IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 25-145

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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 RESPONSE TO 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 Response addresses the following questions presented in the Petitioner's Petition for Writ of Prohibition:

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?

Suggested Answer: No

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?

Suggested Answer: No

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?

Suggested Answer: No

II. STATEMENT OF THE CASE

The case at issue is based on the conduct of the Petitioner, West Virginia University Hospitals, Inc. d/b/a Ruby Memorial Hospital (hereinafter "WVUH") following the death of the Petitioner's infant child, Brody William Morton.

Pursuant to West Virginia Rule of Appellate Procedure 16(g), the Respondent does not take issue with the procedural history asserted by the Petitioner and, as such, the Respondent will not reiterate the posture of this case for purposes of judicial economy. *See,* Petitioner's Petition for Writ of Prohibition at Pages 2-4. However, the Respondent does not agree with any allegations of insufficiency or with any of the various legal arguments and interpretations contained in the Petitioner's Statement of the Case. The Respondent offers this Honorable Court the following additional facts for its consideration:

Following a negligent labor and delivery, Brody Morton died on April 5, 2021 at approximately 9:00 P.M. [Appx. 025]. In the hours following Brody's death, Cody Morton

(Brody's father and the husband of Brooke Morton, Brody's mother) was approached by Dr. Mark "Cody" Smith, the Associate Program Director of the Neonatology Department at WVU. [Appx. 025]. Dr. Smith told Cody that Brody was extremely sick and that there was no way his death could have been prevented. [Appx. 025]. During this meeting, Dr. Smith asked Cody if he would like an autopsy performed on Brody. [Appx. 025]. Dr. Smith advised Cody that it would take a few days for the autopsy to be performed as Brody's body had to be transported to the West Virginia Medical Examiner's office in Charleston, West Virginia. [Appx. 025]. Cody agreed to the autopsy by the West Virginia Medical Examiner only because of the mismanagement of Brooke and Brody's care and because he perceived Ruby Memorial to be making excuses for Brody's death. [Appx. 025]. He specifically *did not* want the autopsy to be done at Ruby Memorial for that reason. [Appx. 025]. However, records completed and signed by Dr. Smith show that neither he, nor anyone else at Ruby Memorial, chose to notify the West Virginia Medical Examiner of Brody's death—despite directly telling Cody that Brody's autopsy would be performed by the West Virginia Medical Examiner in Charleston, West Virginia. [Appx. 026].

In the morning hours of April 6, 2021, Cody Morton was approached in his room by Dr. Marc Smith, Dr. Kathyrn Moffat, Dr. Joshua Dower of Pediatrics & Palliative Care along with another physician at Ruby Memorial. [Appx. 026]. All of the physicians continued to express to Cody that Brody was very sick and that he would never have been able to survive his birth. [Appx. 026]. Cody informed Dr. Smith that he could not believe that the three and a half hours in which Brooke and the nursing staff were asking for a Cesarean Section would not have made a difference in saving Brody's life, to which Dr. Smith responded, "well that's your opinion." [Appx. 026]. Cody was *not* informed that Dr. Joshua Dower, the physician who was there to offer comfort and support and his services as a grief counselor, was in fact the husband of Dr. Sarah Dotson, the

physician who mismanaged Brody's labor and delivery. [Appx. 026]. Dr. Dotson's husband, under the guise of providing emotional support, bolstered Dr. Smith's claims that Brody's death was inevitable and that nothing could be done to save him. [Appx. 026]. Dr. Dower then coached Cody on the best way to break the news to Brooke that their son had died. [Appx. 026].

The following day, April 6, 2021, at approximately 2:00 P.M., Brooke was able to be removed from the ventilator. [Appx. 027]. That evening, Cody had to tell Brooke that Brody died. [Appx. 027]. At approximately 10:00 P.M., NICU staff brought Brody's body, which had been in a cooling unit, to Brooke so she could see the son whom she never got to see alive. [Appx. 027]. Following family photos with Brody, Cody left the room with the incubator holding Brody's body to see him off for the final time. [Appx. 027]. At that time, in the hallway outside of the room where he had held his son for the last time, two nurses presented Cody with the papers to send Brody's body for an autopsy. [Appx. 027]. He was told to sign the papers because the autopsy needed to be performed quickly. [Appx. 027]. Believing that he was releasing Brody's body to the Medical Examiner in Charleston as he was told by Ruby Memorial staff, Cody quickly signed the papers in the hallway without having them explained to him and under pressure to sign as soon as possible. [Appx. 027].

On April 9, 2021, Cody received a call from Theresa Boal, the owner and director of Boal Funeral Home in Westernport, Maryland, who Cody and Brooke entrusted to handle Brody's remains for burial after his autopsy in Charleston. [Appx. 028]. Ms. Boal called to let Cody know that she had picked Brody's body up at Ruby Memorial and she was ready to discuss arrangements. [Appx. 028]. Cody asked Ms. Boal "What do you mean? He was supposed to be in Charleston" to which Ms. Boal assured him if he were in Charleston, she would have picked him up there. [Appx. 028]. Ms. Boal told Cody that an autopsy had been done at Ruby Memorial, entirely against what

Cody and Brooke wanted. [Appx. 028]. Cody, absolutely horrified, told Ms. Boal that he wanted Brody's body sent to Charleston for the state Medical Examiner to do an autopsy as he was told would happen. [Appx. 028]. At that point, Ms. Boal informed Cody, "Cody, I don't know how to tell you this, but there is nothing left to do an autopsy on." [Appx. 028]. The staff of Ruby Memorial had removed Brody's internal organs and did not return them with his body, preventing the Morton family from having their own independent autopsy done. [Appx. 029]. Ms. Boal had to place gauze and fabric in Brody's abdominal cavity to prepare him for burial. [Appx. 029].

