

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. _____

SCA EFiled: Feb 26 2025
11:43AM EST
Transaction ID 75717765

STATE OF WEST VIRGINIA EX REL.
WEST VIRGINIA UNIVERSITY
HOSPITALS, INC. d/b/a J.W. RUBY
MEMORIAL HOSPITAL,
Defendant below,
Petitioner,

v.

HONORABLE MICHAEL D. SIMMS,
Judge of the Circuit Court of Monongalia County,

and

CODY MORTON and BROOKE MORTON,
Individually and as Administrators of the
ESTATE OF BRODY WILLIAM MORTON,
a deceased minor,
Plaintiffs below,
Respondents.

VERIFIED PETITION FOR WRIT OF PROHIBITION
Action Pending in the Circuit Court of Monongalia County
Civil Action No. 23-C-87

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I. QUESTIONS PRESENTED

This Petition presents the following questions for review:

- A. Did the Circuit Court commit clear legal error and exceed its legitimate powers by concluding that neither Brooke nor Brody Morton qualify as a “patient” under the West Virginia Medical Professional Liability Act?
- B. Did the Circuit Court commit clear legal error and exceed its legitimate powers by failing to consider that the identified anchor claim also applies to the emotional distress claims?
- C. Did the Circuit Court commit clear legal error and exceed its legitimate powers by failing to consider the sufficiency of the screening certificates of merit authored by Nurse Felty under the mandatory pre-suit notice requirements of the West Virginia Medical Professional Liability Act?

II. STATEMENT OF THE CASE

Respondents assert several claims in their Complaint [Appx. 019], filed on March 30, 2023, on their behalf [Cody and Brooke Morton (Respondents)] and on behalf of the decedent, Brody Morton, against the West Virginia University Board of Governors (WVUBOG) and Petitioner West Virginia University Hospitals, Inc. d/b/a Ruby Memorial Hospital (WVUH). This matter arises out of the healthcare surrounding the labor of Brooke Morton and delivery of Brody Morton at WVUH on or about April 5, 2021.

Plaintiff Brooke Morton presented to the WVUH labor and delivery unit on April 4, 2021, at 7:56 a.m., for induction of labor deemed necessary because she was suffering from cystic fibrosis induced diabetes. [Appx. 021]. Brody Morton was delivered via emergent cesarean section at 3:43 p.m.; he had no heart rate or respiratory effort and was limp. [Appx. 024]. Aggressive resuscitation was required for re-establishment of the infant’s heart rate. APGAR¹ scores were 0, 0, 1, and 2 at one minute, five minutes, ten minutes, and twenty minutes respectively. [Appx. 024].

¹ An APGAR score is a rapid method for evaluating the appearance, pulse, grimace, activity and respiration of a neonate immediately after birth on a scale of one to ten. It was pioneered in 1952 by Virginia Apgar, M.D., an anesthesiologist at Columbia University College of Physicians and Surgeons.

WVUH staff undertook resuscitation efforts including chest compressions, endotracheal intubation, and multiple rounds of epinephrine. [Appx. 025]. Brody was taken to the Neonatal Intensive Care Unit (“NICU”) for additional care and treatment. [Appx. 024-025]. Despite these efforts, Brody died at 9:00 p.m., more than five hours after delivery. [Appx. 025]. Following the birth, Brooke Morton suffered severe hemorrhaging and was placed on a ventilator. [Appx. 024]. Mrs. Morton required further operative services, leading to her ultimate admission to the surgical intensive care unit. [Appx. 024]. During the attempts to save Brooke Morton, Dr. Mark Smith approached Cody Morton and obtained consent to autopsy Brody Morton’s body. [Appx. 025-026]. Dr. Mark Smith was not an employee of Petitioner WVUH. He was an employee of WVUBOG which settled with Plaintiffs.

Respondents commenced this action by service of two Notices of Claim dated March 7, 2023, to WVUH. [Appx. 050, 083]. The relevant Notice of Claim [Appx. 050] made allegations of intentional infliction of emotional distress upon Respondents related to the handling of the infant’s internal organs during and after the infant’s autopsy; negligent infliction of emotional distress upon Respondents for events surrounding the labor and delivery and handling of the infant’s internal organs; fraud and misrepresentation related to the “inducement” of the infant’s autopsy; intentional spoliation regarding the handling of the infant’s internal organs and the alleged fabrication and alteration of medical records; and negligent spoliation regarding the destruction of the internal organs and alleged fabrication/alteration of the medical records. The allegations in this Notice of Claim form the basis of the causes of action alleged against WVUH and the Notice is relevant to evaluating this Petition.² The relevant Notice of Claim was accompanied by a Screening

² A second Notice of Claim [Appx. 083] served the same day made general allegations of deviations from the standard of care by “the care team” including “staff, employees, servants, agents, residents, nurses, nursing assistants, technicians and/or associates” as it pertained to the management of Brooke Morton’s labor and the timing of the delivery. The Notice of Claim was accompanied by two screening certificates

Certificate of Merit from Gerald Felty, R.N., and generally criticized WVUH for delivering the body of the infant to the funeral home without all of his internal organs and for the process by which Mr. Morton's written consent was obtained for the infant's autopsy. [Appx. 053].

