IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 20-0750

CHRISTOPHER MORRIS, individually and as Administrator of the ESTATE OF AMY CHRISTINE WADE,

Petitioner and Plaintiff Below,

v.

STEVEN CORDER, M.D.; MELANIE BASSA, M.A.; MARTHA DONAHUE, N.P.; NORTHWOOD HEALTH SYSTEMS, INC.; MID-VALLEY HEALTHCARE SYSTEMS, INC. and JOHN DOES 1-5,

Respondents and Defendants Below.

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IV. RESPONSE TO PETITIONER'S STATEMENT OF THE CASE

Petitioner's Introduction and Statement of the Case characterizes the Circuit Court's Order as stripping critical Medical Professional Liability Act (MPLA) entitlements and protections from a particularly vulnerable group and as approving deviations from the standard of care when those deviations result in outpatient suicides.[1] Conversely, however, the Circuit Court Order provides a calm, reasoned analysis of West Virginia law on motions to dismiss for failure to state a claim and then provides guidance relative to the two non-custodial suicide decisions issued to date by West Virginia's Supreme Court of Appeals: *Moats v. Preston County Comm'n,* 206 W. Va. 8, 521 S.E.2d 180 (1999) and *Hull v. Nasher-Alneam,* No. 18-1028, 2020 W. Va. Lexis 112 W. Va. Supreme Court (February 24, 2020) (memorandum decision). The Circuit Court's concise adherence to West Virginia law is under review because of the Estate's dissatisfaction with the outcome of the law when applied to these facts, not because the Circuit Court deviated from West Virginia law.

[1] Petitioner's Brief at 1.

Far from rote recognition of facts, blindly traced to a mandated outcome, the Circuit Court analyzed the issues and questions precisely, step by step. Expressly the Court recognized the defendants' bar as high in that a motion to dismiss tests the formal sufficiency of the complaint, such that dismissal is available only in instances where it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. The Circuit Court considered whether the Estate's facts, if established as true, would entitle it to relief under West Virginia law.

The Procedural Background of the matter below as recounted in Petitioner's Brief provides a highly excerpted view of the Circuit Court's Findings of Fact in three key areas. Paramount here, Petitioner twice excludes in its recitation of the Finding of Fact numbered [3],[2] the phrase "during the relevant timeframe." By example, Petitioner's Brief cites the Circuit Court's Order as follows:

> (3) "At no time was Decedent in the voluntary or involuntary custody of any of the Defendants . . ." and ". . . all services were rendered on an out-patient basis."

[Petitioner's Brief at 3] Conversely, the Circuit Court's order reads as follows:

> "At no time was Decedent in the voluntary or involuntary custody of any of the Defendants **during the relevant timeframe**" and ". . . all services were rendered on an out-patient basis."

[JA0212, emphasis added] This phrase is significant in that it reflects the Circuit Court's understanding that the determination of duty focuses on control of the patient at the time of the patient's volitional act. Its excerption from Petitioner's Brief is also significant in that the Estate seeks review of its version of events below, undercutting the Circuit Court's careful attention to the factual and legal requisites.

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[2] Petitioner's Brief at page 3 identifies the Findings as 1, 2, 3. However, in the Order [JA0212-13], the paragraphs are 2, 4, 5.

Also, Petitioner has highly excerpted the Circuit Court's Conclusions of Law, such that the first two points cited in Petitioner's Brief are not identified for what they are: the Circuit Court's first Conclusion of Law and direct quotes from the *Moats* decision.[3]

Petitioner also excerpted from Conclusion numbered [3] another direct quote from *Moats* that the Circuit Court included in its Order:

> the act of suicide is considered deliberate and intentional, and therefore, an intervening act that precludes a finding that the defendant is responsible [unless] the defendant is found to have actually caused the suicide or where the defendant is found to have had a duty to prevent the suicide from occurring.[4]

This Court's consideration of the actual text of the Circuit Court's Order is key in that the text itself demonstrates that the Circuit Court worked step by step, ensuring and demonstrating compliance with West Virginia law in each facet of its determination. The full text of the Order demonstrates that the Circuit Court read and understood the underlying facts and allegations. Its Order is tightly constructed, such that excerptions fail to provide the Order its due, especially when those excerptions remove citations to supporting authorities.

Further, even as it dismissed the Estate's claim, the Circuit Court recognized and acknowledged that West Virginia law prefers resolutions on the merits. The Circuit Court adopted the Estate's allegations as true and worked to determine whether West Virginia law would provide relief for losses arising from the Estate's facts as plead. In so doing, the Circuit Court reached *inter alia* the summary below:

> The Supreme Court has adopted one exception[5] to the general bar on suicide claims. The Court has held that an individual, such as a health care provider, may not be held liable for the suicide of another unless each and every one of the following factors is present at the time of death: (1) the health care provider has a

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[3] *See* JA0211 at Conclusion of Law numbered 1, directly quoting [Syl. pt. 6,] *Moats v. Preston County Comm'n,* 206 W. Va. 8, 521 S.E.2d 180 (1999) (internal citations omitted in the Order).

[4] JA0212.

[5] *See Hull v. Nasher-Alneam,* No. 18-1028, 2020 W. Va. Lexis 112 (Feb. 24, 2020) at *7, referencing "the single, narrow exception to the general rule."

