondents because he was a "person" who received "healthcare" from a "healthcare provider"; and that once a healthcare provider engages in affirmative conduct such as to constitute "healthcare", he/she comes under duty to provide such "healthcare" in accordance with the accepted standard of care as provided for under W.Va. Code §55-7B-2(m); and 55-7B-2(e)(1) and (2) (JA 717-722, Vol. 2). Notwithstanding the

voluntary admission, and that neither Austin nor his Father resisted such admission after WTC staff told Austin that he needed to be evaluated at Northwood

extensive briefing on Petitioner's request for a pre-trial ruling that Austin was a "patient" for purposes of bringing the instant action under the MPLA the Circuit Court never ruled on that motion.

Two weeks before trial, however, Respondents filed a "Bench Brief" whereby they requested the Circuit Court to find that they owed no duty to Austin sufficient to support a claim under the MPLA (JA 823-828, Vol. 2). Petitioner filed a responsive memorandum reminding the Circuit Court that the Respondents "no duty" defense had already been argued in their amended motion for summary judgment, considered, and denied (JA 263, Vol. 1). Petitioner also advised the Circuit Court that the issues pertaining to Respondents' "no duty" defense had previously been briefed in conjunction with Petitioner's Motion for Pre-trial Ruling that Austin Ghaphery was a "Patient" for Purposes of Bringing the Instant Action Under the MPLA (JA 263, Vol. 1; JA 632, JA 699, JA 717, Vol. 2) and also discussed multiple other pre-trial filings made in connection with the admissibility of exhibits and the appropriateness of proposed jury instructions for use in the case (JA 833-839, Vol. 2).

By Order of Court dated September 21, 2022 (5days before trial) the Circuit Court entered its Revised Order granting Respondents' motion for summary judgment (JA 886-888, Vol. 2). The essence of the Circuit Court's ruling is its conclusion that no patient-healthcare provider relationship was established between Austin and Respondents upon which liability can be based. (*Id.*) In reaching its decision the Circuit Court stated that:

> "the critical fact is that Austin Ghaphery was denied admission to the Wheeling Treatment Program. Therefore, absent a healthcare provider relationship, there was no duty or law requiring that Wheeling Treatment Center had to accept Austin, either voluntarily or involuntarily, to its inpatient psychiatric treatment facility. When the Wheeling Treatment Center denied the admission to the facility, it had no reason or legal duty to attempt to commit Austin voluntarily or involuntarily. Thus the Defendants in this case had no duty to attempt to prevent Austin's death by opioid overdose 21 days after he was denied admission to the program." (*Id.* at JA 887).

The Circuit Court's Order uses verbatim language adopted from Respondents' "Bench Brief"; but the incongruity with Respondents' admitted evaluation of Austin (who the Circuit Court acknowledged was technically a patient while he was there for the pre-admission assessment), and the Court's finding that no healthcare provider-patient relationship was established is never explained.

Following the Circuit Court's adoption of Respondents' "no duty" defense, and entry of the Revised Order granting Respondents' motion for summary judgment, Petitioner filed the instant appeal.

SUMMARY OF ARGUMENT

1. "Healthcare" includes any "medical diagnosis or act, service or treatment performed or which should have been performed by any healthcare provider to a patient during a patient's medical care." W.Va. Code §55-7B-2(e)(1).
2. A "patient" is a person who received "healthcare" from a "healthcare provider" under an express or implied contract. W.Va. Code §55-7B-2(m).
3. The pre-admission initial assessment of Austin conducted by WTC staff and Dr. Schultz was such as to constitute "healthcare" under the terms of the MPLA. W.Va. Code §55-7B-2(e)(1) and (2).
4. When a healthcare provider engages in affirmative conduct such as to constitute "healthcare", such healthcare provider comes under a duty to provide such "healthcare" in accordance with the accepted standard of care provided for under the MPLA.

5. At the time Austin received his pre-admission initial assessment by WTC staff and Dr. Schultz he was a "patient" receiving "healthcare" from a "healthcare provider" under an express or implied contract. W.Va. Code §55-7B-2(m).

6. At the time WTC staff and Dr. Schultz provided healthcare to Austin by conducting a pre-admission initial assessment to determine whether he met the criteria for admission to the MAT Program, they were under a duty to conduct such pre-admission initial assessment in accordance with the accepted standard of care provided for under the MPLA.

