IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 22-0439
(Underlying Mingo County Civil Action No. 21-C-75)

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

Petitioner,

v.

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

Respondents.

RESPONDENTS ANGEL LESTER AND DENNY SETH LESTER'S RESPONSE TO AMENDED PETITION FOR WRIT OF PROHIBITION

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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 by 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 failed to comply with the MPLA's pre-suit notice requirements.

ANSWER: No. Applying the clear and unambiguous language of the pertinent code sections of the MPLA and relevant case law to the Plaintiffs' claims against the Petitioner and to the facts of the case, the Circuit Court correctly found the pre-suit requirements of the MPLA are not triggered. The Circuit Court having subject jurisdiction over said claims did not exceed its legitimate powers by denying Petitioner's *Motion to Dismiss Plaintiffs' Amended Complaint.*

STATEMENT OF CASE

On May 17, 2018, Respondents Angela and Denny Seth Lester's ("Respondents") approximately 17-week-old son ("A.C.L.") was stillborn at CAMC Women and Children's Hospital. Respondents made arrangements with Respondent Mounts Funeral Home to handle the final disposition of their son's body. Denny Seth Lester signed an authorization on May 21, 2018, to release his son's body to Mounts Funeral Home. *See*, Authorization, App. 81. Unbeknownst to the Respondents, Respondent Mounts Funeral Home commissioned its employee, Respondent Nicole Cline, to pick up A.C.L.'s body at CAMC Women and Children's Hospital in her private vehicle. Not only was Respondent Cline driving her private vehicle, but she was also accompanied by her husband, Jeff Cline[1]. The backseat of the Cline vehicle was piled up with packages from Sam's Club where they had been shopping when Respondent Cline received a call from her

[1] Jeff Cline was not an agent, employee, or representative of Respondent Mounts Funeral Home.

employer, Respondent Mounts Funeral Home, to retrieve the corpse. A.C.L.'s unprotected corpse was placed in the back seat of the Cline vehicle alongside the stack of bulk purchases from Sam's Club.

On or about January 29, 2020, Jeff Cline posted a video ("the Cline Video") on social media outlets describing in detail the process of transporting and embalming A.C.L.'s corpse and wrongfully suggesting that the corpse was the result of an abortion. In the Cline Video, Jeff Cline gave a detailed description of picking up A.C.L.'s corpse from CAMC Women and Children's Hospital including the hospital's employee placing the body in the back seat next to the bulk purchases, the hospital employee's refusal to permit Respondent Cline's use of the basket to transport the body, how he held the body in his lap during the two-hour drive to the funeral home and details of the embalming process. Respondents were first made aware of the Cline Video on February 1, 2020. Until that time, they were unaware of the mishandling of their son's corpse and were horrified and traumatized to learn of the events surrounding the transport and embalming of his body.

Respondents filed their Complaint on July 13, 2021, against Respondent Mounts Funeral Home, Inc. and Respondent Nicole Cline stemming from allegations, among others, of the negligent mishandling of the corpse of their infant son ("A.C.L."). *See,* Compl., App. 1-9. On October 18, 2021, Respondents received the verified discovery responses of Respondent Cline. *See,* Def. Nicole Cline's Discovery Response, App. 37-42. In her responses, Respondent Cline detailed Petitioner's involvement in the mishandling of A.C.L.'s corpse and the disrespectful way it was treated. Specifically, Respondent Cline recounted the following as to the Petitioner:

> Upon entering the building, she stopped at the information desk and identified herself and the purpose of her visit. The reception desk employee called someone who came down and met Cline at the desk. The hospital employee, who appeared to be a female nurse and was in "scrubs," instructed Cline to follow her. They went to an elevator and then Cline followed the employee into a small working room or lab. There, the employee got a basket and a small package. The employee put the package in the basket. Cline had to sign papers to acknowledge receipt of the remains. The employee carried the basket and its contents as they left and walked to where the car was parked. Cline opened the rear vehicle door and cleared out a space. At that point the employee took the package out of the basket and placed it on the seat. Cline asked about whether the basket could be used and was told that

it was hospital property. After placing the package and blanket on the seat, the employee left.

See, Def. Nicole Cline's Discovery Response, App. 38.