> duty of custodial care, (2) the health care provider knows that the potential for suicide exists; and (3) the health care provider fails to take measures to prevent the suicide from occurring. *Hull v. Nasher-Alneam,* No. 18-1028, 2020 W. Va. Lexis 112 W. Va. Supreme Court (February 24, 2020) (memorandum decision)," [4] (finding that "[t]o fit within this exception, petitioners would have had to allege facts to satisfy each of these elements: custodial care, knowledge of the potential for suicide, and failure to take appropriate measures to prevent the suicide from occurring"); see also *Moats v. Preston County Commission,* 206 W. Va. 16, 521 S.E.2d 180, 188 (1999).

In *Moats v. Preston County Comm'n,* this Court found in particular part, that "negligence actions seeking damages for the suicide of another have generally been barred because the act of suicide is considered deliberate and intentional, and therefore, an intervening act that precludes a finding that the defendant is responsible."

Our jurisdiction (among others) has focused in particular on the legal concepts of deliberate, intentional, intervening,[6] each of which applies in the instant matter. Nonetheless, this Supreme Court has identified two instances in which a cause of action relative to suicide is available, only one of which is alleged to apply here: where the defendant is found to have had a duty to prevent the suicide from occurring, which "has generally been applied to someone who has a duty of custodial care, knows that the potential for suicide exists, and fails to take the appropriate measures to prevent the suicide from occurring."[7] In support of that assertion, this Supreme Court has given both general and specific examples where the exception has applied, of note, each of which involves custodial care: "jails, hospitals, reform schools, and others having actual physical custody and control over such persons." Among the cases cited specifically in

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[6] *See, e.g., Surloff v. Regions Bank,* 179 So.3d 472 (2015), finding duty to prevent suicide only with provider assumes same (such as with custodial care); *KW v. Children's Hosp. Colo.,* 2016 CO 6, 364 P.3d 891 (2016), finding that patients own themselves a duty not to harm themselves; *Maloney v. Badman,* 156 N.H. 599, 603, 938 A.2d 883, 886 (2007), finding that suicide breaks the causal connection between even an alleged wrongful act and the death; *Edwards v. Tardif,* 240 Conn. 610, 615, 692 A.2d 1266, 1269 (1997), excluding generally damages for suicide, as it is a deliberate, intentional and intervening act;
[7] *Moats,* 206 W. Va. 8, 16, 521 S.E.2d 180, 188 (1999).

Moats were those involving an 8-hour furlough from custodial mental health care with alleged insufficient warnings/guidance to the family,[8] insufficient vigilance during the first week of custodial mental health care,[9] two cases of insufficient vigilance during incarceration.[10]

Recognizing this Court's guidance, the Circuit Court then addressed whether the Estate's claim falls within each of the factors recently adopted by this Court in *Hull v. Nasher-Alneam,* No. 18-1028, 2020 W. Va. Lexis 112 (Feb. 24, 2020), expressly quoting from *Hull* – that "[t]o fit within this exception, petitioners would have had to allege facts to satisfy ***each*** of these elements: custodial care, knowledge of the potential for suicide, and failure to take appropriate measures to prevent the suicide from occurring" (emphasis added).[11] Beginning with the first factor, custodial care, the Circuit Court found that the Estate's Complaint does not even allege custodial care at the time of the June 30, 2018, suicide. The Circuit Court further recognized that the Complaint admits that the Estate's decedent had not seen or contacted any of the defendants since June 20, 2018, which was ten days before the suicide. Therefore, not summarily, not cavalierly, but only after a reasoned analysis of West Virginia law and adoption of the Estate's facts as true, the Circuit Court found that the Estate's claim must fail as a matter of law.

The Circuit Court followed West Virginia law and adopted all of the Estate's facts as true for purposes of the motion. Nonetheless, in its Statement of the Case, the Estate once again focuses on the facts of the care provided and the 'emotional instability' demonstrated by the suicide itself. The Circuit Court understood and adopted those facts, which still fell short of actionable under

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[8] *Moats,* 206 W. Va. at 16, 521 S.E.2d at 188, analyzing *Martin v. Smith,* 190 W. Va. 286, 438 S.E.2d 318 (1993).
[9] *Moats,* 206 W. Va. at 16, 521 S.E.2d at 188, analyzing *Bramlette v. Charter-Medical- Columbia,* 302 S.C. 68, 393 S.E.2d 914 (1990).
[10] *Moats,* 206 W. Va. at 16, 521 S.E.2d at 188, analyzing *Dezort v. Village of Hinsdale,* 35 Ill. App. 3d 703, 342 N.E.2d 468 (1976); *LaVigne v. Allen,* 36 A.D.2d 981, 321 N.Y.S.2d 179 (1971).
[11] *Hull v. Nasher-Alneam,* No. 18-1028, 2020 W. Va. Lexis 112 (Feb. 24, 2020) at *7.