7. The Circuit Court's finding that the Respondents did not come under a duty to conduct Austin's pre-admission initial assessment to determine whether he met the criteria for admission the MAT Program in accordance with the standard of care provided for under the MPLA because Austin was ultimately not admitted to the MAT Program is erroneous.

8. At the time WTC staff and Dr. Schultz conducted Austin's suicide risk assessment he was a "patient" receiving "healthcare" from a "healthcare provider" under an express or implied contract. W.Va. Code §55-7B-2(m).

9. At the time WTC staff and Dr. Schultz provided healthcare to Austin by conducting any suicide risk assessment to determine whether he was at enhanced risk for self-harm, they were under a duty to conduct such suicide risk assessment in accordance with the accepted standard of care provided for under the MPLA.

10. The Circuit Court's finding that the Respondents did not come under a duty to conduct Austin's suicide risk assessment in accordance with the standard of care provided for under the MPLA is erroneous.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

While Petitioner, Nicholas A. Ghaphery, D.O. as Personal Representative of the Estate of Austin Ghaphery, (and father of the decedent), believes that the facts and legal arguments for his instant appeal are adequately presented in his brief; he nonetheless believes the decisional process would be significantly aided by oral argument, given that the issue raised in this appeal fundamentally impacts the public policy of the State of West Virginia in battling the Opioid Epidemic adversely affecting many West Virginia citizens and families, for reasons Petitioner believes will be apparent to the Court, upon review.

ARGUMENT

I. Standard of Review

In West Virginia "[a] Circuit Court's entry of summary judgment is reviewed in *denovo*." Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Moreover "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of law." Syl. Pt. 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (163); Syl. Pt. 1, *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 459 S.E.2d 329 (1995).

II. Respondents' owed a duty to conduct Austin's pre-admission initial assessment in accordance with the standard of care provided for under the MPLA

It is important to recognize that this is not a case where WTC staff met Austin at the door and sent him home before providing any healthcare services. Instead, Austin went into the facility at the time of his appointment, filled out the initial patient information form, provided a urine sample, and was taken back to the assessment room where he was examined by a WTC

counselor who noted "Austin came in today for his initial screening." (JA 460-461, Vol. 1)[2] Indeed Respondents' admitted in their pretrial memorandum that Dr. Schultz and Counselor Coen-Pickens were acting within the scope and course of their employment by WTC "while evaluating the eligibility of the decedent, Austin Nickolas Ghaphery for admission to the opioid treatment program offered at Wheeling Treatment Center, LLC." (JA 85-93 at P. 86, Vol. 1). In considering whether Respondents owed a duty of care when conducting Austin's said evaluation and assessment, this Court may take into account the Clinical Director's deposition testimony where she acknowledged that WTC had in place a Patient Screening Policy requiring every person presenting for treatment services to be initially assessed for appropriateness of admission; and also testified that in conducting Austin's initial assessment, Counselor Coen-Pickens was required to adhere to the screening policy. (JA 849-50, Vol. 2; JA 436, Vol. 1).

Moreover, in giving her deposition, WTC's Clinical Supervisor acknowledged that the State Regulations pertaining to the operation of a MAT Program provide that "the determination of admission eligibility shall be made using accepted medical criteria such as those listed in the latest approved version of the Diagnostic and Statistical Manual for Mental Disorders" and that the WTC staff were required to comply with that provision when conducting a pre-admission initial assessment. (JA 853, JA 855, Vol. 2).

Although Respondents admit to conducting a pre-admission initial assessment to determine whether Austin met the criteria for admission to the MAT Program, they argued below that they owed no duty to meet any standard of care in performing such assessment on the basis that Austin was not ultimately admitted to the MAT Program and therefore not a "patient." (JA

[2] It should be observed that while Respondents asserted with a straight face that Austin was never a "patient" of the facility, the WTC counselor who conducted Austin's pre-admission initial assessment used the term Pt (the abbreviation for patient) in describing Austin's relationship to the facility no less than 11 times in her two paragraph Case Note memorializing her interaction with Austin (JA 460-461, Vol. 1).

