

APPEAL NO. 15-1148

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**

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. The Circuit Court Committed Reversible Error by Failing to Consider the Record Evidence when Ruling on Respondent's Motion for Summary Judgment

The Circuit Court granted Respondent summary judgment on Petitioner's premises liability claim by finding the Medical Professional Liability Act, West Virginia Code § 55-7B-1, *et seq.*, ("MPLA") applicable thereto. JA 9-25. In doing so, the Circuit Court addressed, considered and relied solely upon its interpretation of Petitioner's Complaint. This unassailable fact is clearly shown by the Summary Judgment Order, which does not cite, address or refer to any evidence; instead, it exclusively cites the Complaint. *Id.* Consistent therewith, Respondent supported its Motion with but a single piece of evidence; electing to rely upon the Complaint's allegations.¹ JA 68-87; JA 4417-436. Although limiting review to the Complaint is appropriate when addressing a motion to dismiss, Respondent filed a summary judgment motion at the close of evidence and before it can be granted, the Circuit Court and Respondent must meet the requirements of Rule 56 of the West Virginia Rules of Civil Procedure.

Rule 56(c) requires that a court must consider the pleadings, depositions, answers to interrogatories and admissions filed before granting summary judgment. W.Va. R. Civ. Pro. 56(c). See also, Conrad v. ARA Szabo, 198 W.Va. 362, 374 480 S.E.2d 801, 813 (1996) (emphasis added); Syl. Pt. 2, Aetna Cas. & Sur. Co., 148 W.Va. 160, 133 S.E.2d 770 (1963).

Although this Court has not specifically addressed how to determine whether the MPLA is applicable to a claim in the summary judgment context, this Court has addressed the MPLA's application to claims under similar conditions – after discovery is completed – in the post-verdict context. In Manor Care, Inc. v. Douglas, 234 W.Va. 57, 763 S.E.2d 73 (2014), this Court

¹ The evidence cited by Respondent to support its Motion for Summary Judgment is the consent for treatment and authorization for disclosure of protected medical information signed by Andrew Minnich, which Respondent admits does nothing more than demonstrate that Mr. Minnich agreed to be treated by Respondent. JA 73.

considered, post-verdict, whether the trial court erred in allowing the plaintiff to assert a medical malpractice claim under the MPLA and a corporate negligence claim. The defendant argued that all of the plaintiff's claims were subject to the MPLA. In finding the MPLA inapplicable to the plaintiff's corporate negligence claim, this Court not only examined the plaintiff's allegations, but specifically examined the plaintiff's evidence supporting her claim. *Id.*, 234 W.Va. at 74-75, 63 S.E.2d at 90-91. Also, in her concurrence in Riggs v. WVU Hospitals, Inc. 221 W.Va. 646, 666, 656 S.E.2d 91, 111 (2007), Justice Davis considered, post-verdict, the facts of the case to determine the MPLA was inapplicable to a health care facility's failure to maintain a safe environment.

Respondent does not refute that precedent dictates the Circuit Court, when addressing a summary judgment motion, must review and consider the parties' evidence. Further, Respondent never argues that the Circuit Court reviewed or considered Petitioner's evidence responding to Respondent's Motion for Summary Judgment. In fact, Respondent essentially concedes that Circuit Court limited its review to the Complaint's allegations. Response at 7 (stating "as the Court correctly found, the Complaint itself, while styled as one for premises liability, contains numerous facts which, as pled, brings this case under the MPLA"). As the Circuit Court failed to review or consider Petitioner's evidence addressing Respondent's Motion for Summary Judgment, the Circuit Court committed reversible error. The Circuit Court cannot ignore Rule 56's requirements and treat Respondent's Motion as if it was a motion to dismiss.

II. Petitioner's Evidence Addressing Respondent's Summary Judgment Motion Created a Genuine Issue of Material Fact as to the MPLA's Applicability to Petitioner's Claim

Avoiding the issue of whether the Circuit Court, as required by West Virginia law, considered the evidence submitted by Petitioner in response to Respondent's Motion for

Summary Judgment, Respondent argues that the record evidence does not create a genuine issue of material fact as to the issue upon which summary judgment was granted – the MPLA’s applicability to Petitioner’s premises liability claim. Response at 7-12. Respondent is mistaken.

A. The MPLA has a Defined, Limited Scope 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 v. Larry’s Drive-In Pharmacy, Inc., 220 W.Va. 484, 492, 647 S.E.2d 920, 928. 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). In discussing the MPLA’s limited scope, this Court found, “The Legislature has granted special protection to medical professionals, while they are acting as such.” Boggs v. Camden-Clark Mem’l Hosp. Corp., 216 W.Va. 656, 662-63, 609 S.E.2d 917, 923-24 (2007). Accordingly, “[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). These precepts led this Court to find:

[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 (citations omitted).

B. Evidence is Material to the Determination of whether a Claim is Subject to the MPLA when It Relates to the Fundamental Basis of the Claim

The determination of whether the MPLA applies to a claim requires an inquiry into the facts of that claim. Blankenship v. Ethicon, Inc., 221 W.Va. 700, 706, 656 S.E.2d 451, 457

(2007). In conducting this inquiry at the motion to dismiss phase, *i.e.* prior to discovery, one must determine the “core allegations” of the complaint. Id., 221 W.Va. at 707, 656 S.E.2d at 458. 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 in support of the claim. See, Manor Care, Inc., 234 W.Va. at 73, 763 S.E.2d at 89. Once the fundamental basis of the tort and/or substance of the an action is determined, one can ascertain whether the claim is “based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient” and, therefore, subject to the MPLA. W.Va. Code § 55-7B-2(i)(2006).

