THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 20-0906

STATE OF WEST VIRGINIA ex rel.
WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,
d/b/a CHESTNUT RIDGE CENTER, and
WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS,
Defendants Below/Petitioners,

v.

THE HONORABLE LYNN A. NELSON,
JUDGE OF THE CIRCUIT COURT OF TUCKER COUNTY, and
MARK HECKLER, Individually and as
Personal Representative and Administrator of the
Estate of MARION HECKLER, deceased.,
Respondents.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION

Submitted By:

Benjamin B. Ware (W. Va. Bar. No. 10008)
W. Jeffrey Vollmer (W. Va. Bar No. 10277)
Shanna L. Brown (W. Va. Bar No. 12516)
Robert S. Pruett (W. Va. Bar No. 12683)
GOODWIN & GOODWIN, LLP
300 Summers Street, Suite 1500
Charleston, WV 25301
P: 304-346-7000
F: 304-344-9692
bbw@goodwingoodwin.com
wjv@goodwingoodwin.com
slb2@goodwingoodwin.com
rsp@goodwingoodwin.com
Counsel for Respondent, Mark Heckler

TABLE OF CONTENTS

TABLE OF AUTHORITIES

West Virginia Cases

Federal Cases

Statutes

Rules

QUESTION PRESENTED

West Virginia University Hospitals, Inc. and West Virginia University Board of Governors (collectively "Petitioner") present the following question: "Whether the Respondent judge exceeded his judicial powers in violation of the exclusive venue statutes of *West Virginia Code* §§ 56-1-1(a)(1) and 14-2-21 by erroneously concluding that venue over Civil Action No. 20-C-16 was appropriate in Tucker County rather than Monongalia County, where the cause of action actually arose." Pet. at 1.

As written, Petitioner's question interposes argument and does not accurately reflect the issue before this Court. Particularly, this question (1) disregards this Court's well-established precedent that a claim can arise in more than one county under West Virginia Code §§ 56-1-1(a)(1) and 14-2-2a; and (2) wrongly assumes that this claim arose solely in Monongalia County. It also ignores the unique nature of this claim. Petitioner is not being sued by a patient for harm caused by acts occurring solely in Monongalia County. Rather, it is being sued by a third-party nonpatient for harm caused by acts that occurred largely in Tucker County. Specifically, Petitioner sent its mentally ill and dangerous patient to live with Plaintiff's decedent, the specific target of her homicidal ideation, at Plaintiff and his decedent's Tucker County residence. A day and a half later, the entirely foreseeable result occurred, the gruesome stabbing murder of Plaintiff's decedent in Tucker County. Accordingly, the lawsuit was filed in the logical and correct place—Tucker County—where Petitioner knowingly sent its patient, aware that harm to the people living there would likely result, where *fatal* harm did, indeed, occur, and where Plaintiff's cause of action became complete.

Therefore, Plaintiff, Mark Heckler ("Mark"), who brings the cause of action asserted in this case individually and on behalf of the estate of his late wife, Marion Heckler ("Marion"), respectfully asserts that the question presented to this Court is more properly framed as follows:

> Should this Court grant extraordinary relief and prohibit the circuit court from enforcing an order in which it concluded that a third-party cause of action brought by Mark Heckler under West Virginia Code § 55-7B-9b arose in Tucker County – the County in which the proximate cause of harm and damages giving rise to this action (the stabbing death of Mark's wife, Marion, a non-patient) undisputedly occurred?

STATEMENT OF THE CASE

Reading the Petition, one might think this case involves a typical medical malpractice claim, where the harm to the named plaintiff occurred solely on the operating table, and in turn, all facts giving rise to the case occurred where the defendant was located. However, this is *not* a typical medical malpractice claim. It is a unique third-party nonpatient claim under West Virginia Code § 55-7B-9b under which a health care provider may be liable for a patient's subsequent act that proximately causes injury or death to a third-party nonpatient. Accordingly, this case is drastically different and readily distinguishable from a typical medical malpractice claim because its focus is solely on harm to the third-party nonpatient. Here, Petitioner cannot deny that ***all*** harm (indeed, fatal harm) to Marion, the Plaintiff's decedent in this case and a third-party nonpatient, occurred in Tucker County. And, contrary to the assertions of Petitioner, nothing about the circuit court's entirely correct ruling – which is limited to the unique facts of this case and this specific cause of action – would set any more generalized precedent for venue in West Virginia medical malpractice cases.

To add a second layer of uniqueness to this case, Petitioner had every reason to know that the harm giving rise to this case would likely occur specifically in Tucker County. Petitioner

knew, undisputedly, that Emily was a danger to herself and others. Indeed, during her insufficiently brief two-week stay at Petitioner's facility that began after Emily's self-inflicted brain hemorrhage, Petitioner expressly documented Emily's myriad episodes of dangerous outbursts and deeply concerning behavior, including, but not limited to Emily: claiming to have seen the devil; running around her unit disrobed; tearing a sink off the wall; rubbing vomit on her face; and attempting further harm to herself. APP000006, ¶ 31; APP000007, ¶ 34.[1] Critically, Petitioner documented, but wholly failed to treat, Emily's dangerous delusions, including at least one homicidal ideation specifically against Marion, Plaintiff's decedent. APP000004, ¶ 16. Suffice to say, it was not safe to release Emily. Petitioner was also acutely aware, and in fact, specifically planned that, upon discharge, Emily would live with her father, Mark, at his and Marion's home in Tucker County, giving Emily ample opportunity to act upon the exact homicidal ideation Petitioner failed to address. APP000007, ¶ 7.

