IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-0439

STATE OF WEST VIRGINIA *ex rel.* CHARLESTON AREA MEDICAL CENTER, INC. d/b/a WOMEN AND CHILDREN'S HOSPITAL

Petitioner,

v.

The HONORABLE MIKI J. THOMPSON, Judge of the Circuit Court of Mingo County, West Virginia; ANGELA LESTER; DENNY SETH LESTER; MOUNTS FUNERAL HOME, INC.; and NICOLE CLINE

Respondent.

AMENDED PETITION FOR WRIT OF PROHIBITION

ANGELA LESTER, *et al.* v. MOUNTS FUNERAL HOME, INC, a Domestic Corporation, *et al.*
Circuit Court of Mingo County, West Virginia
Civil Action No. 21-C-75

CHARLESTON AREA MEDICAL CENTER, INC.

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QUESTION PRESENTED

Whether the Circuit Court of Mingo County, West Virginia (the "Circuit Court") committed clear legal error and exceeded its jurisdiction in denying Petitioner's *Motion to Dismiss Plaintiffs' Amended Complaint* asserting the application of the West Virginia Medical Professional Liability Act (W. Va. Code § 55-7B-1 *et seq.*) (the "MPLA") and challenging the Circuit Court's subject matter jurisdiction over the claims against Petitioner when Plaintiffs had explicitly failed to comply with the MPLA's pre-suit notice requirements.

STATEMENT OF THE CASE

1. Petitioner, Charleston Area Medical Center, Inc. ("Petitioner"), is a West Virginia Corporation that owns and operates various health care facilities throughout the State of West Virginia, including Women and Children's Hospital located in Charleston, West Virginia. (*See generally*, Amended Compl. at ¶ 4, *Appendix* at p. 58.)

2. The foregoing Petition concerns a civil action instituted against Petitioner in the Circuit Court of Mingo County, West Virginia, by way of an *Amended Complaint*, asserting that it was, *inter alia*, negligent in the mishandling of a stillborn infant's remains. (*See generally*, Amended Compl., *Appendix* at pp. 57-67.)

3. Despite the undisputed fact that Petitioner is a health care facility, as defined by the MPLA, and Plaintiffs failed to comply with the mandatory pre-suit notice requirements of the MPLA,[1] the Circuit Court improperly denied Petitioner's *Motion To*

[1] *See* W. Va. Code § 55-7B-2(f) ("'Health care facility' means any...hospital...in and licensed, regulated or certified by the State of West Virginia under state or federal law..."); *c.f. generally, Neary v. Charleston Area Medical Ctr.*, 194 W. Va. 329, 460 S.E.2d 464 (1995) (finding the MPLA applicable to Charleston Area Medical Center, Inc.); *see also* (Plfs.' Resp. To Def. Charleston Area Medical Center, Inc.'s Motion To Dismiss Plfs.' Amended Compl. at pp. 4-6, *Appendix* at pp. 88-90 (confirming that Plaintiffs did not comply with the MPLA's pre-suit notice requirements based on their mistaken belief that such was not required).).

Dismiss Plaintiffs' Amended Complaint, which asserted that the Circuit Court lacked subject matter jurisdiction, based on the Circuit Court's mistaken belief that "discovery" could resolve the jurisdictional issues raised by Petitioner.[2] (*See generally*, Order Denying [Petitioner's] Motion To Dismiss Plfs.' Amended Complaint, *Appendix* at pp. 121-126; *See also*, Hearing Transcript at 14:13-18, *Appendix* at p. 140.)

4. In the underlying civil action, Plaintiffs-below, Angela Lester and Denny Lester ("Plaintiffs"), allege the following facts in their *Amended Complaint* which are presumed true for the purpose of the instant Petition:[3]

a. Plaintiffs are the biological parents of infant A.C.L. who died stillborn of natural causes on May 17, 2018 during Plaintiff, Angela Lester's hospitalization at Petitioner's Women and Children's Hospital.[4] (*See* Amended Compl. at ¶ 2, *Appendix* at p. 58.)

b. Plaintiffs hired Defendant-below, Mounts Funeral Home, Inc. to handle the funeral arrangements and final disposition of A.C.L.'s body, including

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[2] "When jurisdictional challenges are raised, [this Court] 'must determine...whether it is jurisdictional in the sense of requiring a decision upon facts or a decision upon a pure question of law.'" *State ex rel. W. Va. Univ. Hosps., Inc. v. Scott*, 866 S.E.2d 350, 357, 2021 W. Va. LEXIS 653, *12-13 (November 22, 2021) (citing *Lewis v. Fisher*, 114 W. Va. 151, 154-55, 171 S.E. 106, 106-07 (1933). "If it rests upon a determination of fact, prohibition will not lie. If it rests upon a determination of a question of law, prohibition will lie if the trial court has exceed its jurisdiction or usurped a jurisdiction that in law does not exist." *State ex rel. W. Va. Univ. Hosps., Inc.*, 866 S.E.2d at 357, 2021 W. Va. LEXIS 653, at *12-13 (citing *Lewis*, 114 W. Va. 155, 171 S.E. at 107. Here, the pertinent issue is the application of a statute, *i.e.*, the MPLA, to an undisputed set of facts for purposes of the motion to dismiss. Therefore, this matter involves a question of jurisdiction involving a purely legal issue such that prohibition is warranted.

[3] *See e.g., State ex rel. Raven Crest. Contr., LLC v. Thompson*, 240 W. Va. 8, 807 S.E.2d 256 (2017) (illustrating that in original jurisdictions proceedings before this Court requesting a Writ of Prohibition involving a motion to dismiss this Court, "like the circuit court, must read the complaint in the light most favorable to the plaintiff, and...take its allegations as true."); *see also*, fn. 2, *supra*.