Months after Brody's death, on October 11, 2021 a close friend of Brooke Morton was informed by fellow-Ruby Memorial Employees that Brody's records were being accessed and that falsifications had been made in both Brooke and Brody's chart since his death. [Appx. 029].

III. SUMMARY OF ARGUMENT

The rulings of the Circuit Court are in keeping with the rulings of this Court in the most recent case to address issues related to the Medical Professional Liability Act W. Va. Code §§ 55-7B-1 *et seq* (hereinafter "MPLA") and its application to the deceased, West Virginia Department of Health vs. Cipoletti, 250 W.Va. 1, 902 S.E.2d 133 (2024). The Circuit Court properly ruled that the decedent, Brody Morton, was not a "patient" within the parameters of the MPLA as he was deceased at the time of the actions alleged against the Petitioner in the Respondents' Complaint. [Appx. 013]. The Circuit Court ruled that the emotional distress claims held by Respondents against the Petitioner were outside of the confines of the MPLA and not anchored in Brooke or Brody Morton's health care, and, as such, no screening certificates of merit were required for the claims against the Petitioners. [Appx. 013].

However, the Respondents disagree with the Circuit Court's ruling that the fraud and spoliation claims held by the Respondents are anchored to the underlying MPLA claim. [Appx.

014]. Since the fraud and spoliation causes of action were dismissed at the Circuit Court level, they were not addressed by the Petitioners in the instant Petition for Writ of Prohibition. As such, the Respondents have not argued their point that dismissal was improper within the confines of this Response to the extent they would have otherwise.[1]

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents assert that the matter before this Honorable Court warrants oral argument pursuant to West Virginia Rules of Appellate Procedure 18(a) and 20(a)(2).

V. ARGUMENT

A. Standard of Review

The standard of review for a writ of prohibition is high given magnitude of the argument before the Court. "The writ of prohibition shall lie as a matter of right in all cases of usurpation or abuse of power, when the inferior court has no jurisdiction over the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W. Va. Code §§ 53-1-1.

It is imperative to note that a writ of prohibition cannot be used as a means to circumvent an appeal. "Our law plainly says that a writ of prohibition may not be used as a substitute for appeal." State ex rel. Shelton v. Burnside, 212 W. Va. 514, 518, 575 S.E.2d 124, 128 (2002). In the Shelton case, the Court also noted:

> Where prohibition is sought to restrain a trial court from the abuse of its legitimate powers, rather than to challenge its jurisdiction, the appellate court will review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate, and **only if the appellate court determines that the**

[1] A writ of prohibition will lie if the Court acts outside its jurisdiction. The dismissal of certain claims by the Circuit Court is a finding that those claims are covered by the MPLA, and the dismissal therefore is not an action where the Circuit Court improperly assumes jurisdiction over claims. As such, the dismissal of these claims is subject only to direct appeal—which would be interlocutory at this stage. However, in the interest of judicial economy, this Court may want to consider the dismissed claims now, as opposed to later on direct appeal. Respondents are prepared to provide additional briefing on the dismissed claims should the Court wish to consider them, and if the Court determines that additional briefing would be helpful.

> **abuse of powers is so flagrant and violative of petitioner's rights as to make a remedy by appeal inadequate, will a writ of prohibition issue**.

Shelton, 212 W.Va. at 518, 575 S.E.2d at 128. (Emphasis added).

This Court has promulgated a test which outlines five (5) factors to consider in allowing for a writ of prohibition based on a lower tribunal exceeding its legitimate powers:

> (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.

State ex rel. Hoover v. Berger, 199 W. Va. 12, 15, 483 S.E.2d 12, 15 (1996).

In the instant matter, a writ of prohibition and review by this Court is not appropriate. Although not all five (5) factors enumerated above must be met to warrant a writ of prohibition, only factor three (3) could be applicable to this case. In this case, factors (1), (2), (4) and (5) are at best minimally relevant as: the Petitioner (1) does have a means to direct appeal following a jury verdict and (2) the Petitioner will not have irreparable damage hoisted upon it that cannot be remediated on appeal. Further, (4) the circumstances of this instant case are narrow under the confines of the MPLA and, though important, it is not a topic that is often addressed—even less so persistently disregarded. Finally, (5) although it is not a commonly addressed issue within the lower courts, this is not a matter of first impression as the arguments raised by the Petitioner in the

instant matter were addressed by this Court just last year in West Virginia Department of Health vs. Cipoletti, 250 W.Va. 1, 902 S.E.2d. 133 (2024). The only factor of the Hoover test that is truly relevant here is 3rd factor: whether the lower court made a clear error as a matter of law as to arguments surrounding the applicability of the MPLA and the sufficiency of the Respondents' certificates of merit and as such acted extra-jurisdictionally. Those issues are addressed herein.