699, Vol. 2; JA 830, Vol. 2). Upon adopting the Respondents' "no duty" defense, the Circuit Court acknowledged that Austin was "technically a patient" while at the facility for his pre-admission initial assessment, but that despite his receipt of healthcare services as a "patient," somehow no healthcare provider-patient relationship was established sufficient to require Respondents' adherence to the standard of care provided for under the MPLA (JA 866-888 at P. 887, Vol. 2). The inherent conflict between of the finding that Austin was a "patient" when WTC provided healthcare by assessing his eligibility for admission to the MAT Program, but that he was not a "patient" such as to give rise to a duty requiring the Respondents to abide by the required standard of care in conducting that assessment highlights why the Circuit Court's adoption of Respondents' "no duty" defense should be found to constitute error.

While Respondents cited the Circuit Court to *Gooch v. W.Va. Dept. of Pub. Safety*, 195 W. Va. 357, 465 S.E.2d 628 (W. Va. 1995) as purported authority for a finding that Austin was never a "patient", the *Gooch* Court's finding that a hospital/patient relationship is not created merely by virtue of an arrestee being presented to a hospital for a drug/alcohol blood test by the arresting officer has no application to the situation at bar where Austin appeared at WTC in accordance with an appointment, completed the intake information forms, and was the undisputed recipient of healthcare services provided by WTC staff and Dr. Schultz in the nature of an assessment of his eligibility for the MAT Program. In *Gooch* a State Trooper arrested the driver of a motor vehicle and took the driver to a hospital to have his blood drawn to determine if he was DUI. *Id.* at 632. The Trooper provided a medical technologist with a kit to perform the blood test, and after drawing the blood the technician completed a form contained in the kit and gave both the form and kit (with the blood) back to the Trooper. (*Id.* 632)

Importantly the evidence in *Gooch* was that the hospital did not perform any type of analysis on the blood, the technologist's job duties did "not include making a patient assessment

for medical treatment", and the arrestee was never even seen by a physician." (*Id.* at 632). The driver died of pneumonia a few days later and thereafter his personal representative brought an action against the hospital for failure to recognize the decedent's medical condition while at the hospital for the blood alcohol test. (*Id.* at 637).

Upon observing that a medical negligence claim must be predicated upon the existence of a healthcare provider-patient relationship, the *Gooch* court found as a matter of law that "a hospital-patient relationship cannot be created merely by virtue of an arrestee being presented to a hospital for a drug and alcohol blood test. (*Id.* at 639). It is noteworthy that the *Gooch* court's analysis of the question of whether a hospital-patient relationship had been established focused on the issue of whether the decedent received or should have received healthcare from the hospital as provided for under W.Va. Code §55-7B-2(e). Based on the Court's determination that there existed no evidence in the record that the decedent had received or should have received healthcare, trial court's grant of summary judgment in favor of the hospital was upheld. (*Id.* at 640).

Notwithstanding the Circuit Court's finding that the "critical fact" supporting its conclusion that no healthcare provider-patient relationship was established with Austin was that he was ultimately denied admission to the MAT Program, the question of whether Austin was or was not admitted to the MAT Program does not determine his status as a "patient" for purposes of pursuing a claim arising out of the healthcare services which were actually provided to him by Respondents while he was at the facility.

Under the MPLA "patient" means "a natural person who receives or should have received healthcare from a licensed healthcare provider under a contract, express or implied." W.Va. Code §55-7B-2(m). Thus, the issue determinative of Austin's status as a "patient" is whether he received "healthcare" when was seen by WTC staff and Dr. Schultz for purposes of

undergoing a pre-admission initial assessment to determine his eligibility for admission to the MAT program. The MPLA defines that "healthcare" as "any act, service or treatment provided under...a healthcare facility's plan of care, medical diagnosis or treatment." W.Va. Code § 55-7B-2(c)(1).