WVUH initially responded to the Notices of Claim with a *Hinchman* letter [Appx. 055] in which it made clear that WVUH did not employ **any** of the physicians involved in Respondents' care and that WVUH would not be responsible for the physicians under a theory of ostensible agency pursuant to W. Va. Code § 55-7B-9(g). *Hinchman v. Gillette*, 217 W.Va. 378, 618 S.E.2d 387 (2005). In addition, the response challenged the specificity of the allegations against the nonphysicians and pointed out that there were no certificates of merit addressing the allegations of spoliation and alteration of medical records. [Appx. 056]. Respondents were provided thirty days to respond to the letter, then later granted an additional seven days to respond.³ Plaintiffs produced a report from Michael Seaver, R.N., [Appx. 058] that did not identify any deviations from the standard of care concerning the allegations of spoliation and alteration but only "several areas and items of interest". Respondents also produced a supplemental report from Gerald Felty, R.N. [Appx. 080], characterizing the so-called "areas and items of interest" identified by Nurse Seaver as deviations from the standard of care, but did not relate the alleged deviations to any impact or injury to Respondents as required by W. Va. Code § 55-7B-6(b)(D). Counts I through III of the

of merit authored by Keith S. Merlin, M.D. [Appx. 085], and Jim Rost, M.D. [Appx. 089]. Drs. Merlin and Rost, an obstetrician and neonatologist, respectively, and opined that the attending obstetrician, Sarah Dotson, M.D., deviated from the standard of care by not delivering the fetus by cesarian section at least four hours before birth and that the delay caused profound hypoxic encephalopathy and the subsequent death. Otherwise, the fetus would have been delivered alive and survived. The certificates of merit from Drs. Merlin and Rost did not specifically implicate the care provided by nonphysicians at WVUH. Dr. Dotson is an employee of the former defendant, West Virginia University Board of Governors.

³ In and around this time, the parties agreed to suspend activity and mediate the case. Mediation took place on August 23, 2023, at which time a settlement was reached between Plaintiffs and WVUBOG but not WVUH. The settlement with WVUBOG encompassed the allegations of medical negligence or culpability of the physicians involved in the care of Brooke and Brody Morton.

Complaint were settled as a result of the mediation with WVUBOG on August 23, 2023. [Appx. 016].

WVUH subsequently filed a Motion to Dismiss and Memorandum of Law in Support on November 29, 2023 [Appx. 093], on the grounds that the remaining causes of action asserted against WVUH fail to comply with the mandatory pre-suit notice requirements of the West Virginia Medical Professional Liability Act (MPLA), W. Va. Code §§ 55-7B-1 *et seq.* Respondents filed their Response to the Motion to Dismiss on January 5, 2024 [Appx. 107], and Petitioner filed its Reply in Further Support of Motion to Dismiss and Memorandum of Law in Support on January 29, 2024. [Appx. 127]. Notably, Respondents conceded one aspect of the emotional distress claims in a footnote of the Response to the Motion to Dismiss: “Plaintiffs have determined that it is likely not possible for them to prove that the delivery of the wrong child’s memorial keepsakes to their house was due to the negligence of the Defendant, and, as such, will not be pursuing damages related to that incident.” [Appx. 121].

Counsel appeared for oral argument on May 21, 2024, [Appx. 137] and the Circuit Court entered its “Order Denying, In Part, Defendant West Virginia University Hospital’s, Inc.’s d/b/a J.W. Ruby Memorial’s Motion to Dismiss” (Order) [Appx. 001] on December 30, 2024, containing findings of fact and conclusions of law, ultimately leading to this Petition.

The Order of the Circuit Court is somewhat incomprehensible and internally inconsistent. As Petitioner understands the Order, the Circuit Court partially granted the motion to dismiss insofar as the fraud, misrepresentation and spoliation claims (Counts VI, IX, and X) against WVUH because:

The care and treatment of Brooke and Brody Morton ... form the “anchor” claim described by the Supreme Court of Appeals of West Virginia in *Scott*, ... and Plaintiffs[‘] remaining allegations for [fraud/misrepresentation] and spoliation are contemporaneous to or related to the alleged tort or breach of contract or otherwise

provided, all in the context of rendering health care services as described in the MPLA, W.Va. Code § 55-7B-2(i).

[Appx. 014].⁴

At the same time, the Circuit Court specifically concluded that the negligent and intentional infliction of emotional distress claims do not fall under the parameters of the MPLA and are not subject to the MPLA's pre-suit notice requirements. [Appx. 012]. The Circuit Court inexplicably concluded that "Plaintiffs in this matter never asserted an MPLA claim against [WVUH], only in the alternative indicating that they did 'not believe that Counts II-X of this Complaint fall within the jurisdiction of the [MPLA] ... Rather, the only true MPLA claims asserted were against the WVUBOG.'" [Appx. 013]. Somehow, while determining that an anchor claim existed in relation to Counts VI, IX, and X, the Circuit Court concluded that no anchor claim existed contemporaneous or related to the negligent and intentional infliction of emotional distress claims.⁵

III. SUMMARY OF ARGUMENT

⁴ The claims dismissed by the Order are as follows: (1) Count VI: Intentional Spoliation for the destruction of the infant's internal organs and alleged falsification and alteration of medical records (Brooke Morton); (2) Count IX: Intentional Spoliation for the destruction of the infant's internal organs and alleged falsification and alteration of medical records (Cody Morton); and (3) Count X: Fraud and Misrepresentation related to grief counseling, the consent for the autopsy and the destruction of the internal organs (Cody Morton). [Appx. 014].

