No. 22-ICA-150

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

NICHOLAS A. GHAPHERY, D.O.,
As Personal Representative of the
Estate of Austin Ghaphery,

Petitioner,

v.

(ON APPEAL FROM THE CIRCUIT COURT OF OHIO COUNTY, W.VA. CIVIL ACTION NO. 19-C-182

WHEELING TREATMENT CENTER, LLC,
and JOHN SCHULTS, M.D.,

Respondents.

RESPONDENTS' BRIEF

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II. ASSIGNMENTS OF ERROR

Petitioner asserts in four separate assignments of error that the Circuit Court erred in finding that the Respondents did not owe a duty of care to conduct the Decedent's admission assessment to the Wheeling Treatment Center MAT program and/or suicidality assessment in accordance with the applicable standard of care. The assignments of error as asserted by the Petitioner are based upon rulings which were in fact not made, either expressly or implicitly, by the Circuit Court. The ruling from the Circuit Court, as very clearly set forth in its September 21, 2022, REVISED ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND FINDING THAT DEFENDANTS HAD NO DUTY TO ACCEPT OR TREAT THE DECEDENT, AUSTIN GHAPHERY was that these Respondents "had no duty, as a matter of law, to accept as patient or otherwise treat the decedent[.]" (JA Vol 2: 888). In harmony with the precedent of this Court and the national majority, the Circuit Court found "that there is no duty of care owed to every person who is screened but not accepted for treatment as a patient, and, in this case, is never treated as a patient and who is never seen again." (JA Vol 2: 888). Contrary to the Petitioner's assignments of error and arguments regarding the Decedent's status as a patient, the Circuit Court found that "[a]lthough [the Decedent] was technically a "patient" while he was there for pre-admission assessment, he was not accepted as a patient thereafter because he was refused admission to the program." (JA Vol 2: 887).

III. REBUTTAL AS TO PETITIONER'S STATEMENT OF THE CASE

On November 3, 2017, the Petitioner's Decedent, Austin Ghaphery, was found dead at the Petitioner's home from an apparent drug overdose. The REPORT OF DEATH INVESTIGATION AND POST-MORTEM EXAMINATION FINDINGS of the West Virginia Office of the Chief Medical

Examiner lists the cause of death as being due to fentanyl, nor-fentanyl, heroin, amphetamine and cocaine intoxication, with the manner of death identified as an accident. (JA Vol. 1: 284).

On or about July 29, 2019, Petitioner filed the underlying civil action asserting claims for medical professional liability and wrongful death, alleging that the Decedent, Austin Ghaphery, had presented to the Wheeling Treatment Center on September 28, 2017, and "requested treatment for his substance use disorder" and had advised the Respondents' staff that "he was having suicidal ideation and had a plan to follow through by the use of a gun. (JA Vol. 2: 887). Wheeling Treatment Center is a medication-assisted treatment (MAT) facility utilizing methadone and suboxone, in conjunction with counseling / behavior therapy, for the treatment of long-term opioid addiction. (JA Vol. 1:304). The Respondents are not a full-service hospital; are not a behavioral medicine crisis center; are not an in-patient psychiatric facility; and Respondents treat *only* opioid addiction, the process for which is regulated by both state and federal agencies, statutes and regulations.

Upon presentation to the Wheeling Treatment Center on September 28, 2017: the Decedent's urine drug screen came back negative for opioids. (JA Vol. 1:292); the Decedent did not disclose an addiction to opioids, a history of abuse of opioids, nor an imminent intent to use opiates in the future (JA Vol. 1: 304, 308-09); and he was not exhibiting any clinical signs of opioid withdrawal. (JA Vol. 1: 293, 302, 310, 319-20). Evidence adduced during the course of discovery further established that at the time the Decedent presented to the Wheeling Treatment Center, he did not disclose any *active* suicidal ideations and was not otherwise in crisis. (JA Vol. 1: 296, 303, 308-09, 316). Based upon the foregoing, the Decedent was not accepted into the opioid medication assisted treatment program operated by Defendant Wheeling Treatment Center on September 28, 2017. (JA Vol. 1, 306, 327-328) The Decedent was given a referral sheet

containing contact information for alternative behavioral health providers and was encouraged to seek follow up treatment with his primary care physician for his symptoms of depression. (JA Vol. 1: 304).

During the course of his pre-admission assessment by Respondents, the Decedent did disclose ongoing medical treatment by a physician for depression with a *past history* of suicidal thoughts. (JA Vol.1: 293, 308-09). Based upon the Decedent's statements to staff that he previously had suicidal ideations, but was not actively suicidal, and that he was undergoing medical management of his depression, the Respondents obtained the Decedent's agreement to follow up with his treating family physician to further discuss treatment of his depression. (Id.). At that time, the Decedent was advised that he was not being admitted to and/or accepted as a patient of, Wheeling Treatment Center. The Decedent then left the facility and was picked up from the Wheeling Treatment Center on September 28, 2017, by his father, the Petitioner, Nicholas Ghaphery, M.D. (JA Vol. 1: 321).

During the course of this litigation, it was discovered that the Decedent, at the request of the Petitioner, had begun seeing board certified family medicine practitioner Brad Schmitt, M.D., for issues related to depression, suspected drug use, and other medical ailments beginning on July 18, 2017. (JA Vol. 1: 342-43). As part of his treatment with Dr. Schmitt, the Decedent emphatically denied illicit drug use. (JA Vol. 1: 329-41). Dr. Schmitt ultimately prescribed medication as an initial plan of treatment for the Decedent's depression, as well as his attention deficit disorder "ADD". (Id.).

The Decedent saw his primary care physician, Dr. Schmitt, for a follow-up visit/discussion on September 21, 2017, seven (7) days before presenting to the Wheeling Treatment Center. (Id.). During this office visit, the Decedent reported to Dr. Schmitt that "he has had suicidal thoughts

but no plan" and that he had previously discussed these suicidal thoughts with his parents which resulted in all guns being removed from the Petitioner's home. (JA Vol. 1: 333). As a result of this disclosure, Dr. Schmitt and the Decedent "made an agreement" that the Decedent would tell his parents or go to a crisis unit if his depressive symptoms became worse or if he developed a plan. (Id). Dr. Schmitt prescribed a trial of Lexapro with "close follow up" and indicated that he would consider referral to a "psych" if the Decedent's symptoms did not improve. (Id).

Thereafter on October 5, 2017, seven (7) days *after* the Decedent had been declined admission to the Wheeling Treatment Center, the Decedent again went to see his primary care physician, Brad Schmitt, M.D., at which time Dr. Schmitt noted that Austin was "much improved over [the] last few weeks" indicating that Austin believed that "time" and the "medication has help[ed] substantially" and that his depression was much improved. (JA Vol. 1: 338). Dr. Schmitt specifically noted at that time that the Decedent was "smiling" and had improved affect, good insight, and good judgment with no suicidal or homicidal ideations. (JA Vol. 1: 339). Dr. Schmitt made no changes in the Decedent's Lexapro prescription but reiterated that he was to call immediately or get to a crisis unit if he got any worse or developed suicidal ideations. (JA Vol. 1: 333). The Decedent was to follow up with Dr. Schmitt again in four (4) weeks. (Id.).