Within a day and a half after Emily's discharge, the entirely foreseeable and devastatingly tragic result occurred. In her frantic, final phone call to 911, Marion specifically lamented that Petitioner discharged Emily far too soon. APP000009, ¶ 46. Moments later, Marion was stabbed over 40 times in the family's Tucker County driveway, and Emily was arrested at the house. *Id.* ¶ 47. Emily was soaked in blood and in an unimaginable state of mind. Petitioner prematurely discharged Emily knowing she was going to live, and likely cause this specific form of harm, in Tucker County.

---

[1] In the discussion of the underlying facts, Plaintiff cites the Complaint. All well-pleaded factual allegations in the Complaint relating to venue are to be taken as true at the current stage of the proceedings. *Hancock v. AT&T Co.*, 701 F.3d 1248, 1260-61 (10th Cir. 2012) (quoting, in part, 5B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1352, at 234 (2004)) ("All well-pleaded allegations in the complaint bearing on the venue question generally are taken as true, unless contradicted by the defendant's affidavits. . . . And, as is consistent with practice in other contexts, such as construing the complaint, the court must draw all reasonable inferences and resolve all factual conflicts in favor of the plaintiff.") (quotation marks omitted)).

In sum, this is a unique medical malpractice claim brought by a third party, not a patient, under a narrow provision of the Medical Professional Liability Act (the "Act"). As a result, the circuit court's sound decision is limited to the specific, narrow facts of this case and will not, as Petitioner hyperbolically suggests, open the floodgates for venue in typical medical malpractice actions brought by patients themselves rather than third parties. Given that Petitioner has painted this case with a broad brush; has suggested, inaccurately, that this case deals exclusively with conduct occurring in Monongalia County; and has intimated that the circuit court's consideration of the applicable law was somehow incomplete; the following sections provide a summary of the specific facts and procedural history of this case.

1. Factual Background

The sole cause of action in this case is a third-party nonpatient claim asserted on Marion Heckler's behalf under West Virginia Code § 55-7B-9b, which provides:

> An action may not be maintained against a health care provider pursuant to this article by or on behalf of a third-party nonpatient for rendering or failing to render health care services to a patient whose subsequent act is a proximate cause of injury or death to the third party unless the health care provider rendered or failed to render health care services in willful and wanton or reckless disregard of a foreseeable risk of harm to third persons. . . .

By enacting West Virginia Code § 55-7B-9b, the Legislature clearly determined that: (1) third-party nonpatient claims are actionable in certain circumstances and (2) third-party claims are critically different from first-party claims because the third-party statutory provision requires injury or death to a *third-party nonpatient that is proximately caused by a patient's subsequent act.*[2] Indeed, it is the patient's subsequent act and resulting harm to the third-party nonpatient that

[2] *Osborne v. United States* is an example of a third-party nonpatient claim. 211 W. Va. 667, 567 S.E.2d 677 (2002). In *Osborne*, certain family member plaintiffs sued a doctor who may have negligently prescribed pain medication to an addicted person, who later became intoxicated on the medication and crashed his vehicle into the family's car, causing injury to some of the passengers and death to others.

is the crux of a claim under West Virginia Code § 55-7B-9b. The statutory language giving rise to this claim specifically contemplates—indeed, requires—foreseeable harm caused by the patient *after* the conclusion of the services rendered by the health care provider.

Accordingly, the focus of this case is Marion's tragic and preventable death in Tucker County. Without Marion's death, there would be no claim under West Virginia Code § 55-7B-9b. Here, Mark alleges that Marion died after being stabbed forty times with a kitchen knife in her Tucker County driveway by Emily, her stepdaughter and former recipient of inpatient services at Petitioner's behavioral health facility. APP000004, ¶ 18. Just one and a half days before Marion's death, Petitioner prematurely discharged Emily even though it knew that Emily needed continuous treatment and supervision, that Emily was "in a state of increased and uncontrolled psychotic agitation," and that her release to Tucker County would present a serious and specifically foreseeable danger to Marion's life. APP000001-2; APP0000010, ¶ 51.

Particularly, Petitioner's treatment notes make clear that Emily's premature discharge would present a grave danger to Mark and Marion Heckler, both Tucker County residents. During her two weeks at Petitioner's behavioral health facility (from March 27 to April 11, 2018), Emily exhibited multiple episodes of bizarre and labile behavior, including but not limited to responding to unseen stimuli; seeing the devil; bouts of aggression, including tearing a sink off the wall; rubbing vomit on her face; attempting to injure herself; and talking about deaths that never occurred. APP000006-7, ¶¶ 28, 31 & 34. These bouts of bizarre behavior continued until at least April 10, 2018, the day before she was released, when Emily was found naked in her room, cursing, labile, and unable to engage in a back-and-forth conversation, save repeating bible verses.

Osborne predates West Virginia Code § 55-7B-9b but it is still recognized as good law. *Boggs v. Camden-Clark Mem'l Hosp. Corp.*, 225 W. Va. 300, 316 n.27, 693 S.E.2d 53, 69 n.27 (2010). Venue was not an issue in the *Osborne* decision.

APP000008, ¶ 38. More importantly, knew that Emily expressed a specific homicidal ideation against Marion and had attacked Mark, her father, on several occasions. APP000006, ¶ 29.

Critically, the day before Petitioner's premature discharge of Emily, Petitioner specifically documented that Emily needed long term care. APP000004, ¶ 14. And Mark, Emily's father, did not mince words when he specifically warned Petitioner that Emily was not ready to be released. *Id.* Nevertheless, and despite being aware of Emily's severe mental condition and its knowledge that Emily expressed a specific homicidal ideation toward Marion, Petitioner prematurely discharged Emily to live in Marion's home in Tucker County. APP000008, ¶ 43. Petitioner made this discharge decision without addressing the obvious safety concerns relating to Emily's discharge with her family, including the homicidal ideation against Marion. APP000008, ¶¶ 42-43. Without the information necessary to make an informed decision, and not wanting his daughter homeless on the streets, Mark took Emily to his and Marion's home in Tucker County.