B. Questions Presented

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?

Suggested Answer: No

In the case of the State of West Virginia ex rel. Charleston Area Medical Center vs. Thompson, Chief Justice Wooten commented on the inclusions of the definitions of the MPLA[2]: "While the reach of the MPLA may indeed be broad, it is not limitless. If the Legislature's intent were to require the MPLA's application to virtually any case filed against a health care provider regardless of the nature of the underlying allegations, it would scarcely have bothered to create definitions at all." State ex rel. Charleston Area Med. Ctr., Inc. v. Thompson, 248 W. Va. 352, 366, 888 S.E.2d 852, 866 (2023, C.J. Wooten, dissenting). The most current version of the MPLA was updated in 2015. The definitions in question for the instant case are "patient", "health care" and "medical professional liability" .

a. Patient

Under the MPLA, a patient is defined as "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. It is important to note at this juncture that Brody Morton was deceased

[2] Chief Justice Wooten's comment was made in dissent. However, the basic premise is both logical and accurate.

at the time of all of the Petitioner's conduct in question. He was no longer a "natural person"—and he ceased being a "natural person" when he died.

The Petitioner relies on the Thompson case and its application of the word "patient" to argue that Brody Morton was a patient at the time of the events in question. However, the facts of Thompson are not the same: in Thompson, a mother delivered a **stillborn** fetus. The Thompson Court reasoned that the handling of the stillborn fetus's remains arose out of the health care of the **mother**, and, as such, the **mother** was the "patient" to be evaluated in the context of the MPLA *See* Thompson, 248 W. Va. 352, 360, 888 S.E.2d 852, 860 (2023) . Brody Morton was not a fetus. Brody Morton was born alive at 37 weeks gestation (at almost ten pounds) after induction and lived for six (6) hours until his death. During those six (6) hours he received extensive medical care—so much so, that he was given his own chart with his own Patient Identification number. During those six (6) hours, Brody was a patient pursuant to the MPLA, **unlike** the stillborn fetus in Thompson.

Brody's case is analogous to the facts in the case of Ricottilli v. Summersville Memorial Hospital, 188 W. Va. 674, 425 S.E.2d 629 (1992). Although the holdings of Ricottilli were distinguished by the rulings in Thompson, Ricottilli remains good law and is precedential in this case. In Ricottilli, a mother sued for the mishandling of her child's body after her child was admitted to the hospital and died within a few hours. *See generally,* Ricottilli, 188 W. Va. 674, 425 S.E.2d 629. In Ricottilli, the Court held that "a deceased individual does not qualify as a 'patient' under the Medical Professional Liability Act." Ricottilli 188 W. Va. at 678, 425 S.E.2d at 633. In distinguishing Ricottilli by identifying the mother of the stillborn fetus as the 'patient' per the MPLA, the Thompson court noted:

> The facts of *Ricottilli* are distinguishable because it involved the alleged mishandling of an autopsy of a *deceased prior patient.* The

> allegations in the amended complaint in the present matter [Thompson] arise from the alleged mishandling of fetal remains following health care given to Ms. Lester. Consequently, we must examine whether Ms. Lester was a patient, and if so, under this narrow set of facts, whether the alleged mishandling of the fetal remains was a part of the health care services rendered to her.

Thompson, 248 W. Va. at 358, 888 S.E.2d at 858–59 (emphasis original).

Brody Morton was exactly the type of "deceased prior patient" that the Thompson Court referenced in distinguishing the Thompson facts from Ricottilli. Although Ricottilli was decided in 1992, before the 2015 amendments of the MPLA, the Thompson Court acknowledged that the definition of 'patient' did not change with the new amendments. The Court noted: "Additionally, as discussed below, Ricottilli was decided prior to the Legislature's 2015 amendments broadening what is encompassed under the MPLA. *While the definition of patient has not changed*, we acknowledge the "changing landscape of medical malpractice claims" since the amendments. *See,* Thompson, 248 W. Va. at 358 n.9, 888 S.E.2d at 858 (emphasis added).

In short, Brody Morton, was not a patient per the definition of the MPLA at the time of the conduct in question. This case is directly analogous to Ricottilli and distinguishable from Thompson. In the words of Chief Justice Wooten's Thompson dissent:

> The majority quickly and tersely distinguishes this case—*not because the allegations, cause of action, or underlying conduct is substantially different*—but simply because the decedent in *Ricottilli* was a "*prior patient.*" (Footnote omitted). In other words, because the decedent in *Ricottilli* entered the hospital alive and was given a patient identification and registration, the decedent was the "patient" to be evaluated under the MPLA's definition. However, because CAMC does not provide a stillborn fetus a separate patient identification or registration, the majority concludes that A.C.L.'s mother—respondent Angela Lester—is the relevant "patient" who triggers the application of the MPLA.

Thompson, 248 W. Va. at 364-65, 888 S.E.2d at 864-65.