[4] Plaintiff, Angela Lester, remained a hospitalized as a patient at Petitioner's Women and Children's Hospital until May 21, 2018 – the day of the events at issue in the underlying action with respect to Plaintiffs' claims against Petitioner.

the transportation of the infant's remains from Petitioner's Women and Children's Hospital to Mingo County, West Virginia. (*See* id. at ¶ 3, *Appendix* at p. 58.)

c. On May 21, 2018, Plaintiff, Denny Seth Lester, signed a *Release of Body* form authorizing A.C.L.'s remains to be released to Mounts Funeral Home, Inc. (*See* id. at ¶ 4, *Appendix* at p. 59; *see also*, "Release of Body" form, *Appendix* at p. 81.) The same day, Defendant-below, Nicole Cline (an employee of Mounts Funeral Home, Inc.) arrived at Petitioner's Women and Children's Hospital via her personal automobile and accompanied by her husband, Jeff Cline, to retrieve A.C.L.'s remains.[5] (*See* Amended Compl. at ¶¶5-6, *Appendix* at p. 59.)

d. Upon arrival at Petitioner's Women and Children's Hospital, only Nicole Cline entered the facility and, while inside the facility, counter-executed the aforementioned *Release of Body* form acknowledging that legal custody and control of A.C.L.'s remains had, as of that time, transferred from Petitioner to her, as an agent of Mounts Funeral Home, Inc. (*See* id. at ¶ 7, *Appendix* at p. 59; *see also* "Release of Body" form, *Appendix* at p. 81; *see also*, Def. Nicole Cline's Response To Plaintiffs' First Set of Interrogatories, No. 1, pp. 1-2, Ex. 1 To Unopposed Motion To Amend

[5] It appears from the facts in the record that immediately prior to arriving at Petitioner's Women and Children's Hospital to retrieve A.C.L.'s remains, Defendant, Nicole Cline and her husband, Jeff Cline, used their personal automobile to attend a doctor's appointment and pick up groceries from Sam's Club in Charleston, West Virginia and that the groceries still remained in the vehicle when they arrived at the hospital. (*See* Amended Comp. at ¶ 8, *Appendix* at p. 59.)

Complaint, *Appendix* p. 38 ("Cline had to sign papers to acknowledge receipt of the remains."))

e. A package containing A.C.L.'s remains was loaded into Nicole Cline's private automobile and both Nicole Cline and Jeff Cline (who had been waiting in the automobile) left Petitioner's premises with A.C.L.'s remains.[6] (*See* Amended Compl. at ¶ 8, *Appendix* at p. 59; Def. Nicole Cline's Response To Plaintiffs' First Set of Interrogatories, No. 1, pp. 1-2, Ex. 1 To Unopposed Motion To Amend Complaint, *Appendix* p. 38.)

f. On or about January 29, 2020, over a year and a half after A.C.L.'s remains were received by Mounts Funeral Home, Inc. and left Petitioner's premises, Jeff Cline (a present non-party to the underlying action), posted a video on various social media platforms allegedly "describing the process of loading the infant's remains into the[ ] private vehicle, transporting and embalming [ ] Plaintiffs' infant child's corpse and wrongfully suggested the infant corpse was the result of Plaintiff, Angela Lester, terminating her pregnancy." (*See* Amended Comp. at ¶ 12, *Appendix* at p. 60.)

g. This video was allegedly "shared numerous times and [ ] viewed by a large number of people[,]" including Plaintiffs on or about February 1, 2020. (*See* id. at ¶¶ 13-14, *Appendix* at p. 60.)

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[6] Plaintiffs allege that "an employee of Defendant Women and Children's Hospital placed the package containing the remains in a basket and walked with Defendant Nicole Cline out to her private vehicle where Defendant Nicole Cline's husband was sitting in the passenger seat." (*See* Amended Compl. at ¶ 7, *Appendix* at p. 59). Additionally, Plaintiffs allege that "Defendant Nicole Cline opened the rear vehicle door and cleared a space on the back seat and Defendant, CAMC d/b/a Women and Children's Hospital employee took the package containing the remains and placed in on the back seat [*sic*] alongside the Defendant, Nicole Cline's Sam's Club purchases." (*See* id. at ¶ 8, *Appendix* at p. 59). Petitioner denies all of those specific allegations; however, Petitioner will assume *arguendo* that those allegations are true for purposes of these proceedings. *See* fn. 3, *supra*.

5. On November 24, 2021, Plaintiffs filed an *Amended Complaint* naming Petitioner as a defendant in this action for the first time. (*See generally*, Amended Compl., *Appendix* at pp. 57-67.) In the *Amended Complaint*, Plaintiffs describe their claims against Petitioner as follows:

> This is a negligence, negligent infliction of emotional distress, negligent mishandling of a corpse, and negligent supervision of employee case arising out of mental anguish, serious emotional distress, and damages suffered as a result of mishandling of a corpse by Defendant Mounts Funeral Home, Inc., by and through their agent and employee, Nicole Cline and Defendant Women and Children's Hospital.

(*Id.* at ¶ 1, *Appendix* at p. 58.)

6. On January 10, 2022, Petitioner filed the *Motion To Dismiss Plaintiffs' Amended Complaint* at issue asserting, *inter alia*, that it was entitled to the pre-suit notice protections set forth in the MPLA and that Plaintiffs' failure to comply with such deprived the Circuit Court of subject matter jurisdiction. (*See* Def., Charleston Area Medical Center, Inc.'s, Motion To Dismiss Plfs.' Amended Compl. With Incorp. Memo. of Law, *Appendix* at pp. 68-81.)

7. On January 19, 2022, Plaintiffs filed their *Response* to Petitioner's *Motion To Dismiss Plaintiffs' Amended Complaint* asserting, *inter alia*, that the MPLA does not apply to the claims they asserted against Petitioner in this action and, even if the MPLA does apply, they should be given the opportunity to comply with the MPLA. (*See* Plfs.' Resp. To Def. Charleston Area Medical Center, Inc.'s Motion To Dismiss Plfs.' Amended Compl., *Appendix* at pp. 85-101.)

8. On March 22, 2022, Petitioner filed its *Reply In Support* of its *Motion To Dismiss Plaintiffs' Amended Complaint* and the matter was brought forth for a hearing on

March 24, 2022, during which the Circuit Court heard oral argument from counsel for CAMC and Plaintiffs. (*See* Def. Charleston Area Medical Center, Inc.'s Reply In Support of Its Motion To Dismiss Plfs.' Amended Compl., *Appendix* at pp. 102-120; *see generally*, Hearing Transcript, *Appendix* at 127-142.)

9. The Circuit Court denied Petitioner's *Motion To Dismiss Plaintiffs' Amended Complaint* erroneously concluding that "discovery" could potentially resolve the subject matter jurisdiction issues raised by CAMC. (*See* Hearing Transcript at 14:13-18, *Appendix* at p. 140.) Specifically, Judge Miki Thompson stated:

> **THE COURT:** The Court is going to deny your motion to dismiss and that 12(b)(1) doesn't apply, and I just have one word to say – discovery. I mean, that's what discovery is for...

(*Id.*)

10. On March 29, 2022, the Circuit Court entered an *Order Denying [Petitioner's] Motion To Dismiss Plaintiffs' Amended Complaint* in which it based its denial of Petitioner's *Motion To Dismiss Plaintiffs' Amended Complaint*, in part, on the following:

> ...the Court finds as a matter of law that Plaintiffs' stillborn son was not a patient as defined by the MPLA and is precluded from qualifying as a patient and cannot be the basis for a cause of action alleging medical malpractice. Thus, the facts of this case do not trigger the pre-suit requirements of the MPLA.

