INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
No. 22-ICA-233

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JAMES ATKINSON,

Plaintiff Below, Petitioner

v.

MEDTOX LABORATORIES, INC,
and NCI NURSING CORPS.

Defendants Below, Respondents

RESPONSE BRIEF

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I. INTRODUCTION AND STATEMENT OF THE CASE

Petitioner James Atkinson, the plaintiff in this appeal, was an employee of Harrison County Coal Company and was selected to submit to a urinalysis drug screening which occurred on July 14, 2020. Respondent NCI Nursing Corps ("NCI"), via its DOT certified collection specialist, conducted the collection of Petitioner's urine. The Petitioner's urine sample was then mailed to defendant MedTox Laboratories who conducted the urinalysis and generated a report on said urinalysis which resulted in a positive finding for "marijuana (THC) metabolite", in the amount of 32 ng/ml (nanograms per milliliter). Thereafter, the Medical Review Officer ("MRO") Dr. Stephen Mascio, not employed by the Respondent, interpreted and communicated said results to the West Virginia Office of Miners' Health, Safety and Training (WVOMHST) and/or his employer, which resulted in Petitioner being suspended from his job pursuant to state law due to this positive drug test.

Per the Petition for Appeal brief, Petitioner protested his suspension and litigated this protest with the WVOMHST. During this WVOMHST litigation related to the suspension, the following facts were testified to and admitted:

- Petitioner testified that that he used CBD oil on his body prior to the urine screen;
- Petitioner's urine screen via NCI and MedTox Laboratories, Inc. tested positive for THC;
- There was no allegation or claim that the urine sample was not the Petitioner's, was mishandled, or manipulated;
- The medical review officer (MRO) Dr. Mascio, testified that the results indicate Petitioner's urine was positive for marijuana (THC-A) being in the system,

- Dr. Mascio testified that 32 nanograms is indicative of someone using illegal marijuana;
- Dr. Mascio did not cancel the test or throw out the results of the test;
- Petitioner's own expert, Dr. Lykissa testified that if there was THC detected in the urine, it could have come from the administration of CBD oils.
- There was no testimony or ruling that any fatal flaw occurred with the testing process to render the results void or improper

Petitioner thereafter filed his lawsuit against the named defendants and specifically against Respondent for its failure to void the drug screen based on certain allegations that the nurse/technician did not meet certain federal and state regulations and standards, or had sufficient training and qualifications.[1]

Petitioner's Complaint asserted a claim of Professional Malpractice (Count I), against Respondent. He further asserted claims of Negligence (Count II), Violation of Statutes (Count III) and Punitive Damages (Count IV), which all flow from and are based on the same premise of the Professional Malpractice claims. Thereafter, the Circuit Court properly dismissed Petitioner's claims against Respondent, per Respondent's Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the West Virginia Rules of Civil Procedure and the applicability of the West Virginia Medical Professional Liability Act (West Virginia Code § 55-7B-1 et. seq.) finding that the asserted causes of action (i.e., Counts II , III, and IV) are based on the same premise as Petitioner's allegations contained in his "Professional Malpractice" (Count I) claim, and thereby, they are

[1] Importantly there is no allegation that the positive finding of THC in Petitioner's urine was incorrect, false, and/or manipulated. As per Petitioner's Complaint indicates, he litigated his protest of the suspensions of his WVOMHST Certifications. During this litigation, he testified and admitted under oath that he used CBD oil on his body and experts who testified in the administrative hearing opined that CBD oil will and can produce a positive THC result.

deemed to directly stem from such Count I claim. The Circuit Court further ruled that "Collectively, they relate directly to the medical services being provided by Respondent/Defendant NCI, a professional nursing management company, and which employed (as alleged in Petitioner's Complaint) a nurse/technician who was required to meet certain federal and state regulations and standards as well as have certain training and qualifications." The Circuit Court held that "Plaintiffs claims fall under the MPLA and therefore strict compliance with the applicable statute must be met in order to maintain his causes of action." See Dismissal Order, App. 76.

