IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

WEST VIRGINIA UNIVERSITY HOSPITALS, INC. d/b/a Chestnut Ridge Center and WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS,

Petitioners,

v.

The Honorable LYNN A. NELSON, Judge of the Twenty-First Judicial Circuit, and MARK HECKLER, Individually and as Personal Representative and Administrator of the Estate of Marion Heckler, deceased (Parties in Interest),

Respondents.

Case No. 20-0906

PETITION FOR WRIT OF PROHIBITION

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QUESTION PRESENTED

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.

STATEMENT OF THE CASE

I. Statement of Facts

The Complaint is almost entirely devoid of important dates and omits significant details of the treatment provided to Emily Heckler ("Ms. Heckler") while she was a patient at Chestnut Ridge Center ("CRC") in Monongalia County, West Virginia. Because this is a medical malpractice action and this treatment is the core of Respondent-Plaintiff's claim against the Petitioner-Defendants, this Statement of Facts is provided to give appropriate context for the Petition for Writ of Prohibition.

1. On March 25, 2018, Emily Heckler, age 19, was transferred to the West Virginia University Hospitals, Inc. ("WVUH") emergency department from Davis Memorial Hospital for treatment of a self-inflicted subdural hematoma (*i.e.,* a head injury). Ms. Heckler sustained the head injury, and other injuries, while incarcerated at Tygart Valley Correctional Facility, where she attempted to drown herself in the toilet of her cell and purposely fell to the ground multiple times. Upon admission to WVUH, Ms. Heckler's history of mental illness was noted, and a psychiatric consult was immediately obtained.[1]

[1] App. 23. Defendants' Joint Motion [App. 19-32] and Reply [App. 78-110] contain the original source citations for each point.

2. Once Ms. Heckler's medical condition was stabilized, she was transferred from WVUH to CRC for inpatient psychiatric treatment. Ms. Heckler was admitted to CRC from March 27, 2018 through April 11, 2018.[2]

3. Both WVUH and CRC are located in Morgantown, Monongalia County, West Virginia. The faculty and resident physicians who provide treatment to patients at WVUH and CRC are employees of the Petitioner-Defendant West Virginia University Board of Governors ("WVUBOG"). Non-physician healthcare providers at WVUH and CRC are, generally speaking, employees of WVUH.[3]

4. Although Mark Heckler ("Mr. Heckler") alleges that, during her hospitalization at CRC, Ms. Heckler made specific threats to kill her stepmother,[4] the Petitioner-Defendants categorically reject this claim. At no time during her hospitalization at CRC did Ms. Heckler express any intention to harm her stepmother.[5]

5. Upon completion of her inpatient treatment at CRC, Ms. Heckler was discharged to the care of her father, Respondent-Plaintiff Mark Heckler. Mr. Heckler then resided in Tucker County, West Virginia.[6]

6. Mr. Heckler voluntarily accepted custody of his daughter in Monongalia County at the time of her discharge from CRC and ratified that she "would be safe under his care and supervision":

> This provider spoke with patient's father today regarding upcoming discharge. **Mark[] is comfortable taking the patient home today** but acknowledge's [sic] the fact that she will need continued

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[2] App. 22-24.

[3] *Id.*

[4] App. 1.

[5] App. 22-24.

[6] *Id.*

> **outpatient treatment** moving forward. He was informed of current medical regiment and informed to hold Senokot-S should Emily have continued diarrhea once she leaves the hospital.
>
> ***
>
> The aftercare planner called and spoke to the pt father [sic] who confirmed that he is ok with her being d/c today, that he will be here today at 1300 to pick her up and take her to the [follow-up neurosurgery] appointment. ... A community engagement referral was sent and she will follow up with Dana Nugent for therapy 4/21/18 at noon. She will also follow up with Thoughts d/o clinic on April 19 at 2:30 p.m. And with Thoughts d/o clinic on May 31 at 1:30 pm, medication injection is due this day.
>
> ***
>
> Patient was discharged in her father's custody on 4/11/18 and instructed to go directly to her follow up appointment with neurosurgery at 2 PM on the day of discharge. Patient's father was contacted by the treatment plan prior to discharge **and he agreed that his daughter appeared much more stable and would be safe under his care and supervision.** Patient's father was understanding of patient's discharge medication regimen and of all follow up appointments for the patient. **At the time of discharge, patient denied suicidal ideation, homicidal ideation or auditory/visual hallucinations. If concerns arose post discharge, patient's father was instructed to take his daughter to the nearest emergency department for further evaluation.**[7]

7. Immediately after accepting custody of his daughter, Mr. Heckler transported her to her neurosurgery follow-up appointment, again, in Monongalia County. During the evaluation, both Mr. Heckler and Emily Heckler provided the following history of present illness:

> Emily J. Heckler is a 19 y.o., female here today for follow-up SDH-self inflected with head banging. Pt denies headache or visual disturbances, denies balance or gait issues. Released from chestnut ridge today, here with ftr and ptis [sic] going home and will be living with ft. Denies vomiting, pt eating and drinking without problems