(*See* Order Denying Def. Charleston Area Medical Center, Inc.'s Motion To Dismiss Plfs.' Amended Compl. at p. 3, *Appendix* at p. 123.)

11. It is from this Order that Petitioner seeks the extraordinary relief of a Writ of Prohibition in light of the Circuit Court's clear legal error in allowing Plaintiffs' claims against Petitioner to proceed despite its lack of subject matter jurisdiction over such claims

because of Plaintiffs' failure to comply with the MPLA's mandatory pre-suit notice requirements.

SUMMARY OF ARGUMENT

The Circuit Court committed clear legal error and exceeded its jurisdiction in denying Petitioner's *Motion To Dismiss Plaintiffs' Amended Complaint* given that Plaintiffs had explicitly failed to comply with the pre-suit notice requirements of the MPLA. The allegations set forth in the *Amended Complaint* are essentially claims for "medical professional liability" and Plaintiffs cannot creatively mask their claims as something else with the hopes of avoiding the application of the MPLA or to excuse their failure to comply with its pre-suit mandates. The Circuit Court's order denying Petitioner's *Motion To Dismiss Plaintiffs' Amended Complaint*, in light of Plaintiffs' failure to provide a pre-suit Notice of Claim or Screening Certificate of Merit, amounts to a judicial repeal of the MPLA's protections to health care providers such as Petitioner and, unless corrected by this Court, will result it Plaintiffs' claims against Petitioner continuing despite the Circuit Court's present lack of subject matter jurisdiction over such claims. Accordingly, the issuance of a Writ of Prohibition is unquestionably warranted.

SUMMARY REGARDING ORAL ARGUMENT AND DECISION

Oral argument is warranted in this matter because the disqualifying elements set forth in Rule 18(a) of the West Virginia Rules of Appellate Procedure are not met as Petitioner believes that the decisional process would be significantly aided by oral argument and Petitioner is unaware of any controlling authority of this Court where the issue of the MPLA's application to the alleged mishandling of infant remains has been authoritatively decided. *See* W. Va. R. App. P. 18(a). More specifically, Petitioner asserts

that while the jurisdictional nature of the MPLA's pre-suit notice requirements is settled law, this matter is appropriate for Rule 20 oral argument given that there appears to be no controlling authority specific as to the MPLA's application to a health care provider's alleged mishandling of an infant's remains. *See* W. Va. R. App. P. 20(a).

ARGUMENT

The Circuit Court erroneously denied Petitioner's *Motion To Dismiss Plaintiffs' Amended Complaint* and improperly concluded that it had subject matter jurisdiction over Plaintiffs' claims against Petitioner despite Plaintiffs' undisputed failure to comply with the MPLA's mandatory pre-suit notice requirements. While this Court has cautioned litigants to error on the side of compliance with the MPLA's pre-suit notice requirements for nearly two decades,[7] in 2019, it expressly confirmed that *pre-suit* compliance with the MPLA's notice requirements were not only mandatory, but also the manner in which circuit courts are afforded subject matter jurisdiction over medical professional liability claims against health care providers and health care facilities. *See* Syl. Pt. 2, *State ex. rel. PrimeCare Med. of W. Va. Inc. v. Faircloth*, 242 W. Va. 335, 835 S.E.2d 579 (2019) ("The pre-suit notice requirements contained in the [MPLA] are jurisdictional, and failure to provide such notice deprives a circuit court of subject matter jurisdiction.").

Here, as detailed *infra*, all of Plaintiffs' claims against Petitioner, as set forth in the *Amended Complaint*, are claims for medical professional liability – notwithstanding any contrary name Plaintiffs may have assigned to them. Accordingly, Plaintiffs' claims are

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[7] *See Gray v. Mena*, 218 W. Va. 564, 571, 625 S.E.2d 326, 333 (2005) ("We cannot, however, assure future litigants who fail to comply with the requirements of the [MPLA] that dismissal can be avoided."); *see also, Westmoreland v. Vaidya*, 222 W. Va. 205, 212, 664 S.E.2d 90, 97, n. 14 (2008) ("An ignorance of the mandates or a failure to comply [with the MPLA], without more, will not suffice to provide litigants a second chance to provide a certificate of merit."); *see also, Cline v. Kresa-Reahl*, 229 W. Va. 203, 214, 728 S.E.2d 87, 98 (2012) ("[W]e have expressly and repeatedly warned litigants to err on the side of caution in complying with the MPLA.").

subject to the MPLA's pre-suit notice requirements and their explicit failure to comply with such requirements deprived the Circuit Court of subject matter jurisdiction. As a result, dismissal was mandated and the Circuit Court should have "take[n] no further action in the case other than to dismiss it from the docket." *See* Syl. Pt. 7, *Tanner v. Raybuck*, 2022 W. Va. LEXIS 280, 2022 WL 1124882 (April 15, 2022) (citing Syl. Pt. 1, *Barnett v. Wolfolk*, 149 W. Va. 246, 140 S.E.2d 466 (1965)).

While it is well-settled law that "a [W]rit of [P]rohibition is an extraordinary remedy reserved for extraordinary causes" and that such relief "will not be issued to prevent a simple abuse of discretion by a trial court[,]" such extraordinarily relief is unquestionably warranted in this matter as Petitioner has no other means of redress to avoid the Circuit Court's clear legal error without enduring the expense and prejudice of being forced to remain captive in and litigate claims over which the Circuit Court lacks subject matter jurisdiction. *See State ex re. W. Va. Univ. Hosps., Inc.*, 866 S.E.2d at 354, 2021 W. Va. LEXIS 653, at *7-8. Accordingly, the issuance of extraordinary relief to Petitioner is warranted.

A. Jurisdiction and Standard of Review

This Petition is filed pursuant to Article VIII, Section Three of the West Virginia Constitution, granting the Supreme Court of Appeals original jurisdiction of proceedings in prohibition and W. Va. Code §53-1-1, which provides that "[t]he writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." *See* West Virginia Constitution, Article VIII, §3; *see also* W. Va. Code § 53-1-1. Accordingly, Petitioner seeks relief in the form of the issuance of a Writ

of Prohibition on the grounds that the Circuit Court's Order denying its *Motion To Dismiss Plaintiffs' Amended Complaint* was in error in light of the Circuit Court's lack of subject matter jurisdiction. Further, Petitioner asserts that the Circuit Court's Order denying its *Motion To Dismiss Plaintiffs' Amended Complaint* is clearly erroneous as a matter of law and is in derogation of the statutory, constitutional, and common law of the State of West Virginia. The Circuit Court's Order further constitutes substantial, clear-cut legal error which, absent this Petition, would undoubtedly be reversed by this Court after the unnecessary expenditure of significant time, money, and effort at trial. Accordingly, a Writ of Prohibition is justified and appropriate. *See* id.