West Virginia law. The Estate's Statement of the Case fails to recognize and acknowledge the narrow legal principle at the heart of this case, which was the full and sole focus of the Circuit Court's order. Suicide is inescapably a volitional act that legally serves as an intervening act. By committing suicide, Ms. Wade decided outcome for herself and, thereby, eliminated options for the providers or her family to help. West Virginia law generally recognizes that patients owe themselves a duty of care, which, when proximately breached, obviates any cause of action for other underlying care.[12] Here, the Circuit Court of Ohio County expressly followed this Court's precedent in *Moats v. Preston County Commission,* 206 W. Va. 8, 521 S.E.2d 180 (1999), and in *Hull v. Nasher-Alneam,* No. 18-1028, 2020 WL 882087, all of which is consistent with West Virginia law generally.

In sum, the issue before the Court is not whether West Virginia law currently provides relief for the Estate relative to the facts as plead. Decidedly, it does not. Conversely, what Petitioner seeks through this appeal is a change in or expansion of West Virginia law relative to non-custodial suicides. Given the scope of foreseeability already shouldered by West Virginia's healthcare providers and given that this Court and West Virginia's lawmakers have already considered the facts and equities, and have set the balance, Respondents oppose the Estate's initiative to expand the duties and expectations retrospectively for the healthcare providers who, as a matter of fact and law, could not have changed outcome in this instance.

V. RESPONSE TO SUMMARY OF ARGUMENT.

The Circuit Court of Ohio County expressly applied West Virginia law relative to motions to dismiss and to liability for suicides in non-custodial settings, finding, finally, that no cause of action remains to the Estate under this law applied to these facts. Whereas Petitioner's Brief seeks

[12] Syl. pt. 5, *Rowe v. Sisters of the Pallottine,* 211 W. Va. 16, 560 S.E.2d 491 (2001).

now to expand the scope of the discussion and claim to generalized care provided pursuant to the Medical Professional Liability Act and to constitutional claims and Equal Protection, the kernel of the Complaint below, the motions practice below and the Circuit Court's Order is that the Estate's decedent committed suicide in a non-custodial setting, thereby expressly falling within the rubrics set by this Court's holdings in *Moats v. Preston County Commission,* 206 W. Va. 8, 521 S.E.2d 180 (1999), and in *Hull v. Nasher-Alneam,* No. 18-1028, 2020 WL 882087. While other courts and jurisdictions may consider similar facts and law differently, Petitioner has identified no error in the Circuit Court's application of existing West Virginia law to the facts, both properly set out in its Order. Therefore, to the extent that the Estate seeks an expansion of West Virginia law relative to non-custodial suicide, Respondents oppose same and question the wisdom of expanding duties retrospectively, especially those that would place any one person or process in a position of determining the inner working of another's mind.

For all of the reasons set forth below, Respondents appear before this Honorable Court in support of the Circuit Court of Ohio County and its Order that fully and fairly considers the fact and law of the instant matter, and applies that law to these facts accurately, appropriately, lawfully. Respondents seek the relief this Court deems just.

VI. RESPONSE TO STATEMENT REGARDING ORAL ARGUMENT.

The Estate's appeal can be resolved without argument based upon the application of established law to the facts. However, to the extent that the Estate seeks an expansion of established West Virginia law, its arguments in favor of liability for non-custodial suicides would seem to arise under West Virginia Rules of Appellate Procedure Rule 20. The Respondents will await the Court's determination as to the need for oral argument and as to its estimation of the nature of claim and relief sought.

VII. RESPONSE

A. Introduction.

B. De Novo Standard of Review.

Respondents agree with Petitioner that "[a]ppellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo.*" Syl. pt. 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick,* 194 W. Va. 770, 461 S.E.2d 516 (1995).

C. Response to Assignment of Error Number 1: The Circuit Court of Ohio County correctly focused on the West Virginia law relative to suicide of an unconfined person rather than focus on 'special relationship' generally.

Petitioner has alleged that the circuit court erred when it failed to find a "special relationship" giving rise to a duty of the Respondents to prevent the decedent's suicide. This argument is a tacit recognition of the validity of the holdings in *Moats v. Preston County Comm'n,* 206 W. Va. 8, 521 S.E.2d 180 (1999), and recently reaffirmed in *Hull v. Dr. Muhammed Samar Nasher-Alneum,* 2020 W. Va. LEXIS 112, 2020 WL 882087 (2020).

In *Moats*, the decedent had been taken to a sheriff's office by mental health worker to await transport to a hospital after involuntary commitment in a mental hygiene proceeding. She was left unsupervised in office area when she went to a bathroom and ingested a lethal amount of cleaning solution. The plaintiff sued the county commission and the comprehensive behavioral health center involved in the proceeding. The *Moats* court addressed several certified questions from the circuit court surrounding liability for the suicide of a detainee from a mental hygiene proceeding.

A seminal question presented was whether the plaintiff's claims were altogether barred by the fact that the decedent had committed suicide. In answering the certified question in the negative, the Court in *Moats* held that

> [a]lthough negligence actions seeking damages for the suicide of another have generally been barred because the act of suicide is considered deliberate and intentional, and therefore, an intervening act that precludes a finding that the defendant is responsible, courts have allowed such actions where the defendant is found to have had a duty to prevent the suicide from occurring. (citations omitted). The latter exception, which is at issue in this case, has generally been applied to someone who has a duty of custodial care, knows that the potential for suicide exists, and fails to take the appropriate measures to prevent the suicide from occurring. Specifically, this exception has been applied to jails, hospitals, reform schools, and others having actual physical custody and control over such persons. (citations omitted).

