WEST VIRGINIA SUPREME COURT OF APPEALS

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NICHOLAS A. GHAPHERY, D.O.,	:	
As Personal Representative of	:	
the Estate of Austin Ghaphery,	:	
Plaintiff Below, Petitioner,	:	
	:	
v.	:	**No. 24-52**
	:	
WHEELING TREATMENT CENTER,	:	
LLC and JOHN SCHULTZ, M.D.,	:	
Defendants Below, Respondents	:	

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

l. The Circuit Court erred in granting Defendants' Motion for Summary Judgment, and the Intermediate Court of Appeals (hereafter "ICA") erred in affirming said judgment, by finding that Respondents owed no duty to conduct Austin's pre-admission initial assessment (hereafter "initial assessment") as required by the standard of care provided in the MPLA.

2. The Circuit Court erred in granting Defendants' Motion for Summary Judgment, and the Intermediate Court of Appeals erred in affirming said judgment, by finding that Respondents owed no duty to Austin to conduct a "suicide risk assessment" in accordance with the standard of care required by the MPLA, which Respondents undertook to do while providing Health Care Services to Austin.

3. The Intermediate Court erred in dismissing Petitioner's case upon affirmance of the Trial Court's Ruling finding that the MPLA imposed no duty upon respondents, instead of remanding it back to the Circuit Court of Ohio County to give Petitioner an opportunity to seek to amend his complaint under WV Rules of Civil Procedure 15 and seek relief under common law negligence under the dictates of *Robertson v. LeMaster*, 171 W.Va. 607, 301 S.E.2d 563 (1983).

STATEMENT OF THE CASE

Prior to filing this action Petitioner served a Notice of Claim upon each of the Respondents together with Certificates of Merit in accordance with the MPLA's pre-suit requirements provided for at W.Va. Code §55-7B-6(b). Thereafter the Complaint was filed

stating a cause of action entitled Action for Medical Professional Liability Resulting in Wrongful Death (JA 1, Vol. 1).

The evidence adduced during the discovery phase of this action demonstrates that in the event Petitioner had been allowed to present his case to a jury, he was prepared to establish the following facts at trial : (1) Austin finished college and was awarded a B.A. degree from West Liberty University during the summer of 2017; (2) on July 13, 2017 Austin's girlfriend called 911 from their apartment after Austin was not making sense with his words, had become non-responsive and his lips were turning blue, she advised the responding patrolman "this is the third time this has happened since November," that Austin's Mother went to Austin's apartment to help out, and that the patrolman and the EMT believed Austin was under the influence of opiate medication (JA 397-98, Vol. 2); (3) an initial appointment was made with Dr. Schmitt, Austin's primary care physician, who saw Austin five days after the 911 incident based on Mrs. Ghaphery's concern about Austin's drug use, but Austin denied having a drug problem (JA 401-402, Vol. 2); (4) in late September 2017, Austin finally admitted to his father (Dr. Ghaphery) that he did have a drug problem, asked for help with his drug problem, and Dr. Ghaphery called Wheeling Treatment Center (hereafter "WTC") to set up an appointment for his son to be evaluated (JA 405-410, Vol. 2); (5) on September 28, 2017 Austin appeared for his appointment at WTC for help with his drug problem, and at that time, counselor Coen-Pickens determined Austin did not meet the criteria for treatment on the basis that Austin's urine drug screen was not positive for opiates, and that Austin was not demonstrating signs of withdrawal (JA 413, Vol. 2); (6) the urine drug screen given to Austin was not capable of detecting the presence of fentanyl (JA 421-423, 426-428, Vol. 2) such that Austin could have used fentanyl prior to his visit to WTC, not tested positive for opiates, not shown symptoms of withdrawal, and still had an opioid use disorder; (7) after determining that Austin was not an appropriate candidate for admission

based only on the absence of a positive urine test for opiates and the absence of a visible display of withdrawal symptoms, Ms. Coen-Pickens made no further initial assessment of Austin for appropriateness of admission to the MAT Program despite the facility's own Patient Screening Procedure which expressly required staff to complete a Patient Screening Form designed to elicit information necessary to appropriately conduct an initial assessment (JA 435-439, Vol. 2); Ms. Coen-Pickens also failed to comply with West Virginia state regulations requiring the performance of an initial assessment to determine admission eligibility by using accepted medical criteria (JA 441, Vol. 2) including the failure to make any determination of Austin's use of substances of abuse, current substance use disorder, length of substance use disorder, readiness to participate in treatment (JA 443, 446-447, 449-450, 453, 458, Vol. 2); following Austin's Initial Assessment and the Respondents' determination that Austin was not eligible for the MAT Program he was released from WTC (JA 461, Vol. 2); 36 days after WTC Staff and Dr. Schultz determined Austin was not eligible for admission to the MAT Program Austin was found dead lying on the hallway floor outside his bedroom in his father's home. His death was determined on autopsy to have resulted from a drug overdose due to fentanyl, nor-fentanyl, heroin, amphetamines, and cocaine intoxication (JA 167, Vol. 1).

Based on his consideration of the foregoing facts, Petitioner's Expert, Dr. Santoro (an addiction medicine specialist; JA 19, 46, Vol. 1), testified at deposition that Ms. Coen-Pickens and Dr. Schultz breached the applicable standard of care by failing to properly conduct Austin's initial assessment to determine whether he met the criteria for admission to the MAT Program. (JA 426-430, Vol. 2).

The Respondents asserted below they were entitled to summary judgment (notwithstanding their alleged failure to meet the standard of care in conducting Austin's initial assessment) on the ground that because Austin was not ultimately admitted to the MAT Program,

no healthcare provider-patient relationship was formed such as to give rise to a duty the breach of which would justify an action under the MPLA. (JA 270 Vol. 1; JA 488, JA 491, JA 493, Vol. 2). The Respondents' "no duty" argument is premised on their contention that "no physician-patient relationship was formed and at no time did the Defendants, either individually or collectively, agree to provide any medical service to Austin Ghaphery". (JA 493, Vol. 2). However, the ICA decision of November 16, 2023 does in fact find that health care services were provided to Austin in connection with his initial assessment for admission to the MAT program, but finds that because he was not "admitted" for actual treatment at Respondent's facility, he never became a "patient" of Respondent's, and consequently had no express or implied contract with Respondents creating a healthcare provider-patient duty of care under the MPLA.