Eight (8) days later, on October 13, 2017, the Petitioner, a board certified family practice doctor in his own right, called Dr. Schmitt with the Decedent to advise that the Decedent was "doing better on Lexapro" and tolerating the medication well, but felt he could be "doing a little better." (JA Vol. 1: 336). As a result, Dr. Schmitt increased the Decedent's Lexapro dose from 10 mg. to 20 mg., and indicating that he had a follow up appointment "next week" [the week of October 16th -20th]. (Id.). There are no records of the Decedent attending or otherwise cancelling or rescheduling an appointment with Dr. Schmitt. (JA Vol. 1: 345-46).

Twenty-one (21) days later, while the Petitioner was away at the Greenbrier Resort for a medical conference, the Decedent was found dead in their home from an accidental drug overdose which included fentanyl, heroin and cocaine. The Medical Examiner's Report noted no wounds on the Decedent and no indication that this was anything other than the voluntary, though accidental, ingestion of a fatal combination of illegal drugs by the Decedent that caused his death. (JA Vol 1: 283).

IV. SUMMARY OF THE ARGUMENT

The Respondents did not have a duty, as a matter of law, to accept the Decedent as a patient and/or to provide him medical treatment through their Medication Assisted Treatment (MAT) program. As such, refusal to admit Austin Ghaphery as a patient to the Wheeling Treatment Center MAT program is not actionable. The Respondents did not have a duty, as a matter of law, to provide any medical treatment to the Decedent because no physician-patient relationship was formed. Moreover, there has been no evidence produced that further medical treatment of the Decedent was expected or anticipated from the Respondents. Likewise, the Respondents did not have a duty, as a matter of law, to seek a commitment of the Decedent either voluntarily or involuntarily, to an inpatient psychiatric facility.

Despite having arrived at the eve of trial on three separate occasions spanning years of litigation, Petitioner failed to produce any *evidence* that the Decedent had consumed opiates or otherwise should have tested positive for opiates upon his presentation to the Wheeling Treatment Center on September 27, 2017, for admission to Respondents' opioid treatment program. Petitioner has likewise failed to present any evidence that the Decedent disclosed a history of opioid abuse for a period of one year prior to his presentation sufficient to qualify for the Respondents' MAT program as a matter of law. Furthermore, Petitioner presented no evidence

that the suicide assessment of the Decedent performed by counselor Jamie Coen-Pickens and/or Dr. Schultz was not appropriate, and failed to produce any evidence that the Decedent was actively suicidal at or even near the time of his presentation to the Wheeling Treatment Center. And, perhaps most importantly, failed to present ***any evidence*** that the Decedent committed suicide. The Decedent's presentation to and assessment by the Respondents was simply not a proximate cause of his death as a matter of law.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18 of the West Virginia Rules of Appellate Procedure, Petitioner submits that oral argument is necessary as there are extensive facts and legal arguments on behalf of the Respondents in support of affirming the Circuit Court's rulings. While adequately presented in Respondents' Brief and the record below, Respondents submits that this Honorable Court will be significantly aided by oral argument. Oral argument is appropriate pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure argument, as a case involving "issues of fundamental public importance" as well as implication of the Respondents' constitutional liberties not to be required to accept patients. W.Va.A.P. 20(a)(2).

VI. ARGUMENT

These Respondents engaged in no act or failure to act which proximately caused any injury or damage to the Petitioner and/or his Decedent, and yet the Petitioner seeks an unprecedented ruling from this Court which would force healthcare professionals to accept as patients and treat all persons who present for evaluation regardless of whether they *should* properly be treated by that particular healthcare professional and/or whether that healthcare professional's scope of practice permits treatment of that individual's condition(s). More dangerous, however, is that such a ruling would effectively extend the liability of healthcare professionals for the subsequent illness

and/or death of person whom they declined to treated, provided no treatment to, and never saw again. A ruling in favor of the Petitioner would require all healthcare providers, regardless of specialty, to ascertain, with or without the cooperation of the patient, any and all potential ailment(s) of the patient, accept them for treatment, make a direct referral to any number of additional healthcare providers, and force the patient to follow up. While infringing greatly upon the constitutional autonomy of all healthcare providers to voluntarily enter into (or not enter into) physician-patient relationships, a ruling in favor of the Petitioner would be particularly crippling to those practitioners in West Virginia on the front lines of the opioid addiction crisis by making all providers indefinitely liable for overdose deaths of all patients and non-patients.

The Petitioner's arguments boil down to a flawed and speculative theory, unfairly reasoning that since the Decedent died of an opioid drug overdose thirty-six (36) days after he presented to the Respondents for assessment, then he should have qualified for admission into the Respondents' MAT program and it was a breach of the standard of care for the Respondents not to accept him or to transfer the Decedent to an in-patient psychiatric facility. As a factual matter, the Petitioner's tenuous theory completely ignores not only the very real passage of time, over a month between the Decedent's presentation and his death, but also the objective findings of another, independent physician who assessed the Decedent *after* the Respondents, as well as the testimony of the Petitioner, also a medical doctor, regarding his observation of his son during that intervening time period. As a legal matter, it summarily ignores not only a complete absence of statutory or common law assigning the Respondents a duty to provide treatment to the Decedent, but also the Respondents' constitutional right not to be forced into a physician-patient relationship against their will.

"Standard of care" is the level at which one performs a duty owed. "Duty" is a legal obligation that is deemed to arise in certain circumstances. Once such a duty is established, then the standard of care dictates the manner in which those obligations must be carried out. However, the Petitioner's arguments seek to confuse the legal question of whether there exists a duty, with the factual question of whether, once established, that duty was breached by the failure of the practitioner to comply with the applicable standard of care.

It is axiomatic that "[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 to the plaintiff. No action will lie without a duty broken." Syl. Pt. 1, Parsley v. General Motors Acceptance Corp., 280 S.E.2d 703 (W.Va. 1981); Syl. Pt. 4, Wal-Mart Stores East, L.P. v. Ankrom, 854 S.E.2d 257 (W.Va. 2020). West Virginia law provides that whether a particular party owes a duty of care is an issue of law which may be properly decided by a trial court a motion for summary judgment. Syl. Pt. 5, Aikens v. Debow, 541 S.E.2d 576 (W. Va. 2000).

Petitioner's medical negligence action alleges that the Respondents breached the standard of care in their assessment of the Decedent and therefore failed to either accept him as a patient of the Wheeling Treatment Center's opioid MAT program and/or failed to seek his involuntary commitment to and inpatient psychiatric facility for psychiatric treatment.. However, the Petitioner wholly ignores the absence of any duty on the part of the Respondents to accept the Decedent as a patient, and skips to the part where his experts opine that the Respondents failed to meet the standard of care.. As more fully discussed below, the undisputed evidence in this case shows that the Respondents did not have a duty, as a matter of law, to accept the Decedent as a patient and/or to provide him medical treatment through their MAT program, nor did they have a legal duty, or right, to seek his involuntary commitment to an in-patient psychiatric treatment

facility at the time of his presentation to the Wheeling Treatment Center on September 28, 2017. While denying that they were negligent, in the absence of a duty to accept the Decedent into the MAT program, the manner in which the Respondents went about assessing whether or not they would accept the Decedent as a patient is immaterial.