Moats, supra, at pp. 23-24.

The Court in *Moats* refined this very narrow exception to this general rule and clarified its holding at syllabus point 6:

> Recovery for wrongful death by suicide may be possible where the defendant had a duty to prevent the suicide from occurring. In order to recover, the plaintiff must show the existence of some relationship between the defendant(s) and the decedent giving rise to a duty to prevent the decedent from committing suicide. Generally, such relationship exists if one of the parties, knowing the other is suicidal, is placed in the superior position of caretaker of the other who depends upon that caretaker either entirely or with respect to a particular matter.

Recently, the Court in *Hull* reaffirmed the existing law of *Moats*: "This Court has long held that 'negligence actions seeking damages for the suicide of another have generally been barred because the act of suicide is considered deliberate and intentional, and therefore, an intervening act that precludes a finding that the defendant is responsible . . . .' *Moats*, 206 W. Va. at 16, 521 S.E.2d at 188." *Hull, supra*, at p. 6.

In dismissing the Estate's complaint in the present case, pursuant to Respondents' motions to dismiss under the W. Va. R. Civ. P. 12 (b)(6), the Circuit Court relied upon the language of syllabus point 6 in *Moats*. In accordance with existing law, the Circuit Court granted Respondents' motions to dismiss because the complaint did "not allege that Defendants were in a relationship

that gave rise to a duty to prevent the suicide such as that of a custodial caretaker."[13] The Circuit Court obviously contemplated that while actual custody of the decedent is not necessary to maintain a cause of action, there must be something more to the noncustodial relationship between decedent and defendant than physician and patient. The narrow exception is necessary to overcome the holding of *Moats* that the deliberate act of suicide is an intervening cause. *See Moats, supra.*

Petitioner argues that the narrow *Moats* exception can be met by implying a special relationship between the decedent and Respondents because the decedent was a long-term mental health patient of Respondents; however, such an argument was rejected by the Court in *Hull*. In *Hull*, it was alleged that defendant orthopedic surgeons should be held responsible for the decedent's suicide for their failure to properly treat the causes of the decedent's pain during the physician-patient relationship thus causing his suicide. The petitioners in *Hull* argued that the decedent had a special relationship with the defendant physicians such that it was tantamount to a custodial relationship, thus falling into the narrow exception in *Moats*. The Court in *Hull* disagreed and held that the failure of the petitioner to even allege custodial care was fatal. The Court in *Hull* held that "[i]nasmuch as petitioners allege no facts that would cause this case to fall within the single, narrow exception to the general rule, we concur with the circuit court's well-founded conclusion that Mr. Hull's suicide bars petitioners' claims." *Hull*, 2020 W. Va. LEXIS at 8. The *Hull* Court held that the narrow exception to the *Moats* rule must be plead and it was not.

Petitioner is urging this Court to hold that a statutory cause of action for professional negligence under the Medical Professional Liability Act, §55-7B-1 *et seq.* (MPLA) vitiates well-established and well-founded law of *Moats,* which would be a drastic departure from conventional

[13] JA0212.

holdings. The action in *Hull* was likewise based upon the MPLA, and the Court did not hold that a statutory action under the MPLA provided an exception to the *Moats* rule. Petitioner was still required to plead a common law action that fell under the narrow exception set forth in *Moats*.

The Circuit Court did not err when it followed *Moats* and *Hull* and granted Respondents' motions to dismiss under W. Va. R. Civ. P. 12(b)(6).

D. Response to Assignment of Error Number 2: The Circuit Court of Ohio County did not obviate the need for reasonably ordinary care. Instead, the Circuit Court correctly relied upon West Virginia law in holding that non-custodial patients who commit suicide are different as a matter of law than other patients, such that their healthcare providers' duties differ as well.

Petitioner's arguments below and on appeal are based in emotion[14] and urge this Court to respond accordingly. For instance, here Petitioner initiates its arguments relying upon the fundamentals of negligence: duty, breach, causation, damages. In doing so, the Estate equates West Virginia's law on non-custodial suicide with allowing healthcare providers to proceed without even reasonably ordinary care.[15] Whereas the Estate discusses West Virginia law on duty, presenting cases both where duty was found and where it was not,[16] none of the cases the Estate cites are suicide cases beyond *Moats* and *Hull*. Petitioner's Brief concedes that the question of whether a duty exists is a question of law for the court. While the Brief focuses on duty in instances such as car insurance, credit reporting and construction, this Court has expressly found that, as a

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[14] *See, e.g.,* Petitioner's Brief at 1, 4, contrasting the Court's stripping the Estate of remedy for the 'negligent conduct of health care providers' in the face of rapid decline, disheveled appearance, without sleep, 'life has been hell.'

[15] Petitioner's Brief at 11.