B. Plaintiffs' Claims Set Forth In The *Amended Complaint* Against Petitioner Are Subject To The MPLA. Thus, The Circuit Court Exceeded Its Jurisdiction By Failing To Dismiss Those Claims When Plaintiffs Failed To Comply With The MPLA's Pre-Suit Notice Requirements.

The overarching and pivotal issue presented by this Petition is whether Plaintiffs' claims against Petitioner are claims for "medical professional liability" as defined by the MPLA. Specifically, the MPLA provides that "no person may file a *medical professional liability* action against a health care provider without complying with the [pre-suit notice requirements]."[8] W. Va. Code § 55-7B-6(a) (emphasis added). The MPLA defines the term "medical professional liability" broadly to include:

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[8] Those pre-suit notice requirements include:

> [a]t least 30 days prior to the filing of a medical professional liability action against a health care provider, the claimant shall serve by certified mail, return receipt requested, a notice of claim on each health care provider the claimant will join in litigation...The notice of claim shall include a statement of the theory or theories of liability upon which a cause of action may be based, and a list of all health care providers and health care facilities to whom notices of claim are being sent together with a screening certificate of merit.

See W. Va. Code § 55-7B-6(b); *c.f.*, W. Va. Code § 55-7B-6(c).

> ...***any liability for damages*** resulting from the death or injury of a person ***for any tort*** or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient. It also means other claims that may be contemporaneous to or related to the alleged tort or breach of contract or otherwise provided, all in the context of rendering health care services.

W. Va. Code § 55-7B-2(i) (emphasis added). Here, this is no question that *all* of Plaintiffs' claims against Petitioner are based on alleged "liability for damages resulting from the...injury [(*albeit purely emotional*)] for [an alleged] tort...based on health care services rendered, or which should have been rendered, by a...health care facility to a patient." *See* id.; (*see also generally*, Amended Compl., *Appendix* at pp. 57-67.) Moreover, all of Plaintiffs' claims against Petitioner in the underlying action certainly fit within the latter portion of the statutory definition of "medical professional liability" which includes "other claims that may be contemporaneous to or related to the alleged tort....or otherwise provided, all in the context of rendering health care services." *Id.*

Plaintiffs were quite clear in describing the claims asserted against Petitioner in their *Amended Complaint* in specifically stating that:

> This is a negligence, negligent infliction of emotional distress, negligent mishandling of a corpse, and negligent supervision of employee case arising out of mental anguish, serious emotional distress, and damages suffered as a result of mishandling of a corpse by...Defendant Women and Children's Hospital.

(*See* Amended Compl. at ¶ 1, *Appendix* at p. 58.) Any assertion by Plaintiffs that these claims are not claims for "medical professional liability[,]" and thus not subject to the MPLA, is in strict contradiction to Syllabus Point 4 of this Court's decision in *Blankenship v. Ethicon, Inc.*, 221 W. Va. 700, 656 S.E.2d 451 (2007) holding that:

> [t]he failure to plead a claim as governed by the [MPLA], does not preclude the application of the Act. Where the alleged

> tortious acts or omissions are committed by a health care provider within the context of the rendering of 'health care'...the Act applies regardless of how the claims have been pled.

See Syl. Pt. 4, *Blankenship v. Ethicon, Inc.*, 221 W. Va. 700, 656 S.E.2d 451 (2007) (recently reaffirmed in Syl. Pt. 5, *State ex rel. W. Va. Univ. Hosps., Inc. v. Scott*, 866 S.E.2d 350, 2021 W. Va. LEXIS 653 (November 22, 2021)

In fact, in reviewing the delineated causes of action in the *Amended Complaint*, Plaintiffs' draftsmanship leaves no doubt that their claims are that of: "negligence, negligent infliction of emotional distress, negligent mishandling of a corpse, and negligent supervision of employee[.]" (*See* Amended Compl. at ¶ 1, *Appendix* at p. 58.) With those causes of action in mind, it is clear that this Court has previously ruled that almost all of those specific causes of action are subject to the MPLA when they occur in the context of health care. More specifically, it is well-established that general negligence claims are subject to the MPLA. *See e.g., State ex rel. W. Va. Univ. Hosps., Inc.* 866 S.E.2d at, 365, 2021 W. Va. LEXIS at *37 ("[W]e emphasized that litigants cannot characterize claims as...general negligence in an attempt to circumvent the parameters of the MPLA."). As to Plaintiffs' claims for negligent infliction of emotional distress, this Court has previously found that such cause of action is subject to the MPLA. *See e.g., State ex rel. PrimeCare Med. of W. Va., Inc.*, 242 W. Va. at 339, 343, 835 S.E.2d at 583, 587 (underlying action involved claims for, *inter alia,* "negligent and intentional infliction of emotional distress" and this Court concluded that "[u]pon review of the amended complaint, we find that all of the Estate's claims against PrimeCare are subject to the MPLA."); *see also, Blankenship*, 221 W. Va. at 703,708, 656 S.E.2d at 454, 495 (underlying action involved claims for, *inter alia,* "intentional infliction of emotional distress" and this Court held that "[w]e find no

error in the circuit court's conclusions...that the Appellants' claims...must be brought under the MPLA."); *see also, Clay v. J.W. Ruby Mem'l Hosp.*, No. 18-0983, 2020 W. Va. LEXIS 51, 2020 WL 533951 (W. Va. Supreme Court, February 3, 2020 (Memorandum Decision) (application of the MPLA to claims for, *inter alia,* emotional distress). With regard to Plaintiffs' claim for negligent supervision of employees, this Court just recently confirmed that such cause of action is subject to the MPLA. *See State ex rel. W. Va. Univ. Hosps. Inc.*, 866 S.E.2d 350, 365, 2021 W. Va. LEXIS 653, *37 (concluding that, *inter alia*, "negligent failure to supervise" is subject to the MPLA).[9] That leaves only the negligent mishandling of a corpse claim. Given the context in which such claim arose and the analysis set forth *infra*, this Court should easily conclude that it too, is subject to the MPLA.[10] This is especially true given this Court's recent recognition of the clear legislative direction in the past few years that the MPLA includes services encompassing patient care

