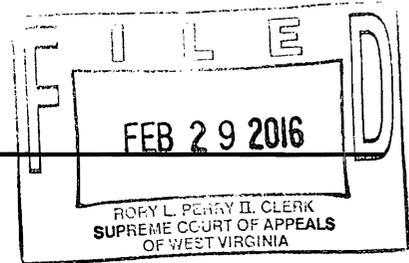


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**APPEAL NO. 15-1148**

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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**JOYCE E. MINNICH, AS EXECUTRIX  
OF THE ESTATE OF ANDREW A. MINNICH,  
AND JOYCE E. MINNICH, INDIVIDUALLY,**

**Petitioner,**

**v.**

**MEDEXPRESS URGENT CARE, INC. – WEST VIRGINIA  
D/B/A MEDEXPRESS URGENT CARE – SOUTH CHARLESTON,**

**Respondent.**

**ON APPEAL FROM THE  
CIRCUIT COURT OF KANAWHA COUNTY, WV**

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**BRIEF OF PETITIONER JOYCE E. MINNICH**

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## ASSIGMENTS OF ERROR

- I. The Circuit Court erred in granting Respondent summary judgment pursuant to Rule 56(c) of the West Virginia Rules of Civil Procedure without considering the substantial amount of uncontroverted evidence in the record demonstrating Petitioner set forth a viable premises liability claim and the complete absence of any evidence supporting the finding that Petitioner set forth a claim for medical professional liability subject to the Medical Professional Liability Act, West Virginia Code § 55-7B-1, *et seq.*
  
- II. The Circuit Court committed multiple errors when granting Respondent summary judgment as to Petitioner's premises liability claim by means of finding the Medical Professional Liability Act, West Virginia Code § 55-7B-1, *et seq.* applicable to Petitioner's claim:
  - A. The Circuit Court erred in finding that Andrew Minnich received health care services prior to his fall;
  - B. The Circuit Court erred in finding that Petitioner's claim was based upon health services rendered or that should have been rendered to Andrew Minnich;
  - C. The Circuit Court erred by adopting Respondent's "Continuity of Care" argument to determine the applicability of the Medical Professional Liability Act, West Virginia Code § 55-7B-1, *et seq.* to Petitioner's premises liability claim in contradiction of clear controlling precedent to the contrary;
  - D. The Circuit Court erred in relying on flawed foreign case law to support its order granting Respondent summary judgment;
  - E. The Circuit Court erred in finding that Petitioner's claim was based upon a fall risk assessment of Andrew Minnich; and
  - F. The Circuit Court erred in finding that Respondent's employee, Jessica Hively, was a health care professional as defined by the Medical Professional Liability Act, West Virginia Code § 55-7B-1 *et seq.*

## STATEMENT OF THE CASE

### **I. Statement of Facts**

On January 25, 2013, Andrew and Joyce Minnich arrived at the South Charleston, WV MedExpress because Mr. Minnich felt weak and was short of breath. JA 32 at ¶¶ 12 and 14; JA 368-69. After arriving and prior to any medical evaluation taking place, Jessica Hively

("Hively"), Respondent's employee, inquired into the reason for Mr. Minnich's visit. JA 32 at ¶ 13. Mr. Minnich advised that he was short of breath, feeling weak, recently had hip surgery, and recently stopped using a walker. JA 32 at ¶ 14; JA 369. After answering Hively's questions, Mr. and Mrs. Minnich were escorted to examination room three. *Id.*; JA 379 at 91. Upon arriving at examination room three, Hively entered the room and turned on the light. JA 389 at 95-96. Thereafter, she told Mr. Minnich, "I need you to get up on the table," while awaiting the physician. JA 32 at ¶¶ 13 and 16; JA 370. Unbeknownst to Mr. and Mrs. Minnich, when Hively advised Mr. Minnich to get on the examination table, Respondent had failed to prepare the table for use. JA 33 at ¶ 18; JA 374. Although it was Respondent's policy to fully extend the retractable footstool used to assist patients onto the examination table, the footstool in this case was not so extended. JA 33 at ¶¶ 18 and 19; JA 373-74; JA 380 at 104 – JA 381 at 105; JA 383; JA 387 at 57, JA 390 at 100. By failing to properly prepare the examination table for use, Respondent created an unsafe, dangerous condition which Respondent knew could cause a fall. JA 34 at ¶¶ 31 and 33; JA 391 at 101, 103; JA 378 at 86-88 – JA 379 at 89. Moreover, Respondent specifically acknowledged that properly extending the examination table's footstool was of particular importance to those in a condition similar to Mr. Minnich. JA 379 at 90-91.

Following her instructions to Mr. Minnich, a 71 year old man, Hively left the room without assisting or offering to assist Mr. Minnich onto the examination table. JA 32 at ¶ 17; JA 370; JA 389 at 95-96. Mr. Minnich followed Hively's instruction and attempted to access the table by means of the partially extended footstool in his obviously weakened condition and fell back into his wife before they both hit the floor. JA 33 at ¶¶ 19 and 20; JA 371-72. At the time of the fall, Mr. Minnich had received no diagnosis, treatment or care from any medical provider. He was awaiting the arrival of the physician as Hively directed. As a direct and proximate cause

of Respondent's failure to prepare the examination room for use – fully extending the footstool – both Mr. and Mrs. Minnich were injured. JA 33 at ¶¶ 22, 23. Mrs. Minnich suffered a periorbital hematoma and knot on the back of her head. JA 33 at ¶ 23. Mr. Minnich suffered a laceration stretching the length of his forearm and subarachnoid hemorrhage (“brain bleed”). JA 33 at ¶ 22. The brain bleed substantially contributed to Mr. Minnich's physical deconditioning and ultimately to his untimely death on April 25, 2013 or a mere 90 days after his fall from the defective examination table. JA 393 at 19-20; JA 395 at 81.

## **II. Procedural History**

On August 14, 2013, Petitioner filed her Complaint, which included the following counts: (1) Negligence (Premise Liability); (2) Loss of Consortium; and (3) Wrongful Death. JA 29-37. On March 7, 2014, the Kanawha County Circuit Clerk entered default against Respondent. JA 38. On September 3, 2014, over Petitioner's objection, the Circuit Court entered its “Order and Memorandum Opinion Granting Defendant's Motion to Set Aside Entry of Default.” JA 39-55. Thereafter, Respondent filed its answer on September 8, 2014 and introduced into this action the Medical Professional Liability Act, West Virginia Code § 55-7B-1, et seq., (“MPLA”) by means of an affirmative defense. JA 56-67.

On October 24, 2014, Respondent filed “Defendant MedExpress Urgent Care, Inc. – West Virginia d/b/a MedExpress Urgent Care – South Charleston's Motion for Summary Judgment” and a brief in support thereof arguing that the MPLA was applicable to Petitioner's claims because the fall occurred during the “continuity of care.” JA 68-87. On November 12, 2014, Petitioner filed “Plaintiff's Response in Opposition to Defendant's Motion for Summary Judgment.”<sup>1</sup> JA 88-139. Thereafter, Respondent filed its Reply. JA 140-147. On December 1,

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<sup>1</sup> Respondent's Motion for Summary Judgment was noticed on November 6, 2014 for a hearing to occur on November 13, 2014, in violation of Rule 6 of the West Virginia Rules of Civil Procedure, which requires that notice

2014, the Circuit Court entered its “Order and Memorandum Opinion Granting Defendant’s Motion for Summary Judgment as to the Claims of Andrew Minnich” (“Summary Judgment Order”).<sup>2</sup> JA 9-25. Therein, the Circuit Court erroneously granted Respondent summary judgement as to Petitioner’s premises liability claim by finding the MPLA applicable to Petitioner’s claims and directed Petitioner to amend her Complaint to assert a medical professional liability claim against Respondent in accordance with the MPLA. JA 24-25.

On January 16, 2015, Petitioner filed her “Petition for Writ of Prohibition” with this Court seeking to prohibit the enforcement of the Circuit Court’s Summary Judgment and Default Orders. JA 148-300. Thereafter, Respondent responded thereto. JA 301-345. On March 11, 2015, this Court found that a rule should not be awarded and Petitioner’s Writ was refused. JA 346.