Respondents requested a copy of A.C.L.'s medical records from the Petitioner. On or about January 7, 2021, Respondents received a No Records Statement from the Petitioner. The Petitioner's release of information specialist certified the Petitioner had no medical records for A.C.L. because he was not a patient. *See*, No Records Statement, App. 99.

The MPLA defines "patient" as a "natural person who receives or should have received health care from a licensed health care provider under a contract, expressed or implied." W.Va. § 55-7B-2(m). *See,* App. 94-97. This Court has held that "[b]y definition, a deceased individual does not qualify as a "patient" under the Medical Professional Liability Act ("Act"), West Virginia Code §§ 55-7B-1 to 11 (Supp.1992), and therefore cannot be the basis for a cause of action alleging medical professional liability pursuant to the Act." *Ricottilli v. Summersville Memorial Hospital*, 425 S.E.2d 629, (1992)[2]. Despite many amendments to the definitions section of the MPLA over the years, the definition of "patient" has remained the same. Thus, the *Ricottilli* definition of "patient" remains controlling.

West Virginia Code § 55-7B-2(i) defines "Medical Professional Liability" as "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. § 55-7B-2(i), (emphasis added). *See*, App. 94-97. In *State ex rel. W.Va. Univ. Hosps., Inc. v. Scott*, 866 S.E.2d 350, 359 (W.Va. 2021), this Court found the second sentence of W.Va. Code § 55-7B-2(i) to broadly apply to services encompassing **patient** care. (Emphasis added).

[2] In *Ricottilli*, it was the Petitioner, CAMC, who successfully argued that a deceased individual does not qualify as a "patient" and therefore cannot be the basis of a medical professional liability claim.

The definition of health care encompasses and includes service or treatment provided pursuant to a physician's or health care facility's plan of care, diagnosis, or treatment; services or treatment performed, or which should have been performed for or on behalf of a patient; and the employment, contracting, credentialing, privileging, and supervision of health care providers. W.Va. Code § 55-7B-2(e), App. 94-95. All health care services encompassing **patient** care as held by this Court in *State v. Scott,* (emphasis added).

While Respondents acknowledge that the Petitioner is a healthcare provider as defined in WV Code § 55-7B-2(g) (*See,* App. 94-97) they assert it is also well settled law that "[j]ust because a cause of action involves a healthcare provider does not make the MPLA the exclusive remedy." *R.K. vs. St. Mary's Med. Ctr., Inc.,* 735 S.E.2d 715 (2012). There being no patient and thus no patient upon which to base allegations of medical professional liability,[3] Respondents filed an Amended Complaint on November 24, 2021, to include Petitioner as a defendant asserting claims of general negligence, negligent mishandling of the corpse of their infant son ("A.C.L."), negligent infliction of emotional distress and negligent supervision. *See,* Amended Compl., App. 58-67.

Respondents agree with the Petitioner that there is an undisputed set of facts. *See* FN 2 of Petitioner's *Amended Petition for Writ of Prohibition.* The following are undisputed facts as it relates to the Petitioner and the issues before this Court: 1) A.C.L. was not a patient at Petitioner's health care facility; 2) A.C.L. was stillborn and received no medical care; 3) A.C.L. was deceased at the time Respondents alleged negligent mishandling of a corpse; 3) Respondents' Amended Complaint contains no allegations of medical malpractice; 4) a deceased individual does not qualify as a "patient" under the MPLA and therefore cannot be the basis for a cause of action alleging medical professional liability; 5) the negligent mishandling of a corpse does not constitute medical professional liability[4]; 6) an employee of Petitioner carried the body of A.C.L. to the private vehicle of Respondent Cline; 7) an employee of Petitioner, in the presence of an

[3] At the time of the filing of the Amended Complaint, there was no case law or statute holding that for purposes of application of the MPLA mishandling of the corpse of a stillborn fetus is an extension of the patient care of the mother.

[4] *See, Ricottilli v. Summersville,* 425 S.E.2d 629 (W.Va. 1992).

unauthorized individual, removed the corpse of A.C.L. from its protective basket and placed it in the back seat of a Ford Fusion alongside a pile of bulk packages from Sam's Club; 8) an employee of Petitioner violated Respondents' privacy rights by placing the body of their son in an unauthorized vehicle in the presence of an unauthorized individual; and 9) an employee of Petitioner refused to permit the use of the protective basket for the transportation of A.C.L.'s body.