II. PROCEDURAL HISTORY

Petitioner filed his Complaint on or about July 18, 2022. On August 29, 2022, Respondent NCI filed its Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(6) of the West Virginia Rules of Civil Procedure and the applicability of the West Virginia Medical Professional Liability Act (West Virginia Code § 55-7B-1 et. seq.). Petitioner filed his response to the Motion to Dismiss on or about September 27, 2022. Respondent then filed its Reply Memorandum in Support of its Motion to Dismiss on October 3, 2022.

On October 31, 2022, the Circuit Court of Harrison County (Judge Thomas Bedell) entered an Order granting Respondents Motion to Dismiss ruling that the Complaint failed "to comply with the requirements of the MPLA deemed applicable thereto given this Court's determinations that Defendant NCI and/or its employee(s) are a health care provider pursuant to the MPLA and their services rendered with respect to Plaintiff qualify as health care." On November 22, 2022, Petitioner filed his Notice of Appeal before this Court as a result of the Circuit Court's October 31, 2022 Order.

III. SUMMARY OF ARGUMENT

The Circuit Court properly granted Respondent's Motion To Dismiss as a matter of law by finding that the causes of action and assertions in Petitioner's Complaint are governed by The West Virginia Medical Professional Liability Act, West Virginia Code § 55-7B-1, et seq. ("MPLA). First and foremost, the services performed by NCI and its nurse/technician constitute health care as defined by the MPLA. See West Virginia Code § 55-7B-2(e) defining "health care" as:

> (1) **Any act, service or treatment provided under, pursuant to or in the furtherance of a** physician's plan of care, a health care facility's plan of care, **medical diagnosis** or treatment;
>
> (2) **Any act, service or treatment performed or furnished**, or which should have been performed or furnished, **by any health care provider** or person supervised by or acting under the direction of a health care provider **or licensed professional for, to or on behalf of a patient during the patient's medical care, treatment** or confinement, including, but not limited to, staffing, medical transport, custodial care or **basic care**, infection control, positioning, hydration, nutrition and similar patient services;

NCI and its nurse/technician (as pled in the Complaint) is a health care provider under this section, and its service and plan of care was to collect a urine specimen from the Petitioner/Plaintiff in the furtherance of a medical diagnosis (positive or negative drug results). Furthermore, this act and service of collecting a urine specimen performed by NCI's nurse/technician, a licensed professional, is clearly medical care or basic care under the statute. Therefore, NCI's urine specimen collection is "health care" pursuant to the MPLA as it resulted in a diagnosis of a positive THC (marijuana) urine screening test result.

Additionally, NCI and/or its nurse/technician as alleged in the Complaint is clearly a "health care provider" as defined under West Virginia Code § 55-7B-2(g).

> (g) **"Health care provider" means a person**, partnership, **corporation**, professional limited liability company, health care facility, entity or institution **licensed by, or certified in, this state or another state, to provide health care or professional health care services, including,** but not limited to, a physician, osteopathic physician, physician assistant, advanced practice registered nurse, hospital, health care facility, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, speech-language pathologist, audiologist, occupational therapist, psychologist, pharmacist, **technician**, certified nursing assistant, emergency medical service personnel, emergency medical services authority or agency, any person supervised by or acting under the direction of a licensed professional, a**ny person taking actions or providing service or treatment pursuant to or in furtherance of** a physician's plan of care, a health care facility's plan of care, **medical diagnosis** or treatment; or an officer, **employee or agent of a health care provider acting in the course and scope of the** officer's, **employee's or agent's employment**.