[7] App. 81 (emphasis in original in brief only).

per ftr. **Ftr reports pt doing better with medication and no longer banging head.**[8]

8. Consequently, on April 11, 2018, Mr. Heckler voluntarily accepted custody of his daughter following her treatment exclusively in Monongalia County. He accepted custody of Emily Heckler in Monongalia County on the assurance he would provide supervision of this patient. He transported her to her follow-up evaluation in Monongalia County, where he reported her behavior was improved. It was only then, after spending several hours in her company post-discharge from CRC, that Mr. Heckler voluntarily transported her to Tucker County.[9]

9. On or about April 13, 2018, Ms. Heckler attacked her stepmother, Marion Heckler, in an altercation, resulting in the death of Marion Heckler.[10]

II. Procedural History

On or about July 20, 2020, Respondent-Plaintiff filed a medical negligence civil action in the Circuit Court of Tucker County, West Virginia, after fulfilling the pre-suit notice requirements set forth in the West Virginia Medical Professional Liability Act ("MPLA"). W. Va. Code § 55-7B-6. Respondent-Plaintiff alleges that Petitioners' healthcare employees prematurely discharged Ms. Heckler from CRC as a result of failed clinical decision-making, thereby breaching the standard of care applicable to their respective professions.[11]

On August 14, 2020, Petitioner-Defendants filed a Joint Motion to Dismiss for Improper Venue, or, in the Alternative, to Transfer Venue on the following grounds:

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[8] App. 82 (emphasis in original in brief only).

[9] App. 81-82.

[10] App. 24.

[11] App. 1-13.

1. W. Va. Code § 55-7B-4(e) defines venue as the county in which the acute care hospital, at which the alleged act occurred, is located—Monongalia County, West Virginia;[12]

2. The general venue statute, W. Va. Code § 56-1-1(a)(1), dictates that venue be in Monongalia County, West Virginia; and,

3. W. Va. Code § 14-2-2a requires that actions against governing boards of state institutions of higher education be brought in the county where the cause of action arose, which, likewise, confers venue only in Monongalia County, West Virginia.[13]

Respondent-Plaintiff filed a Response to Defendants' Joint Motion to Dismiss For Improper Venue and argued that West Virginia Code § 55-7B-4(e) is inapplicable to CRC and also that the cause of action "arose" in Tucker County, West Virginia, because this is where substantial damages occurred.[14]

In reply, Petitioner-Defendants argued that the cause of action arose where the elements of a medical negligence action brought on behalf of a third-party non-patient occurred; that is, where a healthcare provider "**render[ed] or fail[ed] to render health care services to a patient whose subsequent act is a proximate cause of injury or death** to a third party". W. Va. Code § 55-7B-9b.[15] There is no dispute that all of the healthcare services rendered to Ms. Heckler occurred in Monongalia County. The Petitioner-Defendants provided no medical care to Ms. Heckler in Tucker County. In fact, after her discharge from CRC, neither Mark Heckler, Emily Heckler, nor Marion Heckler made any contact with Emily Heckler's treaters prior to the time of Marion Heckler's death.[16]

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[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.

[13] App. 19-44.

[14] App. 45-77.

[15] App. 78-113.

[16] *Id.*

Following oral argument, the Honorable Lynn Nelson took the Joint Motion to Dismiss under advisement. On October 29, 2020, the Court denied the Motion to Dismiss. The Court found that West Virginia Code § 55-7B-4(e) is inapplicable to the type of care that CRC provides. Therefore, the Court looked to West Virginia Code §§ 56-1-1(a) and § 14-2-2a to make its determination regarding venue.[17] The Court concluded that Respondent-Plaintiff's cause of action "arose" in Tucker County "because that is the location where the Plaintiffs *(sic)* incurred substantial damages from the alleged breach of duty by the Defendants" and "the case can remain in Tucker County."[18]

Petitioner-Defendants respectfully assert that this ruling by the Circuit Court of Tucker County is in error inasmuch as the Court failed to consider the language of West Virginia Code § 55-7B-9b and other provisions of the MPLA in determining where this medical negligence cause of action arose, thereby applying the incorrect legal standard to reach its conclusion on venue.

SUMMARY OF ARGUMENT

Monongalia County is the only location where any act, service, or treatment was rendered in the course of Emily Heckler's medical care by providers at Chestnut Ridge Center. All clinical decision-making occurred in Monongalia County, and Emily Heckler's discharge occurred in Monongalia County, per prior agreement with Respondent-Plaintiff Mark Heckler. Because an MPLA cause of action for medical negligence is dependent on the alleged failure to render appropriate medical treatment (*i.e.*, the act, service, or treatment provided), a cause of action falling under this statute can only arise where the act, service, or treatment was rendered.

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[17] The general venue statute permits a civil action to be brought "wherein any of the defendants may reside or the cause of action arose." W. Va. Code § 56-1-1(a)(1).

[18] App. 114-115.