The entire purpose of conducting the pre-admission initial assessment which is required under WTC's own screening policy (JA 436, Vol. 1), C.S.R. 69-11-21.2[1] (JA 855, Vol. 2), and the standard of care in the field of addiction medicine, is to determine whether the person undergoing the assessment meets the criteria for admission to the MAT program (i.e. whether the assessed individual meets the diagnosis for opioid use disorder, is diagnosed as "high risk", or is otherwise diagnosed as meeting the criteria for admission to the MAT Program. C.S.R. 69-11-21.8). The rationale underpinning the requirement to conduct a pre-admission initial assessment in a manner consistent with the standard of care, is to assure that healthcare providers can obtain the information necessary to make an appropriate diagnosis using accepted medical criteria to determine admission eligibility. The very essence of Petitioner's first theory of liability under the MPLA is that the Respondents' owed a duty to conduct Austin's pre-admission initial assessment in a manner consistent with the standard of care required by the MPLA. To argue that Austin was not a person who was provided "healthcare" because he was not ultimately admitted to the MAT program completely ignores the fact that making the "diagnosis" resulting in the decision to deny admission to the Program is at the core of the "healthcare" that was provided to Austin and is the focus of his action under the MPLA.

[1] Austin's Pre-admission Initial Assessment was required to be conducted under West Virginia's regulations pertaining to the operation of a MAT Program which provides in pertinent part: "any individual seeking admittance to the MAT Program shall undergo a pre-admission initial assessment in order to determine whether the person meets the criteria for admission to the MAT Program...the determination of admission eligibility shall be made using accepted medical criteria such as those listed in the latest approved version of the Diagnostic and Statistical Manual for Mental Disorders. 69 C.S.R. 11 §69-11-21.2. (JA 855, Vol. 2)

The question of "duty" is a question of law for the Court to decide. *Jack v. Fritts*, 193 W. Va. 494, 498, 457 S.E.2d 431, 435 (1995). Once the Respondents undertook responsibility for conducting a pre-admission initial assessment of Austin, they owed the duty, as a matter of law, to conduct that assessment in compliance with the applicable standard of care. In their briefs below, Respondents mischaracterized Petitioner's case as one seeking to impose a duty upon Respondents to accept all potential patients who present for treatment (JA 823-828, Vol. 2). Petitioner's action, however, seeks nothing more than to require Respondents' adherence to the duty imposed under the MPLA.

It is undisputed that Respondents conducted a pre-admission initial assessment for purposes of determining whether Austin met the criteria for admission to the MAT program; and such assessment was clearly a "diagnostic" exercise falling within the MPLA's express definition of "healthcare." W.Va. Code §55-7B-2(e). Accordingly, once Respondents undertook the responsibility to conduct Austin's pre-admission initial assessment they owed a duty to conduct such assessment in a manner consistent with the standard of care required of prudent healthcare providers practicing in the same or a similar field. W.Va. Code §55-7B-3.

Petitioner is required to offer proof that the Respondent healthcare providers breached the applicable standard of care when providing healthcare services to Austin and that such breach was a proximate cause of Austin's death. *Id.* Petitioner demonstrated below that he was able to offer proof that Respondents' failed to meet the required standard of care when conducting Austin's pre-admission assessment. (JA 432-433, Vol. 1). Petitioner is also able to offer proof that but for the failure to properly conduct Austin's pre-admission assessment, it is more probable than not that Austin would have been admitted to the MAT program; and upon such admission, state and federal regulations would have required WTC to provide medical,

counseling, vocational, educational, recovery, random drug testing, and substance use disorder counseling/monitoring in addition to referral to off-site facilities (C.S.R. 69-11-26).

Expert testimony was also adduced which showed that the reason why the Respondents were under a duty to conduct Austin's pre-admission initial assessment in accordance with the recognized standard of care in the field of addiction medicine is precisely because the failure to meet that duty carries with it the likelihood of the exact type of harm suffered in this case (i.e. death by drug overdose) (JA 434, Vol. 1). The evidence tying the Respondent's duty to comply with the standard of care to the foreseeability of harm that may result if such duty is not complied with further exposes why the Circuit Court's adoption of Respondents' "no duty" defense is at odds with established law in West Virginia. See *Sewell v. Gregory*, 179 W. Va. 585, 586, 371 S.E.2d 82, 83, Syl. Pt. 4 (W.Va. 1988); see also *Robertson v. LeMaster*, 171 W. Va. 607, 301 S.E.2d 563 (1983)where it was made clear long ago that foreseeability of harm is the primary factor in determining whether a duty exists. *Id.* at 567.