Petitioner admits and asserts in his Complaint that NCI is a "a professional nursing management company". Furthermore, Petitioner in his Complaint asserts that the urine specimen collector is a nurse/technician, who must abide by and adhere to certain qualifications, training, standards, and laws. By Petitioner's own pleadings, NCI and/or the nurse/technician is a "health care provider" under the MPLA. Equally important is the fact that the Petitioner pled a "Professional Malpractice" claim against NCI, demonstrating that this matter should fall under the MPLA. Furthermore, the Petitioners is correct in his pleadings and allegations that the urine specimen collector for NCI must be trained, qualified, and certified to perform his job duties, as well as follow certain standards and regulations. NCI and its nurse/technician are clearly a health care provider pursuant to the WVMPA statute, as the individual collecting the urine sample was certified to do so, was providing health care in West Virginia, and taking actions or providing service pursuant to or in furtherance of a medical diagnosis or treatment. Petitioner/Plaintiff's own language and assertions in the Complaint establish it as a ***professional medical malpractice claim***

(See Count I of Complaint, titled "Professional Malpractice"), App. 4. This section of the statute is also satisfied as NCI's nurse/technician was an employee of a health care provider acting withing the scope of his employment.

Therefore Petitioner's claim must fail due to his failure to comply with the requirements set forth in the plain language of the MPLA requiring at least thirty days prior to the filing of such action service of a notice of claim on NCI. *See* W.Va. Code § 55-7B-6(a) and W.Va. Code § 55-7B-6. In this instance, Petitioner did not serve NCI with a notice of claim and screening certificate of merit pursuant to West Virginia Code § 55-7B-6 at least thirty days prior to filing this Complaint. Because it was undisputed that Petitioner did not abide by the mandatory provisions of the MPLA, the Circuit Court lacked subject matter jurisdiction over the Complaint. The Circuit Court thereafter properly ruled that Petitioner did not bring forth his lawsuit pursuant to the MPLA and abide by the MPLA statute, and dismissed the lawsuit as a matter of law as to NCI.

For the above reasons, and for the arguments of law stated herein, the Petition for Appeal should be denied and the Circuit Court's order of dismissal should be upheld and affirmed as to all matters before this Court.

IV. STATEMENT OF ORAL ARGUMENT

Pursuant to the criteria set forth in Rule 18(a) of the Revised Rules of Appellate Procedure (R.R.A.P.), Respondent believes that the deliberation process would be aided by oral argument in this matter.

V. STANDARD OF REVIEW

"Appellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syl. Pt 1, *Tanner v. Raybuck*, 246 W. Va. 361 *; 873 S.E.2d 892 **; 2022 W. Va. LEXIS

280 ***; 2022 WL 1124882; Syllabus Point 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W. Va. 770, 461 S.E.2d 516 (1995)." Syl. Pt. 1, *Collins v. Heaster*, 217 W. Va. 652, 619 S.E.2d 165 (2005). "Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statue, we apply a *de novo s*tandard of review." Syl. Pt. 2, *Tanner v. Raybuck*, 246 W. Va. 361 *; 873 S.E.2d 892 **; 2022 W. Va. LEXIS 280 ***; 2022 WL 1124882Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

VI. <u>ARGUMENT</u>

Petitioner alleges three assignments of error in his appeal. He asserts that the Circuit Court of Harrison County erred in finding that the claims in Petitioner's Complaint fall under the MLPA. Petitioner also claims that the Circuit Court erred by disregarding Counts 27, 31, 35, 36, 37, and 41 and numerous other counts and paragraphs of the Complaint. His final assertion of error is the claim that the lower court erred in finding that the actions and services performed by NCI constitute health care as defined by the MPLA. Regardless of his three separate assignments of error, the entirety of the argument and petition for appeal boils down to whether the allegations in the Complaint fall under the MPLA, and whether the Circuit Court dismissal ruling was proper.

I. The Circuit Court of Harrison County Correctly Ruled That Petitioner's Complaint Fell Under the West Virginia Medical Professional Liability Act (West Virginia Code § 55-7B-1 et. seq.)