Again, while Chief Justice Wooten clearly disagreed with the Thompson majority, he accurately summarized the distinction drawn by the majority. In cases involving the mishandling of remains, what matters is whether the remains belong to a "deceased former patient," in which case the MPLA does not apply, as compared to a stillbirth, in which the mother is considered the patient and the MPLA does apply. Here, Brody is a "deceased former patient" so the claims of his parents arising from the mishandling of his remains fall outside of the MPLA. In Thompson, the baby was stillborn and the only "patient" was the mother. In Ricottilli, the only patient was a deceased child and the parent was not a patient. However, while in this case we arguably have two "patients"—Brooke Morton, and Brody Morton for the six (6) hours he was alive, the key is that the conduct, as alleged in Ricottilli, occurred with regard to a "deceased former" patient—Brody Morton.

To put an even finer point on it, even if this Court were to follow Thompson and hold that Brooke was the patient such that her claims fall under the MPLA, there is simply no question that Cody Morton was ever a patient and ever had health care provided to him. Therefore, there is simply no way that his claims could ever be MPLA claims.

Importantly, this Court's most recent ruling on this issue, West Virginia Dept. of Health, Office of the Chief Medical Examiner and Allen Mock, M.D., v. Dr. Patsy Cipoletti, Jr, 250 W.Va. 1, 902 S.E.2d 133 (2024)[3] confirmed the Ricottilli/Thompson distinction. The Cipoletti case arises out of the conduct of Dr. Mock, a medical examiner who performed an autopsy on Mrs. June Cipoletti, The Cipoletti Court had to examine whether the decedent constituted a "patient" per the

[3] This case was decided on the date oral argument was held in the Circuit Court on the Petitioner's Motion to Dismiss. Neither Petitioner nor Respondent argued this case below.

standards of the MPLA and whether an autopsy and subsequent determinations on causes and manners of death constituted "health care" under the MPLA. Ultimately, the Cipoletti Court determined that the deceased Mrs. Cipoletti was not a patient, nor, by extension, was an autopsy health care. *See,* Cipoletti, 250 W.Va. 1, 19, 902 S.E.2d 133, 142 (2024).

The Cipoletti Court opined:

> Respondent correctly notes that the Legislature has expanded the MPLA since *Ricottilli* was decided in 1992. However, the Legislature has not changed the definition of "patient" during that time, nor has it broadened the MPLA such that a decedent may be the basis of an MPLA cause of action. Further, this Court examined our holding in *Ricottilli* in *State ex rel. Charleston Area Med. Ctr., Inc. v. Thompson*, a case brought by a mother against a hospital alleging that it had mishandled her stillborn fetus's remains. One of the issues in *Thompson* was whether the mother's claim involved a "patient" under the MPLA. This Court found that there was a valid MPLA claim because the mother, rather than the decedent stillborn fetus, satisfied the definition of "patient" under the MPLA. **Importantly, however, *Thompson* did not overrule or cast doubt on *Ricottilli' s* holding that a decedent could not qualify as a patient under the MPLA or constitute the basis for an MPLA claim**.

Cipoletti, 250 W.Va. at 17, 902 S.E.2d at 141 (emphasis added) (internal citations omitted).

In the instant matter, the Petitioner notes:

> 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.

See Petitioner's Petition for Writ of Prohibition at 15.

First, the Petitioner infers that the Cipoletti Court knew that Mrs. Cipoletti had died at home prior to her arrival at the hospital and points the Court to Page 142 of the Cipoletti opinion.

However, this information is not contained in the opinion and it is not clear if the Court even knew where Mrs. Cipoletti died. It was not noted in the Court's opinion. Given the central importance of the treatment (or lack thereof) of Mrs. Cipoletti to her status of a "patient," it seems unlikely that the Court would not have noted this if it were aware. Regardless, in Cipoletti, this Court affirmed that a deceased individual cannot be a patient per the MPLA. That ruling is directly applicable to this matter before the Court.

What the Petitioner ultimately fails to address is the fact that, at one point, Brody Morton was a "patient" per the MPLA—when he was alive and receiving medical treatment. However, he then died. At that moment, he ceased to be a patient. Physicians and nurses had to turn their attention from caring for him to caring for other patients who they still had the chance to help. There was no medical care that could have helped Brody once he died. A human can go from being a patient to not a patient within seconds—and that is through his or her death. In the moment of death, the goals and plans of those providing care change. Medical providers only care for the living—and those patients are the ones with claims dictated by the MPLA. This vital distinction is one that cannot be ignored or rationalized around.

b. Health care

In order to fully determine whether or not claims at issue in front of this Court are within the confines of the MPLA, this Court has to also consider the definition of "health care" as defined by the Act.

Per the MPLA, health care means:

> (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 Ann. § 55-7B-2 (emphasis added).

The Petitioners consistently argue that the Circuit Court erred in determining that an autopsy is not "health care" per the MPLA. *See,* Petitioner's Petition for Writ of Prohibition at 15). However, the language of the MPLA dictates that the actions in question must be in the "furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis, or treatment". W. Va. Code Ann. § 55-7B-2. In this definition, the terms "health care facility" modifies both the terms "plan of care" and "medical diagnosis." As such, it is a "health care facility's diagnosis" or a "health care facility's treatment" at issue not simply any "treatment or diagnosis." An autopsy is not done to enhance or address the care being given to a patient in furtherance of their care and wellbeing. Physicians and health care facilities do not have plans or care or treatment for a deceased individual. And an autopsy does not provide a medical diagnosis—it provides a cause and manner of death and makes other "findings". A diagnosis implies future treatment, which is not something considered when performing an autopsy.