Because under both the strictures of the MPLA and the traditional common law test for the existence of a duty required a legal conclusion contrary to the one sought by Respondents, they argued below that if the Circuit Court were to find they owed a duty to actually comply with the standard of care provided for under their own policies for conducting a pre-admission initial assessment, the State Regulations requiring that the determination of admission eligibility be made by using accepted medical criteria, and the standard of care applicable to healthcare providers working in the field of Addiction Medicine (as testified to by a properly qualified medical expert), such finding of duty "would be an unprecedented expansion of liability for healthcare providers throughout the State of West Virginia" (JA 823-828 at P. 826, Vol. 2).

This Court may note that the Respondents premised their "sky is falling" argument on a scenario not applicable to this case. Petitioner is not seeking to expand the ambit of liability in

this case beyond the express contours of the MPLA. The Respondents provided healthcare to Austin when they conducted his pre-admission initial assessment; and Petitioner sought nothing more than the Circuit Court's acknowledgement that Respondents were under a duty to adhere to the required standard of care when conducting such assessment as a matter of law. This is routine instruction in virtually every action brought under the MPLA. When healthcare providers engage in affirmative action for the purpose of providing health services, they are required to comply with the applicable standard of care. Petitioner is not seeking to impose an "untenable burden" upon healthcare providers as suggested by Respondents. The only duty sought to be imposed upon Respondents in this case is that they be required to adhere to the standard of care required of healthcare providers practicing in the field of Addiction Medicine when they provided healthcare services to Austin as provided for under the MPLA. Nothing more. Nothing less.

Once the question of duty is correctly decided as a matter of law, the issue of whether the Respondents met the standard of care will remain a question of fact for jury determination. This is a basic medical negligence/wrongful death case which should not give rise to a need to create any deviation from the basic principles used to analyze any other action under the MPLA. Respondents' suggestion that if the Circuit Court were to find that Respondents had a duty to conduct themselves in accordance with the applicable standard of care, such finding "would have a chilling effect on the specialized practice of medicine generally, while potentially overwhelming healthcare facilities as it would essentially create an obligation to accept and treat all persons seeking services at the facility – whether they qualify for services as provided or not, or whether the services provided correspond with the condition for which they actually need treatment" (JA 827, Vol. 2) must be seen for what it is: hyperbole, without basis in fact or law.

Petitioner is not seeking the imposition of any duty requiring healthcare facilities to accept and treat all persons seeking services at the facility. Petitioner's son went to WTC to be evaluated for a drug problem. He appeared at the appointed time and was assessed by WTC staff and Dr. Schultz for purposes of determining whether he met the criteria for admission to the MAT Program. The WTC has promulgated policies to be followed by staff and physicians when conducting a pre-admission initial assessment such as that provided to Austin and the State has promulgated regulations requiring that the determination of admission eligibility be made by using accepted medical criteria. Petitioner adduced expert evidence below that the standard of care in the field of addiction medicine required WTC staff and Dr. Schultz to make the determination of Austin's admission eligibility by using accepted medical criteria and that WTC staff and Dr. Schultz failed to meet that standard of care when conducting Austin's pre-admission initial assessment. Under these facts, Petitioner seeks only a recognition that when WTC staff and Dr. Schultz assessed his son to determine whether he met the criteria for admission to the treatment program they owed him a duty to conduct that assessment in a manner consistent with the standard of care provided for under the MPLA. Once such duty is determined to exist as a matter of law (as it is by way of "instruction of law" in virtually every action brought under the MPLA), Respondents are free to adduce all and any evidence they may have to support a position that their conduct was such as to conform to the standard of care, or attempt to counter Petitioner's causation evidence with a claim that even if they did breach the standard of care in Austin's pre-admission initial assessment, such breach was not a proximate cause of Austin's death. Thus, a finding of duty, as required by law, would not create the legal catastrophe or medical crisis howled about by Respondents, but rather simply allow this case to go forward to trial on the merits.

Based on the foregoing this Court should find that the Circuit Court erred in granting Summary Judgment against Petitioner on the basis of its conclusion that Respondents owed no duty to conduct Austin's pre-admission initial assessment in accordance with the applicable standard of care. Austin was provided healthcare by Respondents and was therefore a "patient" under the MPLA for purposes of his receipt of such healthcare. As such, Respondents were under a duty to conduct his pre-admission initial assessment in a manner consistent with the standard of care required of healthcare professionals working in the field of Addiction Medicine.

III. Respondents owed a duty to conduct Austin's suicide risk assessment in accordance with the standard of care provided for under the MPLA.