Additionally, the Petitioner dedicates a large portion of his argument to the discussion of whether Petitioner's Decedent was a patient of the Respondents. Initially, it should be noted that at no time did the Respondents argue, nor did the Circuit Court rule, that the Petitioner's claims were not governed by the West Virginia Medical Professional Liability Act ("MPLA"). Whether the Decedent met the legal definition of the term "patient" as set forth in the MPLA is not dispositive of the issues in this case. Additionally, Petitioner makes much ado about the Respondents' passing reference to the Decedent as a "patient." Perhaps the better practice would have been for the Respondents (and their counsel) to make sole reference to the Decedent as a "putative patient," rather than using the common vernacular of the medical field, but such legal formality is not required in the documentation of medical records (or the word usage of counsel) and cannot serve to create a legal duty on the part of the Respondents to provide continuing medical treatment to the Petitioner's Decedent.

A. THE RESPONDENTS HAD NO LEGAL DUTY TO ACCEPT PETITIONER'S DECEDENT AS PATIENT OR TO PROVIDE HIM WITH MEDICAL TREATMENT.

The Petitioner's Decedent was denied admission to Wheeling Treatment Center as a patient and such denial is not actionable as the Respondents owed no duty and, therefore, breached no duty to the Decedent. The Respondents have a virtually unqualified right to refuse to treat or otherwise accept as a patient any person, including the Decedent. At no time were these Respondents legally obligated to accept the Decedent as a patient regardless of whether he

qualified for treatment there or not. In the absence of any such duty to accept him as a patient, the Respondents' decision not to admit Decedent into their MAT program is not actionable.

The implicit understanding when the Petitioner's Decedent presented to the Wheeling Treatment Center on September 28, 2017, was that he would be *considered* for admission to the medication assisted opioid treatment program. Right or wrong, fully and appropriately assessed for admission as testified to by the Respondents, or negligently assessed as alleged by Petitioner, the Decedent was not accepted as a patient and the Respondents were under no legal duty to do so. Accordingly, no physician-patient relationship was formed and at no time did the Respondents, either individually or collectively, agree to provide *any* medical service to the Decedent.

Nevertheless, the Petitioner insists that the Respondents should have accepted the Decedent into their MAT program and that had they properly assessed the Decedent he would have been deemed to qualify for admission. This argument, however, completely ignores the fact that the Respondents, regardless of whether the Decedent did qualify or should have qualified for acceptance, were under no legal duty or obligation to accept the Decedent into the MAT program or to provide him advice, treatment, or care of any kind. The existence of a duty of care by a defendant must be rendered by the court as a matter of law; the determination of whether a defendant in a particular case owes a duty to the plaintiff is not a factual question for the jury. *See e.g.,* Jack v. Fritts, 457 S.E.2d 431, 435 (W.Va. 1995); Syl. Pt. 5, Aikens v. Debow, 541 S.E.2d 576 (W. Va. 2000).

There is no law and no duty which mandates that the Respondents accept anyone as a patient; they have the right to refuse treatment of any individual, at their discretion – so long as there is no discriminatory intent. This is particularly so when, as here, a determination was made that the individual was not a qualifying candidate for the type the treatment which they offer.

Consequently, for this Court to impose such a duty herein would be an unprecedented expansion of liability for healthcare providers throughout the State of West Virginia. Distinguishable from a physician's duty to *continue* to treat a patient with whom a physician-patient relationship has been established, the legal limitations on a physician or medical facilities refusal to accept a person for treatment are incredibly narrow and encompass only the Emergency Medical Treatment & Labor Act (EMTALA) and certain refusals based upon a discriminatory reason. In fact, the very existence of the EMTALA, which incidentally applies only to hospital facilities and not to individual physicians, is evidence that there is no common law duty on healthcare facilities, and particularly individual physicians, to accept patients for treatment.[1] *See e.g.*, Ramonas v. West Virginia University Hospitals-East, 2009 WL 3295024 (N.D.W.Va. 2009) (unreported) (Recognizing that EMTALA arose out of necessity as under traditional state tort law, hospitals are under no legal duty to provide emergency medical care to all persons regardless of their ability to pay for services).; Schubert v. Freed, 682 F.Supp.2d 657 (N.D.W.Va. 2010) (Acknowledging EMTALA allows a civil suit against a participating hospital, but not a treating physician).

In the present case, however, there is simply no existing precedent to impose upon these Respondents a legal duty to have accepted the Decedent as a patient on September 28, 2017, whether he was properly assessed by them or not. Currently, no court, no state legislature, and

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[1] Congress enacted the Emergency Treatment and Active Labor Act ("EMTALA") "to address a growing concern with preventing 'patient dumping,' the practice of refusing to provide emergency medical treatment to patients unable to pay, or transferring them before emergency conditions were stabilized." *Power v. Arlington Hosp. Ass'n,* 42 F.3d 851, 856 (4th Cir.1994). "The Act accordingly imposes two principal obligations on hospitals. … when an individual seeks treatment at a hospital's emergency room, 'the hospital must provide for an appropriate medical screening examination ... to determine whether or not an emergency medical condition' exists. § 42 U.S.C. 1395dd(a). Second, if the screening examination reveals the presence of an emergency medical condition, the hospital ordinarily must 'stabilize the medical condition' before transferring or discharging the patient. § 42 U.S.C. 1395dd(b)(1)." *Vickers v. Nash Gen. Hosp., Inc.,* 78 F.3d 139, 142 (4th Cir.1996).

Ramonas v. W. Virginia Univ. Hosps.-E., 2009 WL 3295024, at *3 (N.D.W. Va. Oct. 13, 2009).

certainly not our federal legislative body has seen fit to impose a duty upon a medical facility or physician to accept a person as a patient (outside of the EMTALA guidelines which are inapplicable here). The consequences of imposing a duty to accept all emergent and non-emergent persons who present for treatment, especially at a medication assisted opioid treatment facility, would expose these Respondents "to liability to the public at large with no manageable limits. *Aikens*, *supra* noted that "[e]ach segment of society will suffer injustice, whether situated as plaintiff or defendant, if there are no finite boundaries to liability." City of Charleston, West Virginia v. Joint Commission, 473 F.Supp.3d 596, 623 (S.D.W.Va. 2020) (referencing Aikens v. Debow, 541 S.E.2d 576 (W. Va. 2000)). A duty as a matter of law to accept a person as a patient simply does not exist under these factual circumstances and should not be created by this Court. As such the Respondents were properly entitled to the summary judgment granted by the Circuit Court.

1. Satisfying the Definition of "Patient" Under the MPLA Does Not Establish The Existence of a Patient-Physician Relationship for Purposes of Imputing A Legal Duty.

The Petitioner asserts that his Decedent was a "patient" under the MPLA who was owed a duty of care to be properly assessed by the Respondents. As will be discussed in further detail later in this brief, the Petitioner has produced absolutely no evidence that the Decedent was not properly assessed but offers only allegations and conjecture. Nevertheless, Petitioner confuses the Respondents' actions in this case as it relates to the pre-admission assessment of the Decedent with the general duty of a physician to diagnose his/her patient in accordance with the standard of care. There is no evidence that the Respondents ever made an actual diagnosis of the Decedent as having or not having a drug addiction. (JA Vol. 1:300) Rather, the only determination made regarding the Decedent by these Respondents was that he was not being accepted into the Respondents' MAT program for opioid addiction.

Under West Virginia law, "[t]he essence of a medical malpractice action is a physician-patient relationship. Generally, it is axiomatic that unless such a relationship is established a legal duty cannot exist between the parties." Gooch v. West Virginia Dept. of Public Safety, 465 S.E.2d 628, 637 (W. Va. 1995). As such, a medical malpractice action must be predicated on the existence of a physician/patient relationship and not simply whether an individual makes allegations sufficient to meet the definition of a "patient" so as to pursue a civil action under the guise of the West Virginia Medical Professional Liability Act ("MPLA"). *See e.g.*, W.VA. CODE § 55-7B-1 (2016).