Further, the definition of "health care" per the MPLA also requires that the act or service performed must be "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" W. Va. Code Ann. § 55-7B-2. The definition within the statute notes that the care must be given during "medical

care, treatment or confinement," none of which are provided to a deceased person. The MPLA even gives a short list of examples of acts that constitute health care which include clear indications of care given to living persons including "infection control, positioning, hydration, [and] nutrition." W. Va. Code Ann. § 55-7B-2. Simply, things such as "infection control, positioning, hydration and nutrition" matter only to the living—they have no impact on the dead.

The Cipoletti ruling, although not stating verbatim "autopsies **are not** health care" does assert this with a simple reading of the text. The Court noted:

> In the present case, Petitioners did not provide **health care services** to either a "**patient**" or a "person" resulting in death or injury. *Instead*, Dr. Mock performed an **autopsy** on a **decedent** and completed a report and a death certificate listing the manner and cause of death. Because Petitioners did not provide health care services to a patient or a person resulting in injury or death, Respondent has not stated a claim for "medical professional liability" under the MPLA.

Cipoletti, 250 W.Va. at 19, 902 S.E.2d at 142.

The Court was clear that the medical examiner in Cipoletti did not provide "health care services to a patient or a person" and **instead** the medical examiner "performed an autopsy on a decedent" Cipoletti, 250 W.Va. at 18, 902 S.E.2d at 142 (emphasis added). The construction of the sentences shows a correlation between the words "health care" and "autopsy" and "patient or a person" and "decedent". The use of the word "instead" contained between the two sets of words shows that they are connected, albeit opposite. This is further clarified by the fact that the Cipoletti ruling indicates that a decedent is not a "patient" per the MPLA. Cipoletti, 250 W.Va. at 17, 902 S.E.2d at 141.

Taken in sum, the Petitioner's argument that the Circuit Court erred in its interpretation of an autopsy not being health care per the Cipoletti ruling is incorrect.

c. Medical Professional Liability

Finally, the Court should also look to the definition of "medical professional liability" to determine this matter—as that term is a central tenant of the Medical Professional Liability Act and is obviously important.

The MPLA defines "medical professional liability" as:

> [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).

In Cipoletti, this Court decided that an autopsy is not "health care" provided to a "patient". In the context of "medical professional liability" the Court also held:

> To assert a viable claim for "medical professional liability" 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[.]" This requirement is fatal to Respondent's argument.
>
> In the present case, Petitioners did not provide health care services to either a "patient" or a "person" resulting in death or injury. Instead, Dr. Mock performed an autopsy on a decedent and completed a report and a death certificate listing the manner and cause of death. Because Petitioners did not provide health care services to a patient or a person resulting in injury or death, Respondent has not stated a claim for "medical professional liability" under the MPLA.

Cipoletti, 250 W.Va. at 19, 902 S.E.2d at 142 (internal citations omitted).[4]

Although there is no doubt that Brody Morton was, at one point in his short, six (6)-hour life, a patient at the Petitioner's facility who received health care, the Respondent did not assert

[4] The Respondent recognizes that the 2nd paragraph of this quotation was also quoted verbatim earlier in this brief. Respondent repeats this critical holding only to show its relevant to the definition of both "health care" and "medical professional liability."

any allegations regarding substandard care against the Petitioner **while Brody was alive**. The Respondents do not list particular actions taken by the Petitioner that "resulted in death or injury" to Brody Morton. Rather, the Respondent has six (6) claims against the Petitioner, all of which are based solely and exclusively on conduct that occurred after he died. The only allegations regarding the care that Brody received when he was alive, or the damages that resulted from his care, were against the WVUBOG (Counts I-III) and are resolved.

The Counts of Plaintiff's case levied against the Petitioner are entitled:

-Count IV: Brooke Morton vs. Ruby Memorial (Intentional Infliction of Emotional Distress vs. Ruby Memorial related to Brody Morton's Autopsy)

-Count V: Brooke Morton vs. Ruby Memorial (Negligent Infliction of Emotional Distress Related to Brody Morton's Autopsy)

-Count VI: Brooke Morton vs. Ruby Memorial (Intentional Spoliation Related to Brody Morton's Autopsy and Medical Records)

-Count VII: Cody Morton vs. Ruby Memorial (Intentional Infliction of Emotional Distress Related to Brody Morton's Autopsy and Grief Counseling)

-Count VIII: Cody Morton vs. Ruby Memorial (Negligent Infliction of Emotional Distress Related to Grief Counseling, Brody Morton's Autopsy, and Keepsake Memorials)[5]

-Count IX: Cody Morton vs. Ruby Memorial (Intentional Spoliation Related to Brody Morton's Autopsy and Medical Records)

-Count X: Cody Morton vs. Ruby Memorial (Fraud/Misrepresentation Related to Grief Counseling and Brody Morton's Autopsy)

The Respondents acknowledge the ruling in Blankenship that "the determination of whether a cause of actions falls within the MPLA is based on the factual circumstances giving rise to the cause of action, not the type of claim asserted." Blankenship v. Ethicon, Inc., 221 W. Va.