⁵ The four remaining emotional distress claims all relate to the handling of the autopsy of Brody Morton: They include: (1) Count IV: Intentional Infliction of Emotional Distress (IIED) for the handling of the consent for the autopsy to be performed in house and the destruction of the infant's internal organs during autopsy (Brooke Morton); (2) Count V: Negligent Infliction of Emotional Distress (NIED) for the handling of the consent for the autopsy, delivery of keepsakes, allowing the autopsy to be performed in house and the destruction of the infant's internal organs during autopsy (Brooke Morton); (3) Count VII: IIED for the handling of the consent for the autopsy, grief counselling, allowing the autopsy to be performed in house and the destruction of the infant's internal organs during autopsy (Cody Morton); and (4) Count VIII: NEID for the handling of the consent for the autopsy, grief counselling, delivery of keepsakes, allowing the autopsy to be performed in house and the destruction of the infant's internal organs during autopsy (Cody Morton). [Appx. 014].

The rulings of the Circuit Court are a result of the complete misinterpretation and misapplication of the previous rulings of this Court in *Ricottilli v. Summersville Memorial Hosp.*, 188 W.Va. 674, 425 S.E.2d 629 (1992), and its progeny. The Order contains several errors which deprive the Circuit Court of subject matter jurisdiction under the MPLA which can only be rectified by a writ of prohibition.

The Circuit Court determined that the MPLA did not apply to the emotional distress claims for two reasons: 1) that Brody Morton could not qualify as a “patient” under the MPLA because he was not a natural person at the time of the autopsy, and 2) that autopsies do not constitute healthcare under the MPLA based upon the Court’s ruling in *W. Va. Dep’t of Health v. Cipoletti*, 250 W.Va. 1, 902 S.E.2d 133 (2024). The Circuit Court ignored that all of the causes of action alleged by Respondents arose out of and were contemporaneous to the healthcare provided to Brooke and Brody Morton during Brooke’s labor and during and after Brody’s delivery. The Circuit Court also failed to address the issue that if the MPLA does apply, did Respondents serve an adequate notice of claim and screening certificate of merit upon WVUH to support the emotional distress claims. Consequently, the Circuit Court lacks subject matter jurisdiction over the claims of Respondents.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner asserts that oral argument is necessary pursuant to the criteria Rules 18(a) and 19(a) of the West Virginia Rules of Appellate Procedure because this matter involves a narrow issue of law and the Circuit Court committed clear error in the application of settled law. Further, pursuant to Rule 16(d)(6) of the West Virginia Rules of Appellate Procedure, Petitioner believes the case is appropriate for a memorandum decision.

V. ARGUMENT

A. Standard of Review

When a writ of prohibition raises a jurisdictional challenge, the Supreme Court of Appeals of West Virginia “must determine, first, whether the question raised is jurisdictional, and, second, if it is, whether it is jurisdictional in the sense of requiring a decision upon the facts or a decision upon a pure question of law. If it rests upon a determination of fact, prohibition will not lie. If it rests upon a determination of a question of law, prohibition will lie if the trial court has exceeded its jurisdiction or usurped a jurisdiction that in law does not exist.” *Lewis v. Fisher*, 114 W.Va. 151, 154-55, 171 S.E. 106-07 (1933). The instant Petition seeks to correct the erroneous application of the MPLA and the jurisdictional effect of the Respondents’ failure to comply with pre-suit notice requirements. Because this Petition raises only questions of law, the Court should apply a *de novo* standard of review to determine whether the circuit court exceeded its jurisdiction and committed clear error. Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 459 S.E.2d 415 (1995). Further, “[t]he pre-suit notice requirements contained in the West Virginia Medical Professional Liability Act are jurisdictional and that failure to provide such notice deprives a circuit court of subject matter jurisdiction.” Syl. Pt. 2, *State ex rel Primecare Med. Of W.Va., Inc. v. Faircloth*, 242 W.Va. 335, 835 S.E.2d 579 (2019).

The Court developed five factors to act as guidelines in determining whether a discretionary writ of prohibition should issue:

(1) whether the party seeking the writ has **no other adequate means, such as direct appeal, to obtain the desired relief**; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression... Although all five

factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

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

Further, direct appeal is not possible because “[o]rdinarily the denial of a motion to dismiss is an interlocutory order, and, therefore, is not immediately appealable.” *Ewing v. Bd. Of Educ. of Cnty. Of Summers*, 202 W.Va. 228, 503 S.E.2d 541 (1998). A motion pursuant to Rule 60(b) of the West Virginia Rules of Civil Procedure would be inappropriate because the Order is not final. Further, the Supreme Court of Appeals of West Virginia adamantly maintains that “A ‘motion to reconsider’ is not recognized by the Rules of Civil Procedure.” Syl. Pt. 3, *Malone v. Potomac Highlands Airport Auth.*, 237 W.Va. 235, 786 S.E.2d 594 (2015). Thus, the only prospect for correcting the Circuit Court’s flawed jurisdictional conclusions rests in a writ of prohibition.

