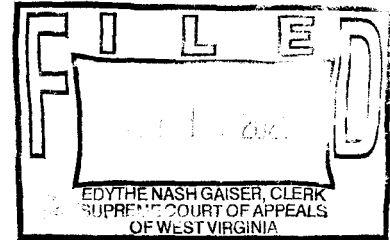


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**WEST VIRGINIA
SUPREME COURT OF APPEALS
CHARLESTON, WEST VIRGINIA**



DIANA BOONE,

Plaintiff Below, Petitioner,

v.

ACTIVATE HEALTHCARE, LLC,

Defendant Below, Respondent.

**CASE NO. 19-1007
Civil Action No. 18-C-96
(Jackson County)**

PETITIONER'S REPLY BRIEF

**WALT AUVIL (WVSB #190)
KIRK AUVIL (WVSB #12953)
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Other Authority

The West Virginia Medical Professional Liability Act (MPLA) 1, 2, 3, 4

I. INTRODUCTION

First, Respondent claims that they provided Petitioner with “exactly what she requested – a medical restriction from operating overhead cranes.” Neither Respondent nor the Circuit Court were correct in coming to this conclusion; a brief examination of the exhibits to Petitioner’s Amended Complaint demonstrate this. Second, Respondent argues that Petitioner should have brought claims against it under the Medical Professional Liability Act (“MPLA”) because they were providing “health care” to Petitioner as contemplated by that act. In reality, Respondent’s only role was to effectively serve as an intermediary to pass Petitioner’s accommodations on to Defendant Constellium, which is not acting as a health care provider within the ambit of the Act. Finally, Respondent claims that their role in Petitioner’s termination was so minimal that they cannot be said to have aided and/or abetted Defendant Constellium in terminating Petitioner. Again, a brief review of Petitioner’s Amended Complaint and the included exhibits cannot be read in a manner supporting that position. Whatever weaknesses Respondent may perceive in Petitioner’s case, Petitioner plainly set forth through allegations and exhibits alike Activate’s role in assisting Constellium in illegally terminating Petitioner.

II. RESPONDENT FOISTED INACCURATE PCRS ON THE PETITIONER, AND ITS COOPERATION IN DEPRIVING PETITIONER OF A PROPER PCR IS CLEAR AID AND ABETMENT OF DISCRIMINATION AND RETALIATION BY DEFENDANT CONSTELLIUM

In their Response Brief, Respondent wrote, “Petitioner cannot dispute the fact that Activate provided Petitioner exactly what she requested - a medical restriction from operating overhead cranes.” They went on to write that “Activate's only action related to that decision was to provide Petitioner the specific work restriction she requested, which ultimately resulted in Constellium

alone determining it had no position for Petitioner. That is no more aiding and abetting than the action of her own personal physician, who gave her a **nearly identical** [emphasis added] work restriction. If Petitioner were logically consistent, she would have named her own personal physician as a defendant as well.”

That statement is a woeful misrepresentation and frames the issue in a manner so misleading that it beggars belief. Respondent’s argument is that they are permitted to write restrictions for an employee that outstrip the restrictions that employee’s physician recommended, so long as one of the included restrictions is something the physician did recommend. That argument is akin to saying that if a contractor is hired to trim a tree’s branches, it is fine for him to chop down the tree; after all, the branches were trimmed in the process.

As set forth in Petitioner’s Complaint, Amended Complaint, as well as her Brief before this Court, Petitioner was requesting a PCR (“Physical Capacity Report”) that reflected her medical diagnosis. That medical diagnosis was acrophobia which prevented her from working in an overhead crane, which consists of both an enclosed space and an elevated space. Petitioner had no restrictions on doing any other part of her job, and knew of others who worked in her area who were not required to use the overhead crane. Petitioner then had to fight both Defendant Constellium and Respondent to try to get the proper PCR in place, just so Defendant Constellium could reject it. The exhibits to Petitioner’s Amended Complaint reflect the manner in which Respondent’s PCRs were shaped by its interactions with Defendant Constellium’s personnel. APPENDIX 13-17. Due to Respondent’s apparent deference to Defendant Constellium in this process, Petitioner was forced to dragoon Respondent over a span of nearly two months in order to get a PCR which reflected her actual work restrictions. Petitioner has stated from the outset that the issue is that Respondent refused to properly recommend the accommodations requested by her

physician. Respondent have made the facetious suggestion that she should sue her doctor under an act that does not apply while seemingly oblivious to the fact that the doctor did not give Constellium cover for wrongfully terminating her; that honor went to Respondent for its apparent imperviousness to Petitioner's physician's actual recommendations. He played no part in the duplicitous duet between Constellium and Respondent which brought about Petitioner's termination.