As a separate theory of liability, Petitioner pursues a claim against Respondents under the MPLA alleging that Respondents failed to meet the requisite standard of care in assessing Austin's suicidality. Here, Petitioner contended below that in the event an assessment of Austin's suicidality had been undertaken and conducted in accordance with the applicable standard of care, arrangements would have been made for Austin to be admitted to a psychiatric facility where his depression, suicidal ideation, and substance use disorder could have been appropriately evaluated and treated; and such intervention, more probably than not, would have prevented Austin's death by drug overdose 36 days after his visit to WTC. Respondents sought summary judgment on this theory of liability based upon the argument that because no healthcare provider-patient relationship existed between Austin and Respondents the Circuit Court could determine as a matter of law that Respondents were under no duty to Austin at the time they claim to have conducted his suicide risk assessment. In granting summary judgment on this issue the Circuit Court adopted Respondents' legal position regarding the absence of a healthcare provider-patient relationship between Austin and WTC/Dr. Schultz. (JA 886-888 at 887, Vol. 3).

In affirming the Circuit Courts order, the ICA found that Austin was being provided "health care services," while said suicide assessment was conducted, but agreed with the Circuit Court that Respondents had no duty because Austin was not a patient, and consequently had no express or implied contact creating a duty of due care in the healthcare provider-patient context.

Questions related to the extent and nature of Austin's suicidality, and what, if anything, was done by Respondents for purposes of assessing such suicidality are the subject of conflicting testimony such as to clearly present genuine issues of material fact. Further, although, Austin's patient record is completely devoid of any documentation supporting the conclusion that any suicide risk assessment was conducted during his visit to the WTC, both Ms. Coen-Pickens and Dr. Schultz claimed to have performed an assessment of Austin's suicidality (JA 418, 479, Vol. 2).

Evidence related to the legal question of whether Respondents were under a duty to assess Austin's suicidality in a manner consistent with the standard of care includes the case note written by Ms. Coen-Pickens after Austin's visit which refers at least 11 times to Austin as the "Pt,", meaning "Patient". Said case note provided as follows: "concern was noted that Pt was having suicidal ideations and had a plan to follow through with utilizing a gun"; that "Pt reported being depressed"; that a discussion was had with the clinical director and medical director about the patient being "in need of a further assessment elsewhere"; and that calls were made to the "Patient's emergency contact to inform the clinic was requesting further evaluation" but, that no one was able to be contacted (emphasis added) (see JA 460, Vol. 2). Deposition testimony also shows that during his visit to WTC Austin placed a telephone call to his father stating "Dad, they want to admit me to Northwood. I saw the counselor, but I have to go see the doctor next."

Petitioner's expert psychiatrist/addiction specialist, Dr. Goldberg (JA 31, Vol. 1), testified at deposition that once the counselor reported her concern about Austin's suicidality to

Dr. Schultz, the standard of care in the field of addiction medicine required Dr. Schultz to conduct a proper suicide risk assessment; and that when a suicide risk assessment supports the conclusion that a person who presents to a drug treatment is at an elevated risk for harm, the standard of care requires the physician to make a referral to a psychiatric facility for further assessment (JA 465, Vol. 2). Petitioner was also prepared to offer proof at trial that in the event an appropriate suicide risk assessment had been conducted, such assessment would have demonstrated many factors which placed Austin at an elevated risk for harm. These risk factors include that: (1) Austin admitted he was having suicidal ideations; (2) Austin admitted to having a lethal plan to use a gun; (3) Austin appeared at WTC for help with a drug use problem; (4) Austin had been diagnosed with a psychiatric disorder; and (5) the presence of multiple risk factors combined in a single person placed Austin at an enhanced risk for harm (JA 461, 465-467, Vol. 2). While the Respondents argued below that they were under no duty to take any steps to arrange for Austin's admission to a psychiatric facility, the expert opinion evidence was that given the many risk factors present at the time of Austin's visit to WTC, an appropriate assessment of Austin's suicidality was required by the standard of care; and such assessment, if properly conducted, would have resulted in the determination that Austin's elevated risk for harm required a referral to a psychiatric facility where his suicidal ideation with a plan, substance use disorder, and depression could be appropriately evaluated and treated (JA 468-469, Vol. 2).[1]

Both the WTC counselor and Dr. Schultz acknowledged that their concerns about Austin resulted in their decision to undertake a suicide risk assessment. However, in opposition to Petitioner's MPLA claim premised upon the alleged failure to conduct such suicide risk assessment in a manner consistent with the applicable standard of care, Respondents argued that

[1] Defendants mischaracterize Petitioner's evidence as to the required standard of care as mandating involuntary commitment. The testimony, however, was that the required referral to a psychiatric facility certainly included a voluntary admission; and that neither Austin nor his Father resisted such admission after WTC staff told Austin that he needed to be evaluated at Northwood.

"the Defendants had no duty to seek commitment of Austin Ghaphery and the evidence shows he would not have qualified if he they had…on the basis that …he was not having a "psychiatric emergency", was not mentally ill, and was not deemed likely to commit harm to himself. (JA 493, Vol. 2).

By Order of July 27, 2021 the Court not only denied Respondents' Motion for Summary Judgment due to the existence of genuine issues of material fact, but also expressly found that "some of Defendants' allegations and conclusions are inconsistent with the records in the Court file and with West Virginia civil law." (JA 622-623, Vol. 2).

Following the Circuit Court's denial of the Respondents' Amended Motion for Summary Judgment, Petitioner moved the Circuit Court for a pre-trial ruling that Austin was a "patient" for purposes of bringing the instant action under the MPLA (JA 632-637, Vol. 2). Respondents opposed the motion and reiterated their contention that "no physician-patient relationship was formed and at no time did the Defendants either individually or collectively, agree to provide *any* medical service(s) to Austin Ghaphery." (JA 699-704, Vol. 3). Petitioner replied by asserting that Austin must be found to be a "patient" of the Respondents because he was a "person" who received "healthcare" from a "healthcare provider"; and that once a healthcare provider engages in affirmative conduct such as to constitute "healthcare", he/she comes under duty to provide such "healthcare" in accordance with the accepted standard of care as provided for under W.Va. Code §55-7B-2(m); and 55-7B-2(e)(1) and (2) (JA 717-722, Vol. 3). Notwithstanding the extensive briefing on Petitioner's request for a pre-trial ruling that Austin was a "patient" for purposes of bringing the instant action under the MPLA the Circuit Court never ruled on that motion.