As an entirely foreseeable result of Petitioner willfully, wantonly, and recklessly disregarding the risk of harm to Marion, she is now dead. Emily is now in jail and awaiting trial in Tucker County, but this action was *not* brought on her behalf. Emily is not a named party, and none of the damages sought in this action pertain to her. APP000011, ¶¶ 55-61. Instead, the alleged damages—including without limitation, Marion's extreme bodily and emotional pain and suffering, Mark's loss of Marion's companionship, and death-related expenses—all relate to Marion's death. And again, this death occurred in Tucker County. *Id.* Petitioner may paint this case as relating solely to Monongalia County. However, the Complaint clearly alleges that this action centers, at least in significant part, in Tucker County. Indeed, the very heart of this claim is that Petitioner received notice of, and recklessly ignored, a very specific type of harm that was likely to occur specifically *in Tucker County.*

2. Procedural History

On August 14, 2020, Petitioner filed a motion to dismiss this action for improper venue. APP000019. Petitioner correctly notes it initially focused the bulk of its argument on West Virginia Code § 55-7B-4(e), which applies to first party claims against a "nursing home," "assisted living facility," or "a distinct part of an acute care hospital providing intermediate care or skilled nursing care[.]" Pet. at 5. Petitioner abandoned this argument after Marion pointed out in her Response to Petitioner's Motion to Dismiss that Petitioner did not fall within any of the aforementioned categories. *See* APP000049-52 & APP000078-91. Petitioner did not resuscitate these § 55-7B-4(e) arguments in its Petition, and thus has waived and abandoned them. *See* Pet. at 5 n.12 ("For the purpose of this brief, Petitioner-Defendants have exclusively focused their venue arguments on the application of West Virginia Code §§ 56-1-1(a)(1) and 14-2-2a to the facts on record.").

The two remaining venue statutes at issue, West Virginia Code §§ 56-1-1(a)(1) and 14-2-2a, permit venue in the county where the cause of action arose. With respect to § 56-1-1(a)(1), Petitioner gave short shrift to the "arising" issue, merely stating without legal citation that the cause of action "arose" in Monongalia County because that is where Petitioner treated Emily. APP000029.[3] With respect to § 14-2-2a, Petitioner relied on the Circuit Court of Kanawha County's decision that a physician's wrongful termination claim against the Marshall University Board of Governors had been brought in the wrong venue, even though this case has nothing to do with employment law. APP000030. That nonbinding decision was clearly distinguishable

[3] Petitioner also argued that § 56-1-1(a)(1) was inapplicable because they did not reside in Tucker County and there were insufficient minimum contacts to subject them to personal jurisdiction. APP000029-30. However, Mark noted in his response that venue was being in asserted in Tucker County because that is where the cause of action arose, which is permissible under § 56-1-1(a)(1). APP000055. Petitioner does not raise this issue in its Petition and thus it is also waived and abandoned.

(involving a wrongful termination, not a third-party nonpatient claim) and as Petitioner acknowledged, the physician's argument in the case it cited was not the argument before the circuit court—that venue was proper in Kanawha County because "the Defendant did business in Kanawha County." APP000030.

In response, Mark noted that he was asserting venue in Tucker County because that is where the cause of action arose, not because Petitioner "does business" in Tucker County. *See* APP000055. Relying on a more analogous claim—legal malpractice—Mark argued that venue may be proper in the county where the plaintiff suffered "substantial damages," even if the defendant breached the duty that caused those damages in another county. APP000053 (citing *McGuire v. Fitzsimmons*, 197 W. Va. 132, 475 S.E.2d 132 (1996)). The same has been held in the context of contracts cases. APP00055 n.11 (citing *Wetzel Cty. Savings & Loan Co. v. Stern Bros. Inc.*, 156 W. Va. 693, 195 S.E.2d 732 (1973)). That is, when the elements of a cause of action arise in more than one county, as was the case with the legal malpractice claim in *McGuire* and the breach of contract claim in *Wetzel*, venue may be proper where the plaintiff suffered substantial damages. APP000053-55. This concept is even more applicable to causes of action under West Virginia Code § 55-7B-9b, which specifically requires a "subsequent" act by a patient that proximately causes injury to a third party. Mark argued that the circuit court should reach the same result and find venue proper where Marion suffered substantial damages—that is, where she died, in Tucker County. *Id.*

In its reply, Petitioner charted a narrower course. Based on its parsed, incorrect reading of West Virginia Code § 55-7B-9b, Petitioner argued that "rendering or failing to render health care services to a patient" is the *only* element of § 55-7B-9b that matters for venue purposes; that the *McGuire* case somehow supports finding venue proper only in Monongalia County; and that an

inapplicable memorandum decision, *Jewell v. Peterson*, 2012 W. Va. LEXIS 843 (2012), is dispositive on venue here, even though that decision did not involve a third-party nonpatient claim under West Virginia Code § 55-7B-9b and was limited, by its own language, to the "specific facts alleged." APP000078-91.

After fully considering the arguments presented by all parties in their briefs and at oral argument, the circuit court found Petitioner's arguments unavailing, denied the motion, and correctly concluded that venue in Tucker County is proper in this case. APP000114-15, APP000116-26. Specifically, in its October 29, 2020 Order, the circuit court found "that the cause of action arose in Tucker County because that is the location where the Plaintiffs incurred substantial damages from the alleged breach of duty by [Petitioner]. Therefore, [Mark Hecker's] choice of Tucker County as the venue for this action is not inappropriate and as such, the case can remain in Tucker County." APP000114-15, ¶ 4. It is from this sound decision that Petitioner seeks extraordinary relief in prohibition from this Court.