The Circuit Court erred by determining that venue over this medical malpractice action is permissible in Tucker County where an altercation between Emily Heckler and Marion Heckler took place, resulting in the death of Marion Heckler. The Circuit Court based this conclusion on its determination that Tucker County was where "substantial damages" occurred. This decision is incorrect as a matter of law because the Circuit Court applied the incorrect standard to reach this determination. In so doing, the Circuit Court ignored the clear language of the MPLA as to the elements of a cause of action and disregarded this Court's prior persuasive jurisprudence on this issue. This Court should issue a Writ of Prohibition to correct this legal error in order to prevent irreparable prejudice to both parties and should clarify, in a written opinion, where a medical malpractice cause of action arises for the purpose of venue.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case is appropriate for oral argument under West Virginia Rule of Appellate Procedure 20(a) because it involves a legal issue that is a matter of first impression (in a published opinion) and reflects conflicts amongst the decisions of lower tribunals on the question of appropriate venue. As noted, *infra,* this Court has considered a similar issue in its memorandum decision of *Jewell v. Peterson,* 2012 WL 5834889 (2012).[19] Because the Circuit Court below failed to acknowledge this Court's opinion in *Jewell v. Peterson,* a published opinion following oral argument would provide the precedential authority to fully resolve the question of venue in medical malpractice actions. Therefore, Petitioner-Defendants respectfully request the opportunity for oral argument in this matter.

[19] 2012 WL 5834889 (2012).

ARGUMENT

I. Standard of Review

Petitioner-Defendants invoke this Court's original jurisdiction in prohibition. Questions involving transfers and venue are "of considerable importance to the judicial system," with the relief permitted by appeal inadequate. It is well-settled that the issue of venue may properly be addressed through a writ of prohibition.[20]

This Court has cautioned that "[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where a trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers."[21] This Court has enumerated the following factors in determining whether to entertain and issue 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 of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.[22]

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[20] *See State ex rel. Riffle v. Ranson,* 195 W. Va. 121, 464 S.E.2d 763 (1995) (explaining its preference for "resolving this issue [venue] in an original action" given the "inadequacy of the relief permitted by appeal"); *accord State ex rel. Huffman v. Stephens*, 206 W. Va. 501, 503, 526 S.E.2d 23, 25 (1999) (recognizing that concerns regarding litigants being placed at unwarranted disadvantage and inadequate appellate relief compel exercise of original jurisdiction in venue matters).

[21] W. Va. Code § 53-1-1. Syl. Pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977).

[22] Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996); Syl. Pt. 2, *State ex rel. Ferrell v. McGraw*, 243 W. Va. 76, 842 S.E.2d 445 (2020).

The statutory interpretation of West Virginia Code §55-7B-9b and other provisions of the MPLA which determine where a medical negligence cause of action arises are to be reviewed *de novo*. However, "[w]here a challenge is made to venue under Rule 12(b)(3) of the West Virginia Rules of Civil Procedure, the burden is on the plaintiff [Respondent] to establish proper venue for the civil action in the county in which it is pending under the framework of West Virginia Code § 56-1-1."[23]

The *Hoover* factors support this Court's review of the petition and issuance of a writ of prohibition to correct the legal errors below. As this Court has noted in its prior jurisprudence, Petitioner-Defendants have no other avenue for relief from the Circuit Court's ruling. All parties will suffer severe prejudice if the venue issue is not corrected until after substantial time and resources have been expended in the incorrect county.

Respondent-Plaintiff has failed to carry his burden of proof to demonstrate venue is appropriate in Tucker County. Rather, the record demonstrates that all clinical decision-making took place in Monongalia County, requiring venue in that county. As argued below, the Circuit Court's ruling was clearly erroneous as a matter of law in that it failed to apply the correct legal standard and disregarded this Court's prior persuasive memorandum decision on this very issue. This ruling was also inconsistent with other Circuit Court decisions submitted to the Court in Petitioners' briefing. Finally, because there is not a published opinion on this issue, it is an issue of first impression of substantial consequence in the many medical malpractice cases litigated annually. This Court's resolution of this issue and correction of the Circuit Court's erroneous conclusion warrants a writ of prohibition in this matter.

[23] Syl. Pt. 4, *State ex rel. Ferrell*, 243 W. Va. 76, 842 S.E.2d 445 (2020).

II. Both West Virginia Code §§ 56-1-1 and 14-2-2a define venue, based upon where the cause of action arose; therefore, venue in this action is only appropriate in Monongalia County, where the alleged acts of medical malpractice occurred, and the Circuit Court's decision to the contrary is clearly erroneous as a matter of law.

Both West Virginia code sections define venue, generally, as well as cases involving the governing board of West Virginia University, based upon where the cause of action at issue arose. West Virginia Code § 56-1-1 states that "[a]ny civil action or other proceeding, except where it is otherwise specifically provided, **may** hereafter be brought in the circuit court of any county: (1) Wherein any of the defendants may reside or the cause of action arose." West Virginia Code § 14-2-2a provides that "any civil action in which the governing board of any state institution of higher education ... is made a party defendant, **shall be brought** in the circuit court of any county wherein the cause of action arose, unless otherwise agreed to by the parties." While these code sections commonly define venue, West Virginia Code § 14-2-2a is mandatory and does not permit venue to exist outside of the county where the cause of action arose.