On May 18, 2015, Petitioner filed her “Motion for Reconsideration of Order and Memorandum Opinion Granting Defendant’s Motion for Summary Judgment as to the Claims of Andrew Minnich.” JA 347-396. Next, Petitioner filed her “Notice of Supplemental Authority in Support of Motion for Reconsideration of Order and Memorandum Opinion Granting Defendant’s Motion for Summary Judgment as to the Claims of Andrew Minnich.” JA 397-416. On August 26, 2015, Respondent filed “Defendant’s Response to Plaintiff’s Motion for Reconsideration.” JA 417-436. On August 28, 2015, Petitioner filed her “Reply in Support of Plaintiff’s Motion for Reconsideration.” JA 437-452. Thereafter, on October 27, 2015, the Circuit Court entered its “Order Denying Plaintiff’s Motion for Reconsideration of Order and Memorandum Opinion Granting Defendant’s Motion for Summary Judgment as to the Claims of

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of a hearing be filed at least seven days before the hearing – not counting weekends. W.Va. R. Civ. 6. By application of Rule 6, the notice given by Respondent was only five days. Although Petitioner objected, the objections were rebuffed by the Circuit Court.

<sup>2</sup> The Summary Judgment Order was drafted by Respondent’s counsel and was entered by the Circuit Court with only one change. The Circuit Court added a line noting Petitioner’s objections to the Order.

Andrew Minnich” (Reconsideration Order”). JA 1-8. Therein, the Court affirmed and adopted by reference its Summary Judgment Order – granting Respondent summary judgment with regard to Petitioner’s premises liability claim, finding the MPLA applicable to Petitioner’s claims and ordering Petitioner to amend her Complaint to assert a medical professional liability claim against Respondent pursuant to the MPLA. Id. The Circuit Court reached this erroneous conclusion by ignoring and disregarding several dispositive factors precluding such a holding: (1) Mr. Minnich had received no medical diagnosis or treatment prior to his fall; (2) Petitioner asserted no claims for medical professional liability; (3) the uncontroverted evidence clearly demonstrated a viable premises liability claim; (4) despite the fact that Respondent filed a motion for summary judgment, the Circuit Court failed to consider the evidence submitted by Petitioner resisting Respondent’s Motion; (5) the substance of the action against Respondent is Respondent’s failure to maintain a safe environment by exposing business invitees to defective equipment – a partially extended footstool; (5) Mr. Minnich’s fall as a result of a known dangerous condition – a partially extended footstool – bears absolutely no relationship to any medical treatment Mr. Minnich may have received; (6) the “continuity of care” argument adopted by the Circuit Court contradicts this Court’s controlling precedent; (7) the record contains no evidentiary support for the Circuit Court’s finding that Petitioner’s claim was based upon a fall risk assessment of Mr. Minnich; (8) Mr. Minnich was never seen by a healthcare provider as defined by W.Va. Code § 55-7B-2(g)(2006) prior to his fall; and (9) the Circuit Court reliance upon foreign case law was misplaced. Further, the Reconsideration Order found that the Summary Judgment Order was a final order disposing of Petitioner’s premises liability claim. JA 5-7. Continuing, the Court found that Petitioner will suffer undue hardship if she was forced to go through trial under potentially the wrong legal theory, file a post-trial appeal and, then

repeat the whole process. JA 6. Consequently, the Circuit Court found, without objection from Respondent, the Summary Judgment Order to be a final judgment and immediately appealable under Rule 54(b) of the West Virginia Rules of Civil Procedure (“W.Va. Rules”). JA 6-7.

On November 24, 2015, Petitioner timely filed her Notice of Appeal seeking relief from the Circuit Court’s Reconsideration Order and its erroneous holdings: (1) granting Respondent summary judgment with regard to Petitioner’s premises liability claim; (2) finding the MPLA applicable to Petitioner’s premises liability claim; and (3) mandating that Petitioner amend her Complaint to assert a medical professional liability action subject to the MPLA against Respondent.

### **SUMMARY OF ARGUMENT**

Respondent sought summary judgment with regard to Petitioner’s premises liability claim contending that Petitioner’s claim was actually for medical professional liability and subject to the MPLA. Rule 56(c) of the W.Va. Rules and the precedent of this Court dictate that in addressing a motion for summary judgment, a court must consider the exhibits, affidavits depositions, answers to interrogatories, answers to admissions and other matters submitted by the party seeking and the party resisting summary judgment. W.Va. Civ. P. 56(c); Haga v. King Coal Chevrolet Co., 151 W.Va. 125, 132, 150 S.E.2d 599, 603 (1966). In this case, the Circuit Court committed clear error by failing to consider the substantial evidence submitted by Petitioner demonstrating her claim sounded in premises liability. This evidence was made all the more persuasive by the complete absence of evidence refuting Petitioner’s evidence and/or evidence demonstrating that Petitioner actually asserted a medical professional liability claim subject to the MPLA.

The Circuit Court erroneously found that Petitioner's premises liability claim was actually a claim for medical professional liability subject to the MPLA. To reach this unsustainable conclusion, the Circuit Court committed numerous errors.

The Circuit Court erred in finding that Mr. Minnich received health care services prior to his fall. Specifically, the Circuit Court found that he was evaluated and triaged by a health care professional. However, Respondent presented the Circuit Court no evidence demonstrating that Mr. Minnich was evaluated and triaged prior to his fall. Thus, the Circuit Court's finding constitutes clear error. Further, the sole allegation in the Complaint regarding the subject set forth that Mr. Minnich was asked preliminary questions regarding his medical history and the purpose of his visit. In addition, the Circuit Court could not cite a single case from any jurisdiction supporting the assertion that the intake functions alleged in Petitioner's Complaint constituted health care services. Finally, without justification, the Circuit Court ignored relevant, persuasive authority addressing the very issue and concluding that intake functions do not constitute health care services.

For a claim to fall within the MPLA's purview, the claim must be based upon health care services rendered or that should have been rendered to a patient by a health care professional. This is fact driven inquiry that, at the summary judgment phase, examines the fundamental basis of the tort and/or the substance of the action by reviewing the record evidence. In this case, there is substantial, uncontroverted evidence demonstrating that substance of Petitioner's claim is Respondent's failure to maintain a safe environment by exposing business invitees to defective equipment – an examination table's partially extended footstool. There is simply no connection between any health care services that Mr. Minnich received or should have received and Respondent's failure to fully extend a footstool in accordance with its own policy. No

professional standard of care exists for extending a footstool and, as such, no reputable physician would opine regarding the same. The duty breached in this case is a general duty owed by Respondent to all non-trespassers and not a special duty relating to Mr. Minnich's medical treatment.

The Circuit Court erred by adopting, in contradiction of controlling precedent, Respondent's "continuity of care" argument that essentially provides that once you become a patient, any claim you may have against a health care provider until discharge falls within the purview of the MPLA because it occurred during the "continuity of care". This argument was specifically rejected by this Court when holding that the fact that an injury occurs at a health care facility to a patient, without more, is insufficient to bring the claim within the purview of the MPLA. Manor Care, Inc. v. Douglas, 234 W.Va. 57, 73 763 S.E.2d 73, 89 (2014). Moreover, the argument renders superfluous the text of the MPLA limiting its application to claims based upon health care services rendered or that should have been rendered to a patient and vastly expands the scope of the MPLA in contradiction of controlling precedent stating that statutes in derogation of the common law must be strictly construed to limit their effect.

The Circuit Court places great weight on Palmese v. Med-Help, P.C., 2013 WL 3617085 (Conn.Super.)(Unpublished) to support its grant of summary judgment to Respondents. This reliance on Palmese, *supra*, is improper because: (1) the case is of no precedential value anywhere, including Connecticut; (2) this Court never adopted the test relied upon in Palmese to determine whether a claim was for medical professional liability; (3) unlike the instant action, Palmese did not involve a piece of defective equipment; and (4) the Circuit Court ignored precedent from the same jurisdiction paralleling the facts of the instant action.