SUMMARY OF ARGUMENT

Petitioner does not dispute that under the two pertinent venue statutes, West Virginia Code §§ 56-1-1(a)(1) and 14-2-2a, venue is proper in any county where the cause of action "arose." Pet. at 11 ("The relevant dispute between the parties is where the cause of action arose."). Petitioner also does not deny that, under certain circumstances, a cause of action may "arise" for venue purposes in more than one county. The parties' point of disagreement is whether, under the unique facts of this case and the specific cause of action alleged, Marion's claim under West Virginia Code § 55-7B-9b arose in more than one county for venue purposes.

Petitioner raises two incorrect arguments in support of its mistaken conclusion that Marion's cause of action arose *only* in Monongalia County. First, it suggests that this Court

determine venue based on where the elements of West Virginia Code § 55-7B-9b were met, and it states that one of the elements, rendering or failing to render health care services, occurred in Monongalia County. Pet. at 11-13. Petitioner errs by stopping its analysis there. The plain language of West Virginia Code § 55-7B-9b makes clear that a health care provider rendering or failing to render health care is not the only element of the statute. Petitioner fails to consider that a patient's subsequent act that proximately causes injury or death to a third-party nonpatient is *also* an essential element of a claim under this statute. Without harm to Marion proximately caused by Emily's actions, there would be no claim. That element was indisputably met in Tucker County, where a day and a half after her premature discharge, Emily stabbed Marion to death in her driveway. Under Petitioner's own suggested approach, determining venue by where the elements to the cause of action occurred, and considering that a cause of action may arise in more than one county, venue could be proper in Monongalia *or* Tucker County because the elements of Marion's claims were met, at least in part, in both counties. Petitioner breached its duty of care by recklessly discharging Emily in Monongalia County with a specific plan that Emily live in the home of Marion Heckler in Tucker County. It breached that duty because, among other things, Emily was in an extremely dangerous state of mind and had specifically stated that she intended to kill Marion—a resident of Tucker County. And the tort was not complete until that terrible murder actually occurred in Tucker County, proximately linking the death of Marion and the damages at issue in this case back to the wrongful act of Petitioner.

Second, Petitioner argues that the circuit court erred by applying the analogous *Wetzel* and *McGuire* decisions to correctly find venue in Tucker County proper. In a nutshell, this Court in *Wetzel* and *McGuire* recognized that some causes of action may be met by facts occurring in more than one county. *Wetzel*, 156 W. Va. at 698, 195 S.E.2d at 736 (providing that, "a cause of action

may, and in most cases does, consist of more than one element and . . . these elements may occur severally and in different geographical locations."); *McGuire*, 197 W. Va. at 136, 475 S.E.2d at 136 (same). Accordingly, as to the specific claims in *Wetzel* and in *McGuire*, where the underlying claims were met by facts occurring in more than one geographical location, this Court found that venue may be proper in at least the following three counties: (1) where the duty came into existence, (2) where the duty was breached, or (3) where the manifestation of the breach—that is, substantial damage occurred. Syl. Pt. 3, *Wetzel*, 156 W. Va. 693, 195 S.E.2d 732; Syl., *McGuire*, 197 W. Va. 132, 475 S.E.2d 132.

Here, Marion's claim was met by facts occurring in more than one county. Part of her claim was met by facts occurring in Monongalia County. Other facts giving rise to her claim occurred in Tucker County. The circuit court did not err by recognizing that fact and then applying the most analogous case law at hand, *Wetzel* and *McGuire*, to find that venue may be proper, among other places, where the manifestation of Petitioner's breach was suffered (Marion's stabbing death), in Tucker County.

Instead of applying the analogous *Wetzel* and *McGuire* decisions, Petitioner argues the circuit court should have applied the inapplicable *Jewell* memorandum decision to find that Marion did not have a choice but to file her claim in Monongalia County. Again, that argument disregards the fact that Marion's claim is a third-party nonpatient claim under West Virginia Code § 55-7B-9b, while the claim in *Jewell* was a more generic, first-party patient claim under the Act. For Marion's claim, the center of the harm (her stabbing death), as well as the patient's "subsequent act" that caused it (Emily's conduct) all occurred in Tucker County. Indeed, there is no indication that Marion ever stepped foot in Monongalia County in connection with this case. Accordingly,

Jewell is inapposite to the unique set of facts and specific cause of action at issue here, and the circuit court committed no error in treating it as such.

Petitioner has failed to demonstrate any error in connection with the circuit court's entirely correct finding that venue is proper in Tucker County. Petitioner's request for a writ of prohibition should therefore be denied.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This Court is asked to resolve a dispute that is clear-cut and limited in scope to third-party nonpatient claims under a single provision of the Act—West Virginia Code § 55-7B-9b. The facts that are pertinent to this venue dispute are virtually uncontested, and this Court is aided with a well-developed record on the thorough litigation below on whether venue is proper in Tucker County. What is more, the circuit court correctly applied the law to the facts before it and committed no error, much less a clear error as required for a writ of prohibition to be granted. Therefore, and given the narrow scope of the question before it, this Court should decline to issue a rule to show cause under West Virginia Rule of Appellate Procedure 16(j), in which case, oral argument would not be necessary.

ARGUMENT

I. Standard of Review

Petitioner does not argue that the circuit court exceeded its jurisdiction. Therefore, the following five factors are considered in determining whether to grant a petition for a writ of prohibition:

> (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for

> either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law.

Syl. Pt. 4, in part, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996).