The MPLA defines a "patient" to mean "a natural person who receives or should have received health care from a licensed health care provider under a contract, express or implied." W.VA. CODE § 55-7B-2(m). In this case, it is *alleged* that the Decedent, a natural person, should have received healthcare from Dr. Schultz and the Wheeling Treatment Center as healthcare providers, thereby meeting the definitional requirement of the MPLA. It is important to note, however, that making allegations in the Complaint sufficient to satisfy application of the MPLA is not the same thing as, nor the same criteria for, establishing the existence of a continuing physician-patient relationship. Rather, at the time the Decedent left the Wheeling Treatment Center, and at all times thereafter, both the Petitioner and his Decedent were fully aware that he had not been accepted into the MAT program, that he was not a patient at Wheeling Treatment Center, that he had not received any treatment at the Wheeling Treatment Center on September 28, 2017, and that he was not going to be receiving any type of treatment at the Wheeling Treatment Center. (JA Vol 1:321)

The formation of the physician-patient relationship is a prerequisite to the imposition of a legal duty on a physician and/or healthcare facility to provide medical services to a patient. This

concept is further fostered by the definition of "health care" as provided under the MPLA which begins by defining "health care" as [a]ny act, service or treatment provided under, pursuant to or in the furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis or treatment." W.VA. CODE § 55-7B-2(e)(1). It is undisputed that the Decedent was not accepted as an MAT patient at Wheeling Treatment Center on September 28, 2017, such that there was no plan of care or medical treatment offered to him by the Respondents at that or any other time. (JA Vol 1:295,297, 300)

Under West Virginia law, "[t]he essence of a medical malpractice action is a physician-patient relationship. Generally, it is axiomatic that unless such a relationship is established a legal duty cannot exist between the parties." Gooch v. West Virginia Dept. of Public Safety, 465 S.E.2d 628, 637 (W. Va. 1995). Moreover, "[t]he patient-health care provider relationship is a consensual one wherein the patient knowingly seeks the assistance of a health care provider." Id. at 639. Casual contact with a person, whether or not the contact is associated with a medical context, is not sufficient to imply or establish a professional relationship. Rather, the creation of that relationship requires that the parties reach an agreement, expressed or implied, that care will be provided. Id. at 637.

The only agreement present in this case was that the Respondents would meet with the Decedent to consider him for admission to the treatment program; right, wrong or indifferent, both the Decedent and his father, the physician Petitioner, understood on the very day of the presentation that no further services were being offered or provided to the Decedent. To state it plainly: Austin Ghaphery left the Wheeling Treatment Center on September 28, 2017, with full knowledge that he was not a patient there and that he would not be returning for treatment. In the parking lot, Austin Ghaphery immediately got into the car with the Petitioner, a board certified

family practice physician, and conveyed to him that Austin Ghaphery had not been accepted as a patient at Wheeling Treatment Center and would not be returning there for treatment.

B. THE RESPONDENTS HAD NO LEGAL DUTY TO SEEK INVOLUNTARY COMMITMENT OF THE PLAINTIFF'S DECEDENT.

The Petitioner wrongly maintains that these Respondents should have sought to commit the Decedent to an in-patient psychiatric treatment facility, on basis of their interaction with the Decedent on September 28, 2017. Yet, the Petitioner did not cite to this Court, and cannot cite to, any authority imposing upon the Respondents a legal duty to seek such a commitment. On the contrary, while "[a]ny adult person *may* make an application for involuntary hospitalization for examination of an individual" the statute requires that the applicant have:

> reason to believe that the individual to be examined has a substance use disorder as defined by the most recent edition of the American Psychiatric Association in the Diagnostic and Statistical Manual of Mental Disorders, inclusive of substance use withdrawal, is mentally ill and, because of his or her substance use disorder or mental illness, the individual is likely to cause serious harm to himself, herself, or to others if allowed to remain at liberty while awaiting and examination [.]

W.VA. CODE § 27-5-2(a). As an initial matter, the statutory language is permissive ~ using the word "may". Thereafter, there is no mandate that a physician seek examination under this statute. Furthermore, "[t]he person making the application shall make the application under oath" and "shall give information and state facts in the application required by the form provided for this purpose by the Supreme Court of Appeals." W.VA. CODE § 27-5-2(b) and (d).

As stated in the West Virginia Code and on the face of the Supreme Court of Appeals form APPLICATION FOR INVOLUNTARY CUSTODY FOR MENTAL HEALTH EXAMINATION form itself, completion of the application would *not* have resulted in commitment of the Decedent to an in-patient psychiatric facility, but only in an examination to determine whether or not he was having a "psychiatric emergency" which the statute defines as "an incident during which an individual

loses control and behaves in a manner that poses substantial likelihood of physical harm to himself, herself or others." W.VA. CODE § 27-5-2(e). Thereafter, "[i]f the examination reveals that the individual is not mentally ill or has no substance use disorder, or is determined to be mentally ill or has a substance use disorder but not likely to cause harm to himself, herself, or others, the individual shall be immediately released without the need for a probable cause hearing[.]" W.VA. CODE § 27-5-2(e). In other words, even if the examiner would have determined that the Decedent had a substance use disorder or was mentally ill, unless that substance use disorder or mental illness was "likely to cause harm" to him or someone else, he would have been required to have been "immediately released." Id.

The overwhelming evidence in this case is that the Decedent was not actively suicidal on September 28, 2017, and therefore was not "likely to cause harm to himself" on that date. It is also undisputed that the Decedent did in fact not harm himself on September 28, 2017. He did not attempt suicide on that date. In fact, there is no evidence that the Decedent never committed suicide. (JA Vol 1: 284, 318). To the contrary, the undisputed, prima facie evidence in this case is that Austin Ghaphery's death was an accident and was determined by authorities not to be suicide per the Death Certificate. (JA Vol. 1:284)

This is consistent with the fact that the Petitioner, a board certified physician, drove his son to the Wheeling Treatment Center on the morning of September 28, 2017, and noted absolutely no issues with him at that time ~ and certainly no indications toward self-harm. (JA Vol 1: 316).

Q: Okay. So when he went to the treatment center a week later, do you have any reason to believe that he was suicidal then when he wasn't suicidal on the 21st?
A: I took him to the treatment center, not from a suicidal standpoint, specifically. I took him to the treatment center because of the drugs.
Q: I understand, but I'm asking you, did you consider him to be suicidal when you took him to the treatment center?
A: Oh, no.

Q: Do you have any reason to believe that he was suicidal at the time that you took him to the treatment center?
A: Not -- no.
Q: Was he exhibiting any symptoms that you associated with his depression or --
A: No.

(JA Vol 1: 316). Thereafter, the Petitioner picked up the Decedent from Wheeling Treatment Center just a few hours later, and immediately after he was seen by WTC staff, and again noted no issues with Austin Ghaphery:

Q: And then you didn't ask Austin why he didn't qualify?
A: No.
Q: And from that day to the day of his death, you didn't have anymore discussions with him about his drug use?
A: I - - no, ma'am. I don't believe so.
Q: During that time period, did you see Austin where you believed him to be under the influence of drugs?
A: I don't believe.
Q: Did you continue to do any kind of monitoring of your son who has had depression and told you he's abusing drugs?
A: Other than, you know, observation, just watching his demeanor, and he - - I thought he was improving. No.