In the present action, West Virginia University Board of Governors has been named as a party defendant as the employer of physician healthcare providers who treated Ms. Heckler while she was a patient at CRC in Monongalia County.[24] WVUBOG is the governing board of West Virginia University, a state institution of higher education to which this statute applies.[25] West Virginia University Hospitals, Inc. d/b/a Chestnut Ridge Center is a healthcare entity providing care to patients located in Monongalia County.[26] There is no dispute that Petitioner-Defendants reside in Monongalia County for the purposes of the venue statute. There are no other Defendants to this cause of action.

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[24] *See generally*, App. 1-13.

[25] Syl. Pt. 2, *State ex rel. Fairmont State Univ. Bd. of Governors v. Wilson*, 239 W. Va. 870, 806 S.E.2d 794 (2017).

[26] *See generally*, App. 1-13.

Moreover, all parties agree that West Virginia Code § 14-2-2a applies in this instance. The relevant dispute between the parties is where the cause of action arose. Therefore, if this Court finds that the Circuit Court improperly concluded that the cause of action arose in Tucker County, the only remedy is to compel the Circuit Court to reverse its decision and either dismiss the action outright or transfer the action to Monongalia County.

a. The West Virginia Supreme Court of Appeals has looked to the elements of a cause of action to assist in determining where the action arose and should do so here in this matter of first impression.

This Court has been called to define venue by how a cause of action arises under various legal theories – from contract breach to legal malpractice cases. This Court has not addressed how a cause of action arises for purposes of venue in a medical malpractice case in a published opinion.[27] However, in analyzing these cases on appeal, the Court has commonly looked to the elements of the cause of action to guide its venue analysis. *See, e.g., Wetzel County Savings and Loan Company v. Stern Bros. Inc.* [28] (a breach of contract action) and *McGuire v. Fitzsimmons* (a legal malpractice action).[29] Looking to the elements of a cause of action to determine where a cause of action arose and where venue properly exists is a logical place for the venue analysis to begin.[30] A claimant cannot state a claim upon which relief may be granted without stating a *prima*

[27] As discussed *infra*, this Court has considered venue in a malpractice action in its memorandum decision of *Jewell v. Peterson*. While Petitioners anticipate that the Court will apply its logic and analysis consistently in this action to determine venue exists only in Monongalia County for this particular cause of action, Petitioners do not presume to argue this decision is binding authority, based upon this Court's cautionary language regarding memorandum decisions.

[28] 156 W. Va. 693, 195 S.E.2d 732 (1973).

[29] 197 W. Va. 132, 134, 475 S.E.2d 132, 134 (1996).

[30] Syl. Pt. 3, *Wetzel,* 156 W. Va. 693, 195 S.E.2d 732 (determining that venue for breach of contract was where the elements (formation, breach, and substantial damages occurred). *See also* Syl. Pt. 3, *McGuire v. Fitzsimmons,* 197 W. Va. 132, 475 S.E.2d 132 (acknowledging the three elements required to prove legal malpractice in determining where the cause of action arose).

facie case as to the elements of the action.[31] Applying this framework to this matter of first impression requires the conclusion that a cause of action arises in a medical malpractice claim where the alleged negligent treatment was provided to the patient.

b. The Medical Professional Liability Act defines the elements of negligence against a non-patient as "rendering or failing to render health care services." Because it is undisputed that Monongalia County is the only county where health care services were rendered to Emily Heckler, that county is where the cause of action arose and is where venue must lie over the Complaint.

Respondent-Plaintiff's Complaint is focused exclusively on an action for medical malpractice, which is governed by the Medical Professional Liability Act, West Virginia Code § 55-7B-1, *et seq*. West Virginia Code § 55-7B-9b specifically delineates the requirement for a cause of action that is asserted on behalf of a third-party non-patient:

> 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 disregard of a foreseeable risk of harm to third persons.[32]

The dispositive language of this section for the purposes of venue is the "rendering or failing to render health care services to a patient..." This is an essential element a third-party non-patient litigant must meet to recover on a cause of action against a provider. Without the provision or omission of healthcare services, there can be no cause of action.

The MPLA defines "health care" as follows:

> **Any act, service or treatment provided** under, pursuant to or in the furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis or treatment...[33]

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[31] *See* W. Va. R. Civ. P. 12(b)(6).

[32] W. Va. Code § 55-7B-9b (emphasis added).

[33] W. Va. Code § 55-7B-2(e)(1) (emphasis added); *see also*, W. Va. Code § 55-7B-2(e)(2).