For reasons closely akin to those discussed above, once Respondents endeavored to assess Austin's suicidality they came under a duty as a matter of law to perform that assessment in accordance with the standard of care provided for under the MPLA (i.e. to exercise that degree of care, skill and learning required or expected of a reasonable, prudent healthcare provider acting in the same or similar circumstances). The question of whether Respondents complied with that standard, however, is a question of fact for the jury. Because, when viewing the evidence in the light most favorable to Petitioner, a jury may find (consistent with Dr. Goldberg's expert opinion offered below) that Respondents did not meet the requisite standard of care in conducting an assessment of Austin's suicidality, neither the existence of a duty nor whether that duty was met were issues properly subject to disposition under Rule 56.

Dr. Goldberg testified at deposition that given the risk factors present at the time of Austin's visit to WTC, the standard of care required that a suicide risk assessment be conducted and that thereafter, Austin to be referred to a psychiatric facility where his suicidal ideation with a plan, substance use disorder, and depression could have been appropriately evaluated and treated (JA 468-469, Vol. I). It is the fact that patients who are known to be at an elevated risk

for injury or death by overdose (if they are not placed in a supervised psychiatric setting) that gives rise to the standard of care requiring healthcare providers to arrange for their admission to a psychiatric facility where their drug problems and psychiatric issues can be properly evaluated and treated (JA 470, Vol. 1). More succinctly, the expert testimony at deposition is that "the foreseeability of a patient being injured or dying from a drug overdose by not adhering to the standard of care, is the reason why there exists a duty for physicians to follow the standard of care when conducting a suicide risk assessment of a person with as many risk factors as those present in Austin's case" (JA470-471, Vol. 1).

Petitioner's evidence below also demonstrated that but for the Respondent's failure to appropriately assess Austin's suicidality and arrange for his admission to a psychiatric facility (i.e. Respondents' failure to meet the standard of care), it is more probable than not that Austin would have been evaluated as an inpatient for a period of time during which he would have received intense counseling for drug abuse, depression and other issues (JA 472, Vol. 1); and would have undergone a thorough treatment regimen which would have included programs designed to prevent him from continuing his drug use, and intervention to assist his depressive illness for purposes of decreasing his risk of injury or death resulting from drug use (JA 474, Vol. 1). The evidence below not only supported a finding by the Circuit Court that Respondents owed Austin a duty to conduct his suicide risk assessment in accordance with the applicable standard of care, but also demonstrated that if the Respondents had met their duty by conducting an appropriate suicide risk assessment and arranging for Austin to be admitted to a psychiatric facility, it is more probable than not that Austin would have received inpatient and outpatient treatment "such that he would not have died by drug overdose some 36 days after seeking entry to Wheeling Treatment Center for help with his drug problem" (JA 474-475, Vol. 1). Such

evidence could not more clearly connect Respondent's duty to the foreseeability of the harm occasioned by the breach thereof.

Other evidence tying Respondents' alleged breach of duty to Austin's death includes testimony that "Dr. Schultz's failure to meet the standard of care by appropriately assessing Austin's suicidality and arranging for Austin to be admitted to a psychiatric facility where his depression, suicidal ideation and substance use disorder could have been appropriately evaluated and treated was a proximate cause of Austin's death." (JA 476, Vol. 1).

In granting summary judgment in in favor of Respondents the Court found that notwithstanding Respondents' admission that they conducted a suicide risk assessment of Austin, they owed no duty to conduct such assessment in accordance with the standard of care because no healthcare provider-patient relationship was established so as to give rise to a duty under the MPLA (JA 887, Vol 2). The Circuit Court's legal reasoning in reaching this decision is difficult to decipher as it appears that the court may have misapprehended the evidence and believed that the standard of care sought to be imposed by Petitioner was a duty "requiring that Wheeling Treatment Center had to accept Austin, either voluntarily or involuntarily, to <u>its</u> inpatient psychiatric treatment facility." (my emphasis) (JA 887, Vol. 2). WTC is not, and has no, inpatient psychiatric treatment facility; and the Circuit Court's misapprehension of the duty of care required by the MPLA under the circumstances of this case may very well have resulted in the erroneous ruling sought to be rectified by this appeal. It is believed that the Court's confusion on this issue may be traced to Respondents' Bench Brief which draws little distinction between Petitioner's theory of liability on the ground that Respondents failed to meet the standard of care in conducting Austin's pre-admission initial assessment and the separate and distinct theory of liability premised upon the claim that Respondents failed to meet the standard of care in assessing Austin's risk for suicide.