(JA Vol 1: 322-23). Such testimony clearly does not establish that on September 28, 2017, the Decedent was in crisis, was displaying signs of mental illness, or was exhibiting any signs, symptoms or behavior justifying the completion of an APPLICATION FOR INVOLUNTARY CUSTODY FOR MENTAL HEALTH EXAMINATION.

Although he was not present for the examination and has offered no testimony to support such an allegation, Petitioner maintains that during the Decedent's evaluation at the Wheeling Treatment Center he disclosed to Jamie Coen-Pickens that he was having, as in actively having, suicidal ideations with a plan to follow through with a gun. These allegations are based solely upon an erroneous, self-serving interpretation of a Case Note written by Mrs. Coen-Pickens. (JA Vol 1:293). Ms. Coen-Pickens clearly testified, under oath, that the suicidal thoughts relayed to

her by the Decedent were "past thoughts of suicide" and that he was "not actively suicidal that day." (JA Vol 1: 307-09). Moreover, this conversation was virtually identical to the conversation that Austin Ghaphery had previously had with the Petitioner wherein he likewise disclosed past suicidal thoughts that he would accomplish by use of a gun:

Were you aware as of September 21st, that Austin had experienced thoughts of suicide?
A. He described -- he described a thought of it, but he did not say that he had a plan.
Q. The next sentence is, "He discussed with parents and guns were taken from the house."
A. Yes.
Q. But you're saying that Austin never discussed with you that he had thought about committing suicide with a gun?

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A. It was a general discussion, and his discussion was, "If I ever were to do it, I'd do it with a gun." It was a general discussion that we had. I don't remember being specific to this, but our general discussions is what he told -- that's what he told me.
Q. And so when he had that conversation with you, you did not think at the time that he required any emergency assistance?
A. Not at that time, because he said, "Dad, I" -- he followed it up with, "Dad, I would not do anything to hurt myself."

Moreover, Respondent Dr. Schultz has likewise testified, under oath, that the Decedent told him that he was not suicidal at that time. (JA Vol 1:301) The testimony of the Respondents, that the Decedent's suicidal ideations were a thing of the past, is wholly consistent both with the sworn testimony of his father, the Petitioner Dr. Nicholas Ghaphery, who observed the Decedent both before and after he was at the Wheeling Treatment Center as he dropped him off for and picked him up from the appointment, and with the medical records of the Decedent's primary care physician, Dr. Brad Schmitt, who treated the Decedent afterward:

> Q: And he was continuing to go out and socialize, or what was he doing during those days? [between his visit to the Wheeling Treatment Center and his death]

A: As far as I know, you know, things were going on as normal, whatever normal is.

Q: Did he indicate to you during that conversation that he was having any suicidal ideations?

A: We talked about - - I did ask him, "Would you do anything" - - I mean, the depression for me was probably the driving force. And I did ask him, "Are you concerned - - do I have to be" - - I said, "Do I have to be concerned about you hurting yourself?" And he said, "No." He said, "you know, I have thought about it." I said, "Well, okay, You've thought about it. What were you going to do?"
He said, "Well, you know, I would probably use a gun." And I said "Oh."
He said, "But I - - don't worry, Dad. I would never do anything to hurt myself," and I took the man, young boy at his word - - young man at his word.

(JA Vol 1:313-14).

The Decedent was treated by his primary care physician Brad Schmitt, M.D. during a follow-up visit on September 21, 2017, seven (7) days before presenting to the Wheeling Treatment Center. (JA Vol 1:331) At that time, the Decedent reported to Dr. Schmitt that "he has had suicidal thoughts but no plan" and that he had discussed these suicidal thoughts with his parents which resulted in all guns being removed from the Petitioner's home. (Id). It is important to note that this is nearly the same conversation as was subsequently documents by Ms. Coen-Pickens when the Decedent was at the Wheeling Treatment Center. And, during this visit Dr. Schmitt, the Decedent "made an agreement" that he would tell his parents or go to a crisis unit if his depressive symptoms became worse or if he developed a plan. (JA Vol 1:333). The Decedent never did either of these things, as the evidence demonstrate that his condition improved as is documented in the medical records and the Petitioner's own deposition testimony. (JA Vol 1:338). The Petitioner testified that he, the parent with whom the Decedent lived, never felt like the Decedent was a danger to himself. (JA Vol 1:315).

Petitioner's interpretation of the WTC's Case Note is self-serving, erroneous and contrary to the testimony of its author. The overwhelming evidence in this case is that the Decedent

previously discussed with his parents and his family physician *prior* thoughts of suicide but never that he was actively suicidal and certainly no expression of suicidal ideations on the day he presented to the Wheeling Treatment Center. Based on the foregoing, there is no evidence in the record which would support the finding of a duty on the part of these Respondents to seek his commitment to a psychiatric facility at that time. In reality, and consistent with the Petitioner's own observations and testimony, the Decedent was not exhibiting or expressing any active suicidal ideations on the day he presented to the Wheeling Treatment Center. Accordingly, these Respondents were and remain entitled to summary judgment on Petitioner's claims that the Respondents negligently failed to seek commitment of the Decedent to a psychiatric treatment center, Northwood, or otherwise.

C. THE PETITIONER HAS PRODUCED NO EVIDENCE THAT THE RESPONDENTS IMPROPERLY ASSESSED THE DECEDENT.

In contrast to the unsubstantiated allegations which permeate the pages of the Petitioner's court briefs, there is no actual evidence that the Decedent was improperly assessed either as to his eligibility for admission into the Respondents' MAT program or as to his suicidality. Rule 56 of the West Virginia Rules of Civil Procedure provides that "summary judgment is proper where the record demonstrates 'that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' " Coleman Estate v. R.M. Logging, Inc., 664 S.E.2d 698 (W.Va. 2008) (internal citations omitted). The principal purpose of summary judgment is to dispose of factually unsupported claims short of trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986).

While *the facts* must be construed in the light most favorable to the plaintiff, it is well established that a plaintiff cannot survive a motion for summary judgment by resting on allegations

alone, "without any significant probative evidence tending to support the complaint." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986) (*citing* First Nat. Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253, 290 (1968)). A plaintiff's own self-serving statements, without corroboration in the factual record, will not be sufficient to defeat summary judgment. *See e.g.*, Dellinger v. Pediatrix Medical Group, P.C., 750 S.E.2d 668 (W.Va. 2013) (Finding summary judgment appropriate where the opposition to the motion for summary judgment "amounts to nothing more than an attorney's argument lacking evidentiary support.")

The plaintiff "'cannot create a genuine issue of fact through mere speculation or the building of one inference upon another.'" O'Connor v. Consolidated Caterers Corp., 56 F.3d 542, 545 (4th Cir. 1995) (quoting Beale v. Hardy, 769 F.2d 213, 214 (4th Cir. 1985)). "Summary judgment is appropriate where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that is has the burden to prove." Syl. Pt. 2, Painter v. Peavey, 451 S.E.2d 755 (W.Va. 1994).