Two weeks before trial, however, Respondents filed a "Bench Brief" whereby they requested the Circuit Court to find that they owed no duty to Austin sufficient to support a claim

under the MPLA (JA 823-828, Vol. 3). Petitioner filed a responsive memorandum reminding the Circuit Court that the Respondents "no duty" defense had already been argued in their amended motion for summary judgment, considered, and denied (JA 263, Vol. 1). Petitioner also advised the Circuit Court that the issues pertaining to Respondents' "no duty" defense had previously been briefed in conjunction with Petitioner's Motion for Pre-trial Ruling that Austin Ghaphery was a "Patient" for Purposes of Bringing the Instant Action Under the MPLA (JA 263, Vol. 1; JA 632, Vol. 1; JA 699, JA 717, Vol. 3) and also discussed multiple other pre-trial filings made in connection with the admissibility of exhibits and the appropriateness of proposed jury instructions for use in the case (JA 833-839, Vol. 3).

By Order of Court dated September 21, 2022 (5 days before trial) the Circuit Court entered its Revised Order granting Respondents' motion for summary judgment (JA 886-888, Vol. 3). The essence of the Circuit Court's ruling is its conclusion that no patient-healthcare provider relationship was established between Austin and Respondents upon which liability can be based. (*Id.*) In reaching its decision the Circuit Court stated that:

> "the critical fact is that Austin Ghaphery was denied admission to the Wheeling Treatment Program. Therefore, absent a healthcare provider relationship, there was no duty or law requiring that Wheeling Treatment Center had to accept Austin, either voluntarily or involuntarily, to its inpatient psychiatric treatment facility. When the Wheeling Treatment Center denied the admission to the facility, it had no reason or legal duty to attempt to commit Austin voluntarily or involuntarily. Thus the Defendants in this case had no duty to attempt to prevent Austin's death by opioid overdose 21 days after he was denied admission to the program." (*Id.* at JA 887, Vol. 3).

The Circuit Court's Order uses verbatim language adopted from Respondents' "Bench Brief"; but the incongruity with Respondents' admitted evaluation of Austin (who the Circuit Court acknowledged was technically a patient while he was there for the initial assessment), and the Court's finding that no healthcare provider-patient relationship was established was never explained.

The ICA affirmed the Circuit Court's grant of summary judgment to Respondents by Order dated September 21, 2022 (JA 886, Vol. 3).

Following the ICA's affirmance of the Circuit Court's Order granting summary judgment to Defendants, Petitioner filed the instant appeal.

SUMMARY OF ARGUMENT

Assignment of Error No. 1: Respondents' owed a duty to conduct Austin's pre-admission initial assessment in accordance with the standard of care provided for under the MPLA

In finding that Respondents owed no duty of care to Petitioner, the ICA, as well as the Court below, failed to separate the "duty of care" required for the initial assessment (the diagnostic portion of the health care provided) – from what defendants have continuously misrepresented below and on appeal to be the issue presented – Respondents "duty to admit" Austin to its MAT treatment program. But at no time below, or on appeal, has Petitioner ever taken the position that Respondents had any "duty to admit" Austin to its MAT Program of treatment. Rather, it has been Petitioner's contention at all times, and continues to be, that having made an appointment for Austin for his drug problem, by having him sign an intake form, and undergo an initial assessment that requires adherence of medical criteria as mandated by Respondents own internal policies, and State Law, that Respondents had a duty to meet that standard of care. "Healthcare" under the MPLA includes any "medical diagnosis or act, service or treatment performed or which should have been performed by any healthcare provider to a patient during a patient's medical care." W.Va. Code §55-7B-2(e)(1). The initial assessment of Austin conducted by WTC staff and Dr. Schultz was such as to constitute "healthcare" under the terms of the MPLA. W.Va. Code §55-7B-2(e)(1) When a healthcare provider engages in affirmative conduct such as to constitute "healthcare", such healthcare provider comes under a

duty to provide such "healthcare" in accordance with the accepted standard of care provided for under the MPLA. A "patient" is a person who received "healthcare" from a "healthcare provider" under an express or implied contract. W.Va. Code §55-7B-2(m). At the time Austin receives his initial assessment by WTC staff and Dr. Schultz he was a "patient" receiving "healthcare" from a "healthcare provider" under an express or implied contract. W.Va. Code §55-7B-2(m). At the time WTC staff and Dr. Schultz provided healthcare to Austin by conducting an initial assessment to determine whether he met the criteria for admission to the MAT Program, they were under a duty to conduct such initial assessment in accordance with the accepted standard of care provided in the MPLA, and the Circuit Court's finding that the Respondents did not have a duty to conduct its initial assessment in accordance with the standard of care provided in the MPLA – because Austin was ultimately not admitted to the MAT Program – is erroneous.

Assignment of Error 2: Respondents owed a duty to conduct Austin's suicide risk assessment in accordance with the standard of care provided for under the MPLA.

Likewise, the ICA's finding that Austin was not a "patient" for purposes of any suicide risk conducted by Dr. Schultz is inconsistent with the MPLA. Dr. Schultz admits to having conducted a suicide risk assessment of Austin independent of his initial assessment of Austin for MAT treatment. Once he undertook responsibility for providing such heath care, Austin became his patient as a matter of law. In granting the Motion for Summary Judgment, and in affirming the Circuit Court's dismissal, both courts ignored this clear distinction, by focusing only on a "duty to admit" which was never advanced by Petitioner. At the time WTC staff and Dr. Schultz conducted Austin's suicide risk assessment he was a "patient" receiving "healthcare" from a "healthcare provider" under an express or implied contract. W.Va. Code §55-7B-2(m). At the time WTC staff and Dr. Schultz provided healthcare to Austin by conducting any suicide risk

assessment to determine whether he was at enhanced risk for self-harm, they were under a duty to conduct such suicide risk assessment in accordance with the accepted standard of care provided under the MPLA.

The Circuit Court's finding and ICA affirmance that the Respondents did not come under a duty to conduct Austin's suicide risk assessment in accordance with the standard of care provided in the MPLA is erroneous.

Assignment of Error 3: ICA erred in not remanding the case for possible amendment of the Complaint.

The ICA erred in not remanding the case for possible amendment of the Complaint to assert common law negligence claim under the dictates of *Robertson v. LeMaster*, 171 W.Va. 607, 301 S.E.2d 563 (1983). It has long been WV law that "duty" is defined by "foreseeability", and the appropriate remedy, even if this Court affirms the ruling of the ICA, is not to dismiss this case, but remand it to the Circuit Court for further proceedings, including, possible amendment of the Complaint by Petitioner, pursuant to the West Virginia Rules of Civil Procedure.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

While Petitioner, Nicholas A. Ghaphery, D.O. as Personal Representative of the Estate of Austin Ghaphery, (and father of the decedent), believes that the facts and legal arguments for his instant appeal are adequately presented in his brief; he nonetheless believes the decisional process would be significantly aided by oral argument, given that the issue raised in this appeal fundamentally impacts the public policy of the State of West Virginia in battling the Opioid Epidemic adversely affecting many West Virginia citizens and families. While the ICA recognized the instant action as a "tragic case," (JA 997, Vol. 3), the Intermediate Court's Decision, if allowed to stand, carves out an exception for Medication Assisted opioid treatment

facilities in the State of West Virginia from having to comply with medical professional standards of due care required by state and federal regulation in assessing a person for admission to its facility for medication assisted treatment.