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[9] "After reviewing the Count II (corporate negligence) causes of action in the original complaint, we agree with WVUH. The corporate negligence claims in Respondent's original complaint include the following: negligent hiring, negligent staffing, negligent failure to train, *negligent failure to supervise*, negligent failure to have proper protocols, failure to protect, and failure to correct. A review of the MPLA's definition of 'health care' illustrates that the definition encompasses these claims..." *Id.*

[10] Petitioner acknowledges that this Court has recognized a cause of action for "negligently or intentionally mishandling...a dead body[.]" *See* Syl. Pt. 2, *Whitehair v. Highland Memory Gardens*, 174 W. Va. 458, 327 S.E.2d 438 (1985). However, *Whitehair* does not truly represent the crux of Plaintiffs' mishandling claim in this action. For example, *Whitehair* represents a cause of action for post-disinterment or reinternment negligence claims, not the proper handling by health care providers of remains after a stillborn delivery in a health care setting. *See* id at 460, 327 S.E.2d at 440 (stating that the case involved the very narrow question of "...whether a person can recover damages for mental anguish caused by the intentional, reckless or negligent mishandling of a relative's remains where the removal itself is lawful."). In fact, with the exception of *Ricottilli* discussed *infra*, this Court's prior cases dealing with the handling of remains, dating back as far as 1912, all generally involve the burial or disinterment of remains. *See Ritter v. Couch*, 71 W. Va. 221, 76 S.E. 428 (1912) (involving the enjoinment of efforts to remove or interfere with graves); *England v. Central Pocahontas Coal Co.*, 86 W. Va. 575, 104 S.E. 46 (1920) (involving claims that defendant entered a cemetery and disinterred the remains of plaintiff's relatives); *Sherrard v. Henry*, 88 W. Va. 315, 106 S.E. 705 (1921) (involving the enjoining of the removal of remains rightfully buried in a cemetery). The underlying action is quite different than a *Whitehair*-type mishandling claim as here, the remains were negligently handled in the course of providing health care to Plaintiff, Angela Lester.

beyond the care itself. *See State ex rel. W. Va. Univ. Hosps., Inc.*, 866 S.E.2d at 359, 2021 W. Va. LEXIS 653, at *18.

Here, there is no dispute that Petitioner is a "health care facility" as the term in defined in the MPLA[11] and that the alleged conduct about which Plaintiffs complain occurred exclusively in the context of rendering "health care[.]" (*See generally*, Amended Compl., *Appendix* at pp. 57-67.) The MPLA defines "health care" to include, in pertinent part, the following:

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

See W. Va. Code § 55-7B-2(e), (1), (2). Certainly, the handling of fetal remains is an "...act [or] service...provided under, pursuant to or in furtherance of a...health care facility's plan of care..." when caring for a patient that underwent a failed pregnancy via a stillborn birth. Moreover, the handling of fetal remains is also certainly an "...act [or] service...performed or furnished, or which should have been performed or furnished, by any health care provider or person supervised by or acting under the direction of a health care provider or licensed professional for, to or on behalf of a patient during the patient's medical care..." Thus, the post-stillborn birth handling of fetal remains is the rendering of "health care" sufficient to trigger the application of the MPLA.

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[11] *See* fn. 1, *supra*.

The remains of the stillborn fetus only came into Petitioner's possession as the result of its rendering health care to the mother – Plaintiff, Angela Lester. But for Petitioner's rendering of health care to Plaintiff, Angela Lester, the fetal remains would never have come into Petitioner's possession or control. Stated differently, Petitioner would never have had to handle and properly dispose of the fetal remains of A.C.L. had Plaintiff, Angela Lester, not presented to its medical facility seeking health care services. Further, once such fetal remains were in Petitioner's possession, it had a duty to properly handle, preserve and/or dispose of such remains. Thus, the handling, preservation and disposal or proper disposition of such fetal remains were all within the context of, and in furtherance of, the health care services rendered to Plaintiff, Angela Lester. If Petitioner mishandled A.C.L's remains, as is alleged in the *Amended Complaint*, such actions were an immediate consequence of having rendered health care to Plaintiff, Angela Lester, as the remains were the focus of the care rendered to her.[12]

The only word within the MPLA's definitions of "health care" and "medical professional liability" that Plaintiffs took issue with below is the word "patient." (*See* Plfs.' Response To Def. Charleston Area Medical Center, Inc.'s, Motion To Dismiss Plfs.' Amended Compl. at pp. 5-6, *Appendix* at pp. 89-90.) The Circuit Court became misguided by Plaintiffs' hyper-fixation on the term "patient" and erroneously relied on this Court's inapplicable precedent of *Ricottilli v. Summersville Mem'l Hosp.*, 188 W. Va. 674, 425 S.E.2d 629 (1992) holding in Syllabus Point 1 that:

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[12] Other jurisdictions have recognized that "...a fetus is part of the mother, and injury to the fetus is injury to the mother. If the fetus is never born alive, the fetus never develops a legal claim, but the mother may recover for the physical injury and mental suffering associated with stillbirth." *Simpson v. Roberts*, 287 Va. 34, 42, 752 S.E.2d 801, 804 (2014) (citing *Modaber v. Kelley*, 232 Va. 60, 66, 348 S.E.2d 233, 236-37 (1986)); *see also*, *Modaber*, 232 Va. at 66, 348 S.E.2d at 236-37 ("...an unborn child is part of the mother until born.") (further citations omitted).

> [b]y definition, a deceased individual does not qualify as a "patient" under the West Virginia Medical Professional Liability Act...and therefore cannot be the basis for a cause of action alleging medical professional liability...

See Syl. Pt. 1, *Ricottilli v. Summersville Mem'l Hosp.*, 188 W. Va. 674, 425 S.E.2d 629 (1992); (*see also*, Order Denying Def. Charleston Area Medical Center, Inc.'s, Motion To Dismiss Plfs.' Amended Compl. at p. 5, *Appendix* at p. 125.) However, *Ricottilli* involved completely different circumstances than those at issue in this matter.