[5] The Petitioner properly notes that the Respondent will no longer be pursuing damages related to the improper delivery of another deceased infant's keepsake hand molds to the Morton family

700, 702-03, 656 S.E.2d 451, 453-54 (2007). However, the Petitioner is incorrect in insinuating that the Circuit Court provided too much leeway in acknowledging the footnote contained in the Respondent's Complaint which noted:

> Plaintiffs do not believe that Counts II-X of this Complaint fall within the jurisdiction of the Medical Professional Liability Act, W. VA. Code §55-7B-6. Plaintiffs also recognize that the Defendants will disagree with this assessment. As such, a judicial determination on the applicability of the MPLA to these counts will need to be made. Recognizing that some or all of Counts II-X may be judicially determined to be within the MPLA, Plaintiffs have also sent the Notices of Claim and Affidavits of Merit to the Defendants as to Counts II-X. Conversely, in the event some or all of Counts II-X are determined to not be within the MPLA, Plaintiffs are filing this Complaint ahead of the April 5, 2023 limitations date. Plaintiffs are willing to stay further action on the Complaint should the Defendants choose to mediate pursuant to the MPLA.

See Petitioner's Petition for Writ of Prohibition at 15.

The specific actions that the Respondents alleged against the Petitioner, contained in Counts IV-X of the Complaint, do not have to do with the provision of health care to a patient in the context of a medical professional liability claim. These damages claimed do not "result from the death or injury" of Brody Morton. Rather, the emotional distress damages claimed in the complaint are solely based in the trauma inflicted upon the Morton family upon learning of the various ways the Petitioner's agents handled their son's autopsy, medical records, and the grief counseling of Cody Morton.

In Counts IV-X of the Complaint, the Respondents allege particulars as causing the damages at issue in Paragraphs 143(a)-(c); 149(a)-(b); 156(a)-(e); 166(a)-(e); 172(a)-(d); 179(a)-(e), and 188(a)-(g). [Appx. 018, 019, 020, 022, 042, 047, and 048]. In reading these particulars, it is clear that the Respondent is not alleging that the actions and/or inactions of the WVUH were the cause of Brody's death or any injury to Brody's living being. The actions and/or inactions all

enumerated in the Complaint are not the provision of "health care" to a "patient". Rather, these are the actions taken by the Petitioner following the death of a child in furtherance of attempts to mitigate (or cover up) the damages caused within the four walls of their flagship institution. The Petitioners go into detail to stress the efforts made by their staff to save Brody and to keep Brooke alive. To be clear, the Respondents are not saying that the Petitioner's staff did not perform those tasks and did not make efforts to save Brody and Brooke. All of those events happened. However, those efforts are not what the Respondents take issue with and are not what this case is about. Any care-based issues were resolved with the WVUBOG and are no longer at issue. There were never any care-based claims made against the Petitioners, so any care provided, regardless of the efforts made, is simply not relevant. The only claims that remain are against the Petitioners and those claims are based solely and exclusively in the postmortem conduct of the Petitioner's agents.

The MPLA is meant to address the negligence of health care providers and facilities in their rendering of health care to patients. It is a statute based in medical *negligence*—not in the intentional conduct of hospitals, medical staff, and professionals. As noted in the Legislative Findings and Declaration of Purpose of the MPLA:

> As in every human endeavor the possibility of injury or death from **negligent** conduct commands that protection of the public served by health care providers be recognized as an important state interest;
>
> Our system of litigation is an essential component of this state's interest in providing adequate and reasonable compensation to those persons who suffer from injury or death as a result of **professional negligence**, and any limitation placed on this system must be balanced with and considerate of the need to fairly compensate patients who have been injured as a result of **negligent and incompetent acts** by health care providers.

W. Va. Code Ann. § 55-7B-1 (West) (emphasis added).

Nowhere in the Declaration of Purpose of the MPLA does the West Virginia Legislature purport any intention to protect medical professionals or hospitals from liability from intentional torts or actions in furtherance of misrepresentation or fraud. It is inconceivable to think that the conduct that is alleged here related to Brody Morton's autopsy and medical records was ever the sort of conduct the Legislature intended on protecting medical providers and hospitals from—doing so would have encouraged chilling and unacceptable conduct. As Chief Justice Wooten so eloquently explained in his dissent in University Hospitals, Inc. vs. Scott:

> Our determination as to whether the MPLA applies requires more than a trail of breadcrumbs to some semblance of health care service. The failure to document/report and spoliation claims constitute malfeasance which is not peculiar to health care providers; this type of wrongdoing fails to implicate the provision of "health care" in any way. Claims of this type were not the genesis of the MPLA's remedial efforts and are undeserving of the special protections the MPLA affords. The MPLA was not intended to provide a blanket of institutional protection to health care providers for any manner of wrongdoing insofar as it was otherwise regularly engaged in the business of health care.

State ex rel. West Virginia University Hospitals, Inc. v. Scott, 246 W.Va. 184, 203-04, 866 S.E.2d 350, 369-70 (2021, C.J. Wooten, dissenting).

The actions taken by the Petitioner and its agents were not based in "health care" nor were these actions provided to a "patient"; furthermore, any of the aforementioned actions and/or inactions are not based upon claims of medical professional liability. As such, the claims at issue do not fall within the parameters of the MPLA.