The effect of the Order will require Petitioner to proceed with litigation and accrue costs until after discovery has closed, after summary judgment motions have been determined, and perhaps even after a final judgment order following trial. Any appeal following trial or summary judgment would be insufficient to correct any of the damage incurred by litigating the matter if the Court finds that subject matter jurisdiction never existed with the Circuit Court in the first place. In addition, all attempts at mediation will be impeded by Petitioner’s good faith position that the Circuit Court is currently deprived of subject matter jurisdiction. The resulting prejudice upon Petitioner and Respondents can only be precluded by issuing a writ to make the Order more consistent with the MPLA and the case law addressed herein. Accordingly, Petitioner seeks a writ of prohibition to obtain a cogent and consistent determination regarding subject matter jurisdiction of the remaining claims. The Order is clearly erroneous as a matter of law because it inexplicably concluded that the emotional distress claims remain within the Circuit Court’s jurisdiction despite clearly arising out of the healthcare provided to Booke and Brody Morton.

B. Questions Presented

It is well-settled law that:

The failure to plead a claim as governed by the Medical Professional Liability Act... does not preclude the application of the Act. Where the alleged tortious acts or omissions are committed by a healthcare provider within the context of rendering “health care” as defined by [the MPLA], the Act applies regardless of how the claims are pled.

Syl. Pt. 4, *Blankenship v. Ethicon, Inc.*, 221 W.Va. 700, 656 S.E.2d 451 (2007). Further, “the determination of whether a cause of action falls within the MPLA is **based upon the factual circumstances giving rise to the cause of action**, not the type of claim asserted.” *Id* at 360, 656 S.E.2d at 860 (emphasis added).

The MPLA defines “healthcare” as:

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

W.Va. Code § 55-7B-2(e) (emphases added). In addition: “‘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).

The MPLA further defines “medical professional liability” to mean:

[A]ny liability for damages resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should

have been rendered, by a health care provider or health care facility to a patient. **It also means other claims that may be contemporaneous to or related to the alleged tort or breach of contract or otherwise provided, all in the context of rendering health care services.**”

W.Va. Code § 55-7B-2(i) (emphasis added). For an ancillary claim to fall under the MPLA, the Court has determined “you must have the anchor claim (fitting the definition of “health care”) and then make the showing that the ancillary claims are (1) contemporaneous with or related to that anchor claim; and (2) despite being ancillary, are still in the context of rendering health care.” *State ex rel. West Virginia University Hospitals, Inc. v. Scott*, 246 W.Va. 184, 194, 866 S.E.2d 350, 360 (2021).

The MPLA further mandates that “no person may file a medical professional liability action against any healthcare provider without complying” with the mandatory pre-suit notice requirements. W.Va. Code § 55-7B-6(a). Respondents, pursuing claims under the MPLA, must serve a notice of claim on each healthcare provider along with a screening certificate of merit supported by the opinions of an expert at least thirty days prior to filing a cause of action alleging medical professional liability. W.Va. Code § 55-7B-6(b). The screening certificate of merit:

[S]hall state with particularity, and include: (A) the basis for the expert’s familiarity with the applicable standard of care; (B) the expert’s qualifications; (C) the expert’s opinion as to how the applicable standard of care was breached; (D) the expert’s opinion as to how the breach of the applicable standard of care resulted in injury or death; and (E) a list of all medical records and other information reviewed.

Id. As noted above, failure to comply deprives a circuit court of subject matter jurisdiction. *Faircloth*, 242 W.Va. at Syl. Pt. 2.

W. Va. Code § 55-7B-6(f) also provides that “[a]ny health care provider who receives a notice of claim pursuant to the provisions of this section may respond, in writing, to the claimant or his or her counsel within 30 days of receipt of the claim.” In *Hinchman*, the Court expanded

upon the requirements of W. Va. Code § 55-7B-6, issuing three syllabus points pertinent to the instant Motion.

Before a defendant in a lawsuit against a healthcare provider can challenge the legal sufficiency of a plaintiff's pre-suit notice of claim or screening certificate of merit under W.Va. Code § 55-7B-6, **the plaintiff must have been given written and specific notice of, and an opportunity to address and correct, the alleged defects and insufficiencies.**

Hinchman, 217 W.Va. at Syl. Pt. 3 (emphasis added). Further, the Court gave guidance to circuit courts when reviewing the legal sufficiency of a notice of claim and screening certificate of merit:

[A] reviewing court should apply W.Va. Code § 55-7B-6 in light of the statutory purposes of preventing the making and filing of frivolous medical malpractice claims and lawsuits; and promoting the pre-suit resolution of non-frivolous medical malpractice claims. **Therefore, a principal consideration before a court reviewing a claim of insufficiency in a notice or certificate should be whether a party challenging or defending the sufficiency of a notice and certificate has demonstrated a good faith and reasonable effort to further the statutory purposes.**

Id at Syl. Pt. 6 (emphasis added).

The Circuit Court based its conclusions of law primarily upon the Court's recent holding in *Cipoletti* and previous holdings in *Ricottilli v. Summersville Memorial Hosp.*, 188 W.Va. 674, 425 S.E.2d 629 (1992). Specifically, the Circuit Court concluded: "Pursuant to the West Virginia Supreme Court's most recent ruling in *Cipoletti*, a deceased individual does not fit the definition of a 'patient' as defined in the MPLA, and an autopsy is not 'healthcare'." [Appx. 012].