More specifically, *Ricottilli* centered, in pertinent part, on a statute of limitations issue in a case where there was an alleged negligent (or more precisely, incomplete) performance of an autopsy of a six-year-old child in which, had the autopsy been performed appropriately, critical and potentially life-saving genetic information could have been potentially obtained for the benefit of the deceased child's siblings. *Ricottilli*, 188 W. Va. 675-676, 425 S.E.2d at 630-631. In an effort to benefit from the two-year statute of limitations set forth in the MPLA, the plaintiff in *Ricottilli* argued that her claims concerning the incomplete autopsy were that of medical professional liability. *Id.* at 678, 425 S.E.2d at 633. This Court disagreed and held that, based on the MPLA's definition of "health care" at the time – which included to term "patient" – and based on the MPLA's definition of the term "patient" as a "natural person[,]" "a deceased individual is necessarily precluded from qualifying as a patient under the Act, and therefore cannot be the basis for a cause of action alleging medical professional liability..." *Id.* However, the Circuit Court in the matter *sub judice* erred in relying on *Ricottilli* because it involved an

issue where the health care at issue, *i.e.*, the autopsy, was rendered to a deceased individual.[13] [14]

Plaintiffs' claims below do not involve health care that was rendered directly to A.C.L., as A.C.L. unfortunately did not survive gestation to become a patient and receive health care services. A.C.L. never presented as a patient to the hospital as he was part of his mother, Plaintiff, Angela Lester, and she was a patient receiving health care at Petitioner's facility. That is to say, the "health care" at issue in this action was rendered in furtherance of the A.C.L.'s mother's care – *i.e.*, Plaintiff, Angela Lester. The critical difference between *Ricottilli* and this matter is that in *Ricottilli*, the six-year-old child at issue presented to Charleston Area Medical Center as a patient to receive health care, but passed away during the course of receiving such health care. *See genrally*, id. The health care at issue in *Ricottolli*, *i.e.*, the autopsy, was rendered to the subject six-year-old child, but she was deceased at the specific time that the subject care was rendered. *Id.* Conversely, in the matter *sub judice*, the health care at issue, *i.e.*, the disposition of fetal remains following a stillborn delivery, was rendered to Plaintiff, Angela Lester.

Other courts, in jurisdictions that have pre-suit notice requirements for medical professional liability claims similar to the MPLA, have held that under circumstances similar to the underlying action, that the handling of fetal remains is in furtherance of the

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[13] It is critical and noteworthy that the estate of the six-year-old child at issue in *Ricottilli* was named as a plaintiff in that action, whereas in this action the estate of A.C.L. is not named as a party. This distinction is important because *Ricottilli* involved health care rendered to the six-year-old child, whereas this action involves care rendered only to Plaintiff, Angela Lester.

[14] It should also be noted that *Ricottilli* was decided prior to the 2015 legislative amendments to the MPLA and, thus, the determination that an autopsy (or care provided to a deceased individual) is not "health care" should be reconsidered in light of the Legislature's clear intent in modifying the MPLA as discussed in Section C, *infra*.

mother's care and that the mother is clearly a "patient" for purposes of triggering the application of the health care act. For example, in *CHCA Bayshore, L.P. v. Ramos*, 338 S.W.3d 741, 2012 Tex. App. LEXIS 5780 (1st Dis. 2012), the First District Court of Appeals of Texas analyzed a case in which a pregnant mother "had a dilation and curettage procedure after suffering a miscarriage when she was 12 weeks pregnant." *CHCA Bayshore, L.P.*, 388 S.W.3d at 743, 2012 Tex. App. LEXIS 5780 at *1-2. The mother and father desired to hold a funeral for the fetal remains and the hospital was instructed to preserve the remains so that the funeral home could retrieve them. *Id.* The next day, a funeral home employee went to the hospital to receive the remains for burial and, after the family had held a funeral, it was discovered that the hospital had given the funeral home the wrong specimen. *Id.* The purported remains were exhumed and determined to be the amputated toe of another patient. *Id.*

The Court in *CHCA Bayshore, L.P.* found that "the [h]ospital's challenged actions were directly related to the health care that [the mother] received while in the hospital." *Id.* At 746, 2012 Tex. App. LEXIS 5780 at *10. The Court went on to reason that:

> ...the alleged mishandling of the specimen that occurred after the dilation and curettage procedure and the removal of the fetal remains was "directly related" to the "health care" received by [the mother]. The fetal remains were initially obtained during and as a result of her dilation and curettage procedure. The [h]ospital thus came into possession of the specimen as a direct result of providing health care to [the mother]. Once the specimen was removed from [the mother] and it came into the control of the [h]ospital, the [h]ospital was obligated to maintain the specimen and ultimately dispose of it in compliance with the applicable regulations and the patient's instructions.

Id. at 746, 2012 Tex. App. LEXIS 5780 at *1. The Court in *CHCA Bayshore, L.P.* ultimately concluded, as this Court should, that the alleged mishandling "was an immediate

consequence of having performed the procedure that resulted in the [h]ospital's handling of the remains, and as such, it was directly related to the health care[15] rendered to [the mother] by the [h]ospital." *Id.* The facts of the underlying action and *CHCA Bayshore, L.P.* are similar and it's practical and well-reasoned rationale should be applied.

With an understanding that the handling, preservation and disposal or proper disposition of the fetal remains at issue in the underlying action were all within the context of, and in furtherance of, the health care services rendered to Plaintiff, Angela Lester, Plaintiffs' (and the Circuit Court's) reliance on the "No Records Statement" – confirming that Petitioner had no medical records for A.C.L. – is misplaced and was in error. (*See* Order Denying Def. Charleston Area Medical Center, Inc.'s Motion To Dismiss Plfs.' Amended Compl. at p. 3, *Appendix* at p. 123.) Certainly no medical records exist for A.C.L. as A.C.L. did not survive gestation to receive health care services. Instead, any health care services rendered concerning A.C.L. would be documented in Plaintiff, Angela Lester's, medical records as A.C.L. was considered part of her (for medical documentation purposes) until born alive.[16] To the contrary of the Circuit Court's conclusion, this fact only further demonstrates that all actions Petitioner engaged in relating to A.C.L. (including the handling of the fetal remains) were ultimately in furtherance of health care rendered to Plaintiff, Angela Lester.

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[15] It is noteworthy that Texas' statutory definition of "health care" is similar to subpart (b) of the MPLA's definition of health care in that Texas defines such term as "any act or treatment performed or furnished, or that should have been performed or furnished, by a health care provider for, to, or on behalf of a patient during the patient's medical care, treatment or confinement." *See* id. 746, 2012 Tex. App. LEXIS 5780 at *10; *see also c.f.*, W. Va. Code § 55-7B-2(e)(2) ("Any act, service or treatment performed or furnished, or which should have been performed or furnished, by any health care provider...for, to, or on behalf of a patient during the patient's medical care, treatment or confinement...).

[16] *See* fn. 12, *supra.*

Accordingly, the Circuit Court lacked subject matter jurisdiction over all of Plaintiffs' claims against Petitioner as the result of Plaintiffs' explicit failure to comply with the MPLA's mandatory pre-suit notice requirements. The Circuit Court should have taken no action other than to dismiss this action from its docket. *See e.g., State ex rel. PrimeCare Med. of W. Va., Inc.*, 242 W. Va. at 345, 835 S.E.2d at 589; *see also* W. Va. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.") Therefore, a Writ of Prohibition is warranted prohibiting the Circuit Court from enforcing its clearly erroneous order denying Petitioner's *Motion To Dismiss Plaintiffs' Amended Complaint.*

C. No Cognizable "Privacy" Claim Exists Against Petitioner In The Underlying Action And Even If Such A Claim Is Permitted It Should Also Be Subject To The MPLA.