Petitioner filed a *Motion to Dismiss Plaintiffs' Amended Complaint. See,* App. 68-84. Respondents filed their Response. *See,* App. 85-101. Petitioner filed a Reply. *See,* App. 102-106. Nowhere in its pleadings below does the Petitioner address the fact that A.C.L. was not a patient of CAMC Women and Children's Hospital, that A.C.L. was deceased at the time all causes of action for negligence against Petitioner were alleged, or that a deceased individual is not a patient and cannot be the basis for a cause of action alleging Medical Professional Liability. Further, Petitioner's counsel failed to address any of the above issues in its oral arguments on March 24, 2022. *See,* Hearing Transcript, App. 127-142. Petitioner raised those arguments for the first time in its Amended Petition for Writ of Prohibition. In its *Amended Petition for a Writ of Prohibition*, Petitioner asks this Court to find that the Circuit Court erred in denying its Motion to Dismiss based on arguments it never made in the lower court.

Additionally, Petitioner misrepresents a comment made by the Circuit Court (Hearing Transcript at 14:13-18, App. 140) in its *Amended Petition for Writ of Prohibition* on Page 6, paragraph 9 by stating the Circuit Court concluded that "discovery" could potentially resolve the subject matter jurisdiction issues raised by CAMC. Putting the Circuit Court's comment in proper context it is clear that the comments regarding discovery were in response to the arguments made regarding the 12(b)(6) motion to dismiss and Plaintiffs' counsel arguing "that's what discovery is about." *See,* Hearing Transcript, App. 39-140.

STANDARD OF REVIEW

"Issuance by the Court of an extraordinary writ is not a matter of right, but of discretion sparingly exercised." *West Virginia Rules of Appellate Procedure,* Rule 16(a); *State ex rel. Almond v. Rudolph,*

238 W.Va. 289, 794 S.E.2d 10, 15 (2016). "A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W.Va. Code 53-1-1." Syl. Pt. 1, *State ex rel. Hope Clinic, PLLC v. McGraw* (W.Va. 2021), *citing,* Syl. Pt. 2, *State ex rel. Peacher v. Sencindiver,* 160 W.Va. 314, 233 S.E.2d 425 (1977). "This Court is restrictive in its use of prohibition as a remedy.'" *State ex rel. Allstate Inc. Co. v. Gaughan,* 220 W.Va. 113, 640 S.E.2d 176 (2006) *citing, State ex rel. West Virginia Fire & Cas. Co. v. Karl,* 199 W.Va. 678, 683, 487 S.E.2d 336, 341 (1997).

> Further, this Court will grant writs of prohibition to correct only **substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law** mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.

State v. Scott, 866 S.E.2d 350, 355 (W. Va. 2021) (emphasis added), *citing,* Syl. Pt. 1, *Hinkle v. Black,* 164 W.Va. 112, 262 S.E.2d 744 (1979).

In the case at bar, the Circuit Court made no substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate. To the contrary, the Circuit Court correctly applied the applicable statutes and case law to the facts and did not exceed its jurisdiction in denying the Petitioner's Motion to Dismiss and finding the Plaintiffs' claims did not trigger the pre-suit requirements of the MPLA, thus, there is no error to correct in advance of trial. The Petitioner's reliance on case law from other states to make its argument in its Petition before this Court underscores the point that the Circuit Court correctly applied the existing laws of the State of West Virginia, and that a Writ of Prohibition is not warranted.

SUMMARY OF ARGUMENT

Based upon the statutory definition of "patient" and case law authority regarding the definition of "patient" as it relates to Medical Professional Liability, it is clear that A.C.L. was not a patient at Petitioner's health care facility. Petitioner acknowledges, by and through its Release of Information Specialist, Mary

Perry, that A.C.L. was not a patient. *See,* No Records Statement, App. 99. In determining what encompasses medical professional liability and health care, a clear and unambiguous reading of the statute, as illustrated above, and supported by case law, demonstrates that causes of action under the MPLA relate back to a "patient."[5] While the legislature has changed and expanded several definitions of the MPLA, it has not done so with the definition of "patient." The definition of 'patient' has remained unchanged since this Court decided *Ricottilli* in 1992. Petitioner asks this Court to legislate from the bench by broadening the definition of "patient."