[16] *Parsley v. General Motors Acceptance Corp.,* 167 W. Va. 866, 280 S.E.2d 703 (1981), finding that car dealer has no duty to ensure that purchaser has insurance beyond initial 30-day policy; *Daugherty v. Equifax Info. Servs., LLC,* No. 5:14-CV024506, duty to ensure credit report is accurate; *Lockhart v. Airco Heating & Cooling, Inc.,* 211 W. Va. 609, 567 S.E.2d 619 (2002), failure to prove duty to protect worker from known hazards of his job; *Sewell v. Gregory,* 179 W. Va. 585, 371 S.E.2d 82 1988), considering common law duty of homebuilder outside privity of contract; *Pack v. Van Meter,* 177 W. Va. 485, 354 S.E.2d 581 (1986), considering duties in places of public accommodation; *Bunner v. United States,* 6:13-CV-20655 (2016), failure of duty to treat mouth lesion.

matter of law, suicide is different. In *Moats* and *Hull,* this Court expressly limited the holdings to suicide, finding duty in only two instances. It bears noting again that this exceedingly narrow rendering of duty is not available relative to diseases or conditions that can be diagnosed or predicted by tests such as an x-ray, a lab test, or a blood screen. Indeed, this Court's holdings in *Moats* and *Hull* apply only in narrow instances and not to general medical claims – and that is for the inescapable reason that suicide is different. Repeatedly this Court has held that suicide is a volitional act that may occur at any time, and without warning, even in instances in which the decedent had been confined. The true landscape of the conscious and unconscious mind remains, finally, far from definitive estimation and discovery, available only through as large or as little a window, clearly or darkly, only as the patient allows. Therefore, claims "seeking damages for the suicide of another are generally barred because the act of suicide is considered deliberate and intentional, and therefore, an intervening act precludes a finding that the defendant is responsible." *Moats v. Preston County Commission,* 206 W. Va. 8, 16, 521 S.E.2d 180, 188 (1999) (internal citations omitted).

Repeatedly and in various contexts, this Court has joined other jurisdictions in addressing suicide and in finding finally that it is a choice by the person that arises and falls outside the surrounding relationships, absent conduct that causes the act or custodial care.[17] As defendants have argued and as this Court has repeatedly – and recently – emphasized, an individual such as a health care provider may not be held liable for the suicide of another unless ***each and every one*** of the following factors is present at the time of death: (1) the health care provider has a duty of custodial care, (2) the health care provider knows that the potential for suicide exists, and (3) the

[17] *See, e.g., Dezort v. Village of Hinsdale,* 35 Ill. App. 3d 703, 342 N.E.2d 468 (1976); *LaVigne v. Allen,* 36 A.D.2d 981, 321 N.Y.S.2d 179 (1971); *Bramlette v. Charter-Medical- Columbia,* 302 S.C. 68, 393 S.E.2d 914 (1990). *See also Sester v. Harvey,* 2015 WV Lexis 516 (April 10, 2015), in which his Court cited the *Moats* Syl. pt. 1 as "announcing an important new point of law."

health care provider fails to take measures to prevent the suicide from occurring. *Hull v. Nasher-Alneam*, No. 18-1028, 2020 W. Va. Lexis 112 (W. Va. Feb. 24, 2020) at [4] (finding that "[t]o fit within this exception, petitioners would have had to allege facts to satisfy each of these elements: custodial care, knowledge of the potential for suicide, and failure to take appropriate measures to prevent the suicide from occurring."); *see also Moats v. Preston County Commission,* 206 W. Va. 8, 16, 521 S.E.2d 180, 188 (1999).

Pursuant to West Virginia law, duty is a question of law for the courts,[18] and this Court has joined other jurisdictions in determining that, as a matter of law, non-custodial suicide constitutes an intervening, superseding act that undercuts any attachment of duty. Every suicide leaves healthcare providers and families wondering what if, could they have, if only – but, finally, the decisional moment is beyond objective assessment by anyone but the patient herself. In crafting Syllabus point 6 of *Moats,* this Court considered the law from various jurisdictions, analyses and treaties on the subject of suicide[19] and determined 'duty' relative to suicide in West Virginia:

> Recovery for wrongful death by suicide may be possible where the defendant had a duty to prevent the suicide from occurring. In order to recover, the plaintiff must show the existence of some relationship between the defendant(s) and the decedent

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[18] *Harris v. R.A. Martin, Inc.,* 204 W. Va. 397, 404, 513 S.E.2d 170, 177 (1998).

[19] *Moats,* 206 W. Va. at 16, 521 S.E.2d at 188, citing Comment, Civil Liability for Causing or Failing to Prevent Suicide, 12 Loy.L.A.L.Rev. 967, 968 (1979) While the *Moats* opinion does not quote from the Comment, it bears noting in this context that it provides as follows:

> Suicide is a traumatic event that produces conflicting feelings in the close relatives of the person who has committed suicide. These survivors often feel somehow responsible for the death and, at the same time, seek to blame someone else for it. This blame is more frequently taking the form of a lawsuit, as an increasing number of persons turns to the courts for the resolution of their problems.
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> While there may be instances in which the imposition of liability will be proper, an examination of this litigation reveals that liability is often being imposed even though the facts of the case and the applicable law indicate that it is inappropriate to do so. To point out these errors in analysis, this comment examines two fundamentally different circumstances that may create liability for suicide[.]

Comment, 12 Loy.L.A.L.Rev. at 967-68.

> giving rise to a duty to prevent the decedent from committing suicide. Generally, such relationship exists if one of the parties, knowing the other is suicidal, is placed in the superior position of caretaker of the other who depends upon that caretaker either entirely or with respect to a particular matter.