The foregoing language clearly demonstrates that, for the purposes of a third-party non-patient claim, the nexus of the civil action is where the provision (or omission) of healthcare services, *i.e.*, the act, service or treatment of a patient occurred. Any contrary interpretation ignores the clear and unambiguous text of the statute, as well as Legislative intent in crafting the same. As argued herein, the Circuit Court failed to properly apply the statutory language of the MPLA to determine venue. Thus, the Circuit Court misapplied the law to reach the erroneous conclusion that venue properly lies in Tucker County, rather than exclusively in Monongalia County.

III. The Circuit Court's decision is clearly erroneous as a matter of law due to the misapplication of the law to the undisputed facts of this case.

The Circuit Court failed to address Petitioner-Defendants' argument that the elements of an MPLA cause of action control the determination of venue.[34] The Circuit Court's opinion omitted any reference to the elements of a medical professional liability cause of action in its analysis and, instead, looked outside the MPLA to misapply the "substantial damages" theory of establishing venue.[35] The Circuit Court further failed to address this Court's persuasive authority, which logically dictates that venue lies solely in Monongalia County, where each and every event relevant to the alleged malpractice occurred.[36] By ignoring the elements of the cause of action at hand and applying the incorrect legal standard, the Circuit Court erred, as a matter of law, in concluding that venue exists in Tucker County.

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[34] App. 114-115.

[35] *Id.*

[36] *State ex rel. Airsquid Ventures, Inc. v. Hummel*, 236 W. Va. 142, 778 S.E.2d 591 (2015) (focusing on the critical issue of where the acts or omissions occurred relevant to the charges pled in the complaint).

a. Monongalia County is where the healthcare providers allegedly failed to render appropriate healthcare services; thus, the Court erred in denying Petitioner-Defendants' motion.

The allegations of Respondent-Plaintiff's Complaint make clear that the conduct at issue – the treatment plan of Emily Heckler during her admission, as well as her discharge into the custody of her father – occurred in Monongalia County, establishing venue exclusively in that county. Paragraphs 24 through 45 of the Complaint, by far the vast majority of the Complaint, reference the clinical decision-making and treatment that occurred in Monongalia County as the sole basis for the cause of action. This care is the factual predicate for Respondent-Plaintiff's cause of action, titled "Medical Negligence." There is no allegation at all in the Complaint that clinical decisions were made in Tucker County, nor were any such allegations raised by Respondent-Plaintiff in his response to Petitioner-Defendants' motion to dismiss.[37]

The Complaint makes clear that the alleged deviation giving rise to Plaintiff-Respondent's cause of action is the clinical decision-making up to and including the discharge decision:[38]

> 51. The doctors, nurses, therapists, and staff at CRC ... breached their duties and deviated from the standard of care in at least the following ways:
>
> i. Failure to address the repeated episodes of bizarre and concerning behavior **on the unit directly with Emily**;
>
> ii. **Failure to have a meeting** with the family of Emily, despite her proposed placement with them, **prior to discharge**;

[37] In fact, the Complaint (either by omission or design) fails entirely to detail Emily Heckler's conduct in Tucker County during the two days after her discharge from CRC. *See* App. 1-13, 45-77. *See also State ex rel. Galloway Group v. McGraw,* 227 W. Va. 435, 711 S.E.2d 257 (2011) (suggesting that if the connection of the damages to the breach is too tenuous, venue cannot be established).

[38] Petitioner-Defendants vehemently reject and dispute Respondent-Plaintiff's inaccurate and misleading characterization of the care provided to Emily Heckler at CRC.

iii. **Failure to address** the very specific homicidal threat that Emily had made toward her stepmother and the acts of violence against her father with Emily **prior to discharge**;

iv. **Failure to discuss** homicidal threats and the acts of violence with Mark and Marion **prior to discharge**;

v. **Failure to develop** an appropriate safety plan with the family regarding Emily **prior to discharge**;

vi. **Failure to prescribe and/or provide proper medications** and dosages to control Emily's mental illness and psychotic agitation;

vii. Placing finances and ability to pay above the care and treatment of Emily;

viii. **Prematurely discharging Emily**;

ix. **Discharging Emily** in a state of increased and uncontrolled psychotic agitation; and

x. Such other ways as discovery may reveal.[39]

These descriptions of the alleged breach of duty clearly relate to pre-discharge treatment decisions and the decision to discharge Emily Heckler to her father's care and custody on April 11, 2018. All of 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. This conclusion would align the Court with its prior recognition, in a case analyzed on the basis of forum non conveniens, that where "the cause of action" accrued in medical malpractice was the place where the alleged malpractice took place.[40]

[39] App. 1-13 at ¶ 51 (emphasis added).

[40] In a case disputing proper forum between Ohio (where initial alleged medical malpractice occurred) and West Virginia, this Court recognized that Ohio was the state in which the cause of action accrued, although it allowed forum to be maintained in West Virginia because subsequent tortious conduct on the part of the physician also occurred in West Virginia. *State ex rel. Khoury v. Cuomo*, 236 W. Va. 729, 783 S.E.2d 849 (2016).