The undisputable facts in this case are that upon presentation to the Wheeling Treatment Center on September 28, 2017: the Decedent's urine drug screen came back negative for opioids (JA Vol. 1:292); the Decedent did not disclose an addiction to or history of abuse of opioids and/or an imminent intent to use opiates in the future (JA Vol. 1; 304, 308-09); and he was not exhibiting any clinical signs of opioid withdrawal. (JA Vol. 1:293, 302, 310, 319-20). The Petitioner's only rebuttal to this evidence is unsubstantiated conjecture that the Decedent must have been taking fentanyl at the time he presented to the Wheeling Treatment Center because he died of a fentanyl overdose thirty-six (36) days later. This is a convenient argument since fentanyl is an opioid but urine testing for fentanyl did not exist in September of 2017 according to Petitioner's own experts.

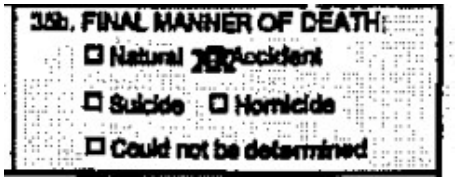
Yet, there was no evidence ever adduced in this case to suggest that any person who observed the Decedent the day he presented to the Wheeling Treatment Center, including his father, the Petitioner, observed any behavior from the Decedent indicative of intoxication or impairment from any drug. (JA Vol. 1:319 – "Q: And that morning, he did not appear to be intoxicated or under the influence of drugs when you saw him? A: No, ma'am.").

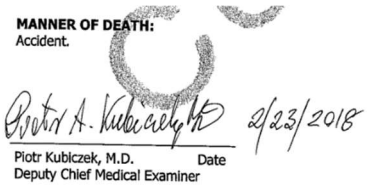
There is likewise no evidence to dispute that the Decedent failed to disclose any history of opioid use or abuse, but rather told the Respondents he was presenting to the Wheeling Treatment Center because his father made him. Despite the Petitioner's incredulous questioning of the Respondents with regard to whether the Decedent presented to the treatment center to order pizza, the Petitioner produced no actual evidence that Austin Ghaphery had disclosed actual or anticipated opioid abuse. Nor, has the Petitioner ever offered an explanation for why a for-profit medical facility would not offer treatment to the Decedent had he been an appropriate candidate for admission.

Austin Ghaphery Was Not Actively Suicidal And Never Committed Suicide

Evidence adduced during the course of discovery further established that at the time the Decedent presented to the Wheeling Treatment Center, he did not disclose any *active* suicidal ideations and was not otherwise in crisis. (JA Vol. 1: 296, 303, 308-09, 316). Despite the arguments of his counsel, the testimony of the Petitioner, as well as the testimony and medical records of the Decedent's primary care physician, provide evidence in support that an appropriate assessment was performed. This is true even as the assessment of the Decedent's 'suicidality' is shown to be completely immaterial as Austin Ghaphery **never** committed suicide.

West Virginia law provides that a certified copy of a Death Certificate which was issued in accordance with West Virginia Code §16-5-28(d), "shall be prima facie evidence of the facts stated in the record[.]" W.VA. CODE § 16-5-28(d). There is no evidence in this case that The Decedent committed suicide; rather his manner of death is listed on the Death Certificate and in the Autopsy Report was "accidental."





(JA Vol 1:284). In fact, the Petitioner does not even argue that the Decedent committed suicide, but rather has in fact been very careful *not* to argue that the Decedent committed suicide to avoid the deluge of cases which would then support summary disposition of this matter. *See e.g.*, Restatement (Second) of Torts § 314 (1965) (The general rule is that a person does not have a duty to act affirmatively to protect another person from harm. "The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action."); *see also*, Stevens v. MTR Gaming Group, Inc., 788 S.E.2d 59 (W.Va. 2016) ("Absent a special relationship between the parties giving rise to a specific duty to prevent the Decedent's suicide, the act of taking one's own life is generally regarded as a supervening act that breaks the chain of causation necessary to hold a defendant liable to the plaintiff's wrongful death.").

There is no evidence, that the Decedent committed suicide and ***no evidence*** that he was in fact ***actively*** suicidal at the time he presented to the Wheeling Treatment Center. Such conjecture by Petitioner's counsel is completely dispelled by evidence in the medical records of the Decedent's primary care physician, Brad Schmitt, M.D. who saw the Decedent both days before

and days after he presented to the Wheeling Treatment Center, finding on both occasions that the Decedent was *not* actively suicidal. (JA Vol 1:333, 338-39). Even the observations and testimony of the Petitioner himself do not support a finding of active suicidality by the Decedent on the day he presented to the Wheeling Treatment Center. (JA Vol 1:316).

As discussed extensively above, there is simply no evidence that the Decedent was in acute suicide crisis or that he would have qualified for either voluntary or in-voluntary psychiatric commitment on the date he presented to the Wheeling Treatment Center. For the Petitioner, the Decedent's father, to argue that the Respondents should have sought the in-voluntary and/or voluntary commitment of the Decedent when he, himself, a physician who lived with Austin Ghaphery saw nothing on the trip to the Wheeling Treatment Center or on the trip from the Wheeling Treatment Center that prompted *him* to seek psychiatric commitment of his son is disingenuous and, frankly, is absurd.

"As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). If the factual context renders the nonmoving party's claim implausible, or if the claim simply makes no sense, the nonmoving party must come forward with more persuasive evidence to withstand summary judgment. Williams v. Precision Coil, Inc., 459 S.E.2d 329, 337-338 (W.Va. 1995), quoting Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). Our case law is very clear that "evidence illustrating the factual controversy cannot be conjecture or problematic. It must have substance in the sense that it limns differing versions of the truth which a factfinder must resolve." Williams at 337.

D. NO ACT OR OMISSION BY THE RESPONDENTS PROXIMATELY CAUSED THE DEATH OF THE DECEDENT.

Based upon nothing but conjecture on top of speculation heaped upon a gross distortion of Jamie Coen-Picken's Case Note, the Petitioner wants this Court to find that the following contortion presents actionable negligence and causation: (1) ***If*** the Respondents would have properly assessed the Decedent's suicidality, (2) ***then*** the Respondents would have deemed him actively suicidal; ***and*** (3) ***If*** the Decedent had been deemed actively suicidal, (4) ***then*** he would have either been involuntarily or voluntarily committed to a psychiatric facility; ***and*** (5) ***If*** the Decedent had been committed to an inpatient facility, (6) ***then*** the Decedent would have been serendipitously diagnosed with a drug use disorder; **and** (7) ***If*** the Decedent had gotten treatment for a drug use disorder, (8) ***then*** he would not have died from a drug overdose on November 3, 2017. Petitioner's long, strained, and very tenuous chain of alleged causation simply cannot be legally actionable. *See e.g.*, Wehner v. Weinstein, 444 S.E.2d 27, 35 (W.Va. 1994) (*quoting* Webb v. Sessler, 63 S.E.2d 65, syl. pt. 4 (W.Va. 1950)).

As has been made clear by the evidence in this case, the Respondents were not negligent in their assessment of the Decedent's suicidality on the day he presented to the Wheeling Treatment Center; however, even assuming *arguendo* that they had been, their negligence as alleged by the Petitioner, was entirely too remote to be a proximate cause of the Decedent's death being separated by at least another seven, very contingent, steps away from any proximate link to the Decedent's death. *See e.g.*, Spencer v. McClure, 618 S.E.2d 451, syl. pt. 4 (W.Va. 2005). The alleged negligence of the Respondents simply did not furnish the condition or occasion for the death of The Decedent. *See e.g.*, Smith v. Penn Line Service, Inc., 113 S.E.2d 505 (W.Va. 1960).