The Circuit Court committed reversible error in finding that Petitioner's claim is based upon a fall risk assessment because: (1) there is no evidence in the record to support the finding that Petitioner's claim is based upon a fall risk assessment of Mr. Minnich, which is necessary to support such a finding at the summary judgment phase; (2) there was no allegation in the Complaint to support a finding that Petitioner's claim was based upon a fall risk assessment of Mr. Minnich; (3) Respondent's proffered defense was not that Respondent properly assessed Mr. Minnich's ability to get on the examination table without assistance; instead, Respondent argued that Mr. Minnich was never told to get on the examination table and, in fact, no one is ever told to get on the examination table while awaiting a physician. Thus, not only was a fall risk assessment not done in this case, it is never done with regard to getting on an examination table.

The Circuit Court erred in finding that Mr. Minnich was seen by a health care professional prior to his fall. Hively, a medical assistant, was the only person with whom Mr. Minnich had contact prior to his fall and the MPLA's definition of health care provider omits medical assistants. This Court adheres to the maxim that the express mention of one thing implies the exclusion of another. Further, this Court has found that a court should not read into a statute that which is omitted. In accordance with these statutory maxims, it is presumed that the omission of medical assistant from the definition of health care provider was purposeful and, therefore, the term should not be read into the statute. Moreover, when previously asked to broadly interpret the MPLA's definition of health care provider so as to read pharmacies into it, this Court refused, noting that the MPLA is in derogation of the common law and, therefore, must be narrowly construed. Phillips v. Larry's Drive-In Pharmacy, Inc., 220 W.Va. 484, 491-92, 647 S.E.2d 920, 927-28 (2007). Finally, contrary to the Circuit Court's finding, Hively is not a certified medical assistant and the MPLA requires that all health care providers be either

licensed by or certified in West Virginia or another state. As Hively was neither, she cannot be a health care provider.

### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Oral argument is appropriate pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure to aid in this Court's consideration of this case. Petitioner requests oral argument pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure because the case involves assignments of error in the application of settled law and the findings below were not supported by the record. W.Va. R. App. P. 19(a)(1) and (3).

### **ARGUMENT**

#### **I. Standard of Review**

This Court applies a *de novo* review to a trial court's grant of summary judgment under Rule 56 of the W.Va. Rules. Syl. Pt. 1, Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755 (1994).

In conducting its *de novo* review, this Court has held:

[W]e are mindful that “[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.”

Fleet v. Webber Springs Owners Ass'n, Inc., 235 W.Va. 184, --, 772 S.E.2d 369, 373 (2015), (quoting, in part, Syl. Pt. 3, Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York, 148 W.Va. 160, 133 S.E.2d 770 (1963)).

“Summary judgment is generally viewed with caution in this jurisdiction.” Lengyel v. Lint, 167 W.Va. 272, 279, 280 S.E.2d 66, 71 (1981). In explaining summary judgment jurisprudence in West Virginia, this Court has held, “The burden of showing that no genuine factual dispute exists rests on the party seeking summary judgment; in assessing the record to determine whether there is a genuine issue as to any material facts, the circuit court is required to

resolve all ambiguities and draw all inferences in favor of the party against whom summary judgment is sought.” Hanlon v. Chambers, 195 W.Va. 99, 105, 464 S.E.2d 741, 747 (1995) (emphasis added). Continuing, this Court found that “in order for summary judgment to be proper, the movant must demonstrate that there is no evidence to support the non-movant’s case and ‘that the evidence is so one-sided that the movant must prevail as a matter of law.’” Shaffer v. Acme Limestone Co., 206 W.Va. 333, 339-40, 524 S.E.2d 688, 694-94 (1999), (quoting, in part, Tolliver v. The Kroger Co., 201 W.Va. 509, 513, 498 S.E.2d 702, 706 (1997)). As demonstrated *infra*, Respondent failed to meet this stringent standard.

## **II. The Circuit Court Erred by Failing to Consider the Record when Ruling on Respondent’s Motion for Summary Judgment**

The Circuit Court erroneously rests its finding that Petitioner’s claim is not for premises liability, but a claim for medical professional liability subject to the MPLA solely upon its interpretation of the Complaint’s allegations. However, Respondent did not file a motion to dismiss; instead, Respondent sought summary judgment pursuant to Rule 56(c) of the W.Va. Rules. Rule 56(c) requires that a court consider the pleadings, depositions, answers to interrogatories and admissions on file before granting summary judgment. W.Va. R. Civ. Pro. 56(c). Moreover, this Court has explicitly held, “Upon a motion for summary judgment all exhibits, affidavits and other matters submitted by both parties should be considered by the court.” Haga v. King Coal Chevrolet Co., 151 W.Va. 125, 132, 150 S.E.2d 599, 603 (1966). See also, Syl. Pt. 2, Aetna Cas. & Sur. Co., 148 W.Va. 160, 133 S.E.2d 770 (holding that “[o]n a motion for summary judgment all papers of record and all matters submitted by both parties should be considered by the court”); Crain v. Lighter, 178 W.Va. 765, 768, 364 S.E.2d 778, 781 (1987) (holding that a party resisting a motion for summary judgment cannot rely solely upon his/her pleading but must be present evidence supporting his/her position).

This Court has not addressed the application of the MPLA to a plaintiff's claim in the context of a motion for summary judgment. However, this Court has addressed what should be considered when determining the application of the MPLA to a claim under similar circumstances – after discovery is completed – in the post-verdict context. To illustrate, in Manor Care, Inc., 234 W.Va. 57, 763 S.E.2d 73, this Court was asked to consider, post-verdict, whether a claim based on alleged corporate negligence stemming from failure to allocate a proper budget to a health care facility so as to have sufficient staffing to care for its residents was subject to the MPLA. In concluding that the MPLA was inapplicable to business decisions, such as proper budgeting and staffing, by entities that do not qualify as health care providers under the MPLA, this Court reviewed the testimony and evidence presented at trial. Id., 234 W.Va. at 74-75, 763 S.E.2d at 90-91. In Riggs v. WVU Hospital, Inc., 221 W.Va. 646, 656 S.E.2d 91 (2007), this Court was also asked to consider whether the MPLA applied to a plaintiff's claims post-verdict. Accordingly, Justice Davis, in her concurrence, did not examine the allegations of the complaint; instead, she considered the facts of the case when finding the defendant's failure to maintain a safe environment did not fall within the MPLA's purview. Id., 221 W.Va. at 666, 656 S.E.2d at 111. See also, Pluard v. Patients Compensation Fund, 795 N.E.2d 1035 (Ind. Ct. App. 1999) (in which the court addressing a motion for summary judgment reviewed affidavits and other evidentiary exhibits in determining that a plaintiff's injury from a lamp falling on him during surgery after being adjusted by a nurse's assistant constituted a premises liability claim).

In the instant action, in contradiction of controlling law, the Circuit Court completely failed to consider the substantial evidence produced by Petitioner in response to Respondent's Motion for Summary Judgment demonstrating she asserted a premises liability claim not subject to the MPLA. Moreover, Petitioner's evidence was uncontroverted. Respondent has never

offered any evidence refuting Petitioner's evidence or, for that matter, supporting its assertion that Petitioner's claim falls within the MPLA's purview. In fact, although this matter was briefed twice before the Circuit Court in Respondent's Motion for Summary Judgment and Petitioner's Motion for Reconsideration, Respondent's sole support for its Motion for Summary Judgment is the consent for treatment and authorization for disclosure of protected medical information signed by Mr. Minnich, a document that Respondent admits does nothing more than demonstrate that Mr. Minnich agreed to become a patient and receive treatment. JA 73. In juxtaposition, Petitioner presented voluminous evidence to the Circuit Court demonstrating in her claim sounded in premises liability.