Petitioner argues the Circuit Court committed clear legal error and exceeded its jurisdiction in denying Petitioner's Motion to Dismiss and in doing so relies on authority and arguments that it failed to address in the court below and presents for the first time in its Petition to this Court. It is patently unfair to accuse the Circuit Court of erring in its decision based upon theories and case law from foreign jurisdictions that it was never given the opportunity to consider and have no precedents in West Virginia.

"In this case, there is no patient to be found." *Doe v. Raleigh Gen. Hosp. (S.D.W.Va. 2021).* A.C.L. was a corpse and had been dead and in the labor and delivery morgue for four days when the alleged negligence occurred. His parents, who have *quasi* property rights over his body, did "not bring claims contemporaneous to or related to any tort, breach of contract, or other action involving a patient. *Id.* Like the Plaintiff in *Doe*, Respondents' action is not a medical professional liability action.

SUMMARY REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not warranted in this matter as the dispositive issues have been authoritatively decided and the facts and legal arguments are adequately presented in the briefs and record on appeal. Respondents do not believe that the decisional process would be significantly aided by oral arguments. Petitioner's assertion that there is no controlling authority as to the MPLA application to a health care

[5] "RGH gives the MPLA a reading unmoored from any connection to patients, an interpretation unsupported by the text. Moreover, such a reading would be contrary to the MPLA's purpose." *Doe v. Raleigh Gen. Hosp.,* (S.D.W.Va. 2021), *citing, Cline v. Kresa-Reahl,* 728 S.E.2d 87, 96 (2012).

provider's alleged mishandling of an infant corpse (*Amended Petition for Writ of Prohibition*, pg. 8) is not correct. In *Ricottilli,* this Court, at the urging of CAMC, held that its mishandling of the body of a six-year-old girl could not be the basis for a cause of action alleging medical professional liability. *Ricottilli,* Syl. Pt 1. Petitioner has failed to carry its extreme burden to show it has a clear right to the relief sought.

While the legislature has amended the definition section of the MPLA multiple times since 1992, it has never changed or amended the definition of "patient" as a "natural person." This Court has reviewed numerous cases and entertained multiple arguments regarding the expansion of the definition of "Medical Professional Liability" and "health care" however, in each case there was a patient to which the health care services were anchored.[6]

It is difficult to comprehend how the Petitioner can argue the Circuit Court's order denying its Motion to Dismiss is "clearly erroneous as a matter of law" and constitutes "substantial, clear-cut legal error" when it relies on authority from a foreign jurisdiction and admits in its *Summary Regarding Oral Argument and Decision* there is no controlling authority in West Virginia. *See, Amended Petition for Writ of Prohibition,* pg. 7.

ARGUMENT

The Circuit Court correctly denied Petitioner's *Motion to Dismiss Plaintiffs' Amended Complaint* and properly concluded that it had subject matter jurisdiction over Plaintiffs' claims against Petitioner and rejected Petitioner's unpersuasive argument that Plaintiffs' claims triggered the MPLA's pre-suit notice requirements. While this Court may have cautioned litigants to err on the side of compliance with the MPLA pre-suit requirements it has not mandated that all suits involving a healthcare provider must comply with said requirements. To the contrary, this Court has held "[j]ust because a cause of action involves a

[6] In *Doe v. Raleigh Gen. Hosp.* (S.D.W.Va. 2021), the Court held that the MPLA did not apply to sexual harassment claims made by an employee of the health care provider against the health care provider finding there was "no patient to be found" and the employee did not bring claims contemporaneous to or related to any tort, breach of contract, or other action involving a **patient.** Like *Doe*, in the case at bar, there is no patient as defined by the MPLA and existing case law nor did the Lester Respondents bring claims contemporaneous to or related to any tort, breach of contract or other action involving a **patient.**

healthcare provider does not make the MPLA [Medical Professional Liability Act] the exclusive remedy. *R.K. v. St. Mary's Med. Ctr., Inc.*, 735 S.E.2d 715 (2012).