ARGUMENT

I. Standard of Review

Standard of Review, the review of the Intermediate Court's Affirmance of the trial court's grant of Motion for summary Judgment is *de novo* Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

II. Assignment of Error No. 1: Respondents' owed a duty to conduct Austin's pre-admission initial assessment in accordance with the standard of care provided in the MPLA

It is important to recognize that this is not a case where WTC staff met Austin at the door and sent him home before providing any healthcare services. Instead, Austin went into the facility at the time of his appointment, filled out the initial patient information form, provided a urine sample, and was taken back to the assessment room where he was examined by a WTC counselor who noted "Austin came in today for his initial screening." (JA 460-461, Vol. 2)[2] Indeed Respondents' admitted in their pretrial memorandum that Dr. Schultz and Counselor Coen-Pickens were acting within the scope and course of their employment by WTC "while evaluating the eligibility of the decedent, Austin Nickolas Ghaphery for admission to the opioid treatment program offered at Wheeling Treatment Center, LLC." (JA 85-93 at P. 86, Vol. 1). In considering whether Respondents owed a duty of care when conducting Austin's evaluation and

[2] The WTC counselor who conducted Austin's pre-admission initial assessment used the term Pt (the abbreviation for patient) in describing Austin's relationship to the facility no less than 11 times in her two paragraph Case Note memorializing her interaction with Austin (JA 460-461, Vol. 2).

assessment, this Court may take into account the Clinical Director's deposition testimony where she acknowledged that WTC had in place a Patient Screening Policy requiring every person presenting for treatment services to be initially assessed for appropriateness of admission; and also testified that in conducting Austin's initial assessment, Counselor Coen-Pickens was required to adhere to the screening policy. (JA 849-50, Vol. 3; JA 436, Vol. 2).

Moreover, in giving her deposition, WTC's Clinical Supervisor acknowledged that the State Regulations pertaining to the operation of a MAT Program provide that "the determination of admission eligibility shall be made using accepted medical criteria such as those listed in the latest approved version of the Diagnostic and Statistical Manual for Mental Disorders" and that the WTC staff were required to comply with that provision when conducting an initial assessment. (JA 853, JA 855, Vol. 3).

Although Respondents admit to conducting an initial assessment to determine whether Austin met the criteria for admission to the MAT Program, they argued below that they owed no duty to meet any standard of care in performing such assessment on the basis that Austin was not ultimately admitted to the MAT Program and therefore not a "patient." (JA 699, Vol. 3; JA 830, Vol. 3). Upon adopting the Respondents' "no duty" defense, the Circuit Court acknowledged that Austin was "technically a patient" while at the facility for his pre-admission initial assessment, but that despite his receipt of healthcare services as a "patient," somehow no healthcare provider-patient relationship was established sufficient to require Respondents' adherence to the standard of care provided for in the MPLA (JA 866-888 at P. 887, Vol. 3). The inherent conflict between the finding that Austin was a "patient" when WTC provided healthcare by assessing his eligibility for admission to the MAT Program, but was not a "patient" such as to give rise to a duty requiring the Respondents to abide by the required standard of care in

conducting that assessment highlights why the Circuit Court's adoption of Respondents' "no duty" defense should be found to constitute error.

The ICA opinion, relying on *Minnich v. MedExpress Urgent Care, Inc.-W. Virginia*, 238 W. Va. 533, 796 S.E.2d 642 (2017), agrees with petitioner that the pre-admission assessment screening process "was presumably 'health care' within the meaning of the MPLA." (JA 995, Vol. 3) Yet, the ICA found Austin to not be a "patient" under the MPLA, reasoning that

> . . . any health care that was provided to him during the pre-admission assessment was incidental to determining whether he was eligible for enrollment in a special purpose, medication assisted treatment program and was not made under an implied or express contract to provide diagnosis or treatment. (JA 995-996, Vol. 3).

The ICA also reasoned that because the WTC "expressly told" Austin that he was ineligible for admission to WTC's MAT program that declination for admission also precluded a physician-patient relationship, and thus there was no contract nor corresponding duty. (JA 996, Vol. 3).

The ICA relied on *Gooch v. W.Va. Dept. of Pub. Safety*, 195 W. Va. 357, 465 S.E.2d 628 (W. Va. 1995) to support its finding that Austin was never a "patient" under the MPLA because of the apparent lack of an express or implied contract between Austin and the WTC. In *Gooch* a State Trooper arrested the driver of a motor vehicle and took the driver to a hospital to have his blood drawn to determine if he was DUI. *Id.* at 632. The Trooper provided a medical technologist with a kit to perform the blood test, and after drawing the blood the technician completed a form contained in the kit and gave both the form and kit (with the blood) back to the Trooper. (*Id.* 632).

Importantly the evidence in *Gooch* was that the hospital did not perform any type of analysis on the blood when the technologist's job duties did "not include making a patient assessment for medical treatment", and the arrestee was never even seen by a physician. (*Id*. at

632). The driver died of pneumonia a few days later and thereafter his personal representative brought an action against the hospital for failure to recognize the decedent's medical condition while at the hospital for the blood alcohol test. (*Id*. at 637).

Upon observing that a medical negligence claim must be predicated upon the existence of a healthcare provider-patient relationship, the *Gooch* court found as a matter of law that "a hospital-patient relationship cannot be created merely by virtue of an arrestee being presented to a hospital for a drug and alcohol blood test. (*Id.* at 639). It is noteworthy that the *Gooch* court's analysis of the question of whether a hospital-patient relationship had been established focused on the issue of whether the decedent received or should have received healthcare from the hospital as provided for under W.Va. Code §55-7B-2(e). Based on the Court's determination that there existed no evidence in the record that the decedent had received or should have received healthcare, trial court's grant of summary judgment in favor of the hospital was upheld. (*Id*. at 640).

The ICA opinion, though, analogized to *Gooch*, not for purpose of showing that Austin, like the decedent in *Gooch*, did not receive "health care" under the MPLA. Indeed, in contrast as noted, the ICA found that Austin did receive health care from WTC during his pre-admission assessment. (JA 995, Vol. 3). Rather, the ICA analogized to *Gooch* because:

> The *Gooch* Court noted that the health care provider in that case had no reason to believe Mr. Gooch was ill, and that no express or implied contact to provide health care existed . . . This case has similarities to *Gooch* because Austin was also showing no signs that he needed opioid treatment. Austin did not appear intoxicated, was not suffering withdrawal symptoms, denied illicit drug use, was not in addiction recovery, and told WTC staff he was only there at the behest of his parents. Dissimilar to *Gooch*, but in support of WTC and its Medical Director, Austin was told that he did not meet the criteria for admission, and he was not a patient. (my emphasis) (JA 996, Vol. 3).