"It goes without saying [that litigants] cannot avoid the MPLA with creative pleading." *State ex rel. W. Va. Univ. Hosps., Inc.*, 866 S.E.2d at 359, 2021 W. Va. LEXIS 653, at *20. Below, Plaintiffs attempted to do just that by manufacturing, for the first time in their briefing, some purported "privacy" claim[17] in the hopes of relying on this Court's outdated decision in *R.K. v. St. Mary's Med. Ctr., Inc.*, 299 W. Va. 712, 735 S.E.2d 715 (2012) (cert. denied by *St. Mary's Med. Ctr., Inc. v. R.K.*, 569 U.S. 905, 133 S. Ct. 1738, 185

[17] In their *Response To Defendant, Charleston Area Medical Center, Inc.'s Motion To Dismiss Plaintiffs' Amended Complaint* when describing their allegations Plaintiffs' haphazardly include a statement indicating that in addition to their claims for negligent inflection of emotional distress and negligent mishandling of a corpse, they also have a claim for "violation of privacy (HIPAA)." (*See* Plfs.' Resp. To Def. Charleston Area Medical Center, Inc.'s Motion To Dismiss Plfs.' Amended Compl. at p. 4, *Appendix* at p. 88.) When confronted with the fact that "HIPAA" does not provide a private right of action pursuant to *J.R. v. Walgreens Boots Alliance, Inc.*, 2021 U.S. App. LEXIS 31389, 2021 WL 4859603 (4th Cir. October 19, 2021), Plaintiffs' counsel conceded that she "did, inadvertently, in [Plaintiffs'] response use the word HIPAA. (*See* Hearing Transcript, at 10:14-15, *Appendix* at p. 136.)

L. Ed. 2d 788, 2013 U.S. LEXIS 2681 (2013)) to skirt around the application of the MPLA and excuse their explicit failure to comply with its mandatory pre-suit notice requirements. (*See* Pfls.' Resp. To Def. Charleston Area Medical Center, Inc.'s Motion to Dismiss Amended Compl. at p. 4, *Appendix* at p. 88; *c.f. generally*, Amended Compl., *Appendix* at pp. 57-67.) Again, Plaintiffs' *Amended Complaint* is clear as to the causes of action it asserts in its precise statement explaining:

> This is a negligence, negligent infliction of emotional distress, negligent mishandling of a corpse, and negligent supervision of employee case arising out of mental anguish, serious emotional distress, and damages suffered as a result of mishandling of a corpse by...Defendant Women and Children's Hospital.

(*See* Amended Compl. at ¶ 1, *Appendix* at p. 58.) Nowhere, in this statement or in its delineated causes of action, does Plaintiffs' *Amended Complaint* set forth a privacy-based cause of action as to Petitioner. Nonetheless, the Circuit Court improperly and erroneously concluded that:

> ....[the] allegations pertaining to the improper disclosure of medical records do not fall within the MPLA's definition of "health care" and, therefore, the MPLA does not apply.

(*See* Order Denying Def. Charleston Area Medical Center, Inc.'s Motion To Dismiss Plfs.' Amended Compl. at p. 5, *Appendix* at 125. (initial citation omitted).) In response to the Circuit Court's conclusion in this regard, a fair reading of the *Amended Complaint* would leave one to wonder: where are those allegations?

A careful review of the *Amended Complaint* reveals that the term "privacy" is only used twice – both times in describing allegations made against defendants <u>other than Petitioner</u> and nowhere is there a specifically delineated cause of action for Plaintiffs' purported "privacy" claim. (*See generally* Amended Compl., *Appendix* at pp. 57-67.) More

specifically, the term "privacy" is used in the following two averments, both of which are relevant only to Defendant, Nicole Cline:

> 9. Notwithstanding the laws of privacy and confidentiality, Defendant Nicole Cline was accompanied by her husband during the retrieval and transport of the infant child's body without Plaintiffs' knowledge, consent or permission.
>
> ***
>
> 23. Defendant, Nicole Cline's, actions in permitting her husband to be present during the transfer of Plaintiffs' son's body made it possible for her husband to make public statements regarding his experience with the infant's body and posting said statements to social media in violation of any and all applicable duties of privacy and confidentiality, against public policy and industry standards.

(*See* id. at ¶¶ 9, 23, *Appendix* at pp. 59, 62.) Simply stated, using the buzz word "privacy" twice throughout the *Amended Complaint* in describing a co-defendant's conduct, is woefully insufficient to amount to asserting some foreign cause of action against Petitioner for the alleged "improper disclosure of medical records" as the Circuit Court concluded.[18] [19]

Even if this Court determines that Plaintiffs have raised a cognizable common law privacy-based claim, this Court should revisit the outdated holding in *R.K.* because of its substantial reliance on the legislatively superseded portions of *Boggs v. Camden-Clark*

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[18] If Plaintiffs base their supposed "privacy" claim on the fact that Defendant, Nicole Cline's husband, Jeff Cline, accompanied her during the transport yet remained in the vehicle while she retrieved the remains from within Petitioner's facility, it is unclear as a matter of practicality, how such fact would create a privacy-based cause of action against Petitioner as it has no control over who Mounts Funeral Home, Inc. sends to retrieve the remains on its behalf and certainly no way of verifying such individuals' (who remain in the vehicle) identities.

[19] Plaintiffs' do also allege in the *Amended Complaint* at Paragraph 33 that Petitioner "negligently mishandled the corpse of the Plaintiff's infant by releasing the body to the transported in a private vehicle, and by placing the body in the back seat of the private vehicle without proper equipment, *and by allowing unauthorized persons to be involved with the transportation and handling* of the Plaintiffs' infant's corpse in violation of W. Va. Code §64-84-10." (*See* Amended Complaint at ¶ 33, *Appendix* at p. 64.) However, Plaintiffs' counsel has conceded that such statutory provision does not apply to Petitioner. (*See* Hearing Transcript at 13:24, *Appendix* at p. 139.)