This Court should reject the Petitioner's spurious comments repeatedly accusing Respondents of creative pleading in an attempt to avoid the MPLA's pre-suit requirements. Respondents made a good faith and correct determination based upon the MPLA statute and current case law that the MPLA pre-suit requirements do not apply to Plaintiffs' claims against Petitioner. As this Petitioner is aware, having successfully made the argument, this Court held in *Ricottilli* that a deceased individual does not qualify as a "patient" and therefore cannot be the basis for a cause of action alleging medical professional liability. *Ricottilli*, Syl. Pt. 1. A.C.L. was a deceased individual who's next of kin brought claims against Petitioner stemming from its negligent mishandling of his four-day old corpse. As demonstrated above, their claims are not subject to the MPLA.

A. The Writ Should Not Issue Because The Petitioner Unduly Delayed Its Petition.

A Petitioner seeking prohibition must promptly seek relief. *State ex rel. W.Va. Nat'l Auto Ins. Co. v. Bedell*, 672 S.E.2d 358, 365 (W.Va. 2008). Here, the Circuit Court entered its Order denying Petitioner's Motion to Dismiss on March 29, 2022. Petitioner unreasonably waited over two months following the entry of this Order to bring this writ. This Court has rejected as untimely delays that were much shorter than the 70-day delay here. *See, State ex rel. Progressive Classic Ins. Co. v. Bedell,* 686 S.E.2d 593 (W.Va. 2009) (delay of 43 days in petitioning constituted grounds for refusing the writ). Petitioner filed its writ only after the Respondents served discovery upon it. Further, Petitioner has made no attempt to expedite these proceedings. Under these circumstances, this Court should view this writ as nothing more than it is – an attempt at delay.

B. Plaintiffs' Claims Set Forth In The Amended Complaint Against Petitioner Are Not Claims For Medical Professional Liability And Therefore Not Subject To The MPLA Pre-suit Requirements. Thus, The Circuit Court Did Not Exceed Its Jurisdiction By Denying Petitioner's Motion To Dismiss.

As discussed above, medical professional liability is defined as 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**. That definition was later expanded by the Legislature in 2015 to include "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. § 55-7B-2(i), (emphasis added). In 2015, after *Manor Care, Inc. v. Douglas,* 234 W.Va. 57, 763 S.E.2d 73 (2014), the legislature also broadened the definition of health care. *See*, W.Va. § 55-7B-2(e), App. 94-95.

As this Court has recently articulated in *State v. Scott,* "when examining a statute to determine its meaning, this Court has held that "[t]he primary object in constructing a statute is to ascertain and give effect to the intent of the Legislature." *State v. Scott, quoting,* Syl. pt. 1, *Smith v. State Workmen's Comp. Comm'r*, 219 S.E. 2d 361 (1975). "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." *State v. Scott, quoting*, Syl. pt. 2, *State v. Epperly*, 65 S.E.2d 488 (1951). After framing the context in which it would view the Legislature's 2015 amendments to the MPLA, this Court found the "additions to the definition of "medical professional liability" combined with the broadened definition of "health care," expanded what services, and therefore, what claims, are included in the definition of "medical professional liability." *State v. Scott,* at 359. This Court went on to hold, "[a]ll of these changes illustrate the Legislature's intent for the MPLA to broadly apply to services encompassing **patient** care – not just the care itself." *Id.*

Having concluded that medical professional liability relates to and encompasses patient care, the pivotal question is whether A.C.L. was a patient. The answer to that question is no. By its own admission, Petitioner concedes that A.C.L. was not a patient of CAMC Women and Children's Hospital. *See*, No Records Statement, App. 99. Nor was A.C.L. a "patient" as defined by the MPLA. "Patient means a natural person who receives or should have received health care from a licensed health care provider under a contract, expressed or implied" W.Va. Code § 55-7B-2(m). This Court has long held that a deceased

individual does not qualify as a "patient[7]" and therefore cannot be the basis for a cause of action alleging medical professional liability. Syl. pt. 1, *Ricottilli.* Accordingly, A.C.L. was not a "patient" and thus not subject to the pre-suit requirements of the MPLA.

Respondents, in their Amended Complaint, have made, among others, claims of general negligence, negligent infliction of emotional distress, negligent mishandling of a corpse, and negligent supervision of its employee. Petitioner argues 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. *See, Amended Petition for Writ of Prohibition,* pg. 12. What the Petitioner has failed to note is that in the instances where this Court has found causes of action occurred in the context of "health care" those causes were always found to be anchored to or related to "patient" care. For instance, Petitioner cites *State v. Scott* as an example of this Court's inclusion of general negligence claims. Unlike this case, the general negligence claims in *State v. Scott.* stemmed from the care and treatment of a "patient."