Petitioner's Complaint and causes of action as pled falls under the MPLA as decided and ruled upon by the Circuit Court of Harrison County, and no error was committed in this finding. Because this is a lawsuit under the MPLA, strict compliance with the applicable statute must be met in order to maintain his cause of action, "[W]here the alleged tortious acts or omissions are committed by a health care provider within the context of the rendering of 'health care' as defined by W. Va. Code §55-7B-2(e) (2006) (Supp.2007), the Act applies regardless of how the claims

have been pled." *Blankenship v. Ethicon, Inc.*, 221 W. Va. 700, 656 S.E.2d 451, 453 (W. Va. 2007). The MPLA, West Virginia Code § 55-7B-1, et seq., applies to any claim involving "medical professional liability." W. Va. Code § 55-7B-6(a). "Medical professional liability" is defined under the MPLA as "any liability for damages resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient. It also means other claims that may be contemporaneous to or related to the alleged tort or breach of contract or otherwise provided, all in the context of rendering health care services." W. Va. Code § 55-7B-2(i).

Obviously, the lynchpin issue in this appeal is do the allegations and causes of action pled in Petitioner's Complaint meet the definitions of "Health care", "Patient", and "Health care provider". Furthermore, it is apparent that each of Petitioner's Complaint causes of action against the Respondent (including the Negligence and Violation of Statute claims) originate and are derived from the Professional Malpractice claims asserted in Count I, which relate directly to the medical services being provided by the defendant NCI, a professional nursing management company, and which employed per the Complaint, a nurse/technician who was required to meet certain federal and state regulations and standards, and have certain training and qualifications. (See Complaint, App. 4).

Importantly, when analyzing and addressing whether the WVMPLA applies to lawsuits, the West Virginia Supreme Court of Appeals has taken a very broad approach in determining whether actions fall under the purview of the MPLA. See *Minnich v. MedExpress Urgent Care*, 238 W. Va. 533, 796 S.E.2d 642, 2017 W. Va. LEXIS 62 (holding that plaintiff's fall while attempting to get on examination table is under the MPLA); *State ex rel. PrimeCare Med. of W.*

Va., Inc. v. Faircloth, 242 W. Va. 335 (2019) (finding the MLPA applied to a claim for failure to monitor a patient for suicide). The lower court properly analyzed the Complaint allegations, the MPLA statute, and the law, and did not commit error when it dismissed Petitioner's action against the Respondent.

a. Definition of Health Care

The services performed by NCI and its nurse/technician (as asserted in the Complaint) constitute health care as defined by the MPLA. West Virginia Code § 55-7B-2(e) defines "health care" as:

> (1) Any act, service or treatment provided under, pursuant to or in the furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis or treatment;
>
> (2) Any act, service or treatment performed or furnished, or which should have been performed or furnished, by any health care provider or person supervised by or acting under the direction of a health care provider or licensed professional for, to or on behalf of a patient during the patient's medical care, treatment or confinement, including, but not limited to, staffing, medical transport, custodial care or basic care, infection control, positioning, hydration, nutrition and similar patient services; and
>
> (3) The process employed by health care providers and health care facilities for the appointment, employment, contracting, credentialing, privileging and supervision of health care providers.

Without question, NCI and its nurse/technician is a health care provider under this section, and its act, service, and plan of care was to collect a urine specimen from the Petitioner in the furtherance of a medical diagnosis (positive or negative drug results). This act and service of collecting a urine specimen performed by NCI's nurse/technician, a licensed professional, is clearly medical care or basic care under the statute, as it resulted in a medical diagnosis (a positive drug (THC) urinalysis result). The entire point of such action by NCI was to obtain a medical

diagnosis of whether the urine drug test was positive or negative for a variety of drugs. Therefore, NCI's urine specimen collection is "health care" pursuant to the MPLA.