Austin Ghaphery's death was caused by his conscious and deliberate act of taking illicit drugs, an act for which these Respondents are not legally liable. *See e.g.*, Robertson v. LeMaster,

301 S.E.2d 563, 612 (W.Va. 1983) (The existence of duty involves policy consideration underlying the core issue of the scope of the legal system's protection. In determining whether a duty is owed, courts are bound to evaluate such pertinent factors as the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant.)

Upon presentation to the Wheeling Treatment Center on September 28, 2017, the Decedent spoke to a counsel about his *history* of past suicidal ideation, as well as active depression for which he was being treated with medication by his primary care physician. (JA Vol 1: 293, 296). He did not disclose any information regarding current or impending use of drugs, a chronic history of opioid use, and did not test positive on his urine drug screen for any illicit drug except marijuana. (JA Vol 1:292). After speaking with the Respondents about his depression, the Decedent agreed to return to his primary care provider to discuss further treatment of his depression. (JA Vol 1:304).

As he had agreed with the Respondents, on October 5, 2017, seven (7) days after he presented to the Wheeling Treatment Center, the Decedent followed up with Brad Schmitt, M.D. at which time he noted that he was "much improved over [the] last few weeks" stating that the Decedent believed that "time" and the "medication has help[ed] substantially" and that his depression was much improved. (JA Vol. 1:338). Dr. Schmitt noted at that time that the Decedent was "smiling" and had improved affect, good insight, good judgment with no suicidal or homicidal ideations. (JA Vol. 1:339). Dr. Schmitt made no changes in the Decedent's mediation at that time but instructed him to call immediately or get to a crisis unit if he got any worse or developed suicidal ideations. The Decedent was to follow up with Dr. Schmitt again in four (4) weeks. (Id). The Petitioner himself has testified in this action that, based upon his observations of and

interaction with the Decedent, he too believed that the Decedent was doing better as of October 5, 2017. (JA Vol 1:318).

Eight (8) days later on October 13, 2017, the Petitioner, a medical doctor, Dr. Schmitt also with the Decedent advising that Austin Ghaphery was doing better on Lexapro and tolerating the medication well but felt he could be doing better. (JA Vol 1:336). Dr. Schmitt increased the Decedent's Lexapro dose from 10 mg. to 20 mg., indicating that he had a follow up appointment "next week" [the week of October 16th -20th]. (Id). There are no records of the Decedent attending or otherwise cancelling or rescheduling an appointment with Dr. Schmitt. (JA Vol 1:345-46).

Twenty-one (21) days later, while the Petitioner was away from the home he shared with the Decedent at a medical conference at the Greenbrier Resort, the Decedent died of a multi-drug overdose including fentanyl, heroin and cocaine. The Medical Examiner's Report noted no wounds on the Decedent and there was no indication that the Decedent did not voluntarily ingest the illegal drugs that resulted in his death. The REPORT OF DEATH INVESTIGATION AND POST-MORTEM EXAMINATION FINDINGS of the West Virginia Office of the Chief Medical Examiner listed the cause of death as being due to fentanyl, nor-fentanyl, heroin, amphetamine and cocaine intoxication, with the manner of death being an accident. (JA Vol 1:284). At the time of death, the Decedent was not a patient of Wheeling Treatment Center or Dr. Schult, having not been admitted to the Wheeling Treatment Center's MAT program over a month prior. Importantly, Austin Ghaphery was actively obtaining medical and psychological treatment from his primary care physician during the intervening time period.

West Virginia law requires that the plaintiff in a medical malpractice action prove that the injuries and damages of which he complains were the proximate result of the defendant healthcare provider's deviation from the standard of care. W.VA. CODE §55-7B-3 (2016). Petitioner argues

in the absence of any evidence (and contrary to the Petitioners own deposition testimony) that upon presentation to the Wheeling Treatment Center, his Decedent, the Decedent was in crisis both as a result of drug addiction and due to active suicidal ideations. However, thirty-six (36) days passed between the Decedent's presentation to the Wheeling Treatment Center and his death. Additionally, after his presentation to the Wheeling Treatment Center, the Decedent was seen, in person, by his primary care physician, Dr. Schmitt, for treatment of his depression. At that time (which was after the Decedent had been at WTC), Dr. Schmitt specifically noted that there was marked improvement in the Decedent's depressive symptoms, as well as a decrease in his alcohol consumption and an absence of suicidal ideations. Furthermore, the Petitioner himself testified in this case that he noted no signs of distress, suicidal ideations and/or drug use by the Decedent from the time of his presentation to the Wheeling Treatment Center until his death. The subsequent medical treatment rendered by the Decedent's primary care physician and the criminal acts of the Decedent are both intervening acts which make any negligence by the Respondents too remote to be actionable.

To be actionable, the defendant's negligence must be "the proximate cause of the injury complained of and must be such as might have been reasonably expected to produce an injury." Aikens, *supra*, at syl. pt. 6 (citations omitted). "Proximate cause is a vital and an essential element of actionable negligence and must be proved to warrant a recovery in an action based on negligence." McCoy v. Cohen, 140 S.E.2d 427, syl. pt. 3 (W.Va. 1965). West Virginia law defines proximate cause as "'that cause which in actual sequence, unbroken by any independent cause, produced the wrong complained of, without which the wrong would not have occurred.'" Spencer v. McClure, 618 S.E.2d 451, syl. pt. 4 (W.Va. 2005) (quoting Syl. Pt. 3, Webb v. Sessler, 63 S.E.2d

65 (W.Va. 1950)). The Supreme Court of Appeals of West Virginia has previously held that the proximate cause of an injury is:

- "the last negligent act contributing to the injury and without which the injury would not have occurred." Mays v. Chang, 579 S.E.2d 561 at syl. pt. 1 (W.Va. 2003);

- "the superior or controlling agency from which springs the harm, as contradistinguished from those causes which are merely incidental or subsidiary to such principal and controlling cause." Stuck v. Kanawha & M. Ry. Co., 86 S.E. 13, syl. pt. 6 (W.Va. 1915).

- "the cause that in actual sequence, unbroken by an independent cause, produced the wrong complained of, and without which the wrong would not have occurred." *Webb v. Sessler,* 63 S.E.2d 65 at syl pt. 3 (W.Va. 1950).

An intervening cause relieves a party charged with negligence in connection with an injury from liability if the intervening cause is a negligent act or omission that constitutes a new effective cause and operates independently of any other act to make it the proximate cause of the injury. Lester v. Rose, 130 S.E.2d 80, syl. pt. 16 (W.Va. 1963); *see also* Pitzer v. M. D. Tomkies & Sons, 67 S.E.2d 437, syl. pt. 3 (W.Va. 1951) ("A failure to obey the mandate of a lawfully enacted statute will be treated as the proximate cause of an injury 'which is a natural, probable and anticipated consequence of the non-observance.'").

In this case, no alleged act and/or omission by these Respondents was a proximate cause of the Decedent's death. Similarly, no conduct of the Respondents was the last negligent act contributing to the injury and without which the death of Petitioner's Decedent would not have occurred. Accordingly, no reasonable person could find that any act or omission of the Respondents was a proximate cause of the Decedent's death and/or the Petitioners' damages. While tragic, the actual and proximate cause of the Decedent's death was his own independent, criminal conduct in knowingly consuming illicit drugs. In accordance with the law, the Decedent's own conduct constituted a subsequent intervening, independent act proximately causing his death.