To give the evidence context, one must review West Virginia's premises liability law. Landowners or possessors of premises owe to all non-trespassers entering the premises a duty of reasonable care under the circumstances to maintain the premises in a reasonably safe condition. Syl. Pt. 4, in part, Mallet v. Pickens, 206 W.Va. 333, 522 S.E.2d 436 (1999). Possessors of property have a duty to take reasonable steps to ameliorate the risk posed by the hazards where it is foreseeable that harm is likely to result from the hazard. Hersh v. E-T Enterprises, Ltd. Partnership, 232 W.Va. 305, 317, 752 S.E.2d 336, 348 (2013) (reversed on other grounds by statute). A health care facility, like all other businesses, has a duty to all non-trespassers to maintain a safe environment. Manor Care, 234 W.Va. at 73 n.21, 763 S.E.2d at 89 n.21.

To determine whether a defendant has met his/her burden of reasonable care in a premise liability case to all non-trespassers, the trier of fact must consider:

- (1) the foreseeability that an injury might occur;
- (2) the severity of injury;
- (3) the time, manner and circumstances under which the injured party entered the premises;
- (4) the normal or expected use made of the premises; and
- (5) the magnitude of the burden placed upon the defendant to guard against the injury.

Syl. Pt. 4, Hersh, 232 W.Va. 305, 752 S.E.2d 336. Further, this Court has held that the ultimate test of the duty to use care is found in the foreseeability that harm may result. Sewell v. Gregory, 179 W.Va. 585, 371 S.E.2d 82 (1988). The test to determine foreseeability is “would the ordinary man in the defendant’s position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result.” Id.

In this case, the defect is found in Respondent’s failure to prepare the examination table for use prior to directing Mr. Minnich to sit on it. Specifically, the retractable footstool was not fully extended, which impeded Mr. Minnich’s ability to access the table. It is the duty of Respondent’s employees to make certain that the examination table is ready for use for each new business invitee. JA 390 at 98. Further, Respondent was well aware that the failure to fully extend the footstool raised safety concerns. JA 378 at 86-87; JA 380 at 101. Hively and Stephani Vealey (“Vealey”), the South Charleston MedExpress center manager at the time of the incident, admitted under oath that the failure to fully extend the footstool could cause a fall. Id.; JA 379 at 90. Continuing, Hively stated that she would not advise a patient to access the table when the footstool was not fully extended because, in part, it is safer to fully extend the footstool. JA 391 at 102-103. Although the failure to completely extend the footstool created a defect potentially dangerous to all patients, Vealey agreed that certain types of patients would be at greater risk of an adverse event by accessing the table by means of a partially extended footstool - patients feeling weak, patients suffering from shortness of breath and patients who had recently stopped using a wheelchair, walker or cane. JA 379 at 90-91. In light of the dangers associated with not fully extending the examination table’s footstool, Respondent’s

policy regarding preparing examination rooms for use by a new patient required that the footstool be fully extended<sup>3</sup> and Hively was so instructed. JA 390 at 100.

On January 25, 2013, Hively entered examination room three<sup>4</sup>, directed Mr. Minnich to get on the examination table and left the room. JA 370. At the time Mr. Minnich was told to access the table, the footstool was not fully extended. JA 373-74. Mrs. Minnich's assertion that the footstool was not fully extended is supported by Vealey's testimony that she observed that the footstool was not fully extended and Respondent's Non-Employee Incident Report, which states that "the foot stool on the exam table was not completely pull-out (sic) when patient went to step on it." JA 380 at 104 – JA 380 at 105; JA 382. As a consequence, Mr. Minnich was seriously injured.

Clearly, Respondent was fully aware that a fall could result from its failure to fully extend the examination table's footstool. Further, as it was Respondent's policy to make certain that the footstool was fully extended prior to use by a new patient, Respondent was required to prepare the examination table for use by Mr. Minnich. Respondent's stated policy dictates that it knew or should have known that the footstool was not completely extended prior to Mr. Minnich's use. Additionally, as Hively entered the examination room, she knew or should have known that the footstool was not fully extended. Moreover, as Respondent's employees are responsible for adjusting the examination table's footstool, Respondent created the defect in the table and is charged with knowledge of the same.

The next factor is severity of the injury. Mr. Minnich suffered a laceration of his arm and a subarachnoid hemorrhage, which substantially contributed to his death on April 25, 2013. The third factor is the time, manner and circumstances of the injured party's entrance on the

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<sup>3</sup> JA 387 at 57.

<sup>4</sup> JA 389 at 95-96.

premises. Mr. Minnich entered the premises during business hours, as a business invitee, to seek services offered by Respondent. Fourth, Mr. Minnich used the premises in a normal and expected manner. In fact, he only attempted to access the defective examination table after being specifically directed to do so by Hively. JA 370. Finally, the magnitude of the burden on Respondent is minimal. At the time of the incident, it was already Respondent's policy to make sure the examination table's footstool was fully extended before use by a patient. Further, it requires little time or effort to enter each examination room prior to a new patient and make certain the footstool is fully extended.

Unquestionably, the aforesaid evidence demonstrates not only a viable premises liability claim, but a strong one. The Circuit Court's failure to consider or address this evidence when ruling on Respondent's Motion for Summary, particularly when Respondent failed to contradict the evidence or support its argument that Petitioner's claim was for medical professional liability subject to the MPLA with its own evidence, constitutes reversible error. The Circuit Court cannot ignore the evidence before it resisting summary judgment or the complete absence of evidence supporting summary judgment when ruling. W.Va. R. Civ. Pro. 56(c); Haga, 151 W.Va. at 132, 150 S.E.2d at 603.

### **III. The Circuit Court Committed Multiple Errors in Finding the MPLA Applicable to Petitioner's Premises Liability Claim Regarding Andrew Minnich**

In granting Respondent summary judgment, the Circuit Court inexplicitly transformed Petitioner's clear premises liability claim into a medical professional liability claim subject to the MPLA. In so doing, the Circuit Court ignored salient facts, made findings unsupported by the record, disregarded this Court's controlling precedent, adopted Respondent's unsupported "continuity of care" argument and vastly expanded the MPLA's scope so as to eviscerate the explicit boundaries and limitations contained within the statute's text. Under the Circuit Court's

holding, a claim so clearly constituting a premises liability claim that Respondent originally referred to it as a slip and fall claim<sup>5</sup> is transformed into a claim for medical professional liability solely because the claimant is a patient, Respondent is a health care facility and the incident occurred at Respondent's facility. This is not and should not be the law in West Virginia.

**A. The Scope of the MPLA is Limited and Defined such that It Does Not Apply to All Claims against Health Care Providers**

The MPLA is in derogation of the common law in that it alters the rights of citizens to seek redress for injuries; as such, "its provisions must generally be given a narrow construction." Phillips, 220 W.Va. at 492, 647 S.E.2d at 928. Consequently, the MPLA must be interpreted in a manner so as to make as few changes to the common law as possible. Id. See also, Holmes Regional Medical Center, Inc. v. Dumigan, 151 So.3d 1282, 1285 (Fla. 5<sup>th</sup> DCA 2014) (holding that as the "requirements of the FMMA limit the constitutional right of access to courts, they must be narrowly construed").<sup>6</sup> The aforesaid long standing rule caused the Florida Court of Appeals to hold, "If there is any doubt as to the applicability of such a statute, the question is generally resolved in favor of the claimant." Feifer v. Galen of Florida, Inc., 685 So.2d 882, 885 (Fla. 2<sup>nd</sup> DCA 1996).

By its own terms, the MPLA's application is limited to medical professional liability claims, which it defines as "any liability 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." W.Va. Code § 55-7B-2(i)(2006); Boggs v. Camden-Clark Mem'l Hosp. Corp., 216 W.Va. 656, 662, 609 S.E.2d 917, 923 (2007). In discussing the MPLA's limited scope, this Court found, "The Legislature has granted special protection to medical professionals,

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<sup>5</sup> JA 382.