Importantly, although there is nothing on point in terms of case law in West Virginia, other jurisdictions have held that "[T]he collection and testing of urine was conducted in the course of medical treatment to which Appellants consented." See *Ferguson v. City of Charleston*, 186 F.3d 469, 479 (Fourth Cir. 1999), 1999 U.S.App.LEXIS 15611, 17-18. "The giving of a urine sample is a normal, routine, and expected part of a medical examination." See *Yin v. California*, 95 F.3d 864, 870 (9th Cir. 1996). Additionally, the United States District Court for the Middle District of Alabama, Northern Division has held that the testing and reporting of a urine specimen of an employee plaintiff constituted medical care and fell within the Alabama Medical Liability Act ("AMLA"). See *Billingsley v. Labcorp, Inc.*, 2006 U.S. Dist. LEXIS 63573, 2006 WL 2559819. Furthermore the Billingsley court found that the AMLA governed plaintiff's claims against LabCorp as LabCorp fell within the AMLA's definition of health care provider " …, or other health care provider", and specifically held that a medical reference laboratory, such as LabCorp, is within the definition of "other health care provider" and is subject to the AMLA. In the case at bar, defendant MedTox is essentially the same entity as LabCorp, as LabCorp purchased MedTox several years ago. MedTox in this matter was the entity that tested the urine specimen, presumably at its facility, making its action of testing the urine sample to provide a medical diagnosis clearly health care. Therefore, Petitioner's claims against both NCI and LabCorp fall within the purview of the MPLA as their actions were health care and no error was committed by the lower court regarding this finding.

b. Definition of Health Care Provider

West Virginia Code § 55-7B-2(g) defines a "health care provider" as:

> (g) "Health care provider" means a person, partnership, corporation, professional limited liability company, health care facility, entity or institution licensed by, or certified in, this state or another state, to provide health care or professional health care services, including, but not limited to, a physician, osteopathic physician, physician assistant, advanced practice registered nurse, hospital, health care facility, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, speech-language pathologist, audiologist, occupational therapist, psychologist, pharmacist, technician, certified nursing assistant, emergency medical service personnel, emergency medical services authority or agency, any person supervised by or acting under the direction of a licensed professional, any person taking actions or providing service or treatment pursuant to or in furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis or treatment; or an officer, employee or agent of a health care provider acting in the course and scope of the officer's, employee's or agent's employment.

W. Va. Code § 55-7B-2(g).

NCI and/or its nurse/technician as alleged in the Complaint is clearly a "health care provider" as defined under West Virginia Code § 55-7B-2(g). Petitioner admits in the Complaint that NCI is a "a professional nursing management company". Furthermore, Petitioner asserts that the urine specimen collector is a nurse/technician, who must abide by and adhere to certain qualifications, training, standards, and laws. By Petitioner's own admission, NCI and/or the nurse/technician is a "health care provider" under the MPLA. Equally important is the fact that plaintiff pled a "Professional Malpractice" claim against NCI, demonstrating that this matter should fall under the MPLA.

Additionally, the Petitioner is correct in his pleadings and allegations that the urine specimen collector for NCI must be trained, qualified, and certified to perform his job duties, as well as follow certain standards and regulations. As has already been argued hereinabove, and germane to the definition of health care provider, NCI, through its nurse/technician, provided "health care or professional health care services" and includes any person taking actions or

providing service or treatment pursuant to or in furtherance of a . . . medical diagnosis or treatment." Additionally, the NCI nurse/technician is clearly an "… employee or agent of a health care provider acting in the course and scope of the . . . employee's or agent's employment". See W. Va. Code § 55-7B-2(g). NCI clearly meets the WVMPLA's definition of "health care provider" and Petitioner's own language in his pleadings demonstrate that. The lower court properly analyzed the pleadings/assertions and the MPLA statute and clearly did not err with its decision.

c. Definition of Patient

Plaintiff also incorrectly argues that plaintiff is not a patient under the MPLA. Patient is defined under the act as follows: "Patient" means a natural person who receives or should have received health care from a licensed health care provider under a contract, expressed or implied. See WVC § 55-7B-2(m). Plaintiff clearly received health care from NCI and/or its employee. When plaintiff submitted to a urine screen/collection by NCI, it was pursuant to a likely contract between his employer (for and on behalf of plaintiff) and NCI (Petitioner states this in his Appeal brief). Petitioner was employed by Harrison County Coal Company and per the Complaint and his Petition for Appeal, was selected by his employer for a urine drug test, to be conducted by NCI. This is the same scenario if his employer sent him to a MedExpress for a drug test or any other testing by a licensed professional. It is also implied that Mr. Atkinson and NCI have a contract between themselves for NCI to perform this individual medical act and/or service to the plaintiff, for the benefit of the plaintiff and plaintiff's employer, and where a medical diagnosis is sought from the treatment provided. Plaintiff consented to this medical treatment by NCI and a diagnosis was rendered to him (positive drug result for THC). Petitioner Atkinson was the patient of NCI during this drug testing process.