Despite this Court's express statements made decades apart in *Moats* and *Hull*, Petitioner urges a change in that law, urges a new understanding of intervening, superseding cause per West Virginia law. Where Petitioner revisits instances in which a jury could determine proximate cause, Petitioner gets there by jumping over this Court's determination that, as a matter of law, a patient's decision to end his or her life is a superseding, intervening cause except in two discrete circumstances (neither of which applies here). This Court has recognized that suicide is a volitional act, undetectable, undiagnosable with any objective precision, especially in an outpatient population such as this, where no one had contacted the healthcare providers for ten days since the patient's last visit and where, by the Estate's own recitation of the facts, the patient denied suicidal ideations at her last appointment on June 20 (ten days before her death) and had not raised the subject of suicidal ideation since June 11, nineteen days prior to her death. It will not have escaped the Court's attention that Petitioner's Brief stops short of alleging that decedent expressed suicidal intention (different than ideation), ever expressed a plan or had taken steps toward completing any plan. The Brief stops short of recounting any recognition by the family of a behavioral or cognitive change, of statements of intent or plan. And nowhere in the record here or below does the Estate allege that calls to providers went unanswered or that the family had concerns that went unheeded or that anyone – even those in the same household with decedent -- knew or could have known what was in her heart and mind. Ms. Wade's death is a tragedy for the family, for the care providers, for the patient herself. Yet, this Court has recognized that, in the absence of duty, no

actionable claim may lie.[20]

Among the cases cited specifically in *Moats* and, in part, Petitioner's Brief were those involving an 8-hour furlough from custodial mental health care with alleged insufficient warnings/guidance to the family,[21] insufficient vigilance during the first week of custodial mental health care,[22] two cases of insufficient vigilance during incarceration.[23] In relying upon the furlough case as evidence of liability outside custody and control, this Court sees it as a caretaker case. That is, where Petitioner relies upon *Martin v. Smith* for the proposition that the patient is outside the facility when the suicide occurs and the provider is liable, this Court relies upon *Martin v. Smith* for the proposition that the provider failed the patient while the patient was in the facility, allowing the patient to leave without clear safeguards. The failure, the breach occurred at that level: custodial, per this Court's reasoning in *Moats.* In *Edwards v. Tardif,* 240 Conn. 610, 615, 692 A.2d 1266, 1269 (1997), the Connecticut court found liability when an on-call physician refilled a 100-count prescription of anti-depressants (with two refills) without a record review or patient consult. The *Edwards* case is factually inapposite in that the patient's treating physician was not liable for her death, only the on-call physician who provided the mechanism but failed to inquire into an active complaint; therefore, the *Edwards* case generally supports the unavailability of damages against treating patients for suicide, as it is a deliberate, intentional and intervening act. Whereas the Estate relies upon *Harbaugh v. Coffinbarger,* 209 W. Va. 57, 543 S.E.2d 338 (2000), for its discussion of proximate cause, the Estate stops short of disclosing that in *Harbaugh,* this

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[20] *See, e.g., Gillingham v. Stephenson,* 209 W. Va. 741, 551 S.E.2d 663 (2001); *Redden v. Comer,* 200 W. Va. 209, 488 S.E.2d 484 (1997); *Hutchison v. City of Huntington,* 198 W. Va. 139, 479 S.E.2d 649 (1996); *Reed v. Phillips,* 192 W. Va. 392, 452 S.E.2d 708 (1994).

[21] *Martin v. Smith,* 190 W. Va. 286, 438 S.E.2d 318 (1993).

[22] *Bramlette v. Charter-Medical- Columbia,* 302 S.C. 68, 393 S.E.2d 914 (1990).

[23] *Dezort v. Village of Hinsdale,* 35 Ill. App. 3d 703, 342 N.E.2d 468 (1976); *LaVigne v. Allen,* 36 A.D.2d 981, 321 N.Y.S.2d 179 (1971).

Court affirmed the Circuit Court of Berkeley County's summary disposition of the claim arising from self-inflicted death on the basis that "'the action taken by the adult decedent is of such obvious consequence that it supercedes [sic] any other possible effect of another's negligence.'" 209 W. Va. at 61, 543 S.E.2d at 342.

This Court, West Virginia's Supreme Court, has tried to move us all beyond that. West Virginia law considers decedent's volitional act and introduces legal concepts such as scope of foreseeable duty, determining that the relevant question was whether the patient was in the custody of the providers so as to increase their level of awareness and to decrease the opportunity for others to intervene. Otherwise, allegations of fault are simply too far removed from the volitional act to support a finding of proximate cause, "in accord with Justice Cardozo's celebrated maxim: 'The risk reasonably perceived defines the duty to be obeyed[.]'" *Mallet v. Pickens*, 206 W. Va. 145, 155, 522 S.E.2d 436, 447 (1999) (citing *Palsgraf v. Long Island R. Co.*, 248 N.Y 339, 344, 162 N.E. 99, 100 (1928)). The underlying facts of non-custodial suicide fail to support a finding of proximate cause under *Moats, Hull* and West Virginia's Medical Professional Liability Act. W. Va. Code § 55-7B-1 *et seq.*[24]