West Virginia law is clear that the burden to establish these factors is on Petitioner. *Norfolk S. Ry. v. Maynard*, 190 W. Va. 113, 120 n.6, 437 S.E.2d 277, 284 n.6 (1993) ("[T]he right to a writ of prohibition *must be shown by [the] petitioner*[.]") (emphasis added). Equally clear is that writs of prohibition are not issued in close cases; instead, the "strictly enforced" rule requires Petitioner to establish that the alleged error was substantial, clear cut, plainly in contravention of a clear legal mandate, and "extraordinary." Syl. Pt. 2, in part, *State ex rel. 3M Co. v. Hoke*, 2020 W. Va. LEXIS 807 (Nov. 23, 2020) (providing prohibition is used to correct "only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate") (quotations and citations omitted); *State ex rel. Yurish v. Faircloth*, 847 S.E.2d 810, 815 (W. Va. 2019) ("A writ of prohibition is an extraordinary remedy reserved for extraordinary cases."); *County Court v. Boreman*, 34 W. Va. 362, 356-66, 12 S.E. 490, 492 (1890) (providing that a writ of prohibition "issues only in cases of extreme necessity[,]" and that "[i]t is a fundamental principle, strictly enforced, that prohibition is never allowed to usurp the functions of appeal"). Because, among other things, Petitioner has failed to meet its burden to show that the circuit court committed any error, much less an error that was substantial, clear cut, plainly in contravention of a clear legal mandate, or "extraordinary," its requested writ of prohibition should be denied.

II. Venue is Proper in Tucker County, where Marion's death—an express and critical element of a cause of action under West Virginia § 55-7B-9b—occurred.

Citing *Wetzel* and *McGuire*, Petitioner argues that venue should be determined by where the elements to Marion's claim under West Virginia Code § 55-7B-9b were met. Pet. at 11. Under Petitioner's suggested approach, venue is proper in Tucker *and* in Monongalia County (not one or

the other) because the elements of West Virginia Code § 55-7B-9b were met by facts occurring in both locations.

By its plain terms, a third-party nonpatient does not have a claim under West Virginia Code § 55-7B-9b without having suffered an injury or death that was proximately caused by a patient's subsequent act:

> An action may not be maintained against a health care provider pursuant to this article by or on behalf of a third-party nonpatient for rendering or failing to render health care services to a patient ***whose subsequent act is a proximate cause of injury or death to the third-party*** unless the health care provider rendered or failed to render health care services in a willful and wanton disregard for a foreseeable risk of harm to third persons.

(emphasis added). Put differently, a required element of West Virginia Code § 55-7B-9b is that a patient's subsequent act proximately caused a third-party nonpatient's injury or death. Emily, a patient, proximately caused Marion's death in Tucker County, and thus an element of this third-party claim occurred in Tucker County.

To avoid this plain and logical result, Petitioner argues this Court should focus exclusively on the "rendering or failing to render health care services to a patient," language of West Virginia Code § 55-7B-9b, as if that were the only element of the claim. As stated above, it is not, and Petitioner provides zero explanation as to why no other element of the statute should be considered for venue purposes. By disregarding entire swaths of the statutory language of West Virginia Code § 55-7B-9b, at least for venue purposes, Petitioner's argument runs afoul of multiple canons of statutory construction. Notably, "significance and effect must, if possible, be given to every section, clause, word or part of the statute." Syl. Pt. 3, in part, *Jackson v. Belcher*, 232 W. Va. 513, 753 S.E.2d 11 (2013) (citations and quotations omitted). And, "courts are not to eliminate

through judicial interpretation words that were purposely included[.]" Syl. Pt. 11, in part, *Brooke B. v. Donald Ray C.*, 230 W. Va. 355, 738 S.E.2d 21 (2013).

Moreover, by focusing exclusively on the health care services that were rendered (or not rendered) to a patient, Petitioner blurs the line between third-party nonpatient claims under West Virginia Code § 55-7B-9b and any other claim under the Act. In turn, Petitioner's argument disregards the fact that the Legislature enacted a separate statutory provision governing third-party nonpatient claims, which included elements that apply exclusively to West Virginia Code § 55-7B-9b. Had the Legislature intended for claims under West Virginia Code § 55-7B-9b to be treated like any other claim under the Act, it would not have enacted a separate statute for third-party nonpatient claims. Syl. Pt. 4, *State ex rel. Hardesty v. Aracoma-Chief Logan No. 4523*, 147 W. Va. 645, 129 S.E.2d 921 (1963) ("It is always presumed that the legislature will not enact a meaningless or useless statute.").

Indeed, Petitioner appears to ignore the fundamental nature of Marion's claim as a third-party nonpatient claim. Plaintiff is not seeking to recover against Petitioner solely for a breach of duty to Emily. Instead, Plaintiff's claim centers on Petitioner willfully, wantonly and/or recklessly disregarding a known risk to *Marion*, a third-party resident of Tucker County, by sending Emily, a mentally ill and dangerous patient to live with her, even though Petitioner was fully aware that Marion was the target of Emily's homicidal ideation. The specific foreseeable harm giving rise to this action was targeted at Tucker County. Accordingly, Petitioner's attempt to disavow any connection between its discharge decision and Tucker County falls flat.

Under the plain language of the statute, a required element for asserting a claim under West Virginia Code § 55-7B-9b is that a patient proximately cause injury or death to a third-party nonpatient. Here, Emily proximately caused Marion's death by stabbing her forty times with a

kitchen knife in Tucker County, thereby satisfying an element under West Virginia Code § 55-7B-9b. Under the approach that Petitioner asks this Court to adopt, using the elements of the cause of action to determine venue, venue is clearly proper in Tucker County.

III. The circuit court did not err by applying *Wetzel* and *McGuire*.

Petitioner is entirely inconsistent in its Petition as to whether the *Wetzel* and *McGuire* decisions apply. In one breath, it argues that this Court should apply *Wetzel* and *McGuire*. Pet. at 11. In another, it asserts that the circuit court so clearly erred by applying *Wetzel* and *McGuire* that this Court should grant it extraordinary relief and prohibit enforcement of the complained-of Order. *Id.* at 16-21. Instead, the Petitioner contends that the circuit court should have applied West Virginia Code § 55-7B-4(e), which, by its plain terms, do not apply to this case and, in any event, was waived by Petitioner in its Petition. *Compare* Pet. at 5 n.12, *with id.* at 15. It also asserts that the circuit court should have considered the *Jewell* memorandum decision, which contrary to Petitioner's argument on West Virginia Code § 55-7B-4(e), did not apply that statute to determine venue. More importantly, the *Jewell* memorandum decision does not involve a third-party nonpatient claim, and accordingly, is inapplicable to this case.