NCI and/or its employee nurse/technician (as well as defendant LabCorp.) is a health care provider pursuant to the MPLA and the services rendered to plaintiff were health care. Furthermore, plaintiff was a patient of NCI during the drug testing process. The Circuit Court of Harrison County properly ruled that the actions and services of NCI and/or its nurse technician constituted health care are as defined in the MPLA. As such, the lower court did not err in its decision to dismiss the Complaint against NCI pursuant to Rules 12(b)(1) and 12(b)(6) of the West Virginia Rules of Civil Procedure for Petitioner's failure to abide by West Virginia Code § 55-7B-1 et. seq.

II. Petitioner's Assertions That the Drug Testing Was Performed Pursuant to United States Department of Transportation Rules, Office of Miners' Health, Safety, and Training Rules, and/or other Federal or State Laws or Rules is Irrelevant as to Whether the WVMPLA Applies to NCI's Actions and Services

Petitioner spends five pages in his Petition discussing various rules and laws (USDOT, WVOMSHT, etc.) that NCI must abide by with respect to its services and actions being provided to Harrison County Coal Company employees, including Petitioner, when performing its drug testing. First and foremost, these arguments were never presented in Petitioner's response to the Motion to Dismiss. (See Response to Motion to Dismiss, App. 66). Secondly, those rules and laws referenced by Petitioner have no bearing on whether or not NCI and/or its nurse/technician or the services rendered fall under the guise of the MPLA. A nurse/technician performing medical services or treatment still must abide by his/her medical and professional standards of care regardless if the care is being conducted pursuant to DOT drug testing and collecting urine specimens of coal miners, or any other medical/collection standards.

There are likely numerous examples of physicians and/or nurses performing medical services and treatment to employees per some federal or state requirement or rule, particular to that person's profession. Commercial truck drivers have to pass a DOT physical performed by a

physician. Some jobs require lung and heart exams as well as vision testing, and said exams and testing are likely required and must adhere to some type of law, rule, or standard. However, if a physician or other medical professional performs such medical examination or renders such act or care to an employee or prospective employee, this certainly does not render the MPLA null and void to their conduct. Petitioner's brief and arguments are silent regarding any law or rule that supports his argument in any way on this issue.

Simply put, there is no rule, law, or other justification to indicate that because the drug testing/screen performed by NCI is done pursuant to DOT and WVOMSHT regulations, then medical standards and the MPLA do not apply. It appears that Petitioner is arguing that if a physician acts below the standard of care and negligently misses a heart condition or another medical condition for a commercial truck driver during a physical examination, and someone is proximately injured because of this missed diagnosis, then the MPLA does not apply because the DOT regulations related to pre-employment physicals apply. He would also appear to argue that any professional malpractice of a pharmacist would not fall under the MPLA because the pharmacist is governed by State Pharmacy rules and the Federal and State Controlled Substances Act. This is simply an incorrect theory, and Petitioner's argument fails miserably on this issue.

Petitioner's argument that the lower court ignored the claims and assertions that because NCI's drug testing of a coal miner is codified or required under certain Federal and State laws then the MPLA does not apply has no merit, is completely unsupported by any law, and lacks common sense. Importantly, Petitioner failed to assert such arguments in the lower court and in responding to the Motion to Dismiss of Respondent. Therefore, the lower court could not have committed error on this issue in its decision to dismiss the case.