Petitioner's complaint is and always has been that Respondent, instead of interacting with the Petitioner regarding her accommodations, or even simply translating them as written to a PCR, instead elected to interact solely with Constellium regarding Petitioner's accommodations. Respondent would not accept information from the Petitioner and her physician regarding the actual accommodations she needed. By working hand in glove with Constellium to deny Petitioner's requests for accommodation, Respondent aided and abetted Constellium in its violation of its duty of accommodation under the West Virginia Human Rights Act.

III. THE MESSER AND R.K. CASES DEMONSTRATE THE INAPPLICABILITY OF THE MPLA

Respondent claims that Messer v. Huntington Anesthesia Grp., Inc., 218 W. Va. 4, 6, 620 S.E.2d 144, 146 (2005) has no application to the facts at hand. In that case, the Messer court warned against Defendant raising a defense based on "an entirely different statute from the Workers' Compensation Act with different policy objectives." Id. The Messer court noted that Messer's WVHRA claim was directed at a different harm than the claim for physical injury compensated pursuant to the Workers Compensation Act. Similarly, as demonstrated in the Amicus brief filed with this Court by the West Virginia Association for Justice and West Virginia Employment

Lawyers Association, protections provided by the MPLA are quite expressly stated to apply to physical, medical harms, not to every tort committed by a physician. Petitioner's allegations against Respondent are for conduct which falls outside the scope of failing to properly render medical care in a manner that medically injured Petitioner.

The mishandling of a patient's information which results in non-medical consequences is not within the scope of the MPLA. As pointed out in the Amicus brief filed with this Court, a patient's claim that a hospital improperly accessed and disclosed his medical records did not fall within the MPLA's definition of healthcare. R. K. v. St. Mary's Med. Ctr., Inc., 229 W. Va. 712, 721, 735 S.E.2d 715, 724 (2012). Petitioner's allegations against Respondent are analogous; she alleges that Respondent did not properly disclose information that they were obliged to disclose, just as St. Mary's Medical Center improperly disclosed information which they were required not to disclose. Neither set of circumstances pertains to actual medical treatment, or the error of some medical professional in administering healthcare.

Therefore based on the principles set forth in R. K. v. St. Mary's Med. Ctr., Inc., the activity of the Respondent is not the type of activity covered by the MPLA. And based on the principles set forth in Messer v. Huntington Anesthesia Grp., Inc., and R. K. v. St. Mary's Med. Ctr., Inc., the harm suffered by Petitioner is not the type of harm appropriate for resolution under the MPLA.

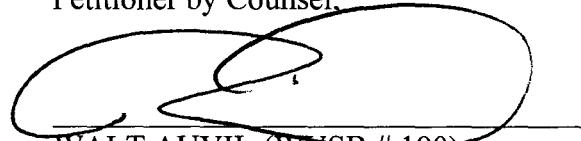
VIII. CONCLUSION

Because the MPLA has no application to the Petitioner's claim and because the Petitioner properly plead a claim of aiding and abetting discrimination against Activate, Respondent Activate's motion to dismiss Petitioner's first amended complaint should have been denied. The Circuit Court failed to apply the appropriate standard of review and adopted two legally incorrect conclusions in dismissing Petitioner's claim against Activate. This Court should reverse that order,

reinstate Activate as a defendant in this action and remand this matter for further proceedings thereafter.

Respectfully submitted,

DIANA BOONE,
Petitioner by Counsel,

A handwritten signature in black ink, appearing to be 'WALT AU VIL', is written over a horizontal line.

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(Jackson County)

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of May, 2020, I served **Petitioner's Reply Brief** upon counsel for Respondent Activate Healthcare, LLC, Counsel for Constellium, and counsel for WVELA / WVAJ by depositing a true copy thereof in the United States Mail, postage prepaid, addressed as follows:

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