Cipoletti involved the autopsy of a 59-year-old woman by the chief medical examiner totally uninvolved with the actual treatment or death of the woman. *Cipoletti*, 250 W.Va. at 136. The decedent's widower later sued the chief medical examiner and the Department of Health for violating the MPLA by negligently determining the decedent's cause of death. *Id.* The medical examiner moved to dismiss for qualified immunity; however, the trial court denied the motion to dismiss, finding that the MPLA did apply, and, therefore qualified immunity could not apply

because the “conduct complained of by [decedent] is within the sphere of his profession as a medical doctor.” *Id* at 137. The Court ultimately determined that the conduct did not apply under the MPLA.

To reach its conclusion, the Court identified two issues to guide the analysis: “(1) whether the decedent was a patient under the MPLA; and (2) whether Petitioners provided medical services or treatment resulting in injury or death”. *Id* at 140. After defining “medical professional liability”, “health care”, and “patient”, the Court held that regardless of whether a plaintiff is a patient or a non-patient, to assert a viable claim under the MPLA a plaintiff “must establish that the health care provider is liable ‘for damages resulting from the death or injury **of a person**[.]’” *Id* at 142 (emphasis added). The Circuit Court missed this distinction. The *Cipoletti* Court **did not** specifically hold that “an autopsy is not ‘health care’.” [Appx. 012].

In *Ricottilli*, a six-year-old child was transported from Summersville Memorial Hospital and admitted to Charleston Area Medical Center (CAMC), but within hours, the child passed away. *Ricottilli*, 188 W.Va. at 676. CAMC obtained authorization for an autopsy and to preserve liver tissue samples to determine potential causes of death. *Id*. Eventually, the parents of the deceased child filed causes of action for negligent infliction of emotional distress for the method of transporting the remains and medical professional negligence for CAMC’s failure to provide an autopsy report to the parents when completed. *Id*. The trial court subsequently granted CAMC’s motion to dismiss the claims for statute of limitations and NIED claim. *Id*. In determining whether the claim for medical professional negligence should survive the motion to dismiss, the Court generated the following syllabus point: “By definition, a deceased individual does not qualify as a “patient” under the Medical Professional Liability Act (“Act”) ..., and therefore **cannot be the**

basis for a cause of action alleging medical professional liability pursuant to the Act.” *Ricottilli*, 188 W.Va. at Syl. Pt. 1 (emphasis added).

Neither *Ricottilli* nor *Cipoletti* involved a mother giving birth to an infant. Neither *Ricottilli* nor *Cipoletti* involved two separate individuals each requiring potentially life-saving services. Neither matter involved treatment related to a difficult birth and the ultimate death of an infant, and neither matter alleged that all the wrongful conduct took place within the hospital setting. However, the Court has examined facts eerily parallel to the instant matter before in *State ex rel. Charleston Area Medical Center, Inc. v. Thompson*, 248 W.Va. 352, 888 S.E.2d 852 (2023). Curiously, the Circuit Court discarded *Thompson* early on because “[a]lthough *Ricottilli* was distinguished by the rulings in *Thompson*, *Ricottilli* remains good law in cases where there was a living person who died and whose body was then autopsied.” [Appx. 005].

In *Thompson*, an expecting couple presented to CAMC where the mother subsequently suffered a stillbirth. *Id.* Upon authorization from the parents, CAMC assumed possession of the fetal remains and later transferred possession to the employee of a funeral home. *Id.* Later, the mother and father sued the funeral home, the employee, and CAMC for four counts of negligence related to the mishandling of the remains, without reference to the MPLA. *Id.* CAMC filed a motion to dismiss for lack of subject matter jurisdiction alleging that the plaintiffs had not complied with the MPLA’s pre-suit notice requirements. *Id.* The trial court denied the motion, finding that the MPLA did not apply because the fetal remains were deceased and therefore not a patient of CAMC. *Id.*

CAMC filed a writ of prohibition, and the Court considered two questions: “(1) was there a patient involved and, if so, (2) does CAMC’s handling of the fetal remains constitute ‘health care’ within the meaning of the MPLA. **Because these two questions are inextricably related**

under the circumstances of the present matter, we will address them together.” *Id* at 357-58 (emphasis added). The Court found that the key distinction between *Thompson* and *Ricottilli* was that *Ricottilli* “involved the alleged mishandling of an autopsy of a **deceased prior patient**. The allegations ... in the present matter [*Thompson*] arise from the alleged mishandling of fetal remains **following health care given to** [the mother].” *Id* at 358 (emphases added). After determining that the mother most certainly qualified as a “patient” under the MPLA, the Court also determined that “the handling and transfer of the fetal remains was an act or service performed” on behalf of [the mother] during her care. *Id* at 359. Notably, when applying the definition of “medical professional liability” from *Scott*, the *Thomspson* court determined that the anchor claim was the “handling of fetal remains as a result of stillbirth.” *Thompson*, 248 W.Va. at 361. The Court found several facts to support the determination:

- A. That CAMC obtained the fetal remains during the hospitalization of the mother through the administration of healthcare services to the mother;
- B. That CAMC came into possession of the fetal remains as a direct result of providing healthcare to the mother;
- C. That after obtaining possession, CAMC continued to act on behalf of the mother by maintaining the remains in the hospital morgue for later transfer;
- D. That CAMC did not maintain a separate medical record for the fetal remains, but the form releasing the remains was included in the mother’s records; and
- E. That the mother remained hospitalized as a patient at CAMC until the day of the events at issue.