III. The Circuit Court of Harrison County Did Not Err in Dismissing Petitioner's Action for Failing to Comply with the MPLA

Petitioner asserts in his Complaint a "Professional Malpractice" claim against the Defendant NCI, "a professional nursing management company". As discussed and proven herein, such claim is governed by the MPLA as plaintiff's own language and assertions in the Complaint is essentially a professional medical malpractice claim, involving heath care by a health care provider to a patient (Petitioner). Therefore Petitioner's claim must fail due to his failure to comply with the requirements set forth in the plain language of the MPLA. *West Virginia Code* § 55-7B-6(a) states "[n]otwithstanding any other provision of this code, no person may file a medical professional liability action against any health care provider without complying with the provisions of this section." *W.Va. Code* § 55-7B-6. The same section goes on to provide that:

> At least thirty days prior to the filing of a medical professional liability action against a health care provider, the claimant shall serve by certified mail, return receipt requested, a notice of claim on each health care provider the claimant will join in litigation. The notice of claim shall include a statement of the theory or theories of liability upon which a cause of action may be based, and a list of all health care providers and health care facilities to whom notices of claim are being sent, together with a screening certificate of merit.

W. Va. Code § 55-7B-6.

In this instance, Petitioner did not serve NCI with a notice of claim and screening certificate of merit pursuant to *West Virginia Code* § 55-7B-6 at least thirty days prior to filing this Complaint. 3. "Pursuant to W. Va. Code § 55-7B-6 (a) and (b) [2003], no person may file a medical professional liability action against any health care provider unless, at least thirty days prior to the filing of the action, he or she has served, by certified mail, return receipt requested, a notice of claim on each health care provider the claimant will join in the litigation." Syl. Pt. 4, *State ex rel. PrimeCare Medical of West Virginia, Inc. v. Faircloth*, 242 W. Va. 335, 835 S.E.2d 579 (2019).

"The MPLA clearly prohibits the filing of a medical professional liability action against a health care provider prior to serving, by certified mail, return receipt requested, a notice of claim upon each health care provider the claimant will join in the litigation. In addition to the notice of claim, unless a claimant is proceeding under West Virginia Code § 55-7B-6(c), the claimant must also serve a screening certificate of merit upon each health care provider the claimant will join in the litigation, prior to filing a civil action.". Syl. Pt. 4., *Tanner*.

It is not disputed, and the Circuit Court has correctly ruled, that Petitioner did not comply with the mandatory provisions of the MPLA. Because Petitioner did not comply with the mandatory pre-suit notice provisions of the MPLA, this Circuit Court of Harrison County lacked subject matter jurisdiction over this Complaint. *State ex rel. PrimeCare Med. of W. Va., Inc. v. Faircloth*, 242 W. Va. 335, 338, 835 S.E.2d 579, 582 (2019) (The pre-suit notice requirements contained in the West Virginia Medical Professional Liability Act are jurisdictional, and failure to provide such notice deprives a circuit court of subject matter jurisdiction.). Therefore the lower court was correct in finding that "in light of the totality of the pleading record herein and particular matters being address on its Motion to Dismiss, Plaintiff's Complaint against it fails to comply with the requirements of the MPLA deemed applicable thereto given this Court's determinations that Defendant NCI and/or its employee(s) are a health care provider pursuant to the MPLA and their services rendered with respect to Plaintiff qualify as health care. Upon the standards of review applied herein pursuant to Rules 12(b)(1) and (6), this Court does not have jurisdiction over this matter with respect to moving Defendant NCI." See Order of Circuit Court, App.76.

VII. CONCLUSION

WHEREFORE, the Respondent NCI prays that this Honorable Court affirm the Circuit Court of Harrison County's Order dismissing Petitioner's claims and lawsuit against NCI and any such further relief as this Court deems just and proper.

/s/ Justin C. Taylor
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INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
No. 22-ICA-233

JAMES ATKINSON,

Plaintiff Below, Petitioner

v.

MEDTOX LABORATORIES, INC,
and NCI NURSING CORPS.

Defendants Below, Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing **RESPONSE BRIEF** was served upon the following parties via File & Serve Xpress on April 24, 2023:

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