There also exists a significant incongruity between the Circuit Court's finding that the Respondents were under no duty to conduct Austin's suicide risk assessment in accordance with the applicable standard of care, and Dr. Schultz's own testimony below. The following deposition exchanges illustrate this point:

> "Q. Sir, do you agree that in a case where a patient presents at a drug treatment center for help with a substance use problem and reports that he is having suicidal ideation, has a plan to complete his suicide by use of a gun and is suffering from depression, that the standard of care requires the treatment center's physician to assess that patient's suicidal risk?
>
> A. That's true (JA 859, Vol. 2).
>
> Q. My question is: What do you believe the standard of care requires of a physician when completing a suicide risk assessment of a patient who reports he is depressed and having suicidal ideation when he presents at the drug treatment center?
>
> A. I speak to them myself and get that information myself. (JA 860-861, Vol. 2).
>
> Q. Do you agree that in a case where a physician is working at a drug treatment center and learns that a patient is expressing suicidal ideation, that the physician has a responsibility to gather information necessary to assess the nature and degree of risk associated with the suicidal ideation?
>
> A. Yes (JA 861, Vol. 2).
>
> Q. Can you tell us what you did, if anything, to gather information necessary to assess the nature and degree of risk associated with Austin's expression of suicidal ideation on September 28 of 2017?
>
> A. As I said, I interviewed myself. (JA 861-862, Vol. 2).

Based on the foregoing, Dr. Schultz acknowledged under oath that the standard of care required him to complete a suicide risk assessment given the statements made by Austin to the WTC counselor; and that in an attempt to meet that standard of care he "interviewed" Austin. Whether that suicide risk assessment was conducted in a manner consistent with the standard of care is at the heart of Petitioner's second theory of liability under the MPLA.

Once WTC staff and Dr. Schultz undertook responsibility for conducting a suicide risk assessment of Austin, irrespective of whether Austin was ultimately admitted to the MAT Program, they were under a duty to conduct such suicide risk assessment in accordance with the accepted standard of care as a matter of law. The duty to meet the accepted standard of care when conducting Austin's suicide risk assessment is imposed under the MPLA since a suicide risk assessment is a diagnostic exercise falling within the purview of healthcare; and once a "healthcare provider" renders "healthcare" to a person, that person is considered to be a "patient" under the MPLA such that the healthcare provider is required to meet the accepted standard. See: W.Va. Code §55-7B(2)(e) "healthcare" and (m) "patient". Thus, to the extent that the Respondent healthcare providers conducted suicide risk assessment of Austin, such suicide risk assessment constituted the provision of healthcare such as to give rise to a healthcare provider-patient relationship between Austin and Respondents. As part and parcel of that relationship the Respondents had a duty under the MPLA to provide such suicide risk assessment in a manner consistent with the standard of care required of healthcare providers conducting a suicide risk assessment in similar circumstances. The duty to meet the standard of care provided for under the MPLA exists as a matter of law irrespective of whether Austin was eventually admitted into the MAT Program. The Circuit Court's finding that the decision to deny Austin admission to the MAT Program somehow relieves the Respondents of their duty to conduct Austin's suicide risk assessment in a manner consistent with the standard of care should be found to constitute reversible error in this case.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests this Court to find that the Circuit Court's conclusion that the Respondents owed no duty of care to Austin when they conducted his

pre-admission initial assessment for purposes of determining whether he met the criteria for admission to the MAT Program is erroneous, and to remand the matter back to the Circuit Court for such further proceedings as may be proper.

Your Petitioner further respectfully requests this Court to find that the Circuit Court's conclusion that the Respondents owed no duty of care to Austin when they conducted his suicide risk assessment for purposes of determining whether he was at an enhanced risk for harm is erroneous, and to remand the matter to the Circuit Court for such further proceedings as may be proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Service of the foregoing BRIEF OF PETITIONER, was had upon the following by mailing a true and complete copy thereto to their last known address, by regular United States mail, postage prepaid, this 23rd day of January, 2023, as follows:

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