The Respondents feel it necessary to note that the Circuit Court dismissed the Respondents' claims for fraud/misrepresentation and spoliation. As this matter was not directly addressed by the Petitioners, the Respondents have not briefed this matter nor could the Respondents have filed a cross Petition for Writ of Prohibition. As noted earlier at nil, infra., for purposes of judicial

economy, the Respondents will not address these issues with this Honorable Court at this time. However, should this Honorable Court ultimately affirm the Circuit Court's ruling that Brody Morton was not a "patient" per the MPLA, nor was the care given to him following his death "health care", it would logically follow that Cody Morton was most certainly also not a "patient" per the MPLA nor were any of the interactions with Cody and Brooke following Brody's death "health care." As such, the fraud/misrepresentation and intentional spoliation claims held by Brooke and Cody Morton do not constitute "health care" under the MPLA and the Circuit Court's dismissal of those claims should be reversed if the holdings regarding the IIED and NIED claims at issue are sustained.

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?

Suggested Answer: No

In 2021, the West Virginia Supreme Court looked in depth at the definition of "health care" and its role as an "anchor" in many MPLA cases in State ex rel. West Virginia University Hospitals, Inc. vs. Scott. In the Scott case, Respondents brought various claims against the WVUH related to injuries sustained by one of their twins after delivery. Along with standard MPLA-based medical malpractice claims, the Respondents brought claims for corporate negligence (failure to report, failure to document, etc.) and negligent spoliation related to the destruction of medical equipment. The Court in Scott noted:

> The "health care" claim is the "anchor;" it gets you in the door of MPLA application to allow for inclusion of claims that are "contemporaneous to or related to" that claim, but still must be in the overall context of rendering health care services. It is not a broad stroke application that because a claim is contemporaneous to or related to health care that it falls under the MPLA. To put a finer point on it, 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.

Scott, 246 W.Va. at 194 866 S.E.2d at 360 (2021).

The Respondents here do not dispute that there was an underlying "anchor claim" of medical malpractice for the Estate of Brody Morton against the WVUBOG to "get [the Petitioners] in the door of MPLA application". However, the Respondents' current claims against the Petitioner are not contemporaneous to the anchor claim, nor are they within the context of rendering "health care" per the MPLA's definition. The only claim "anchoring" the Petitioner to the MPLA are the resolved claims against the WVUBOG, not against the Petitioner itself.

As stated above, all of the conduct of the Petitioner at question in this case is post-death conduct, and as such are not contemporaneous with conduct that makes up the supposed anchor claim.[6] Respondents do not allege that the nursing staff or direct employees of the Petitioner were negligent in their monitoring of Brody's labor and his delivery. Rather, Respondents argue that the conduct of the Petitioner after Brody's death was a coordinated effort to conceal what truly happened to Brody Morton from his parents, including: allowing a physician (who held himself out as an employee of the Petitioner) married to a negligent party to provide comfort services to Cody Morton; in allowing a physician (who again, held himself out as an agent of the Petitioner) to lie to Cody Morton about where his son's autopsy would be done; in permitting the retention and/or destruction of Brody Morton's body organs; in preventing an independent autopsy; and, in altering medical records. None of these events occurred when the patient, Brody Morton, was alive. Some of these events occurred literally months after his death. They were not

[6] A common definition of contemporaneous is "existing or occurring in the same period of time" Oxford Languages Dictionary, accessed via google.com on April 25, 2025.

contemporaneous to "health care" being provided to Brody Morton, as "health care" cannot be provided to a deceased "patient." Beyond that, the "pre-death" actions by definition cannot be contemporaneous with "post-death" actions, as life and death simply cannot exist at the same time, or, in the terms of the MPLA, cannot exist "contemporaneously".

Further, the conduct at issue and the claims that were pled stemming from that conduct cannot be deemed "in the context of rendering health care". Scott, 246 W.Va. at 194 866 S.E.2d at 360 (2021). The claims of intentional infliction of emotional distress, negligent infliction of emotional distress, intentional spoliation and fraud are simply not actions related to "health care"[7].

Again, we recognize that the spoliation/fraud claims are not the subject of this Writ. However, should this Court decide the issues regarding the NIED and IIED claims, the same logic would apply to the spoliation and fraud claims. As Chief Justice Wooten explains in the dissent in Scott: "The MPLA was not intended to provide a blanket of institutional protection to health care providers for any manner of wrongdoing insofar as it was otherwise regularly engaged in the business of health care." Scott, 246 W.Va. at 204, 866 S.E.2d at 370.

The Petitioners claim that the emotional distress claims asserted by the Respondent "arise within the context of the alleged mishandling of the infant remains as health care services to Brooke Morton" and that any conduct that occurred in the process of obtaining consent and authorization signatures for the autopsy from Cody Morton "resulted directly from services rendered on behalf of Brooke Morton". *See* Petitioner's Petition for Writ of Prohibition at 18. This argument is somewhat confounding. There would be no autopsy without the death of Brody Morton, a deceased prior patient. The act of an autopsy is not conduct that is effectuated upon anyone else other than the decedent. To argue that the autopsy of Brody Morton, who died after

[7] The "anchor claim" relates to events that took place during the birthing process and while Brody was alive. The current claims relate to the conduct that occurred after Brody's death.

six (6) hours of intensive medical care in the NICU, was health care provided to his *mother* does not make sense. This autopsy was not performed to provide any medical diagnosis for Brooke Morton—it was performed purely to determine the cause and manner of death of Brody Morton.