In opposing Petitioner-Defendants' joint motion, Respondent-Plaintiff failed to identify any healthcare treatment rendered in Tucker County in order to satisfy his burden of proof to establish venue.[41] Respondent-Plaintiff's sole argument is that the altercation between Ms. Heckler and her stepmother occurred in Tucker County.[42] Only three paragraphs of the Complaint describe conduct that occurred in Tucker County; however, these paragraphs only describe conduct that occurred *between Emily and Marion Heckler*. These paragraphs do not describe treatment decisions or acts by the defendant healthcare providers that occurred in Tucker County. Respondent-Plaintiff's reliance on the dispute between Ms. Heckler and her stepmother to establish venue is misplaced. The Estate is not suing Emily Heckler for an intentional tort to cause physical harm or death. Emily Heckler is not a party to this action, and her conduct cannot be used to establish venue. Respondent-Plaintiff's allegations against the Petitioner-Defendants sound solely in medical negligence, and the subsequent altercation between the Heckler women, however tragic, does not constitute an act of medical treatment in order to confer venue in this medical malpractice action.

b. The Circuit Court misapplied the "substantial damages" language of the *Wetzel* and/or *McGuire* decisions to this action to erroneously conclude venue exists in Tucker County.

The sole reason cited by the Circuit Court in support for its decision was the statement 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 the Defendants."[43] The "substantial damages" language is originally drawn from this Court's decision in *Wetzel County*

[41] *See* W. Va. Code § 56-1-1; W. Va. R. Civ. P. 12(b)(3); Syl. Pt. 4, *State ex rel. Ferrell*, which stand for the proposition that where a challenge is made to venue, the burden is on the plaintiff/respondent to establish venue for the civil action in the county in which it is pending under the framework of the statute governing venue.

[42] *See* App. 1-13 at ¶¶ 46 – 48.

[43] App. 114-115.

Sav. & Loan Co. v. Stern Bros., Inc.[44] and was applied in *McGuire v. Fitzsimmons.*[45] It is unclear whether the Circuit Court relied upon the holding of *Wetzel* or *McGuire*, or both, as neither is cited in the Circuit Court's opinion. Respondent-Plaintiff specifically relied upon *McGuire* in support of his argument. Regardless, by extending the ruling of a breach of contract and/or legal malpractice case to the more specific MPLA cause of action, the Circuit Court applied the incorrect standard of law.[46] Consequently, the Circuit Court's decision must be reversed in favor of venue in Monongalia County.

As a preliminary matter, this Court's *Wetzel* decision[47] was predicated on a breach of contract action, and the *McGuire* decision was specifically limited to "determining venue in a legal malpractice case..."[48] The Circuit Court's extension of either decision's reasoning to this action is misplaced. Both holdings arose out of certified questions, which were narrowly and specifically related to venue for the causes of action at issue. This Court has clearly and repeatedly stated that "... where two statutes apply to the same subject matter, the more specific statute prevails over the general statute."[49]

All of the parties agree that the MPLA is the controlling statute to govern Respondent-Plaintiff's cause of action.[50] Respondent-Plaintiff did not cite any exception to the

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[44] Syl. Pt. 3, *Wetzel*, 156 W. Va. 693, 195 S.E.2d 732 (1973).

[45] Syl. Pt. 3, *McGuire*,197 W. Va. 132, 475 S.E.2d 132 (1996).

[46] Even if the contract law analysis were extended to this case, this Court has recently advised that "typically, however, the situs of the breach of a contract will be the obvious location in which to institute an action to recover from that breach." *State ex rel. Thornhill Group v. King*, 233 W. Va. 564, 571, 759 S.E.2d 795, 802 (2014).

[47] Syl. Pt. 3, *Wetzel*, 156 W. Va. 693, 195 S.E.2d 732 (1973).

[48] *See* Syl., *McGuire*, 197 W. Va. 132, 475 S.E.2d 132 (1996).

[49] *Int'l Union of Operating Engineers, Local Union No. 132 Health & Welfare Fund v. L.A. Pipeline Const. Co.*, 237 W. Va. 261, 267, 786 S.E.2d 620, 626 (2016).

[50] *See* App. 1-13 at ¶¶ 1, 19 - 21.

MPLA and produced a Screening Certificate of Merit prior to filing the Complaint.[51] The only defendants identified in this action are the healthcare providers who cared for Emily Heckler during her admission at CRC (*i.e.*, WVUH and WVUBOG).[52] Thus, there is no dispute that this is a medical malpractice cause of action and must be viewed through the lens of the controlling statute—the MPLA—and not through the analysis of the *Wetzel* or *McGuire* decisions.

Furthermore, the *Wetzel* and *McGuire* decisions are clearly distinguishable from the issues currently pending before this Court. The *Wetzel* Court concluded that "[a]ctions for breach of contract are transitory and consequently not local in nature."[53] It emphasized that a contract cause of action consists of more than one element and "these elements may occur severally and in different geographical locations."[54]

Likewise, a critical consideration in *McGuire* was the fact that "proper venue for legal malpractice actions is based on the divisibility of the elements of such actions."[55] Specifically, "in a legal malpractice case, the 'cause of action' can arise in more [than] one county because portions of the conduct relating to the alleged legal malpractice can occur in more than one county. When a cause of action is divisible, then venue is proper where any portion of the conduct relating to the cause of action arose."[56]

However, the analysis of the *Wetzel* and *McGuire* opinions are inapplicable here, because a medical malpractice cause of action is not divisible in the same way as a legal

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[51] *Id.*

[52] *See generally*, App. 1-13.