<sup>6</sup> This Court has held that Florida's medical malpractice statute is similar to the MPLA and, as such, found Florida case law addressing its statute to be instructive and persuasive. Hinchman v. Gillette, 217 W.Va. 378, 384, 618 S.E.2d 387, 393 (2005).

while they are acting as such. This protection does not extend to intentional torts or acts outside the scope of ‘health care services.’” Id., 216 W.Va. at 662-63, 609 S.E.2d at 923-24. Continuing, this Court opined that the MPLA “does not apply to other claims that may be contemporaneous to or related to the alleged act of medical professional liability.” Id., at Syl. Pt. 3. Succinctly, “[T]he special protection granted to health care professionals does not extend to all acts committed by those individuals.” Gray v. Mena, 218 W.Va. 564, 568, 625 S.E.2d 326, 330 (2005). In accordance with MPLA’s defined, limited scope, this Court recently opined:

[I]t has been correctly observed that the fact that the alleged misconduct occurs in a healthcare facility does not, by itself, make the claim one for malpractice. Nor does the fact that the injured party was a patient at the facility or of the provider, create such a claim.

Manor Care, Inc., 234 W.Va. at 73, 763 S.E.2d at 89 (internal citations omitted).

**B. The Circuit Court Erred in Finding Mr. Minnich Received Health Care Services Prior to His Fall**

Prior to his fall, Mr. Minnich received no diagnosis, treatment or care. At the time of the incident, Mr. Minnich was awaiting the physician’s arrival to render the health care services for which he sought treatment. Nevertheless, the Summary Judgment Order concludes that Mr. Minnich had received health care services prior to Mr. Minnich’s fall because he was evaluated and triaged by a health care provider. JA 15. Importantly, this finding was made without any citation to supporting evidence. As Respondent tendered not a scintilla of evidence to support the conclusion that Mr. Minnich was evaluated and triaged by a health care provider prior to his fall, the Circuit Court’s complete failure to support its finding is understandable. However, without any evidentiary support, the Circuit Court’s finding constitutes clear error.

Moreover, even if one improperly relies solely upon the allegations of Petitioner’s Complaint at the summary judgment phase, the Court’s holding that Mr. Minnich received health

care prior to his fall in the form of evaluation and triage is untenable. The Complaint's sole allegation regarding the subject contends that Hively, when performing the intake function, asked "preliminary questions regarding medical history and the purpose of [Mr. Minnich's] visit." JA 32 at ¶ 13. The Circuit Court fails to identify which intake function performed by Hively constituted health care. Further, the Circuit Court fails to cite a single case from any jurisdiction supporting the assertion that intake functions – basic inquiries into medical history and/or the purpose of one's visit – constitute health care. Indeed, this argument was recently addressed and explicitly rejected in Dawkins v. Union Hosp. Dist., 758 S.E.2d 501 (S.C. 2014).

The plaintiff in Dawkins presented to the hospital experiencing headaches and was unable to maintain her balance. Id. at 502. The hospital admitted her to the emergency room. In so doing, the plaintiff and her daughter told the intake nurse her current medications and complaints. Id. at 503. Despite knowing that the plaintiff had balance issues, she was left unattended by the hospital and fell while going to the bathroom. The trial court found the intake tasks constituted the practice of medicine. Id. However, the Supreme Court of South Carolina ("SC Supreme Court") disagreed, finding that the intake function constituted nonmedical, administrative, ministerial, and/or routine care, which was subject to ordinary negligence and outside the relevant statute's definition of medical malpractice. Id. at 504. Consequently, the Court found, despite the fact that the intake function was performed by a nurse and the plaintiff was admitted to the hospital, that the plaintiff had not received medical care prior to her fall. Id. at 505. As such, the plaintiff's claim sounded in ordinary negligence.<sup>7</sup>

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<sup>7</sup> See also, Brown v. Durden, 393 S.E.2d 450, 451-452 (Ga. App. 1990) (in which a medical assistant took a patient's vitals and was informed that the patient felt dizzy, nausea and believed she suffered a seizure and then left the patient alone. Thereafter, the plaintiff fell. The plaintiff brought an ordinary negligence claim arguing that the plaintiff had not received any medical treatment, diagnosis or care prior to the fall. In response, the defendant argued that the sole claim available was medical malpractice. The Court found that the cause of action sounded in ordinary negligence because the claim did not turn on a medical question and a jury would be capable of determining whether the medical assistant was negligent without the assistance of an expert).

The Circuit Court found the holding in Dawkins was based upon “how the Plaintiff’s claims were plead” and, pursuant to Blankenship v. Ethicon, Inc., 221 W.Va. 700, 656 S.E.2d 451 (2007), West Virginia does not simply rely upon how claims are alleged. JA 23. Consequently, the Circuit Court dismissed the holding as inconsistent with West Virginia law. In truth, Blankenship does not stand for the proposition that a court may disregard the factual allegations of a complaint, which is all that is available when addressing a motion to dismiss, but only that the court is not bound by the legal description bestowed upon a claim. In Blankenship, this Court specifically examined the allegations of the complaint and sought to establish the “core allegations” to determine whether a claim falls within the MPLA’s scope. Id. at 458. In Dawkins, the SC Supreme Court merely applied the law to the factual allegations presented when determining whether the plaintiff’s claims sounded in professional negligence. The SC Supreme Court considered the “core allegations” of the complaint: (1) the fact that the plaintiff alleged that she had not received medical treatment prior to her injury; (2) the fact that the plaintiff alleged she fell when attempting to use the bathroom unsupervised; and (3) the absence of any allegations regarding medical treatment. Id. at 505. Thus, contrary to the Circuit Court’s holding, the SC Supreme Court’s analysis in Dawkins tracked the methodology recognized by this Court in Blankenship. Moreover, as there is no record at the motion to dismiss phase, it is difficult to image what information beyond the allegations of the complaint would be available to a court attempting to determine whether a claim sounded in professional or ordinary negligence. Simply put, the Circuit Court’s criticism of Dawkins is unsupported by West Virginia law.

The fact the Dawkins’ Court considered and rejected the assertion that intake functions – similar to those alleged in Petitioner’s Complaint – constitute health services and the Circuit Court’s inability to cite a single case from any jurisdiction supporting its finding compels the

conclusion that Mr. Minnich received no health care services prior to the incident. Consequently, Petitioner's claim does not fall within the MPLA's purview.

**C. The Circuit Court Erred in Finding Petitioner's Claim was based upon Health Care Services Rendered or that should have been Rendered to Mr. Minnich**

Assuming *arguendo* that Hively's intake functions did constitute health care services, to implicate the MPLA Petitioner's claim must be based upon health care services rendered or that should have been rendered to Mr. Minnich. Boggs, 216 W.Va. at 662, 609 S.E.2d at 923; W.Va. Code § 55-7B-2(i)(2006). The determination of whether the MPLA applies to a certain claim is a fact driven inquiry. Blankenship, 221 W.Va. at 706, 656 S.E.2d at 457; Manor Care, Inc., 234 W.Va. at 74, 763 S.E.2d at 90. In conducting this inquiry at the motion to dismiss phase, *i.e.* prior to discovery, one must determine the "core allegations" of the complaint. Blankenship, 221 W.Va. at 707, 656 S.E.2d at 458. See also, Mobley v. Gilbert E. Hirschberg, P.A., 915 So.2d 217, 219 (Fla.4<sup>th</sup> DCA 2005) (examining the gravamen of a complaint to determine whether the claims arises out of medical negligence). In the context of a post-verdict analysis, *i.e.* once discovery is completed, this Court's examination of the "fundamental basis of the tort" and/or "substance of an action" does not rest upon a review of the complaint's allegations, but the evidence presented. See, Manor Care, Inc., 234 W.Va. at 73, 763 S.E.2d at 89; Riggs, 221 W.Va. at 666, 656 S.E.2d at 111.

A review of the uncontroverted evidence in this case, as detailed in Section II of this Petition, establishes that the substance of this action and/or the fundamental basis of Petitioner's tort is Respondent's failure to maintain a safe environment by exposing business invitees to defective equipment – an examination table's partially extended footstool.<sup>8</sup> Thus, Blankenship,

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<sup>8</sup> Even if one contradicts controlling law by ignoring the record and limiting review to the Complaint's allegations when determining whether the MPLA is applicable to Petitioner's claim, those allegations demonstrate a clear

Riggs and Manor Care, Inc. dictate that to bring Petitioner's claims within the MPLA's purview, Respondent must prove that its failure to fully extend the examination table's footstool creating an unsafe environment stemmed from health care services rendered or that should have been rendered to Mr. Minnich. No plausible argument exists connecting the two. No specialized medical skill or training is necessary to fully extend a footstool. A health care provider is no more qualified as an expert on the proper maintenance of a safe premises than the average juror. See, Pluard, 795 N.E.2d 1037. Moreover, no reputable physician would opine on the professional standard of care for matters unrelated to specialized medical skill or training – extending a footstool. See, Boggs, 212 W.Va. at 663, 609 S.E.2d at 924. The duty breached in this case is a general duty of care owed by Respondent to all non-trespassers entering its facility to provide a safe environment, not a duty relating to the medical treatment of Mr. Minnich. As Petitioner's claim for premises liability is wholly divorced from any health care rendered or that should have been rendered to Mr. Minnich, Petitioner's claim cannot be subject to the MPLA.