Yet, it is the statute (MPLA) that determines duties and not the ICA's choice of facts that are in dispute, which contributes to the inconsistency of the ICA's opinion. For example, the ICA

Opinion adopts Respondents' version of the facts that Austin showed no signs that he needed opioid treatment, where Respondents did not obtain any history of drug abuse as required by their internal policies and state regulations. (*supra*, 2-3). The ICA adopted Respondents' version that Austin was not suffering withdrawal symptoms, where Respondents did not test him for fentanyl, the substance that eventually caused his death. (*supra*, 2). The ICA adopts Respondents' version of the fact that Austin denied drug abuse, which is in dispute. (*supra*, 2-3). The ICA adopts Respondents' version of the fact that Austin told WTC staff that he was only at Respondents' facility at the behest of his parents, which is in dispute. (*supra*, 2-3). Yet, the crux of the ICA's opinion regarding lack of Austin's "patient" status is that WTC declined to treat Austin after the pre-admission screening and that there was "no evidence presented that WTC and its Medical Director, provided specific medical advice, or gave a specific diagnosis to Austin" which, accordingly, rendered no express or implied contract between Austin and WTC and its Medical Director. (JA 996-997, Vol. 3).

While the ICA opinion did not discuss how the decedent in *Gooch* did not receive health care, Austin's situation is distinctive from the plaintiff in *Gooch*. The decedent in *Gooch*, unlike Austin, did not arrive at the hospital in accordance with an appointment, did not complete intake forms, did not meet with a doctor, and did not receive anything akin to the types of assessments Austin underwent at WTC – such as urinalysis and an evaluation for suicide risk. Rather, the medical technologist at the hospital only drew the decedent's blood and completed a form contained in the blood alcohol kit provided by the arresting officer before giving the kit, form, and blood sample back to the officer – the hospital provided no blood analysis and did not receive the test results. *Gooch*, 195 W. Va. at 361, 465 S.E.2d at 633.

Even though the ICA found that Austin received "health care" under the MPLA at WTC, the ICA's determination that Austin lacked patient status because WTC and its Medical Director

expressly disclaimed a physician-patient relationship after the pre-admission assessment does not take into account the existence of such a relationship during the assessment period. Making an appointment with WTC, completing intake forms that disclosed medical information, undergoing assessments by WTC staff and Dr. Schultz regarding opioid addiction and suicide risk, and completing a urine screen constituted not just "health care" (as the ICA found) but also evidences an implied contract for health care services during the pre-admission phase. While Respondents disclaimed the physician-patient relationship after the assessment phase, during Austin's pre-admission assessment the WTC staff's Case Note on Austin referred to Austin as a "pt" (patient) eleven times. (JA 460-461, Vol. 2).

The ICA opinion also backtracks on its finding that Austin received "health care" when it states that "WTC and its Medical Director dispensed limited heath care during Austin's pre-admission initial assessment." (JA 995, Vol. 3)(emphasis added) The ICA based its finding on *Minnich*, where the Supreme Court of Appeals found that the *Minnich* plaintiff received health care during his initial assessment at a MedExpress before falling in the examination room after his initial intake at the facility. *Minnich*, 238 W. Va. at 538, 796 S.E.2d at 647. The *Minnich* Court stated:

> Integral to the diagnosis and examination of a patient by a medical professional is the component of the health care visit that customarily precedes the actual physical examination. Absent the intake aspect of a patient's visit to a health care provider, the examination would not be as properly focused or as likely to result in a correct diagnosis. Consequently, we have little difficulty viewing the questioning by Ms. Hively [health care provider] of the Minnichs [plaintiff] and the taking of vital signs that occurred prior to the fall as transpiring during the course of or "within the context of the rendering of medical services." *Gray*, 218 W.Va. at 570, 625 S.E.2d at 332. The petitioner's attempt to exclude any injuries sustained by a patient before a doctor or nurse enters the examination room, but after a medical history and intake have been taken, from the reach of the MPLA is unavailing.

Id. Austin, like the *Minnich* plaintiff, completed intake forms and provided information about his physical and mental health history (such as the medications he was taking). Austin also underwent a urine screening and met with a doctor, Dr. Schultz. Thus, the ICA, per *Minnich*, correctly found that Austin received "health care" under the MPLA. Further the *Minnich* court provides no qualifiers about the degree of health care that the *Minnich* plaintiff received, "health care" was "health care". *Id.*

While finding the administration of health care to Austin, the ICA opinion also states that there was no evidence that WTC or its Director provided specific medical advice or gave a specific diagnosis to Austin. Such a finding by the ICA is contrary to its earlier finding that Austin did receive health care. Further, the assessment (i.e. health care) provided by Respondents was a diagnosis of Austin not being a candidate for their MTA program.

Lastly, the ICA opinion distinguishes for the purposes of the MPLA the "patient" status of the *Minnich* plaintiff from Austin by stating that the health care provided in *Minnich* never expressly disclaimed a physician-patient relationship. (JA 996, fn.7, Vol. 3) Again, said disclaimer occurred after the initial assessment of Austin. Also, the *Minnich* Court did not expressly analyze whether the plaintiff in that case fell under the definition of "patient" for the purposes of the MPLA, only analyzing the definitions of "health care provider" and "health care" described in the MPLA. *Minnich*, 238 W. Va. at 536-538, 796 S.E.2d at 645-647.

Notwithstanding the Circuit Court's and ICA's reasoning that the "critical fact" supporting its conclusion that no healthcare provider-patient relationship was established with Austin was that he was ultimately denied admission to the MAT Program, the question of whether Austin was or was not admitted to the MAT Program does not determine his status as a "patient" for purposes of pursuing a claim arising out of the healthcare services which were actually provided to him by Respondents while he was at the facility.

Under the MPLA "patient" means "a natural person who receives or should have received healthcare from a licensed healthcare provider under a contract, express or implied." W.Va. Code §55-7B-2(m). Thus, the issue determinative of Austin's status as a "patient" is whether he received "healthcare" when was seen by WTC staff and Dr. Schultz for purposes of undergoing an initial assessment to determine his eligibility for admission to the MAT program. The MPLA defines "healthcare" as "any act, service or treatment provided under…a healthcare facility's plan of care, medical diagnosis or treatment." (my emphasis) W.Va. Code §55-7B-2(e)(1). In coming to its conclusions, the ICA agreed that Austin was provided "health care."