The circuit court applied analogous West Virginia case law to correctly conclude that Tucker County is a proper venue, as that is where Petitioner knowingly sent its mentally ill and dangerous patient to live with the target of her homicidal ideations, and where Marion was killed as a result. This conclusion was not error. Having failed to demonstrate that the circuit court committed error, much less the clear error that is required for relief in prohibition, Petitioner's requested writ should be denied.

A. *The Circuit Court was correct to apply this Court's decisions in Wetzel and McGuire to find that venue is proper in the county where the Plaintiff suffered substantial damages. As in Wetzel and McGuire, the elements of a claim under West Virginia Code § 55-7B-9b may be met by facts occurring in more than one county.*

Petitioner argued that the circuit court erred by applying *Wetzel* and *McGuire*, even though a mere five pages earlier, it argued that this Court should apply those same cases. *Compare* Pet. at 11, *with id.* at 16-21. Notwithstanding Petitioner's inconsistent positions, the logic used by the Court in *Wetzel* and *McGuire*—that the elements of the underlying claims were met by facts occurring in more than one county—squarely applies to this case. Accordingly, the circuit court did not err by applying the same reasoning to reach the same conclusion as this Court in *Wetzel* and *McGuire*.

To illustrate, in *Wetzel*, a contracts case, the defendant allegedly breached duties under its contract with the plaintiff, located in Wetzel County, from its principal place of business in Wood County. 156 W. Va. at 694, 195 S.E.2d at 734. As Petitioner does here, the defendant argued that venue was proper *only* in Wood County, where the alleged acts in breach of the contract occurred, not where the plaintiff suffered substantial damages as a result of the breach, in Wetzel County. *Id.* In rejecting the defendant's argument, this Court correctly noted that "[a]ctions for a breach of contract are transitory and consequently not local in nature." *Id.* at 698, 195 S.E.2d at 736. That is, "a cause of action may, and in most cases does, consist of more than one element and . . . these elements may occur severally and in different geographic locations." *Id.* Accordingly, and because the separate elements of a breach of contract action may occur in separate counties, venue for contracts actions was found to be proper in the county where "the manifestation of the breach—substantial damages occurs." Syl. Pt. 3, in part, *id.*

Similarly, in *McGuire*, a legal malpractice action, the defendant lawyer argued that venue was proper *only* in Ohio county, where he may have breached his obligations to his clients, and

not in Monongalia County, where their claim was dismissed as a result of his alleged malpractice. 197 W. Va. at 134, 475 S.E.2d at 134. As was the case in *Wetzel*, this Court rightly rejected the defendant lawyer's position that venue was proper only in Ohio County, where the breach occurred. *Id.* This Court noted two reasons against restricting venue in the manner suggested by the defendant: (1) the elements necessary to prevail on a claim for legal malpractice may occur severally and in different locations; and (2) West Virginia law already recognizes that venue is proper where substantial damages were suffered outside of the malpractice context. *Id.* at 136, 475 S.E.2d at 136. This Court found this reasoning sufficient to hold that, in a legal malpractice action, venue is proper in the county "where the manifestation of the breach—substantial damage—occurred." Syl., *id.*

By analogy, like the contracts claim in *Wetzel* and the legal malpractice claim in *McGuire*, the elements of a claim under West Virginia Code § 55-7B-9b may be met by facts occurring in more than one county. This case is a prime example of that fact. As noted in *McGuire*, "the plain language of W. Va. Code, 56-1-1(a)(1) [1986] does not limit the venue to one county[.]" 197 W. Va. at 136, 475 S.E.2d at 136.

Marion's death being proximately caused by Emily after she was prematurely discharged is a separate element—and indeed, is the crux—of Plaintiff's claim under West Virginia Code § 55-7B-9b. The death, along with Emily's act that proximately caused the death, occurred in Tucker County. Because the elements of this cause of action occurred in more than one county, the circuit court correctly applied the most analogous case law available—*Wetzel* and *McGuire*—to find that venue is proper in Tucker County, where one of the elements to the cause of action was met and where the plaintiff suffered substantial damages. APP000114-15, ¶ 4. The circuit court committed no error, much less error necessitating extraordinary relief, by reaching this correct conclusion.

B. The circuit court was correct that this Court's memorandum decision in Jewell does not change the outcome of this venue dispute because it is distinguishable from the facts of this case and, by its own language, is limited to the "specific facts as alleged therein."

Petitioner claims that the circuit court committed clear error to such a degree that extraordinary relief is necessary because it failed to address a memorandum decision that does not involve a third-party nonpatient claim under West Virginia Code § 55-7B-9b, *Jewell v. Peterson*. Pet. at 23 ("Because the Circuit Court failed to address this argument or to distinguish its decision from the *Jewell* decision in any way, it clearly erred as a matter of law in concluding Tucker County is an appropriate venue for this action."). To be clear, Petitioner does not cite a single case where this Court found that a writ of prohibition was the proper remedy for the circuit court's mere failure to address a case, much less a memorandum decision, in an order.