[53] *Wetzel,* 156 W. Va. at 698, 195 S.E.2d at 736.

[54] *Id.*

[55] *McGuire*, 197 W. Va. at 137, 475 S.E.2d at 137, n.5.

[56] *McGuire*, 197 W. Va. at 136, 475 S.E.2d at 136. Notably, the Court stated that this method "**does not necessarily apply to all tort actions, and we make no such determination by this holding.**" *Id.* at n. 5.

malpractice action or contract action. The MPLA defines an actionable claim by a third-party non-patient to require, *inter alia*, the negligent rendering of or failure to render healthcare services.[57] Healthcare services are defined, *inter alia*, as the act, service or treatment performed by the patient's providers.[58] Healthcare services are not divisible such as legal services are, nor are the elements of healthcare performed in various counties such as a breach of contract action. This is particularly true where, as here, the healthcare services were provided during the context of an extended admission where the patient and the providers remained in one location through the duration of treatment.

If this Court were to construe venue to exist in any county where the patient returned to home after discharge, there would be no such thing as venue in medical malpractice cases. Rather, hospitals and their healthcare employees would be hailed into court in any of the fifty-five counties of the state, regardless of the nexus between that county and the cause of action alleged. This would create an inconsistency of legal standards and outcomes that would make this type of litigation both capricious and untenable.

As noted above, the healthcare services complained of by Respondent-Plaintiff are solely located in Monongalia County.[59] When looking to the medical records, which provide greater context to these allegations, it is doubly clear that the nexus of this cause of action and its place of origin is Monongalia County. Even a cursory review of the medical chart demonstrates that Mr. Heckler agreed to be Emily Heckler's healthcare surrogate while she was a patient in Monongalia County; that Mr. and Mrs. Heckler (Emily's stepmother) provided information used in Emily Heckler's treatment plan during her treatment in Monongalia County; and that it was Mr.

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[57] W. Va. Code § 55-7B-9b.

[58] *Id.*

[59] *Id* at footnotes 1-8.

and Mrs. Heckler who agreed that Emily would come live in their residence after discharge while Emily was a patient in Monongalia County:

> Patient plans to live with father after discharge as she feels her mothers mental health has declined and she feels this would not be a good living environment for her. She is hopeful to feel better when she leaves the hospital. **Discussed need for HSC based on lacking DMC. Patient stated she feels her father would be best. Spoke with patients father Mark. Informed on need for HCS. Father willing to act as surrogate.** He also provided number for patients mother...**Father and step-mother provided additional background information. They are willing for patient live with them after discharge.** Expressed concern about medications and confirmed patient did receive Abilify injection at Riverpark (records can be seen in HPF, patient there almost 2 months.) and received another injection at Bateman hospital. **Father willing to come early tomorrow to meet with treatment team if needed. Will keep father updated on treatment.**[60]

Mr. Heckler consented to the admission and treatment of his daughter by the providers located in Monongalia County; Mr. Heckler voluntarily accepted custody of his daughter upon discharge in Monongalia County; Mr. Heckler willingly transported her for a follow-up evaluation by a subsequent provider in Monongalia County; and only then, after spending several hours in her company in Monongalia County after discharge from CRC, Mr. Heckler voluntarily transported her to Tucker County.[61] The crux of Mr. Heckler's claim is that the Petitioner-Defendants breached their duty to third-party non-patients by allegedly prematurely discharging Emily Heckler without appropriate treatment plans in place as a continuation of the treatment she received during her inpatient admission.[62] "Where one supports the venue for his civil action based upon the place of the breach comprising a part of the cause of action, in the usual case, he

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[60] *See* App. 80 (emphasis in original in brief only).

[61] *See* footnotes 1-8, *supra.*

[62] *See generally,* App. 1-13.

must bring the action in the place or county in the State **where the breach, repudiation or violation of the duty occurs.**"[63]

Consequently, as the correct law applied to these facts demonstrates, the healthcare that was provided to Emily Heckler, and which is the only foundation for Respondent-Plaintiff's cause of action, occurred in Monongalia County, conferring venue only in this county. The Circuit Court's decision to the contrary is based solely on an erroneous extension of the case law to the facts and must be reversed in favor of venue in Monongalia County.

c. The Circuit Court failed to address this Court's prior jurisprudence in the persuasive *Jewell* memorandum decision, which, applied here, dictates venue in Monongalia County.

The Circuit Court failed to address this Court's decision in *Jewell v. Peterson*,[64] which was cited by the Petitioner-Defendants as persuasive support to establish venue in Monongalia County. The failure to mention or even distinguish this guidance, again, demonstrates the erroneous nature of the Circuit Court's decision below.