Simply because Brody Morton (while alive) and his mother received health care while at the Petitioner's facility does not mean that the claims, at issue here, factually unique as they are, are anchored to their MPLA claim against their former co-defendant, the WVUBOG.

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?

Suggested Answer: No

While Respondents do not believe that any of the causes of actions against the Petitioner are governed by the standards of the MPLA, Respondents anticipated the stance of the Petitioner on this issue before initiating suit. As such, Respondent served the Petitioner with a Complaint, Notices of Claim, and screening COMs simultaneously. Petitioner argues that the COMs provided by Gerald Felty, RN, MBA, BSN, FACHE (hospital administration) is insufficient as it does not address provide causation and damages analysis.

Simply put, in providing certificates of merit regarding the conduct of this Petitioner, Respondents were only attempting to address any anticipated argument by the Petitioner regarding pre-suit notice requirements and prevent this current argument before the Court. In actuality however, it does not take an expert to explain to a jury why any of the actions of the Petitioner or its agents were wholly inappropriate. Rather, "[I]t is within the experience and judgment of the average juror. It is simply unimaginable that any specialized medical knowledge is required for a jury to understand the simple allegations…" Thompson, 248 W. Va. at 363, 888 S.E.2d at 863.

It does not take an expert to explain that it was in no way appropriate for hospital administration to allow the husband of a doctor who caused the death of a child to tell that child's father that the death was an unpredictable medical outcome that could never have been prevented. It does not take an expert to explain that allowing your agents to obtain an autopsy consent fully based on an alleged lie is not appropriate. It does not take an expert to explain how removing a child's bodily organs and thus preventing the parents from getting an independent autopsy is simply wrong. But most importantly, it does not take an expert to explain a causal connection between this conduct and the emotional distress it caused Brooke and Cody Morton. Simply put, the alleged conduct of the Petitioner does not require specialized knowledge or explanation to understand how abhorrent it was, or, at a minimum, that the conduct breached medical standards of care and caused emotional distress.

Petitioners also take issue with alleged vagueness of terminology used by Mr. Felty, much of which is based off of the audit trail analysis performed by Michael Seaver, RN (Epic audit trail expert). *See* Petitioner's Petition for Writ of Prohibition at 21. While counsel for the Petitioner made multiple attempts to provide Mr. Seaver with all of the resources necessary to perform a full audit trail analysis, there are simply things that he cannot fully ascertain without live access to the Petitioner's computer system. Additionally, allegations related to medical records alterations and the process of obtaining the consents for Brody's autopsy cannot be fully developed until witnesses' statements and depositions are completed. As such, experts Seaver and Felty provided as much of an opinion as they were able to on the topics on which they were actually needed (hospital administration and audit trails) at this juncture.

As a final note, despite the Petitioner presenting this argument to the Court now, the Circuit Court never made a true determination on this argument regarding the sufficiency of the certificates

of merit. The Circuit Court did not feel the certificates of merit were needed as these causes of action did not fall under the confines of the MPLA. As such, the Respondents assert that the sufficiency of the screening certificates of merit is not an issue that has been decided by the Circuit Court and thus are not properly before this Court. Further, even if this Court determines that these claims all do somehow fit within the MPLA, and even if this Court determines that the screening certificates of Mr. Seaver and Mr. Felty were insufficient, these claims should still move forward because the nature of the alleged conduct is such that no standard of care experts are necessary and causation is obvious if the alleged conduct is proven to be true.

VI. CONCLUSION

Respondent respectfully requests that this Honorable Court DENY the Writ of Prohibition in this matter.

CODY and BROOKE MORTON, INDIVIDUALLY and as ADMINISTRATORS of the ESTATE of BRODY WILLIAM MORTON, a Deceased Minor

Respondents.

By: /s/ Katelyn D. Edwards, Esq.

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

STATE OF PENNSYLVANIA,

COUNTY OF ALLEGHENY, TO-WIT:

I, Katelyn D. Edwards, counsel for Respondents Cody Morton and Brooke Morton, Individually and as Administrators of the Estate of Brody William Morton, a Deceased Minor, hereby certify that, to the best of my knowledge and belief, the contents of the Verified Response to Petition for Writ of Prohibition are true and accurate to the best of my knowledge.

Katelyn D. Edwards

Taken, sworn to and subscribed before me this 28th day of April, 2025.

Notary Public

My Commission Expires: March 28, 2028

Commonwealth of Pennsylvania - Notary Seal
Samantha Pry, Notary Public
Allegheny County
My commission expires March 28, 2028
Commission number 1297268
Member, Pennsylvania Association of Notaries

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 25-145

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 Response to 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 April 28, 2025:

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CODY and BROOKE MORTON, INDIVIDUALLY and as ADMINISTRATORS of the ESTATE of BRODY WILLIAM MORTON, a Deceased Minor

Respondents.

By: */s/ Katelyn D. Edwards, Esq.*