More to the point, the circuit court was correct that the *Jewell* memorandum decision is not dispositive on venue in this case. First, this Court's holding in *Jewell* was limited to "the specific facts as alleged therein," and accordingly, it was not intended to be applied to cases involving distinguishable facts. *Jewell*, 2012 W. Va. LEXIS 843, at *3. Second, the facts of this case are distinguishable from the *Jewell* memorandum decision. In *Jewell*, the first-party patient claim sought recovery for harms caused by acts and omissions (defendants' failure to diagnose or treat the patient-plaintiff's lung cancer) occurring solely in Fayette County, which is where venue was held to be proper. *Id.* at *2. By contrast, Petitioner's patient, Emily, is not a named party. Pet. at 16. And none of the relief sought in this third-party nonpatient case seeks recovery for harms Emily, Marion, or anyone else suffered in Monongalia County. Rather, the crux of this third-party nonpatient claim is the harm Marion suffered caused by acts occurring in Tucker County, her stabbing death. Because of the fundamental differences between this case and the *Jewell* memorandum decision, the circuit court was correct to find it not dispositive in this case.

What is more, this case is unique because of how foreseeable it was that prematurely releasing Emily to live in Tucker County would result in grave bodily harm, and in turn, liability, specifically in Tucker County. At the time of Emily's discharge, Petitioner knew that: (1) Emily was in too dangerous of a mental state to be discharged, (2) Emily expressed a homicidal ideation against Marion, and (3) Petitioner planned for Emily to live with the target of her homicidal ideation, Marion, in Tucker County. And even knowing all these facts, Petitioner *still* failed to address the obvious safety concerns relating to her discharge with her family, including, the homicidal ideation against Marion. In sum, under the specific set of facts in this case, the harm to Marion not only occurred solely in Tucker County, but Petitioner knew that was the exact location in which Marion was likely to be harmed.

This case presents unique facts wherein Petitioner knowingly sent its mentally ill and dangerous patient to live with the specific target of her homicidal ideation in the county in which it is now being sued. Due to these unique facts, finding venue appropriate under the limited circumstances of this case would not set any more generalized precedent for venue in West Virginia medical malpractice cases. And relatedly, this case is not appropriate to draft a syllabus point setting a one-size-fits-all rule that determines venue in all actions under the Act, as requested by Petitioner. As this Court recognized in *Jewell*, unique cases may, where appropriate, be disposed of in a narrow decision and limited to "the specific facts as alleged therein." *Id.* at *2. But whatever form of this Court's decision on this matter, under the facts of this case, venue was clearly proper in Tucker County, and the circuit court committed no error in reaching this result.

C. *The circuit court was correct to find that venue in this specific case is not limited to the county in which Petitioner provided healthcare services, notwithstanding Petitioner's citation to an inapplicable statute.*

As noted on the sixth page of this Response, Petitioner abandoned and waived any argument it believed it had under West Virginia Code § 55-7B-4(e). *See* Pet. at 5 n.12 ("For the purpose of this brief, Petitioner-Defendants have exclusively focused their venue arguments on the application of West Virginia Code §§ 56-1-1(a)(1) and 14-2-2a to the facts on record."); *see also* Pet. at 1 (presenting question for this Court's consideration in terms of West Virginia Code §§ 56-1-1(a)(1) and 14-2-2a, but not § 55-7B-4(e)).

Notwithstanding this clear waiver, Petitioner states, without support from *any* legal authority, that, "this care was rendered solely in Monongalia County and, pursuant to West Virginia Code § 55-7B-4(e), the only appropriate venue is Monongalia County." *Id.* at 15 (emphasis in original). Of course, this bald assertion without any legal support, is not sufficient to preserve the issue for review. *State v. Lilly*, 194 W. Va. 595, 605 n.16, 461 S.E.2d 101, 111 n.16 (1995) ("It is well settled that casual mention of an issue in a brief is cursory treatment insufficient to preserve the issue on appeal.") (citations, quotations, and ellipses omitted).

Moreover, West Virginia Code § 55-7B-4(e) does not apply to this case. By its own terms, West Virginia Code § 55-7B-4(e) is limited to claims against a "nursing home," "assisted living facility" or "a distinct part of an acute care hospital providing intermediate care or skilled nursing care[.]" As explained in greater detail in Marion's Response to Petitioner's Motion to Dismiss, this statute is limited to the nursing home industry. APP000049-51 (citing, *inter alia*, David E. Marcinko et al., Dictionary of Health Insurance and Managed Care 162 (2006)). Indeed, this much

was explicitly stated when the statute was brought on for a vote in both chambers.[4] In the Senate, the intent behind the statute was described as follows:

> The Committee Substitute for said Bill 338 contains amendments to the Medical Professional Liability Act . . . they're all in chapter . . . 55, article 7B of the Code and contain amendments to sections 2, 4, 6, 10, and 11 *all relating to nursing homes* . . . . There's a venue provision in here that requires an action for medical professional liability against a *nursing home* has to be brought in the county where the *nursing home* is located.

West Virginia Senate Session, at 2:46:39-2:47:48 (Mar. 8, 2017) (emphasis added), available at https://www.youtube.com/watch?v=qw7OM7lrEVM&t=10067s. The bill passed in the Senate without any debate. In the House of Delegates, the stated intent of the statute was even more explicit:

> This Bill is . . . in response to concerns expressed by our *nursing home industry* . . . resulting from a flurry, a flood maybe's a better word, of lawsuits that they have been engulfed in, primarily initiated by one firm out of Mississippi [McHugh Fuller] that has created some real problems. . . .[I]t clarifies the venue, in other words . . . the place where the lawsuit must be brought, is in the county where the *nursing home* is located. One of the problems this bill sought to address was the fact that all of these suits were being brought in Kanawha County, which not only caused a lengthy delay because of the backlog in Kanawha County but was quite inconvenient for these various *nursing facilities* to have to come here for every stage in the lawsuit. . . .

West Virginia House of Delegates Session, at 1:06:22-1:09:23 (Mar. 31, 2017) (emphasis added), available at https://www.youtube.com/watch?v=iOfqb_daPhQ&t=4198s. The bill also passed the House of Delegates without any debate.