Finding the MPLA inapplicable to Petitioner's claim is dictated by relevant precedent.

Concurring in Riggs, Justice Davis opined:

The facts in the instant case demonstrate that at the time Ms. Riggs was having knee surgery, WVUH exposed all of its patients, and possibly anyone entering the hospital, to the potential of contracting a serratia bacterial infection. The potential for contracting a serriatia infection was not the reason Ms. Riggs was

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premises liability claim. First, there are no allegations that Respondent improperly rendered or failed to render any health care services to Mr. Minnich. The Complaint is devoid of allegations contending that Respondent failed to meet any professional standard of care. Further, no claims were asserted against any physicians or nurses. In addition to the absence of what would seem to be necessary allegations to assert a medical professional liability claim, the Complaint's allegations clearly set forth a premises liability claim. Petitioner alleged: Defendant failed to implement basic precautions and procedures to protect the safety of its customers such as Mr. Minnich; Mr. Minnich utilized the premises during normal business hours in a typical, permissible manner; it was reasonably foreseeable that failing to implement basic precautions and procedures to protect the safety of its customers would result in injury to Mr. and Mrs. Minnich; and Mr. and Mrs. Minnich were injured by said failure. JA 33-35 at ¶¶ 25-37. Further, the Complaint makes quite clear that the unsafe condition and/or defect in Respondent's premises was Respondent's failure to properly prepare the examination table for use when failing to fully extend the footstool. JA 33 ¶¶ 18 and 19; JA 34 at ¶¶ 30 and 31.

admitted to the hospital. Ms. Riggs sought medical treatment for her right knee. The duty breached by WVUH was not that of failing to properly treat Ms. Riggs knee, WVUH breached a general duty it owed to all patients and nonpatients to maintain a safe environment .... **Breach of the duty by a hospital to maintain a safe environment, which breach causes injury to a patient or nonpatient, simply does not fall under the MPLA.**

Id. 221 W.Va. at 666, 656 S.E.2d at 111 (emphasis added).<sup>9</sup> Thus, despite the fact the plaintiff's injury occurred in a health care facility, while the plaintiff was a patient and undergoing surgery, Justice Davis found that the hospital's breach of its duty to maintain a safe environment – sterile and free from infection – was unrelated to the plaintiff's knee surgery and, therefore, not covered by the MPLA. See also, Pluard, 705 N.E.2d at 1038 (holding that a lamp falling on a patient during his procedure after its adjustment by a nurse's assistant constituted a premises liability claim because it involved the general duty to maintain a safe premises and equipment and not the exercise of professional judgment or skill); Mobely, 915 So.2d at 218-219 (emphasis added), (holding that the patient's claim sounded in ordinary negligence despite the fact that she was already seated in the dental chair and positioned for treatment when the doctor's assistant unstuck the arm of an x-ray machine in such a way that it struck the plaintiff's face causing injury, because unsticking the x-ray arm was not a medical service requiring professional judgment. Further, the Court found, **"If ... negligence does not arise out of the rendering of medical services, [the professional liability act] does not apply even if an injury occurs after the delivery of medical services has commenced"**); Nowacki v. Community Medical Center, 652 A.2d 758, 766 (N.J. Super. Ct. App. Div. 1995) (holding the plaintiff's claim against the hospital for her fall from a stool, while trying to get on the treatment table to begin treatment, was caused by the hospital's failure to secure the stool or table with handle bars or grip bars;

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<sup>9</sup>Justice Davis' concurrence in Riggs, *supra*, was cited with approval in Manor Care, Inc. 234 W.Va. at 73 n.21, 763 S.E.2d at 89 n.21. Further, it is worthy of note that Justice Davis' concurrence in Riggs, *supra*, was written after she authored the Blankenship opinion.

assist the plaintiff onto the table; maintain the radiation room in a reasonable safe condition; and attend to the plaintiff's special needs was not a medical malpractice action); Feifer, 685 So.2d 882 (finding that a visibly weak elderly man's claim that he fell at a health care facility when the defendant failed to provide him assistance and instructed him to walk down long corridors made dangerous to him because of the absence of handrails or seating sounded in premises liability because the plaintiff's claim did not involve medical care, but instead, involved only the most basic negligence regarding the entry of client on the premises); Tenet St. Mary's, Inc. v. Serratore, 869 So.2d 729, 730-731 (Fla. 4<sup>th</sup> DCA 2004) (holding that the plaintiff's claim did not need to be filed as a medical malpractice action when after completing dialysis and while under the care of the hospital, an orderly negligently kicked the plaintiff's foot when attempting to assist her in rising from a reclining chair because the gravamen of her claim for negligence did arise out of medical care).

**D. The Circuit Court Erred by Adopting Respondent's "Continuity of Care" Argument in Contradiction of Controlling Precedent**

Despite the fact that there is no mention of "continuity of care" in the MPLA or West Virginia common law, the Summary Judgment Order adopts Respondent's "continuity of care" argument. **JA 16-20**. In fact, the Summary Judgment Order fails to cite any case applying the "continuity of care" theory when determining whether a claim is for medical professional liability. Pursuant to this unsupported argument, once a person goes through the intake function at a health care facility, thus becoming a patient, any claim he/she may have arising after the intake until discharged falls within the MPLA's purview because it is part of the "continuity of care." **JA 19**. Specifically, the Summary Judgment Order states:

Mr. Minnich suffered his alleged injuries after being evaluated and triaged by a health care provider, and while waiting to be further evaluated and treated by additional medical providers. Further, it

is uncontroverted that Mr. Minnich's alleged injuries occurred in his capacity as a patient, in a patient examination room and during the continuity of care.

Id. As you have to go through the intake function to become a patient, by extension, the Summary Judgment Order actually holds that any injury suffered by a patient at a health care facility is covered by the MPLA.

This "continuity of care" argument was specifically rejected by this Court when holding that an injured party's status as a patient at a health care facility was insufficient, without more, to bring the party's claims within the purview of the MPLA. Manor Care, Inc. 234 W.Va. at 73, 763 S.E.2d at 89. Moreover, the Circuit Court's adoption of the "continuity of care" argument renders superfluous the plain text of the MPLA specifically and unequivocally limiting its application to claims based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient. W.Va. Code § 55-7B-2(i); Boggs, 216 W.Va. at 662, 609 S.E.2d at 923. Further, by ignoring the MPLA's text, the Summary Judgment Order vastly expands the MPLA's scope in contradiction of long standing West Virginia precedent dictating that statutes that are in derogation of the common law be strictly construed to limit their effect. Phillips, 220 W.Va. at 492, 647 S.E.2d at 928; Kellar v. James, 63 W.Va. 139, 59 S.E. 939 (1907). The absurdity of the "continuity of care" argument is best demonstrated by its endless scope. Under this argument, a patient struck by a ceiling tile while walking from the intake room to the examination room would have to bring his/her claim under the MPLA. Of course, the maintenance of a health care facility's ceiling has absolutely nothing to do with health care services the patient received or should have received and there is no medical professional standard for maintenance of a ceiling. Clearly, the Circuit Court's

adoption of the “continuity of care” argument cannot be reconciled with controlling West Virginia law and, thus constitutes clear error.