The entire purpose of conducting the initial assessment which is required under WTC's own screening policy (JA 436, Vol. 2), C.S.R. 69-11-21.2[3] (JA 855, Vol. 3), and the standard of care in the field of addiction medicine, is to determine whether the person undergoing the assessment meets the criteria for admission to the MAT program (i.e. whether the assessed individual meets the diagnosis for opioid use disorder, is diagnosed as "high risk", or is otherwise diagnosed as meeting the criteria for admission to the MAT Program. C.S.R. 69-11-21.8). The rationale underpinning the requirement to conduct an initial assessment in a manner consistent with the standard of care, is to assure that healthcare providers can obtain the information necessary to make an appropriate diagnosis using accepted medical criteria to determine admission eligibility. The very essence of Petitioner's first theory of liability under the MPLA is that the Respondents' owed a duty to conduct Austin's initial assessment in a manner consistent with the standard of care required by the MPLA. To argue that Austin was not a person who was provided "healthcare" because he was not ultimately admitted to the MAT

[3] Austin's Initial Assessment was required to be conducted under West Virginia's regulations pertaining to the operation of a MAT Program which provides in pertinent part: "any individual seeking admittance to the MAT Program **shall** undergo a pre-admission initial assessment in order to determine whether the person meets the criteria for admission to the MAT Program…the determination of admission eligibility **shall** be made using accepted medical criteria such as those listed in the latest approved version of the Diagnostic and Statistical Manual for Mental Disorders. 69 C.S.R. 11 §69-11-21.2. (JA 855, Vol. 3)

program completely ignores the fact that making the "diagnosis" resulting in the decision to deny admission to the Program is at the core of the "healthcare" that was provided to Austin and is the focus of his action under the MPLA.

The question of "duty" is a question of law for the Court to decide. *Jack v. Fritts*, 193 W. Va. 494, 498, 457 S.E.2d 431, 435 (1995). Once the Respondents undertook responsibility for conducting an initial assessment of Austin, they owed the duty, as a matter of law, to conduct that assessment in compliance with the applicable standard of care. In their briefs below, Respondents mischaracterized Petitioner's case as one seeking to impose a duty upon Respondents to accept all potential patients who present for treatment (JA 823-828, Vol. 3). Petitioner's action, however, seeks nothing more than to require Respondents' adherence to the duty imposed under the MPLA in conducting its Initial Assessment.

Yet, the ICA Opinion, in pertinent part, relies on Respondents' mischaracterization.

> In this case, there is no question that WTC declined to treat Austin after he was initially screened for admission into a special purpose program. Dr. Ghaphery indicated that when Austin left the WTC offices, he told him that he was not accepted as a patient. Moreover, no evidence was presented that WTC and its Medical Director, provided specific medical advice, or gave a specific diagnosis to Austin. Therefore, no express or implied contract to provide and receive health care was agreed to, and WTC and its Medical Director owed no duty <u>to admit</u> Austin to its medication assisted treatment program. (my emphasis) (JA 996-997, Vol. 3).

It is undisputed that Respondents conducted an initial assessment for purposes of determining whether Austin met the criteria for admission to the MAT program; and such assessment was clearly a "diagnostic" exercise falling within the MPLA's express definition of "healthcare." W.Va. Code §55-7B-2(e). Accordingly, once Respondents undertook the responsibility to conduct Austin's initial assessment, they owed a duty to conduct such assessment in a manner consistent with the standard of care required of prudent healthcare providers practicing in the same or a similar field. W.Va. Code §55-7B-3.

Petitioner is required to offer proof that the Respondent healthcare providers breached the applicable standard of care when providing healthcare services to Austin and that such breach was a proximate cause of Austin's death. *Id.* Petitioner demonstrated below that he was able to provide proof that Respondents' failed to meet the required standard of care when conducting Austin's initial assessment. (JA 432-433, Vol. 2). Petitioner is also able to offer proof that but for the failure to properly conduct Austin's initial assessment, it is more probable than not that Austin would have been admitted to the MAT program; and upon such admission, state and federal regulations would have required WTC to provide medical, counseling, vocational, educational, recovery, random drug testing, and substance use disorder counseling/monitoring in addition to referral to off-site facilities (C.S.R. 69-11-26).

Expert testimony was also adduced which showed that the reason why the Respondents were under a duty to conduct Austin's initial assessment in accordance with the recognized standard of care in the field of addiction medicine is precisely because the failure to meet that duty carries with it the likelihood of the exact type of harm suffered in this case (i.e. death by drug overdose) (JA 434, Vol. 2). The evidence tying the Respondent's duty to comply with the standard of care to the foreseeability of harm that may result if such duty is not complied with further exposes why the Circuit Court's adoption of Respondents' "no duty" defense is at odds with established law in West Virginia. See *Sewell v. Gregory*, 179 W. Va. 585, 586, 371 S.E.2d 82, 83, Syl. Pt. 4 (W.Va. 1988); see also *Robertson v. LeMaster*, 171 W. Va. 607, 301 S.E.2d 563 (1983) where it was made clear long ago that foreseeability of harm is the primary factor in determining whether a duty exists. *Id.* at 567.

Because under both the strictures of the MPLA and the traditional common law test for the existence of a duty required a legal conclusion contrary to the one sought by Respondents, they argued below that if the Circuit Court were to find they owed a duty to actually comply with

the standard of care defined in their own policies for conducting an initial assessment – the State Regulations requiring that the determination of admission eligibility be made by using accepted medical criteria, and the standard of care applicable to healthcare providers working in the field of Addiction Medicine (as testified to by a properly qualified medical expert) – such finding of duty "would be an unprecedented expansion of liability for healthcare providers throughout the State of West Virginia" (JA 823-828 at P. 826, Vol. 3).

This Court may note that the Respondents premised their "sky is falling" argument on a scenario not applicable to this case. Petitioner is not seeking to expand the ambit of liability in this case beyond the express contours of the MPLA. The Respondents provided healthcare to Austin when they conducted his initial assessment; and Petitioner sought nothing more than the Circuit Court's acknowledgement that Respondents were under a duty to adhere to the required standard of care when conducting such assessment as a matter of law. This is a routine instruction in virtually every action brought under the MPLA. When healthcare providers engage in affirmative action for the purpose of providing health care services, they are required to comply with the applicable standard of care. Petitioner is not seeking to impose an "untenable burden" upon healthcare providers as suggested by Respondents. The only duty sought to be imposed upon Respondents in this case is that they be required to adhere to the standard of care required of healthcare providers practicing in the field of Addiction Medicine when they provided healthcare services to Austin as provided in the MPLA. Nothing more. Nothing less.