Pursuant to West Virginia law, the Estate can plead "no set of facts in support of [its] claim which would entitle [the Estate] to relief," and defendants are entitled to dismissal of plaintiff's Complaint as a result. Syl. Pt. 3, in part, *Chapman v. Kane Transfer Co., Inc.*, 160 W. Va. 530, 236 S.E.2d 207 (1977) (citation omitted). Through the course of motions practice in this litigation, the Estate has worked to avoid the application of clear and established West Virginia law for this

[24] "The following are necessary elements of proof that an injury or death resulted from the failure of a health care provider to follow the accepted standard of care: (1) The health care provider failed to exercised that degree of care skill and learning required or expected of a reasonable, prudent health care provider in the profession or class to which the health care provider belongs acting in the same or similar circumstances; and (2) ***such failure was a proximate cause of the injury or death.***" W. Va. Code § 55-7B-3 (2003) (emphasis added).

very reason: it does not support the Estate's claim and, in fact, directly undercuts it. Below the Estate attempted to argue cases from other jurisdictions – including attaching a fifty-five (55) page legal encyclopedia survey of law from across the country, which constituted nothing more than a distraction, that is, an invitation to deviate from the straightforward application of the germane West Virginia law to the Estate's allegations. The Estate's claim fails as a matter of West Virginia law as set out in *Moats* initially and renewed more recently in *Hull.*

E. Response to Assignment of Error Number 3: The Circuit Court of Ohio County did not have the opportunity to consider the Equal Protection arguments; however, the Court followed this Honorable Court's directives in applying West Virginia precedent relative to suicides in non-custodial psychiatric patients.

Pursuant to West Virginia law, Petitioner is precluded from raising non-jurisdictional issues for the first time at appeal. *Tri-State Petroleum Corp. v. Coyne,* 240 W. Va. 542, 556, 814 S.E.2d 205, 220 (2018), *quoting Whitlow v. Board of Education,* 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993). Therefore, where Petitioner addresses the Equal Protection guarantee in Article III § 17 of the West Virginia Constitution in Petitioner's Brief,[25] it bears noting that the Circuit Court of Ohio County was not given the opportunity to consider these arguments. Therefore, we are outside the case upon review and are proceeding only if this Court elects to consider arguments outside the case on appeal, which would not in any event change outcome.

Respondents agree that, to the extent there is an equal protection argument to be made here, this Court's guidance in *Robinson v. Charleston Area Medical Center,* 186 W. VA. 720, 414 S.E.2d 877 (1991) is germane. Respondents agree with Petitioner that, per *Robinson,* the right to file a lawsuit for tort damages is not a fundamental right; therefore, the correct test for state constitutional equal protection purposes is the "rational basis" test – does the classification bear a reasonable relationship to a proper governmental purpose, and are all persons within the class

[25] Petitioner's Brief at 18.

treated equally.[26] This Court would need to find that its prior holdings in *Moats* and *Hull* substantially impair vested rights or severely limit existing procedural remedies before Equal Protection gains purchase. This Court would have to find that its prior holdings created a clear social or economic problem and that a reversal of those holdings would be a reasonable method of resolving it.[27] That said, this Court in *Robinson,* notes that courts must exercise due restraint in considering the constitutionality of a legislative enactment.[28]

It is worth note that both *Robinson* and the instant matter would sound in medical malpractice and would be governed by the MPLA. It also bears noting that the concerns evidenced in 1991 in *Robinson* were made even more apparent in recent years. Specifically, in *Robinson,* this Court found that

> [t]he legislature set forth an elaborate statement of its findings and purpose for the Act. The overriding concern of the legislature was to encourage and facilitate the provision of the best health care services to the citizens of this state. W. Va. Code, 55-7B-1. The legislature found that in recent years the cost of professional liability insurance for health care providers has risen dramatically and that the nature and extent of coverage concomitantly has diminished, to the detriment of the injured and health care providers. Id. Therefore, to provide for a comprehensive, integrated resolution, the legislature determined that reforms . . . must be enacted together[.]"[29]

The *Robinson* Court provides the Legislative Findings and Declaration of Purpose in its entirety, finding it (as noted above) "an elaborate statement of [the Legislature's] findings and purpose for the Act" and further finding that "the overriding concern of the legislature was to encourage and facilitate the provision of the best health care services to West Virginians." Since *Robinson,* the MPLA's preamble has been revised twice, 2003 and 2015, with 2003 adding paragraphs particularized to trauma care, attraction and retention of qualified health care providers and

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[26] 186 W. Va. at 726, 414 S.E.2d at 893.
[27] Syl. pt. 3, *Robinson.*
[28] 186 W. Va. at 726, 414 S.E.2d at 883.
[29] 186 W. Va. at 725, 414 S.E.2d at 881.

particularized need in the area of long-term care.[30] While none is directly tied to mental health, suicide or non-custodial care, nonetheless, West Virginia Code Section 55-7B-1 demonstrates West Virginia's continuing interest and concern in limiting unnecessary or improvident or unsupportable litigation in health care arenas. These same issues are reflected by this Court in *Moats* and *Hull.* The *Moats* decision was decided in 1999, with *Hull* reinforcing its holding and particularizing it further with express criteria. Over those intervening years, this Court and the Legislature narrowed the scope of medical malpractice causes of action in this state.[31] However, beyond any concern for the cost of liability insurance or the balance to be weighed between services available and claims available, the larger issue that has gone without comment in this discussion is that this Court determined as a matter of law that non-custodial suicide cases are different. In those instances, the losses result from a volitional act that no one -- not families, not