Petitioner's reliance on *State ex rel. PrimeCare Med. of W.Va., Inc. v. Faircloth,*835 S.E.2d at 583,587, Blankenship, and *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) to prove this Court's inclusion of negligent inflection of emotional distress under the MPLA umbrella are similarly flawed. In *State ex rel. PrimeCare Med. of W.Va., Inc.*, the claims for negligent and intentional infliction of emotional distress stemmed from allegations of the health care facility's failure to properly screen and monitor an individual (patient) under its care. Likewise, the claims for negligent and intentional infliction of emotional distress in both *Blankenship* and *Clay* are moored to claims involving the health care facilities treatment of patients[8]. Claims for corporate negligence, including negligent failure to supervise, subject to

[7] The definition of "patient" has remained unchanged since this Court's 1992 holding in *Ricottilli.*

[8] In *Blankenship*, the claims of intentional infliction of emotional distress were directly related to the treatment of patients who allegedly treated with contaminated sutures. In *Clay*, claims for emotional distress were directly associated with the Plaintiff's treatment while he was admitted as a patient at the health care facility.

the MPLA have also been related back to patient care. *See, State v. Scott* (involving allegation of corporate negligence related to patient care).

Regarding Respondents' claim of negligent mishandling of a corpse, Petitioner asks this Court to overrule *Ricottilli* and conclude for the first time that negligent mishandling of a corpse is subject to the MPLA. In support of its argument, Petitioner cites *State v. Scott,* wherein this Court held that the 2015 Amendments to the MPLA illustrated the Legislature's intent for the MPLA to broadly apply to services encompassing patient care – not just the care itself. Once again, Petitioner fails to acknowledge that despite the holding that the 2015 amendments broaden the services encompassing patient care, those services still relate back to a patient.

Prior to its *Amended Petition for Writ of Prohibi*tion the Petitioner essentially argued that the Plaintiffs' claims were medical professional liability claims because it said so and totally ignored the fact that A.C.L. was not a "patient." *See,* Petitioner's *Motion to Dismiss*, App. 68-78 and Petitioner's *Reply in Support of Motion to Dismiss*, App. 102-105. Petitioner further argues without support of statute or case law that Plaintiffs' torts asserted against CAMC were committed within the context of rendering health care services. Noticeably absent in its motion to dismiss and its reply is any discussion or authority regarding the novel theory that the negligent mishandling A.C.L.'s of corpse was part of the health care provided to the mother. After the Circuit Court's Order holding that A.C.L. was not a patient, the Petitioner raises the argument for the first time in its *Amended Petition for Writ of Prohibition* that the mishandling of a fetal corpse is an extension of the patient care for Angela Lester and thus subject to the MPLA.

Petitioner argues that the Respondents' allegations of mishandling A.C.L.'s body was "an immediate consequence of having rendered health care to Plaintiff, Angela Lester, as the remains were the focus of care rendered to her." *See, Amended Petition for Writ of Prohibition*, pg. 15. However, the mishandling of A.C.L.'s corpse was not immediate. The undisputed facts are that A.C.L. had been stored

in the morgue and dead for four days when Petitioner negligently mishandled his corpse. Additionally, West Virginia has not recognized that injury to the fetus is injury to the mother.[9]

A closer look at *Ricottilli* demonstrates that although it involved an issue regarding a statute of limitations, the circumstances are similar to the issue in this case. In *Ricottilli*, the Plaintiffs' six-year-old daughter, Tara, was admitted to CAMC as a patient. She tragically died within a matter of hours after her admission to CAMC. Her father authorized CAMC to perform an autopsy on her body which was performed the next day. Caroline Ricottilli, individually and in the capacity as representative of her deceased daughter, filed a lawsuit against defendant CAMC predicated on the tort of outrageous conduct or negligent infliction of emotional distress and medical professional negligence. This Court held that the corpse of a former patient cannot be the basis for a cause of action alleging medical professional liability because a deceased individual is not a patient. Respondents have made absolutely no allegations of medical professional liability regarding the patient care of Angela Lester. Nor did they make any medical professional liability claim regarding A.C.L. This was not the product of creative pleading but rather based upon the fact that A.C.L. was not a patient. He had unfortunately been deceased for four days (three days longer than Tara) when his corpse was negligently mishandled by the Petitioner.