Id at 359-60, n. 12.

1. Did the Circuit Court commit clear legal error and exceed its legitimate powers by concluding that neither Brooke nor Brody Morton qualify as a “patient” under the MPLA?

Whether the Respondents’ claims come under the MPLA will be determined by two intertwined inquiries: 1) was there a patient involved and, if so, 2) does WVUH’s handling of the infant’s remains constitute “health care” within the meaning of the MPLA. Respondents cannot

legitimately dispute that WVUH or its representatives are health care providers pursuant to the definition under the MPLA.

The Circuit Court concluded that “**Plaintiffs in this matter never asserted an MPLA claim against the Defendant**, only in the alternative indicating that they did ‘not believe that Counts II-X of this Complaint fall within the jurisdiction of the [MPLA]. *See* Plaintiff’s Complaint at Footnote 1. Rather, the only true MPLA claims asserted were against the WVUBOG.” [Appx. 013] (emphasis added). As noted above, Respondents’ position about the nature of a claim has little to do with the court’s role in applying the MPLA; instead, a circuit court should analyze the facts to determine the nature of the claim. *Blankenship*, 221 W.Va. at Syl. Pt. 4.

To reiterate, “‘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). Here, the Circuit Court mistakenly relied upon the notion that *Cipoletti* determined that autopsies are not healthcare. *Cipoletti* focused more so on the fact that **an autopsy was performed upon the body of a 59-year-old woman deceased before arrival**, rather than the fact that an actual autopsy was performed; no “patient” existed under the MPLA because no natural person received health care services. *Cipoletti*, 250 W.Va. at 142. *Ricottilli* held that 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. *Ricottilli*, 188 W.Va. at Syl. Pt. 1. Because the infant was stillborn, *Thompson* involved only one person who could possibly qualify as a patient: the mother. *Thompson*, 248 W.Va. at 359. Here, the Circuit Court had two candidates: Brooke and/or Brody Morton. It is confounding that the Circuit Court could not determine that a patient existed where a mother delivered an infant on the premises of Ruby Memorial with the assistance of hospital staff. Both Brooke and Brody were natural persons. Both had complications

following the birth which required individualized lifesaving attempts, and both received such health care from licensed health care providers.

As a result of her admission to Ruby Memorial, Brooke Morton received assistance in various forms, ranging from those related to childbirth and to surgical and recovery measures resulting from the difficult birth. Following the birth, Brooke Morton continued to need inpatient care for a few days after Brody's birth. The main difference between the facts of *Thompson* and the instant matter is that the child in *Thompson* was stillborn; Brody Morton was not. *Id.* WVUH assisted the delivery of Brody Morton, then provided constant resuscitative treatment to the infant, including treatment for several hours in the NICU, before he died. One way or another, the Court must find that the Circuit Court committed clear error by failing to determine that Brody or Brooke both qualified as a "patient" under the MPLA.

2. Did the Circuit Court commit clear legal error and exceed its legitimate powers by failing to consider that the identified anchor claim also applies to the emotional distress claims?

Beyond the "patient" issue, the Circuit Court determined that the emotional distress claims are not subject to the MPLA based upon the flawed notion that *Cipoletti* held that autopsies are never healthcare. In dismissing Counts IV, IX, and X (spoliation, fraud and misrepresentation), the Court concluded that "the care and treatment of Brooke and Brody Morton" form the anchor claim contemplated by *Scott*, and the remaining spoliation, fraud, and misrepresentation claims were "contemporaneous to or related to the alleged tort or breach of contract otherwise provided, all in the context of rendering health care services as described in the MPLA". [Appx. 014].

Rather than following the Circuit Courts' exclusionary interpretation, the MPLA should either apply to autopsies as "health care" or at least be considered contemporaneous to or related to health care under certain circumstances. The *Blankenship* maxim (that MPLA claims are

determined by the nature of the facts involved, not the manner by which the causes of action are alleged) supports this latter application to autopsies. Again, the *Cipoletti* holding was based on the fact that an autopsy was performed upon the body of a 59-year-old deceased woman who received no form of treatment from the defendant, rather than the fact that an actual autopsy took place. *Thompson* on the other hand found that the autopsy qualified as health care services contemporaneous or related to a mother's treatment as a patient due to a stillbirth. *Thompson*, 248 W.Va. at 360. Because of the error committed, the Circuit Court never reached the issue of whether the autopsy claim was related to or contemporaneous to the anchor claim it identified: "the care and treatment of Brooke and Brody Morton". [Appx. 014].

The MPLA states in relevant part that "health care" is defined as:

Any act, [or] service, ... performed ... by any health care provider or person supervised by or acting under the direction of a health care provider or licensed professional for, to, or on behalf of a patient during the patient's medical care, treatment, ... including, but not limited to, staffing, medical transport, custodial care, or basic care, infection control, positioning, hydration, nutrition, and similar patient services.