The *Jewell* opinion rose from a medical malpractice action dismissed by the Circuit Court of Kanawha County on the question of venue. In that case, the primary care provider treated the decedent for complaints of chronic cough, fatigue, shortness of breath, and chest pain for one year in his clinic in Oak Hill, Fayette County, West Virginia.[65] The decedent was subsequently transferred to Beckley Hospital in Raleigh County, West Virginia, where she was diagnosed with

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[63] Syl. Pt. 4, *Wetzel*, 156 W. Va. 693, 195 S.E.2d 732 (1973)..

[64] 2012 WL 5834889 (2012).

[65] *Jewell*, 2012 WL 5834889 at *1.

advanced lung cancer.[66] She was thereafter transferred to Charleston Area Medical Center in Kanawha County, West Virginia, where she died from lung cancer three days after her diagnosis.[67]

Plaintiff filed their Complaint in Kanawha County.[68] This Court considered the question of venue under West Virginia Code § 56-1-1(a)(1). The memorandum decision reflects the following recitation of facts and its analysis:

> Petitioner filed his Complaint in the Circuit Court of Kanawha County, which is the county where Ms. Jewell [the decedent] died. However, respondents [healthcare providers] **argued that all of the medical care they provided to Ms. Jewell, including any and all alleged instances of medical malpractice, occurred only at Petersen Clinic in Fayette County, thus, the cause of action arose in Fayette County**. Moreover, the individual defendants assert that they do not reside in Kanawha County.[69]
>
> Upon respondents' motion the circuit court dismissed the Complaint on the basis that venue properly lies in Fayette County, not Kanawha County. The case was dismissed without prejudice so that petitioner could re-file in Fayette County.
>
> We review a circuit court's order granting a motion to dismiss a complaint under a de novo standard of review ... **Upon a review of the allegations in Petitioner's Complaint, we agree that under the specific facts as alleged therein, any cause of action against these respondents arose in Fayette County. Because respondents are not residents of Kanawha County, and because the cause of action did not arise in Kanawha County, dismissal was proper. For the foregoing reasons, we affirm.**[70]

With the *Jewell v. Peterson* case, this Court rejected Respondent-Plaintiff's very argument and the analysis the Circuit Court used to reach its decision below. In *Jewell*, the

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[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] Recall from Plaintiff's *Response*, he has conceded that "Plaintiff never claimed that venue was proper [in Tucker County] because Defendants maintained minimum contacts in Tucker County ... Nor do Plaintiffs contend that Tucker County is a proper venue because Defendants conduct unrelated business there." App. 55.

[70] *Jewell*, 2012 WL 5834889 at *1 – 2 (emphasis added, internal citations omitted).

outcome of the alleged malpractice—the decedent's premature death—occurred in Kanawha County. However, this Court did not find that fact to be dispositive and, instead, focused on the County in which the *act, service or treatment* was provided and affirmed the Circuit Court's decision that venue was only proper in Fayette County, West Virginia.[71]

Using this Court's persuasive analysis and definition of "arose," the focus should not be placed on the physical location where the altercation took place between Emily Heckler and Marion Heckler, but, instead, on the place wherein the medical malpractice defendant allegedly caused injury or damage by committing medical malpractice. The material question is where the allegedly wrongful acts that led to the damages occurred, and the answer is indisputably Monongalia County. Under these facts, venue is only appropriate in Monongalia County.

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. The controlling statutes, as well as this Court's case law on venue, require the opposite conclusion. Because the Circuit Court's decision cannot be corrected at the conclusion of the case on appeal, the *Hoover* factors compel this Court's review and reversal of the decision below.

CONCLUSION

The Circuit Court's decision finding venue over this civil action in Tucker County is clearly incorrect as a matter of law. The undisputed record demonstrates venue is only appropriate in Monongalia County, as that is where the treatment at issue was rendered, and thus where the cause of action arose.

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[71] *See also State ex rel. Galloway Group v. McGraw*, 227 W.Va. 435, 711 S.E.2d 257 (2011) (suggesting that, if the connection of the damages to the breach is too tenuous, venue cannot be established).

Accordingly, Petitioners respectfully request that this Court issue a rule against the Respondents for them to show cause as to why this case should not be ordered dismissed for lack of venue and to issue the requested order to dismiss.

WEST VIRGINIA UNIVERSITY HOSPITALS, INC. d/b/a CHESTNUT RIDGE CENTER, and

WEST VIRGINIA UNIVERSITY BOARD OF GOVERNORS, Defendants,

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CERTIFICATE OF SERVICE

On this 16th day of November, 2020, undersigned counsel served the foregoing ***Writ of Prohibition*** with the accompanying ***Appendix***, upon the below-named individuals on the date indicated via email:

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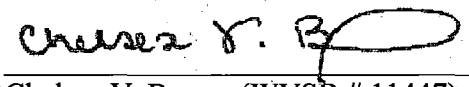

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