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[30] *See* W. Va. Code Section 55-7B-1, in pertinent part:

> The unpredictable nature of traumatic injury health care services often results in a greater likelihood of unsatisfactory patient outcomes, a higher degree of patient and patient family dissatisfaction and frequent malpractice claims, creating a financial strain on the trauma care system of our state, increasing costs for all users of the trauma care system and impacting the availability of these services, requires appropriate and balanced limitations on the rights of persons asserting claims against trauma care health care providers, this balance must guarantee availability of trauma care services while mandating that these services meet all national standards of care, to assure that our health care resources are being directed towards providing the best trauma care available;
>
> The cost of liability insurance coverage has continued to rise dramatically, resulting in the state's loss and threatened loss of physicians, which, together with other costs and taxation incurred by health care providers in this state, have created a competitive disadvantage in attracting and retaining qualified physicians and other health care providers;
>
> Medical liability issues have reached critical proportions for the state's long-term health care facilities, as: (1) Medical liability insurance premiums for nursing homes in West Virginia continue to increase and the number of claims per bed has increased significantly; (2) the cost to the state Medicaid program as a result of such higher premiums has grown considerably in this period; (3) current medical liability premium costs for some nursing homes constitute a significant percentage of the amount of coverage; (4) these high costs are leading some facilities to consider dropping medical liability insurance coverage altogether; and (5) the medical liability insurance crisis for nursing homes may soon result in a reduction of the number of beds available to citizens in need of long-term care;

[31] *See, e.g.,* W. Va. Code 55-7B-4, 6, limiting claims on nursing homes and tightening pre-suit procedures.

healthcare providers – can detect, diagnose, prevent in non-custodial settings. The holdings in *Moats* and *Hull* are not dissimilar with West Virginia law and policy as reflected in other causes of action and other factual scenarios, where this Court has found that patients have a duty to avoid self-harm. Specifically, in *Rowe v. Sisters of the Pallottine,* 211 W. Va. 16, 560 S.E.2d 491 (2001), this Court clarified that each person owes him- or herself a duty of self care and is precluded from recovering as a matter of law if s/he breached that duty such that the breach was the proximate cause of the damages sustained.

Moats and *Hull* do not create a class of persons treated differently on impermissible, unconstitutional grounds. Instead, they further the clear governmental purpose demonstrated across West Virginia jurisprudence of enforcing the duty of self care and precluding liability where duty cannot and does not lie. Even assuming that the Equal Protection considerations apply in the face of non-statutory common law, the denial of recovery for non-custodial suicides fits within a body of established West Virginia law. *Hull* and *Moats* serve the rational basis of accomplishing that limitation, which is a rational state interest, interspersed through its legislation and common law.

VIII. CONCLUSION

From a legal perspective, the assessment of suicide does not mean the prediction of suicide, because the latter is not possible. In its wisdom, the *Moats* Court, delineated a narrow exception to a provider's liability for suicide, where three express criteria must be met before a medical professional may be held liable for the suicide of a non-custodial patient: custodial care, knowledge of the potential for suicide, and failure to take appropriate measures to prevent the suicide from occurring. The sound reasoning of *Moats* was reiterated just last year in *Hull.* Likewise, *Hull* sounded in medical professional liability, yet this Court did not find that the statutory action provided or necessitated an exception to the *Moats* rule. In resolving the Estate's claim as a matter

of law, the Circuit Court of Ohio County followed this Court's guidance precisely, thoughtfully, reaching the correct resolution under West Virginia law at this time. For all the reasons set forth above, the Respondents respectfully request that this Court uphold the Circuit Court's Order, dismissing the claim below, and refrain from expanding West Virginia law. Respondents seek the relief this Court deems just.

Respectfully Submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
NO. 20-0750

CHRISTOPHER MORRIS, individually and as Adminstrator of the ESTATE OF ANY CHRISTINE WADE,

Plaintiff Below, Petitioner,

vs.

STEVEN CORDER, M.D.;
MELANIE BASSA, M.A.;
MARTHA DONAHUE, N.P.;
NORTHWOOD HEALTH SYSTEMS, INC.;
MID-VALLEY HEALTHCARE; and
JOHN DOES 1-5,

Defendants, Respondents.

CERTIFICATE OF SERVICE

I, Roberta F. Green / Justin M. Kearns, counsel for Defendants/Respondents, do hereby certify that we served a true and exact copy of the foregoing **"JOINT BRIEF OF RESPONDENTS"** on counsel of record via the United States Postal Service by placing the same in a stamped envelope addressed as follows:

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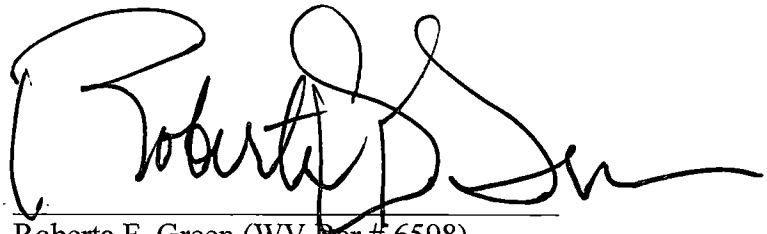

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