Once the question of duty is correctly decided as a matter of law, the issue of whether the Respondents met the standard of care will remain a question of fact for jury determination. This is a basic medical negligence/wrongful death case which should not give rise to a need to create any deviation from the basic principles used to analyze any other action under the MPLA. Respondents' suggestion that if this Court were to find that Respondents had a duty to conduct

themselves in accordance with the applicable standard of care, such finding "would have a chilling effect on the specialized practice of medicine generally, while potentially overwhelming healthcare facilities as it would essentially create an obligation to accept and treat all persons seeking services at the facility – whether they qualify for services as provided or not, or whether the services provided correspond with the condition for which they actually need treatment" (JA 827, Vol. 3) must be seen for what it is: hyperbole, without basis in fact or law.

Petitioner is not seeking the imposition of any duty requiring healthcare facilities to accept and treat all persons seeking services at the facility. Petitioner's son went to WTC to be evaluated for a drug problem. He appeared at the appointed time and was assessed by WTC staff and Dr. Schultz for purposes of determining whether he met the criteria for admission to the MAT Program. The WTC has promulgated policies to be followed by staff and physicians when conducting an initial assessment such as that provided to Austin and the State has promulgated regulations requiring that the determination of admission eligibility be made by using accepted medical criteria. Petitioner adduced expert evidence that the standard of care in the field of addiction medicine required WTC staff and Dr. Schultz to make the determination of Austin's admission eligibility by using accepted medical criteria and that WTC staff and Dr. Schultz failed to meet that standard of care when conducting Austin's initial assessment. Under these facts, Petitioner seeks only a recognition that when WTC staff and Dr. Schultz assessed his son to determine whether he met the criteria for admission to the treatment program they owed him a duty to conduct that assessment in a manner consistent with the standard of care provided for in the MPLA. Once such duty is determined to exist as a matter of law (as it is by way of "instruction of law" in virtually every action brought under the MPLA), Respondents are free to produce any evidence they may have to support a position that their conduct was such as to conform to the standard of care, or attempt to counter Petitioner's causation evidence with a

claim that even if they did breach the standard of care in Austin's pre-admission initial assessment, such breach was not a proximate cause of Austin's death. Thus, a finding of duty, as required by law, would not create the legal catastrophe or medical crisis howled about by Respondents, but rather simply allow this case to go forward to trial on the merits.

Based on the foregoing, this Court should find that the Circuit Court erred in granting Summary Judgment against Petitioner on the basis of its conclusion that Respondents owed no duty to conduct Austin's initial assessment in accordance with the applicable standard of care. Austin was provided healthcare by Respondents and was therefore a "patient" under the MPLA for purposes of his receipt of such healthcare. As such, Respondents were under a duty to conduct his initial assessment in a manner consistent with the standard of care required of healthcare professionals working in the field of Addiction Medicine.

III. Assignment of Error 2. Respondents owed a duty to conduct Austin's suicide risk assessment in accordance with the standard of care provided in the MPLA.

For reasons closely akin to those discussed above, once Respondents endeavored to assess Austin's suicidality (as they admitted they did), they came under a duty as a matter of law to perform that assessment in accordance with the standard of care provided in the MPLA (i.e. to exercise that degree of care, skill and learning required or expected of a reasonable, prudent healthcare provider acting in the same or similar circumstances). The question of whether Respondents complied with that standard, however, is a question of fact for the jury. Because, when viewing the evidence in the light most favorable to Petitioner, a jury may find (consistent with Petitioner's expert, Dr. Goldberg's opinion) that Respondents did not meet the requisite standard of care in conducting Austin's suicidality assessment.

Dr. Goldberg testified at deposition that given the risk factors present at the time of Austin's visit to WTC, the standard of care required that a proper suicide risk assessment be

conducted and that thereafter, Austin should have been referred to a psychiatric facility where his suicidal ideation with a plan, substance use disorder, and depression could have been appropriately evaluated and treated or referred for treatment. (JA 468-469, Vol. 2). It is a fact that patients who are known to be at an elevated risk for injury or death by overdose (if they are not placed in a supervised psychiatric setting) gives rise to the standard of care requiring healthcare providers to arrange for their admission to a psychiatric facility where their drug problems and psychiatric issues can be properly evaluated and treated (JA 470, Vol. 2). More succinctly, Petitioner's expert testimony at deposition was that "the foreseeability of a patient being injured or dying from a drug overdose by not adhering to the standard of care, is the reason why there exists a duty for physicians to follow the standard of care when conducting a suicide risk assessment of a person with as many risk factors as those present in Austin's case" (JA470-471, Vol. 2).

Petitioner's evidence below also demonstrated that but for the Respondent's failure to appropriately assess Austin's suicidality and arrange for his admission to a psychiatric facility (i.e. Respondents' failure to meet the standard of care), it is more probable than not that Austin would have been evaluated as an inpatient for a period of time during which he would have received intense counseling for drug abuse, depression and other issues (JA 472, Vol. 2); and would have undergone a thorough treatment regimen which would have included programs designed to prevent him from continuing his drug use, and intervention to assist his depressive illness for purposes of decreasing his risk of injury or death resulting from drug use (JA 474, Vol. 2). The evidence below not only supported a finding by the Circuit Court that Respondents owed Austin a duty to conduct his suicide risk assessment in accordance with the applicable standard of care, but also demonstrated that if the Respondents had met their duty by conducting an appropriate suicide risk assessment and arranging for Austin to be admitted to a psychiatric

facility, it is more probable than not that Austin would have received inpatient and outpatient treatment "such that he would not have died by drug overdose some 36 days after seeking entry to Wheeling Treatment Center for help with his drug problem" (JA 474-475, Vol. 2). Such evidence could not more clearly connect Respondent's duty to the foreseeability of the harm occasioned by the breach thereof.

Other evidence tying Respondents' alleged breach of duty to Austin's death includes testimony that "Dr. Schultz's failure to meet the standard of care by appropriately assessing Austin's suicidality and arranging for Austin to be admitted to a psychiatric facility where his depression, suicidal ideation and substance use disorder could have been appropriately evaluated and treated was a proximate cause of Austin's death." (JA 476, Vol. 2).