---

[4] Legislative history is relevant to the Legislature's intent in enacting a statute. *Davis Mem'l Hosp. v. W. Va. State Tax Comm'r*, 222 W. Va. 677, 684, 671 S.E.2d 682, 689 (2008) ("Other indicia considered by this Court in determining legislative intent are the legislative history of an act and the circumstances surrounding its adoption.") (internal quotations, citations, and brackets omitted).

Accordingly, even if Petitioner had not waived the argument (it did), it still cannot be afforded relief under West Virginia Code § 55-7B-4(e) because it does not apply. Just as Petitioner did before the circuit court, Petitioner invites this Court to err by finding that West Virginia Code § 55-7B-4(e) effects the venue analysis of this case—except this time, the invitation is in the same Petition in which it waived the argument and is provided without citation to any legal authority. Accordingly, this Court should decline to consider Petitioner's statement that West Virginia Code § 55-7B-4(e) applies.

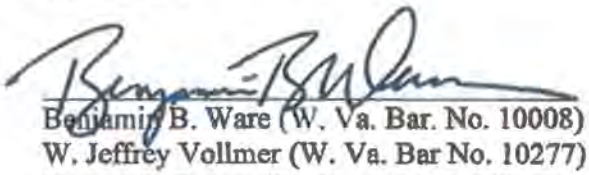
CONCLUSION

Petitioner asks this Court to grant it extraordinary relief and prohibit the circuit court from enforcing an order finding venue proper in the county where the cause of action arose. However, the circuit court committed no error in rendering its venue decision, much less an error that was substantial, clear cut, plainly in contravention of a clear legal mandate, or "extraordinary," as is required for a writ of prohibition to issue. With no error to correct, this Court should deny Petitioner's requested writ of prohibition and decline to issue a rule to show cause under West Virginia Rule of Appellate Procedure 16(j).

Respectfully submitted by:

Mark Heckler, Individually and as Personal Representative and Administrator of the Estate of Marion Heckler, deceased,
Respondents,

By Counsel



Benjamin B. Ware (W. Va. Bar. No. 10008)
W. Jeffrey Vollmer (W. Va. Bar No. 10277)
Shanna L. Brown (W. Va. Bar No. 12516)
Robert S. Pruett (W.Va. Bar No. 12683)
GOODWIN & GOODWIN, LLP
300 Summers Street, Suite 1500
Charleston, WV 25301
P: 304-346-7000
F: 304-344-9692
bbw@goodwingoodwin.com
wjv@goodwingoodwin.com
slb2@goodwingoodwin.com
rsp@goodwingoodwin.com
Counsel for Respondent

THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,
d/b/a CHESTNUT RIDGE CENTER, and
WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS,
Defendants Below/Petitioners,

v.

THE HONORABLE LYNN A. NELSON,
JUDGE OF THE CIRCUIT COURT OF TUCKER COUNTY, and
MARK HECKLER, Individually and as
Personal Representative and Administrator of the
Estate of MARION HECKLER, deceased,
Respondents.

Response in Opposition to Petition for Writ of Prohibition from an order of the Circuit Court of Tucker County Denying Motion to Dismiss
Civil Action 20-C-16

VERIFICATION

I, Benjamin B. Ware, counsel for Respondents, being duly sworn, depose and say that I have reviewed the foregoing *Response in Opposition to Petition for Writ of Prohibition* and believe the factual information contained therein to be true and accurate to the best of my information, knowledge, and belief.

Benjamin B. Ware (W. Va. Bar No. 10008)

Taken, subscribed, and sworn to before me this 21st day of December, 2020.

My commission expires: June 12, 2023

Official Seal
Notary Public, State of West Virginia
Angela K Smith
Goodwin & Goodwin, LLP
300 Summers Street, Suite 1500
Charleston, WV 25301
My Commission Expires June 12, 2023

NOTARY PUBLIC

THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
WEST VIRGINIA UNIVERSITY HOSPITALS, INC.,
d/b/a CHESTNUT RIDGE CENTER, and
WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS,
Defendants Below/Petitioners,

v.

THE HONORABLE LYNN A. NELSON,
JUDGE OF THE CIRCUIT COURT OF TUCKER COUNTY, and
MARK HECKLER, Individually and as
Personal Representative and Administrator of the
Estate of MARION HECKLER, deceased,
Respondents.

Response in Opposition to Petition for Writ of Prohibition from an order of the Circuit Court of Tucker County Denying Motion to Dismiss
Civil Action 20-C-16

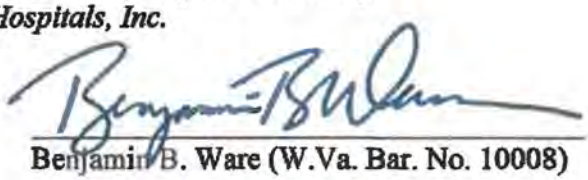
Certificate of Service

I, Benjamin B. Ware, do hereby certify that the foregoing ***"Response in Opposition to Petition for Writ of Prohibition"*** has been served this 21st day of December, 2020, upon the following by United States Mail, addressed as follows:

Chelsea v. Brown
BOWLES RICE, LLP
125 Granville Square, Ste. 400
Morgantown, WV 26501
cbrown@bowlesrice.com
Counsel for Petitioner, West Virginia University Board of Governors.

Christine Vaglienti
Lauren T. Krupica
WEST VIRGINIA UNIVERSITY
HEALTH SYSTEM LEGAL SERVICES
1238 Suncrest Towne Centre
Morgantown, WV 26505
vaglientic@wvumedicine.org
laurentwiggkrupica@wvumedicine.org

Counsel for Petitioner, West Virginia University Hospitals, Inc.



Benjamin B. Ware (W.Va. Bar. No. 10008)