W.Va. Code § 55-7B-2(e)(2) (emphasis added). Further, the Court acknowledged that the Legislature amended the MPLA specifically to broaden this definition. *Scott*, 246 W.Va. at 191. *Scott* determined that "you must have the anchor claim (fitting the definition of "health care") and then make the showing that the ancillary claims are (1) contemporaneous with or related to that anchor claim; and (2) despite being ancillary, are still in the context of rendering health care." *Id* at 194.

The emotional distress alleged by Respondents arises directly out of the care of both the mother and the infant, and would not exist without the labor of Brooke Morton, the delivery of Brody Morton, and the life-saving measures undertaken on behalf of each. Specifically, the first alleged negligent or wrongful conduct by WVUH or its representatives occurred within moments

of Mr. Morton observing Brody for the final time. [Appx. 027]. At the time of his passing, Brody's cause of death remained undetermined; consequently, written consent for the autopsy of Brody Morton was a natural next step following the staff's resuscitative attempts and his ultimate death.

The consent for the autopsy of the fetal remains and the consent for the custody of the fetal remains were both necessarily obtained as a direct result of the labor that occurred during Ms. Morton's hospitalization. Notably, in spite the general rule that allegations of a complaint must be taken as true for the purposes of a motion to dismiss, the individuals who in fact performed the autopsy and decided the condition in which Brody's body would be turned over to the funeral homes were not employees of WVUH, but rather WVUBOG. Like the physicians, the morgue personnel are employees of the WVUBOG and WVUH is not liable for their alleged negligence under the theory of ostensible agency. W.Va. Code § 55-7B-9(g). The emotional distress claims arise within the context of the alleged mishandling of the infant remains as healthcare services to Brooke Morton, originating with the allegedly uninformed consent to autopsy soon after Brody's death. Subsequently, and on behalf of the Respondents, WVUH retained custody of and conducted the autopsy upon the infant's remains. The emotional distress claims are thus contemporaneous or related to the healthcare provided to Brooke and Brody Morton.

Just as in *Thompson*, WVUH obtained consent to handle and transfer the infant's remains while the mother remained hospitalized. [Appx. 025-026]. It cannot be disputed that the handling and transfer of the remains were performed on behalf of Respondents. It is immaterial whether or not the handling and transfer were according to certain wishes; WVUH regardless performed the alleged acts/services on behalf of the Respondents in good faith. Accordingly, all acts in furtherance of the authorization's purpose, regardless of how Respondents characterize the subsequent events, resulted directly from services rendered on behalf of Brooke Morton. Because

Respondents meet the definition as a patient, and the autopsy was ancillary to Brooke and Brody's care and treatment, Respondents' remaining claims should be evaluated for compliance with the pre-suit notice requirements of the MPLA.

3. Did the Circuit Court commit clear legal error and exceed its legitimate powers by failing to consider the sufficiency of the screening certificates of merit authored by Nurse Felty under the mandatory pre-suit notice requirements of the MPLA?

Because the Circuit Court failed to determine that remaining emotional distress claims fall under the MPLA, the Circuit Court further failed to reach the issue of whether or not the relevant notice of claim and screening certificates of merit complied with the mandatory pre-suit notice requirements of the MPLA. As noted earlier, Respondent served a Notice of Claim related to the conduct of WVUH and its representatives, along with a screening certificate of merit authored by Nurse Felty supporting the "claims related to spoliation, IIED, NIED, related to the mishandling of Brody's autopsy arrangements, the destruction of his organs, and the alteration of medical records." [Appx. 051]. Of the three experts who produced screening certificates of merit, Nurse Felty is the only identified expert qualified to offer opinions as it relates to nursing and the conduct of the nonphysicians employed by WVUH.

The Notice of Claim generally alleges that WVUH is liable for various claims, including IIED, NIED, fraud/misrepresentation related to the inducement of Brody's autopsy, intentional spoliation, and negligent spoliation. [Appx. 050]. Beyond describing the general theories of liability, Respondents failed to otherwise implicate WVUH or its representatives in relation to the theories set forth, i.e. Respondents have failed to allege a causal link. The following is the only reference to WVUH or its representatives beyond the general description of the theories of liability: "Additionally, J.W. Ruby Memorial staff members have informed friends of Brooke Morton (who were J.W. Ruby Memorial/WVU employees caring for Brooke and Brody at the time of Brody's

death) that his records were being accessed more than seven (7) months after his death and that they were told to alter their medical records after Brody's death." [Appx. 051]. No other allegations contained in the Notice of Claim implicate WVUH or its representatives as it relates to the IIED or NIED claims. In fact, the Notice of Claim alleges that Dr. Cody Smith, a physician employed by WVUBOG, discussed the consent for the autopsy with Cody Morton rather than any representative of WVUH. [Appx. 025, 051].