Petitioner argues that the Circuit Court erred in relying on *Ricottilli* as "health care" is an issue in this case because A.C.L. was part of his mother. As noted above, this argument was not made by Petitioner in the Circuit Court. Petitioner cites *CHCA Bayshore, L.P. v. Ramos,* 338 S.W.3d 741, 2012 Tex. App. LEXIS 5780 (1st Dis. 2012), a case from a foreign jurisdiction where pre-suit requirements have been held to apply to actions involving the handling of fetal remains to support this new argument. There are, however, critical differences in the facts and circumstances between *CHCA Bayshore, L.P.* and this case. In *CHCA Bayshore, L.P.* the fetal remains at issue were obtained as a result of a dilation and curettage procedure performed on the mother. The specimen was sent to pathology who then released the wrong

[9] To the contrary, W.Va. Code § 61-2-30 recognizes an embryo or fetus as a distinct unborn victim of certain crimes of violence against a person.

specimen to the Ramos for burial. Thus, the crux of the allegations was the health care facility's failure to properly handle, identify, monitor, and dispose of a specimen resulting from a medical procedure. The facts of this case are in stark contrast to those in *CHCA Bayshore, L.P.* In this case, A.C.L. was a fully formed fetus that was the product of a stillbirth, not a medical procedure. He was not a specimen and was not sent to pathology for testing, but rather he was a corpse that was stored in Petitioner's morgue for four days prior to the allegations of mishandling. Therefore, Petitioner's reliance on *CHCA Bayshore, L.P.* is misplaced.

Accordingly, the Circuit Court, having subject matter jurisdiction over Respondents' claims against Petitioner, did not error in denying *Petitioner's Motion to Dismiss* and holding that the pre-suit requirements of the MPLA did not apply. Ergo, a writ of prohibition is not warranted, and the *Amended Petition for Writ of Prohibition* should be denied.

Should this Court be inclined to overturn *Ricottilli* and find the MPLA pre-suit requirements apply, Respondents respectfully request they be remanded to the Circuit Court and given opportunity to comply with the pre-suit requirements.

C. Whether A Cognizable "Privacy" Claim Exists Exceeds The Scope Of Petitioner's "Question Presented" Is An Interlocutory Appeal And Should Be Disregarded.

In its Argument, Section C., Petitioner asks this Court to hold that the Respondents have not made a cognizable "privacy" claim. This issue exceeds the scope of the Question Presented by the Petitioner to this Court. Specifically, the only question presented here is as follows:

> Whether the Circuit Court of Mingo County, West Virginia (the "Circuit Court") committed clear legal error and exceeded its jurisdiction by 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 failed to comply with the MPLA's pre-suit notice requirements.

Whether a cognizable privacy claim exists is clearly not within the scope of the Question Presented and should be disregarded. Petitioner identifies "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. *See, Amended Petition for Writ of Prohibition*, pg. 10. The Petitioner inappropriately attempts to use the vehicle of a writ of prohibition to have this Court consider an interlocutory appeal.

Respondents made no claim of HIPPA violations in their Amended Complaint. Moreover, this Court has held that common law tort claims based upon the wrongful disclosure of medical or personal health information are not preempted by the Health Insurance Portability and Accountability Act of 1996. *R.K. v. St. Mary's Medical Center, Inc.*, 735 S.E.2d 715 (2012), Syl. pt. 3. Further, Respondents' common law privacy claims do not relate to patient care but rather the transporting and handling of a corpse. As such, Petitioner's invitation to determine whether a privacy claim exists must be refused.

CONCLUSION AND PRAYER

For the foregoing reasons, the Petition for Writ of Prohibition should be refused.

Respectfully submitted,

ANGELA LESTER AND
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Respondents

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July, 2022, a true and accurate copy of the foregoing **"Respondents Angela Lester and Denny Seth Lester's Response to Amended Petition for Writ of Prohibition"** was hand delivered to Respondent, The Honorable Miki Thompson, Judge and to counsel of record via email as follows:

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