"Generally, a willful, malicious, or criminal act breaks the chain of causation[.]" Yourtree v. Hubbard, 474 S.E.2d 613, 620 (W.Va. 1996). There can be no dispute that the Decedent's consumption of cocaine and heroin was both a willful and a criminal act. And although his willful, intentional and criminal use of drugs caused his death, there is no evidence that the Decedent intended to commit suicide by drug overdose.

Furthermore, "the negligence which renders a defendant liable for damages must be a proximate, not a remote, cause of injury." Metro v. Smith, 124 S.E.2d 460, 646 (W.Va. 1962). "It is a ' "well established principle of [the common] law that in all cases of loss, we are to attribute it to the proximate cause, and not any remote cause." ' " Bank of America Corp. v. City of Miami, Fla., 137 S.Ct. 1296, 1305 (2017)(internal citations omitted). "In this jurisdiction there is a clear distinction between the proximate cause of an injury and the condition or occasion of the injury." Wehner v. Weinstein, 444 S.E.2d 27, 35 (W.Va. 1994) (*quoting* Webb v. Sessler, 63 S.E.2d 65, syl. pt. 4 (W.Va. 1950)).

Here, the Respondents determined on September 28, 2017, that the Decedent would not be admitted to their medication assisted treatment program and they told him so. He was immediately rejected from the program, was never a patient of the Respondents, and was free to obtain treatment from whatever source he and his family chose. Respondents owed no duty and breached no duty to the Decedent. When asked by the Respondents why he had presented to the Wheeling Treatment Center, the Decedent responded "My dad made me come here" and yet, upon learning that the Decedent had not been accepted as a patient at Wheeling Treatment Center MAT program, the Petitioner, a medical doctor, took no further action, made no substantive inquiry of the Decedent regarding the status of his drug use, and made no attempt to obtain alternative medical services for the Decedent. (JA Vol 1: 322). And to be clear, at **no time** did the Petitioner ever ask his son what

drugs he was taking; Petitioner did not research the Wheeling Treatment Center to determine what type of addiction it treated or what treatment types it offered; and Petitioner never asked his son a single question as to why he was not accepted as a patient at the Wheeling Treatment Center. (JA Vol 1: 214, 322, 408-10). So, Petitioner could never have been assured that the Wheeling Treatment Center would accept his son for treatment, nor surprised when it turned out that it would not.

Assuming *arguendo* negligence on the part of these Respondents, under the comparative negligence doctrine, a plaintiff is not entitled to recover from a negligent tortfeasor if the plaintiff's own contributory negligence equals or exceeds the combined negligence of the other parties involved in the accident. *See* Syl. Pt. 3, Bradley v. Appalachian Power Co., 256 s.E.2d 879 (W.Va. 1979). "In order to obtain a proper assessment of the total amount of the plaintiff's contributory negligence under our comparative negligence rule, it must be ascertained in relation to all parties whose negligence contributed to the accident and not merely those defendants involved in the litigation." Syl. Pt. 3, Bowman v. Barnes, 282 S.E.2d 613 (W.Va. 1981). In this case, the Decedent's death would not have occurred but for the multiple actions and independent choices made by the Decedent; his conduct of intentionally buying and ingesting illegal drugs was the last negligent act contributing to the injury and without which his death would not have occurred and these Respondents were and remain entitled to judgment as a matter of law.

VII. CONCLUSION

The ruling from the Circuit Court as set forth in its September 21, 2022, REVISED ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND FINDING THAT DEFENDANTS HAD NO DUTY TO ACCEPT OR TREAT THE DECEDENT, AUSTIN GHAPHERY should be affirmed as it correctly held that these Respondents "had no duty, as a matter of law, to accept as patient or

otherwise treat the decedent[.]" The existence of a duty of care by a defendant must be rendered by the court as a matter of law and is not a factual question for the jury. *See e.g.,* Jack v. Fritts, 457 S.E.2d 431, 435 (W.Va. 1995); Syl. Pt. 5, Aikens v. Debow, 541 S.E.2d 576 (W. Va. 2000). After review of all the evidence submitted in this matter, the Circuit Court correctly concluded that "that there is no duty of care owed to every person who is screened but not accepted for treatment as a patient, and, in this case, is never treated as a patient and who is never seen again." (JA Vol 2: 888).

Petitioner's Decedent presented to the Wheeling Treatment Center on September 28, 2017, to be *considered* for admission to the medication assisted opioid treatment program. There is no law and no duty which mandates that the Respondents accept anyone as a patient; they have the right to refuse treatment of any individual, at their discretion – so long as there is no discriminatory intent. Right or wrong, the Decedent was not accepted as a patient and the Respondents were under no legal duty to do so. Accordingly, no physician-patient relationship was formed and at no time did the Respondents, either individually or collectively, agree to provide *any* medical service to the Decedent. Rather, he was immediately rejected from the program, was never a patient of the Respondents, and was free to obtain treatment from whatever source he and his family chose.

Nevertheless, the evidence establishes that the Decedent was properly assessed by the Respondents on September 28, 2017, and determined not to be eligible for admission into the Respondents' opioid MAT program, nor to be actively suicidal. As the records and testimony bore out, the Decedent's urine drug screen was negative for opioid use and no person who observed the Decedent the day he presented to the Wheeling Treatment Center, including the Petitioner who drove him there, observed any behavior from the Decedent indicative of drug impairment or withdrawal.

Likewise, all evidence in this case as to any prior suicidal ideations by the Decedent established that they were something that had occurred in the past but were not actively occurring at the time he presented to Wheeling Treatment Center, this included the sworn testimony of his father, the Petitioner, who observed the Decedent both before and after he was at the Wheeling Treatment Center (as he drove him to and from the appointment), and with the medical records of the Decedent's primary care physician, Dr. Brad Schmitt, who treated the Decedent before and after he was at WTC. And, it must be remembered that Austin Ghaphery did not die by suicide, making the argument as to thoroughness of the suicidal assessment a moot point.

WHEREFORE, the Respondents, Wheeling Treatment Center and John Schultz, M.D., by counsel, respectfully request this Court enter an Order affirming the Circuit Court's grant of summary judgment to the Respondents, finding that the Respondents had no duty to accept the Decedent Austin Ghaphery as a patient; the Respondents owed no duty to seek commitment of the Decedent to psychiatric facility on September 27, 2017; and that the death of Plaintiff's Decedent was not proximately caused by any act or omission of these Respondents, and granting such other and further relief in favor of the Respondents as the Court deems just and appropriate under the circumstances.

Respectfully submitted,
WHEELING TREATMENT CENTER, LLC AND JOHN SCHULTZ, M.D.
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No. 22-ICA-150

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRIGNIA

NICHOLAS A. GHAPHERY, D.O.,
As Personal Representative of the
Estate of Austin Ghaphery,

Petitioner,

v. **(ON APPEAL FROM THE CIRCUIT COURT OF OHIO COUNTY, W.VA. CIVIL ACTION NO. 19-C-182**

WHEELING TREATMENT CENTER, LLC,
and JOHN SCHULTS, M.D.,

Respondents.

CERTIFICATE OF SERVICE

I, the undersigned counsel, hereby certify that on this 9th day of March 2023, the foregoing **RESPONDENTS' BRIEF** has been filed electronically using the WV E-Filing System which will provide service upon all counsel of record.

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