**E. The Circuit Court Erred in Relying on Palmese v. Med-Help, P.C., 2013 WL 3617085 (Conn.Super.)(Unpublished) to Support Its Summary Judgment Order**

The Circuit Court heavily relied upon Palmese v. Med-Help, P.C., 2013 WL 3617085 (Conn.Super.)(Unpublished) when holding the MPLA applied to Petitioner’s premises liability claim and granting Respondent summary judgment. JA 16-18. The Circuit Court’s reliance upon Palmese, *supra*, is flawed and unsupportable for several reasons. First, the Supreme Court of Connecticut held that the rulings of superior courts have no precedential value. In re: Emma F., 107 A.3d 947, 958 (Conn. 2015). Palmese is a decision of a superior court and, as such, lacks precedential value not only in foreign jurisdictions like West Virginia, but also in Connecticut. Further, this Court never adopted the test relied upon in Palmese to reach its conclusion that the plaintiff’s claims were for professional liability and covered by Connecticut General Statutes Section 52-190(a). Next, Palmese did not address a situation wherein the plaintiff’s fall was caused by a defective piece of equipment like in the instant action. Finally, in relying on Palmese, the Circuit Court completely ignored and disregarded Connecticut case law paralleling Petitioner’s claims.

In Dwyer v. Bio-Medical Application of CT, Inc., 2013 WL 3388874 (Conn. Super.)(Unpublished), the plaintiff went to the defendant’s dialysis center for treatment. The plaintiff alleged: (1) he was led onto a scale prior to dialysis; (2) he was left unassisted and without his walker on the scale; (3) the defendant knew that the plaintiff needed assistance or a walker to get on and off the scale; (4) the defendant failed to keep the premises safe for people lawfully at the facility by allowing a lip to form around the scale creating a trip hazard; (5) the defendant failed to use due care by maintaining the facility in a condition it knew or should have

known would tend to cause injury to those like the plaintiff and failed to provide personnel to assist the plaintiff in stepping off the scale. Id. at \*1. The defendant argued that the plaintiff's claims sounded in medical malpractice because the defendant was sued in its capacity as a dialysis provider, assessing the plaintiff's weight was integral to his dialysis care and treatment, and ambulatory ability requires medical judgment. Id. at \*2.

The Superior Court analyzed the defendant's argument under the same three prong test used in Palmese and cited by the Circuit Court in its Summary Judgment Order. Id.; JA 17-18. In so doing, the Superior Court primarily addressed the third prong – the alleged negligence be substantially related to medical diagnosis or treatment and involve the exercise of medical judgment – and found:

[T]he defendant's alleged negligence, that it failed to fix or cordon off a surface it knew or should have known was hazardous and further, through its agents or employees, left the plaintiff, who came onto the premises with a walker, on that hazardous surface without assistance or his walker, is not substantially related to medical diagnosis or treatment and does not involve the exercise of any medical judgment. Although the patient was at the defendant's facility for a medical procedure, dialysis treatment, the negligence is not alleged to have occurred during the medical procedure, but beforehand, when the plaintiff was being led to and from the scale. Furthermore, knowing not to leave a person without their walker on a tripping hazard does not involve any medical knowledge or judgment.

Dwyer, 2013 WL 338874 at \*3. Thus, the Superior Court found that the plaintiff's claims sounded in ordinary negligence.

In Lefkimiatis v. Luchini Orthopedic Surgeons, P.C., 2012 WL 1624059 (Conn. Super.) (Unpublished), the plaintiff was at a health care facility seeking physical therapy. To start therapy, the plaintiff lowered himself onto a stool placed adjacent to a physical therapy machine he was about to use and it slipped causing him to fall. The plaintiff alleged that the defendant

failed to supervise him in conducting his therapy and failed to warn him of the possible harm from the stool's use. Id. at \*1. The defendant moved to dismiss asserting that the plaintiff's claims sounded in medical malpractice. In addressing the motion to dismiss, the Superior Court applied the same test used in Palmese. In so doing, the Superior Court found that the second and third prongs necessary to come within the medical malpractice statute's purview were not met. Id. at \*4. The Superior Court found that the crux of the plaintiff's complaint was that he slipped when he went to sit on a stool. Id. at \*6. **"Taking precautions to ensure that a stool is safe to use does not require specialized medical knowledge."** Id. at \*5 (emphasis added). The plaintiff made no allegations that the defendant did not exercise the requisite medical skill. Id. at \*6. This injury could have happened to anyone in almost any setting. Id. \*5. Consequently, the Superior Court found the plaintiff's claim sounded in ordinary negligence.

Clearly, had the Circuit considered Connecticut case law addressing a situation similar to the instant action, a different conclusion would have been compelled.

**F. The Circuit Court Erred in Finding that Petitioner's Claim is Based Upon a Fall Risk Assessment of Mr. Minnich**

The Summary Judgment Order finds that "Plaintiff mischaracterizes her Complaint as simply involving MedEspress' purported failure to fully extend a foot-stool creating an unsafe environment for business invitees." JA 21. Further, the Summary Judgment Order asserts that the Complaint's allegations contain a negligence claim based upon Respondent's evaluation of Mr. Minnich's fall risk. Id. These findings have no support in the record or Plaintiff's Complaint.

The Circuit Court's initial error is its exclusive reliance on the allegations of Petitioner's Complaint when finding Petitioner's negligence claim originated from a fall risk assessment. As fully addressed in Section II of this Petition, Respondent filed a motion for summary judgment

and not a motion to dismiss. Consequently, the Circuit Court was required to examine the evidence in the record when determining whether Petitioner's negligence claim was based upon a fall risk assessment or premises liability. Haga, 151 W.Va. at 132, 150 S.E.2d at 603; R. Civ. Pro. 56(c); Crain, 178 W.Va. at 768, 364 S.E.2d at 781; Riggs, 656 S.E.2d at 111. In this case, the Circuit Court failed to address the substantial evidence demonstrating Petitioner asserted a premises liability claim based upon the unsafe environment created by Respondent's failure to fully extend the examination table's footstool and the complete absence of any evidence refuting this conclusion. Moreover, the Circuit Court overlooked the unassailable fact that the record was devoid of any evidence supporting the conclusion that Petitioner's negligence claim was based upon a fall risk assessment. Without a single piece of evidence demonstrating Petitioner's claim was derived from a fall risk assessment, it is difficult to fathom how the Circuit Court could make such a finding.

Moreover, even if one wrongly limits their review to the allegations of the Complaint, the conclusion reached by the Circuit Court is belied by the absence of necessary allegations. The Complaint is devoid of the phrase "fall risk." There no allegations that Mr. Minnich's fall risk was evaluated, improperly or not. There are no allegations that Respondent should have, but failed to evaluate Mr. Minnich's fall risk. Further, there no allegations that any health care provider fell below any standard of care in making any evaluation or assessment of Mr. Minnich. In fact, as stated many times, Mr. Minnich received no health care service until after his fall. The Circuit Court's finding is simply not supported by the allegations of the Complaint.

Finally, the proffered defense to Petitioner's allegation that Respondent exposed all potential business invitees, including Mr. Minnich, to an unsafe environment by directing the use of an examination table not prepared for use is not that Respondent properly evaluated Mr.

Minnich's fall risk and determined he could get on the examination table without assistance. Instead, Respondent argues that its employees never told Mr. Minnich to get on the examination table. JA 388 at 89. In fact, Respondent has asserted that its employees never tell a patient to get on the examination table, while awaiting the arrival of a physician. JA 389 at 93; JA 376 at 75-76. Thus, an assessment of whether a business invitee is able to get on a table without assistance is never done because it automatic, according to Respondent, that patients are not told to get on the examination table while awaiting a physician. Respondent's defense has nothing to do with defending the sufficiency of any medical evaluation, treatment or care preformed or not preformed. To the contrary, Respondent's defense is the absence of an event leading to the fall. Respondent asserts a defense to premises liability and not medical professional liability.<sup>10</sup>

**G. The Circuit Court Erred in Finding that Hively was a Health Care Professional under W.Va. Code § 55-7B-2(g)**

Prior to his fall, Mr. Minnich only interacted with Hively, a medical assistant. The Summary Judgment Order finds that Mr. Minnich's alleged injury occurred between being evaluated and triaged by one health care provider, and while waiting to be further evaluated and treated by another. JA 19. As such, the Order finds that Hively is a health care provider pursuant to W.Va. Code § 55-7B-2(g) (2006), which defines a health care provider as:

A person, partnership, corporation, professional limited liability company, health care facility or institution licensed by, or certified in, this state or another state, to provide health care or professional health care services, including, but not limited to, a physician, osteopathic physician, hospital, dentist, registered or licensed practical nurse, optometrist, podiatrist, chiropractor, physical therapist, psychologist, emergency medical services authority or agency, or an officer, employee or agent thereof acting in the

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<sup>10</sup> The Summary Judgment Order presumptively finds that the assessment of a business invitee's fall risk is a medical determination performed by a medical professional. However, Vealey testified that all employees, including non-clinical employees, received training in fall risk assessment. See, JA 376 at 57. Thus, even if a fall risk assessment was preformed, it is difficult to image how Respondent can claim such assessments require medical expertise when non-medical employees are given training to make such assessments.

course and scope of such officer's, employee's or agent's employment.