Petitioner responded with a *Hinchman* letter, noting the deficiencies contained in Nurse Felty's original screening certificate of merit and citing to the relevant sections of the MPLA. [Appx. 055]. Respondents replied to the *Hinchman* letter by producing an audit report from Michael Seaver [Appx. 058] along with a supplemental screening certificate of merit from Nurse Felty [Appx. 080] expounding on the findings of the audit report; the supplemental report is nearly identical to the first, but contains an additional paragraph with five bullet points noting "the following conclusions and areas for concern:

- Multiple notes by multiple providers were deleted without any indication of the reason for the deletions... **I reserve the right to comment further and offer additional opinions on relevant [breaches] of hospital administration standards of care** on this issue...
- There were identified gaps in the ... documentation that coincides with critical time frames in the care of both Brooke and Brody [Morton]... The identified three (3) hours plus gap in documentation is inappropriate and **constitutes another breach in hospital administration and medical record standards of care** and regulatory standard...
- Laboratory tests were resulted months after treatment occurred... Resulting labs months after treatment and months after Brody [Morton's] passing, without documentation to explain the delay, is a **breach of hospital administration and medical records standard of care** for timely, accurate and complete medical records.
- Flowsheet entries were made later and done using the 'copy forward' option... These entries made hours or days after care observations occurred **do not comply with standards of care for hospital administration and medical records** standard of care for timely, accurate and complete medical records. Additionally, the use of 'copying forward' documentation of observations of care calls into question the veracity of the care observations and further

constitutes a breach of the standard of care for hospital administration and medical records for accurate, timely, and complete medical records.

- Five (5) notes were identified as being modified / edited as detailed in Informatics Nurse Michael Seaver's Attachment 1. Earlier versions of the medical record were not produced so it is not possible to determine what edits and modifications were made. Depending on the nature of the edits and modifications made, **it is possible that these edits and modifications do not comply with hospital administration and medical records standard of care for accurate, timely, and complete medical records...**"

[Appx. 081-082] (emphases added). Pursuant to the MPLA, the screening certificate of merit:

shall state with particularity, and include: (A) the basis for the expert's familiarity with the applicable standard of care; (B) the expert's qualifications; (C) the expert's opinion as to how the applicable standard of care was breached; (D) the expert's opinion as to how the breach of the applicable standard of care resulted in injury or death; and (E) a list of all medical records and other information reviewed.

W.Va. Code § 55-7B-6(b) (emphasis added).

Even with the supplementary opinions, both documents authored by Nurse Felty offer general and overbroad conclusions are devoid of particulars or specifics as to any deviations from the standard of care by nonphysicians who were employed by WVUH at the time, let alone the causal line. [Appx. 053, 080]. The allegations do not distinguish between or among the varying responsibilities of the professionals and how they relate to the standard of care. Clearly, each bullet contained in Nurse Felty's supplement failed to address Respondent's remaining emotional distress claims. Accordingly, because Respondents' claims against WVUH are subject to the MPLA, and the screening certificates of merit do not meet the particularity requirements of W. Va. Code § 55-7B-6(b)(D), Petitioner urges the Court to grant this Petition and issue a Writ dismissing all remaining claims.

VI. CONCLUSION

Petitioner respectfully requests that the Court reverse the Circuit Court's determination that the remaining claims are not subject to the pre-suit notice requirements of the MPLA and direct the Circuit Court to dismiss the claims against WVUH for failure to comply therewith.

**WEST VIRGINIA UNIVERSITY
HOSPITALS, INC., d/b/a J.W.
RUBY MEMORIAL HOSPITAL,
Petitioner.**

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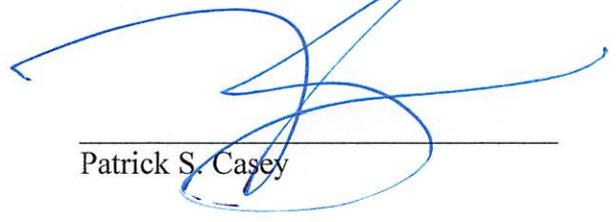
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VERIFICATION PURSUANT TO WEST VIRGINIA CODE § 53-1-3

STATE OF WEST VIRGINIA,

COUNTY OF OHIO, TO-WIT:

I, Patrick S. Casey, counsel for Petitioner West Virginia University Hospitals, Inc. d/b/a Ruby Memorial Hospital, hereby certify that, to the best of my knowledge and belief, the contents of the Verified Petition for Writ of Prohibition are true and accurate to the best of my knowledge.



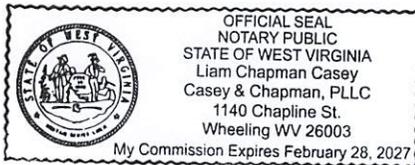
Patrick S. Casey

Taken, sworn to and subscribed before me this 24th day of February, 2025.



Notary Public

My Commission Expires: Feb. 28, 2027



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. _____

**STATE OF WEST VIRGINIA EX REL.
WEST VIRGINIA UNIVERSITY
HOSPITALS, INC. d/b/a J.W. RUBY
MEMORIAL HOSPITAL,
Defendant Below,
Petitioner,**

v.

**HONORABLE MICHAEL D. SIMMS,
Judge of the Circuit Court of Monongalia County,**

and

**CODY MORTON and BROOKE MORTON,
Individually and as Administrators of the
ESTATE OF BRODY WILLIAM MORTON,
a deceased minor,
Plaintiffs Below,
Respondents.**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing VERIFIED PETITION FOR WRIT OF PROHIBITION was served upon counsel of record by the File&ServeXpress system and to the office of the Honorable Michael D. Simms by the West Virginia E-File system on February 25, 2025:

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