In granting summary judgment in favor of Respondents the Circuit Court found that notwithstanding Respondents' admission that they conducted a suicide risk assessment of Austin, they owed no duty to conduct such assessment in accordance with the standard of care because no healthcare provider-patient relationship was established so as to give rise to a duty under the MPLA (JA 887, Vol 3). The Circuit Court and ICA's legal reasoning in reaching this decision is difficult to decipher as it appears that both courts may have misapprehended the evidence and believed that the standard of care sought to be imposed by Petitioner was a duty "requiring that Wheeling Treatment Center had to accept Austin, either voluntarily or involuntarily, to **its** inpatient psychiatric treatment facility." (emphasis added) (JA 887, Vol. 3).

WTC is not an inpatient psychiatric treatment facility, and does not even have an inpatient psychiatric facility; and the Circuit Court misapprehends the duty of care required by the MPLA under the circumstances of this case.

The ICA's Opinion, in pertinent part, states as follows:

> Finally, the personal representative argues that WTC's Medical Director admitted he had a duty to investigate Austin's suicidal ideations, and that the Medical Director did not follow the appropriate standard of care when he failed to refer Austin to a psychiatric facility….(my emphasis)(JA 997, Vol. 3).

The ICA's misapprehension that Petitioner was advancing a "duty to investigate" argument as well may have resulted in the erroneous ruling sought to be rectified by this appeal. It is believed that the Court's confusion on this issue may be traced to Respondents' Bench Brief which draws little distinction between Petitioner's separate theories of liability: (1) that Respondents failed to meet the standard of care in conducting Austin's initial assessment and (2) the separate and distinct theory of liability premised upon the claim that Respondents failed to meet the standard of care in assessing Austin's risk for suicide. Petitioner's expert did not testify about any standard of care in connection with a "duty to investigate', but testified that once Ms. Coen-Pickens reported her concern about Austin's suicidality, that the standard of care in the field of addition medicine required Dr. Schultz to appropriately conduct a suicide assessment. (JA 465, Vol. 2). Dr. Schultz admitted he conducted such a suicide risk assessment while Austin was receiving "health care services" at WTC. (JA 479, Vol. 2).

There also exists a significant incongruity between the Circuit Court's finding that the Respondents were under no duty to conduct Austin's suicide risk assessment in accordance with the applicable standard of care, and Dr. Schultz's own testimony below. The following deposition exchanges illustrate this point:

> "Q. Sir, do you agree that in a case where a patient presents at a drug treatment center for help with a substance use problem and reports that he is having suicidal ideation, has a plan to complete his suicide by use of a gun and is suffering from depression, that the standard of care requires the treatment center's physician to assess that patient's suicidal risk?
>
> A. That's true (JA 859, Vol. 3).

Q. My question is: What do you believe the standard of care requires of a physician when completing a suicide risk assessment of a patient who reports he is depressed and having suicidal ideation when he presents at the drug treatment center?

A. I speak to them myself and get that information myself. (JA 860-861, Vol. 3).

Q. Do you agree that in a case where a physician is working at a drug treatment center and learns that a patient is expressing suicidal ideation, that the physician has a responsibility to gather information necessary to assess the nature and degree of risk associated with the suicidal ideation?

A. Yes (JA 861, Vol. 3).

Q. Can you tell us what you did, if anything, to gather information necessary to assess the nature and degree of risk associated with Austin's expression of suicidal ideation on September 28 of 2017?

A. As I said, I interviewed myself. (JA 861-862, Vol. 3).

Based on the foregoing, Dr. Schultz acknowledged under oath that the standard of care required him to complete a suicide risk assessment given the statements made by Austin to the WTC counselor; and that in an attempt to meet that standard of care he "interviewed" Austin. Whether that suicide risk assessment was conducted in a manner consistent with the standard of care is at the heart of Petitioner's second theory of liability under the MPLA.

Once WTC staff and Dr. Schultz undertook responsibility for conducting a suicide risk assessment of Austin, irrespective of whether Austin was ultimately admitted to the MAT Program, they were under a duty to conduct such suicide risk assessment in accordance with the accepted standard of care as a matter of law. The duty to meet the accepted standard of care when conducting Austin's suicide risk assessment is imposed under the MPLA since a suicide risk assessment is a diagnostic exercise falling within the purview of healthcare; and once a "healthcare provider" renders "healthcare" to a person, that person is considered to be a "patient" under the MPLA such that the healthcare provider is required to meet the accepted standard. See: W.Va. Code §55-7B(2)(e) "healthcare" and (m) "patient". Thus, to the extent that the

Respondent healthcare providers conducted a suicide risk assessment of Austin, such suicide risk assessment constituted the provision of healthcare such as to give rise to a healthcare provider-patient relationship between Austin and Respondents. As part and parcel of that relationship the Respondents had a duty under the MPLA to provide such suicide risk assessment in a manner consistent with the standard of care required of healthcare providers conducting a suicide risk assessment in similar circumstances. The duty to meet the standard of care provided in the MPLA exists as a matter of law irrespective of whether Austin was eventually admitted into the MAT Program. The Circuit Court's finding and affirmance by the ICA, that the decision to deny Austin admission to the MAT Program somehow relieves the Respondents of their duty to conduct Austin's suicide risk assessment in a manner consistent with the standard of care should be found to constitute reversible error in this case.

IV. Assignment of Error 3: ICA erred in not remanding the case for possible amendment of the Complaint.

As stated in *Sewell v. Gregory*, 179 W. Va. 585, 586, 371 S.E.2d 82, 83, Syl. Pt. 4 (W.Va. 1988), and *Robertson v. LeMaster*, 171 W. Va. 607, 301 S.E.2d 563 (1983), West Virginia law has long recognized that that foreseeability of harm is the primary factor in determining whether a duty exists. *Id.* at 567. Rule 15(c)(2) of the West Virginia Rules of Civil Procedure, allows for relation back of any pleading to the date of the original pleading when the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth in the original pleading.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests this Court to find that the Intermediate Court's conclusion that the Respondents owed no duty of care to Austin when they

conducted his pre-admission initial assessment for purposes of determining whether he met the criteria for admission to the MAT Program is erroneous, and to remand the matter back to the Circuit Court for such further proceedings as may be proper.

Your Petitioner further respectfully requests this Court to find that the Intermediate Court's conclusion that the Respondents owed no duty of care to Austin when they conducted his suicide risk assessment for purposes of determining whether he was at an enhanced risk for harm is erroneous, and to remand the matter to the Circuit Court for such further proceedings as may be proper.

Even if this Honorable Court should conclude that Petitioner's claims of medical negligence fall outside of West Virginia MPLA, this case should be remanded to allow for Petitioner the right to seek amendment to his Complaint under the West Virginia Rules of Civil Procedure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Service of the foregoing BRIEF OF PETITIONER, was had upon the following by e-mailing and mailing a true and complete copy thereto to their last known address, by regular United States mail, postage prepaid, this _____ day of April, 2024, as follows:

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