Following recent amendments, the definition of health care provider was greatly expanded in scope by adding physician assistant, advanced practice registered nurse, health care facility, registered or licensed practical nurse, speech-language pathologist and audiologist, occupational therapist, pharmacist, technician and certified nursing assistants to the definition.<sup>11</sup> W.Va. Code § 55-7B-2(g) (2015). However, medical assistants were again omitted. As medical assistants were omitted not only from the applicable definition of health care provider, but also the recent substantial expansion of the definition, it is clear that the West Virginia Legislature did not intend medical assistants to be considered health care providers under the MPLA. Such a conclusion is dictated by relevant precedent.

In Phillips, *supra*, this Court was asked to determine whether a pharmacy constituted a health care provider under W.Va. Code 55-7B-2(c)(1986), despite the term's absence from the definition. Id. 220 W.Va. at 490; 647 S.E.2d at 926. In analyzing the issue, this Court applied the familiar maxim, “*unius est exclusion alterius*, the express mention of one thing implies the exclusion of another.” Id. 220 W.Va. at 492, 647 S.E.2d at 928, (quoting Syl. Pt. 3, Manchin v. Dunfee, 174 W.Va. 532, 327 S.E.2d 710 (1984)). See also, Banker v. Banker, 196 W.Va. 535, 546-47, 474 S.E.2d 465, 476-77 (1996) (holding that it is not for a court to read into a statute that which it does not say). Further, this Court concluded that the MPLA is in derogation of the common law and must be narrowly construed. Phillips, 220 at 491, 647 S.E.2d at 927. Applying these statutory maxims, this Court concluded that pharmacies were not health care providers as defined by the MPLA. Phillips parallels the instant action and, as such, the same conclusion is

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<sup>11</sup> The 2015 amendments to the MPLA became effective on March 10, 2015 and are, of course, inapplicable to Petitioner's claim filed in 2013.

required – as the MPLA’s definition of health care provider does not include medical assistants, the definition should not be read broadly so as to read into the statute that which is omitted.

Further, to be a health care provider, one must be licensed or certified in West Virginia or another state and Hively is neither. W.Va. Code § 55-7B-2(g). West Virginia does not license medical assistants. Additionally, although the Circuit Court found that Hively is a certified medical assistant, she is not. JA 10. Hively never claimed to have received a certificate from the American Association of Medical Assistants – the certifying group for medical assistants. Instead, she asserts that upon the completion of a 13 month certificate program that she received a certificate from the National Institute of Technology. JA 386 at 7-8. Hively’s certificate is simply an acknowledgment of the completion of her education and not credentialing from the AAMA. Consequently, Hively cannot be a health care provider under the MPLA.

As Hively, the only person with whom Mr. Minnich had contact prior to his fall, is not a health care provider under the MPLA, the MPLA is inapplicable to Petitioner’s claim for premises liability.

### **CONCLUSION AND RELIEF REQUESTED**

In contradiction of the MPLA’s plain text, this Court’s controlling precedent and the evidentiary record, the Circuit Court found the MPLA applicable to Petitioner’s clear premises liability claim and granted Respondent summary judgment with regard to said claim. As demonstrated herein, the Circuit Court’s findings cannot withstand scrutiny. By adopting Respondent’s unsupported “continuity of care” argument, the Circuit Court cloaked Respondent with the protection of the MPLA based solely upon the fact that Respondent is a health care facility, the incident occurred in Respondent’s facility and Mr. Minnich was a patient. However, this Court has already explicitly rejected this argument. Manor Care, Inc., 234 W.Va. at 737, 63

S.E.2d at 89. Further, by adopting the “continuity of care” argument, the Circuit Court impermissibly disregarded the text of the MPLA limiting its application to claims based upon health care services rendered or that should have been rendered by health care provider to a patient. Boggs, 216 W.Va. at 492, 647 S.E.2d at 928. Thereby, the Circuit Court exponentially increased the scope of MPLA in contradiction of clear precedent requiring that statutes in derogation of the common law be strictly construed to limit their effect. Phillips, 220 W.Va. at 492, 647 S.E.2d 928. Further, despite the fact that Respondent filed a motion for summary judgment, the Circuit Court never considered the substantial evidence within the record demonstrating Petitioner’s claim sounded in premises liability and the complete absence of evidence contradicting Petitioner’s evidence or supporting the conclusion that Petitioner’s claim was for medical professional liability.

All businesses, including Respondent, have a general duty to maintain their premises in a reasonably safe condition for business invitees. Petitioner’s claim is based upon Respondent’s failure to comply with this general duty. The same claim could be asserted against any business. No health care services are implicated by Respondent’s failure to, in accordance with its own policies, properly prepare its equipment, an examination table, prior to directing Mr. Minnich to use the same. No professional standard exists dictating how to properly extend an examination table’s footstool and, as such, no reputable physician would opine regarding the same. Moreover, any effort by a physician to so opine would be inappropriate because a physician is no more qualified than the average juror to offer opinions on the proper maintenance of a premises. Simply put, Petitioner alleged and the record evidences a premises liability claim to which the MPLA is wholly inapplicable.

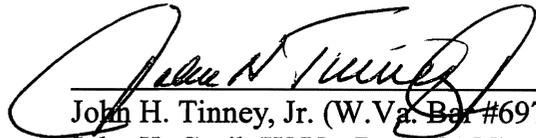
Consequently, Petitioner requests relief from the Circuit Court's Reconsideration Order as follows: (1) reversal of the grant of summary judgment to Respondent with regard to Petitioner's premises liability claim; (2) reversal of the Circuit Court's finding that the MPLA is applicable to Petitioner's premises liability claim; and (3) reversal of the Circuit Court directive that Petitioner amend her complaint to assert a medical professional liability claim against Respondent in accordance with the MPLA's requirements.

Dated: February 29, 2016

Respectfully submitted,

**Petitioner, JOYCE E. MINNICH**

By: Counsel



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 15-1148

JOYCE E. MINNICH, AS EXECUTRIX  
OF THE ESTATE OF ANDREW A. MINNICH,  
AND JOYCE E. MINNICH, INDIVIDUALLY,

Petitioner,

v.

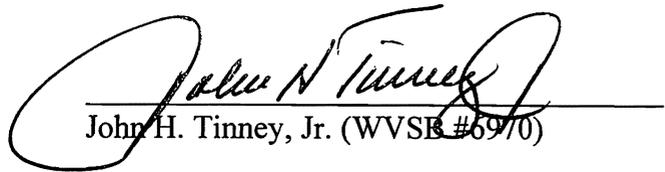
MEDEXPRESS URGENT CARE, INC. –  
WEST VIRGINIA D/B/A MEDEXPRESS  
URGENT CARE – SOUTH CHARLESTON,

Respondent.

**CERTIFICATE OF SERVICE**

I, John H. Tinney, Jr., hereby certify that service of the foregoing *Brief of Petitioner Joyce E. Minnich* was made upon counsel of record, this 29<sup>th</sup> day of February, 2016, by mailing a true and exact copy thereof via first class United States Mail, postage prepaid, in an envelope addressed as follows:

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