Mem'l. Hosp. Corp., 216 W. Va. 656, 609 S.E.2d 917 (2004) and the Legislature's statutory modifications to the MPLA in the years after *Boggs* (and this Court's subsequent modification of *Boggs*) as recognized in Syllabus Point 4 of this Court's decision in *Gary*, in footnote 18 of *State ex rel. PrimeCare Med. of W. Va., Inc.* and in footnote 2 of *State ex rel. W. Va. Univ. Hosps., Inc. See* Syl. Pt. 4, *Gary*, 218 W. Va. at 564, 625 S.E.2d at 32; *State ex rel. PrimeCare Med. of W. Va., Inc.*, 242 W. Va. at 342, fn. 18, 835 S.E.2d at 568, fn. 18; *State ex rel. W. Va. Univ. Hosps., Inc.*, 866 S.E.2d at 358, fn. 2, 2021 W. Va. LEXIS 653, at *16, fn. 2.

R.K. concerned a psychiatric patient's claim that his confidential medical and psychological information had been improperly accessed and disseminated to this estranged wife and her attorney by an employee of St. Mary's Medical Center. *R.K.*, 299 W. Va. 714, 735 S.E.2d at 717. In analyzing whether the plaintiff's state law claims for the wrongful disclosure of his medical and personal health information was subject to the MPLA, this Court relied on the MPLA's now statutorily modified definition of "health care" and the now statutorily superseded proposition of *Boggs* that the MPLA "does not apply to other claims that may be contemporaneous to or related to the alleged act of medical professional liability" to conclude that plaintiff's claim for the improper disclosure of medical records was outside of the scope of the MPLA. *See* id. at 722-23, 735 S.E.2d at 725-26. Just a few months ago in *State ex rel. W. Va. Univ. Hosps., Inc.*, this Court affirmatively recognized that the Legislature's 2015 amendments to the MPLA – specifically to the broadened definitions of "medical professional liability" and "health care" – "illustrate the Legislature's intent for the MPLA to broadly apply to services encompassing patient care – not just the care itself." *State ex rel. W. Va. Univ. Hosps., Inc.*, 866 S.E.2d at 359, 2021

W. Va. LEXIS 653, at *18. Accordingly, this Court's holding in *R.K.* does not reflect the current version of the MPLA nor the Legislature's obvious intent on broadening the scope of its application as recognized by this Court.

Here, this Court should apply the same analysis and framework it just recently used in *State ex rel. W. Va. Hosps, Inc.* to reject the respondent in that case's reliance on the pre-2015 legislative MPLA amendment cases of *Manor Care, Inc. v. Douglas*, 234 W. Va. 57, 763 S.E.2d 73 (2014) and *Boggs* to argue that "corporate decision" type claims are outside of the definition of "health care" and thus outside of the scope of the MPLA. *See generally*, id. More specifically, this Court should revisit and modify its holding in *R.K.* to reflect the 2015 legislative amendments to the MPLA just as it did to *Manor Care* and *Boggs* in *State ex rel. W. Va. Hosps, Inc.* Much like *State ex rel. W. Va. Hosps, Inc.*, "understanding the amendments to the MPLA and the changing landscape of medical malpractice cases is significant to the resolution of this case." *Id.* at 360, 2021 W. Va. LEXIS 653, at *23.

In light of the Legislature's 2015 amendments to the MPLA, broadening the statutory definition to "health care" to "[a]ny act, service or treatment provided under, pursuant to or in furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis or treatment" and also broadening the definition of "medical professional liability" to include "other claims that may be contemporaneous to or related to the alleged tort or breach of contract or otherwise provided[,]" it is difficult to realistically imagine that activity such as the gathering, utilization and protection of confidential medical information would not be included in the MPLA's definition of "health care" and that a claim relating to such activities would not be encompassed within the MPLA's definition of "medical professional liability." *See* W. Va. Code § 55-7B-2(e), (i). As

the result of these legislative changes to the MPLA's definitions of "health care" and "medical professional liability[,]" this Court's holding in *R.K.* is of questionable authority and warrants modification.

Therefore, based on the record below, this Court should conclude that Plaintiffs have no cognizable privacy claim against Petitioner and that the Circuit Court error in concluding otherwise. However, in the event that this Court believes such a claim does exist, a review and modification of its prior holding in *R.K.* is warranted and the Circuit Court erred in finding that such a claim was not also subject to the MPLA. Either way, the Circuit Court erred in denying Petitioner's *Motion To Dismiss Plaintiffs' Amended Complaint* for lack of subject matter jurisdiction.

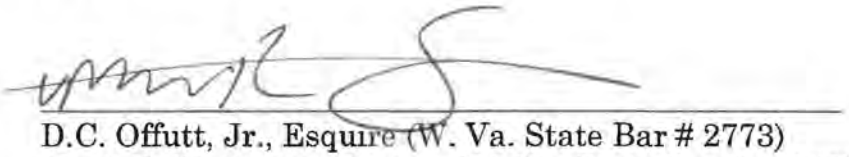
CONCLUSION

For the aforementioned reasons, Petitioner respectfully requests that this Court issue a Writ of Prohibition to prevent the Circuit Court from enforcing its erroneous Order denying Petitioner's *Motion To Dismiss Plaintiffs' Amended Complaint*, and thereby reverse the Circuit Court's erroneous decision. The Petitioner also requests that this Court enter an immediate stay of the underlying proceedings pending review and resolution of this Petition.

RESPECTFULLY SUBMITTED,

CHARLESTON AREA MEDICAL CENTER, INC.

By Counsel:



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VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF KANAWHA, to wit:

I, Glenn Crotty, Jr., M.D., individually and as Executive Vice President and Chief Operating Officer of Charleston Area Medical Center, Inc., after first being duly sworn upon oath, state that I have read the foregoing ***Amended Petition for Writ of Prohibition***, and that all facts and allegations contained therein are true and correct to the best of my knowledge and belief.

Glenn Crotty, Jr., M.D.

Taken, sworn to, and subscribed before me this 20th day of June, 2022.

My commission expires: 2-27-2024.

[SEAL]

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
JOHNNA L. WILLS
PO BOX 324
CHARLTON HEIGHTS, WV 25040
My Commission Expires Feb. 27, 2024

NOTARY PUBLIC

CERTIFICATE OF SERVICE

I, Mark R. Simonton, counsel for Petitioner, Charleston Area Medical Center, Inc., do hereby personally certify the a true and correct copy of the foregoing ***Amended Petition for Writ of Prohibition*** was served upon the following via United States Mail, First Class, postage prepaid, as well as via the Circuit Court of Mingo County, West Virginia's electronic filing system this **22nd** day of **June**, **2022** which shall send notice of the same to the following:

The Honorable Miki J. Thompson
Circuit Court of Mingo County, West Virginia
Mingo County Courthouse
78 East Second Avenue, Room 228
Williamson, West Virginia 25661
Judge of the Circuit Court of Mingo County, West Virginia

Lonnie Hannah, Clerk
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