A summary of the evidence the Circuit Court failed to consider when determining that the MPLA applied to Petitioner’s premises liability claim follows.² The retractable footstool was not fully extended when Mr. Minnich was directed to get on the exam table, which impeded his ability to access the table. JA 370; JA 373-74; JA 380 at 104 – JA 381 at 105; JA 383. Respondent’s employees were aware that failing to fully extend the footstool raised safety concerns and could cause a fall. JA 378 at 86-87; JA 379 at 90; JA 380 at 100. Further, Respondent’s employees understood that although failing to extend the footstool created a defect potentially dangerous to all patients, there was a greater risk to patients with physical conditions similar to Mr. Minnich. JA 379 at 90-91. Respondent knew or should have known³ the footstool was not fully extended when Mr. Minnich was directed to access the table because: Respondent’s employee, Jessica Hively, entered examination room prior to directing Mr.

² See also, Petition at 1-3, 14-16.

³ For purposes of premises liability, the phrases “actual or constructive knowledge,” “learns or should have learned,” and “knows or should know,” are interchangeable expressing the same standard. Hawkins v. U.S. Sports Ass’n, Inc., 219 W.Va. 275, 279 fn3, 633 S.E.2d 31, 35 fn3 (2006).

Minnich to get onto the exam table⁴ and should have seen the footstool was not fully extended; it was Respondent's policy that the exam table's footstool be fully extended prior to use by a patient;⁵ thus, Respondent was required to inspect the footstool and make certain it was fully extended before its use by Mr. Minnich; and Respondent's employees are solely responsible for adjusting the exam table's footstool; therefore, Respondent created the defect and is charged with knowledge of the same.⁶ Mr. Minnich suffered severe injuries – laceration of his forearm and subarachnoid hemorrhage (“brain bleed”), which substantially contributed to his death. JA 383; JA 393 at 19-20; JA 395 at 81. Mr. Minnich entered the premises during business hours, as a business invitee, to seek Respondent's services. Mr. Minnich used the premises in a normal and expected manner. In fact, he only attempted to access the defective exam table after Ms. Hively so directed him. JA 370. Finally, Respondent's burden to act is minimal as it was already Respondent's policy to fully extend the exam table's footstool before its use by a patient and it required little effort to do so.

A review of this evidence clearly demonstrates that the fundamental basis of Petitioner's premises liability claim is Respondent's failure to maintain a reasonably safe environment by exposing business invitees, like Mr. Minnich, to defective equipment. Respondent's failure to fully extend the footstool and the dangerous condition created thereby is the gravamen of Petitioner's claim. Further, there is no plausible connection between Respondent's failure to fully extend a footstool and any health care Mr. Minnich received or should have received. No specialized medical skill is necessary to complete this rudimentary task. Thus, contrary to Respondent's argument, Petitioner's evidence creates a genuine issue of material fact as the

⁴ JA 389 at 95-96

⁵ JA 387 at 57

⁶ See, Roach v. McCory Corp., 158 W.Va. 282, 285, 210 S.E.2d 312, 314 (1974).

evidence has the capacity to sway the outcome of whether the MPLA is applied to Petitioner's premises liability claim.

Clearly, the Circuit Court erred when it failed to consider Petitioner's evidence when ruling on Respondent's Motion for Summary Judgment. This is particularly true when you consider that summary judgment is viewed with disfavor in this jurisdiction. Andrick v. Town of Buckhannon, 187 W.Va. 706, 708, 421 S.E.2d 247, 249 (1992). All ambiguities must be resolved and all inferences drawn in favor of Petitioner as the non-moving party. Hanlon v. Chambers, 195 W.Va. 99, 105, 464 S.E.2d 741, 747 (1995). Respondent did not meet its burden of demonstrating the absence of evidence in the record by reviewing for the court affidavits and discovery materials. Smith v. Buege, 182 W.Va. 204, 209, 387 S.E.2d 109, 114 (1989). In fact, Respondent failed to cite any evidence supportive of its Motion or evidence refuting Petitioner's evidence. Instead, Respondent relied on the Complaint's allegations to support its Motion. To summarize, Petitioner's record evidence not only creates a genuine issue of material fact regarding whether the MPLA applied to Petitioner's premises liability claim, but affirmatively demonstrates that it does not. Therefore, it was reversible error for the Circuit Court to grant Respondent summary judgment.

Respondent erroneously argues that Petitioner failed to present evidence regarding all the elements of a premises liability claim. Response at 10. Contrary to Respondent's assertion, Petitioner tendered evidence meeting all five factors set-forth in Mallet v. Pickens, 206 W.Va. 145, 522 S.E.2d 436 (1999), to assert a premises liability claim.⁷ Petition at 13-16. Nevertheless, Respondent argues, relying on Hawkins v. U.S. Sports Ass'n, Inc., 219 W.Va. 275,

⁷ "In determining whether a defendant in a premises liability case met his or her burden of reasonable care under the circumstances to all non-trespassing entrants, the trier of fact must consider (1) the foreseeability that an injury might occur; (2) the severity of the 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; (5) the magnitude of the burden placed upon the defendant to guard against injury." Syl. Pt. 6, Mallet, 206 W.Va. 145, 522 S.E.2d 436.

633 S.E.2d 31 (2006) (*per curiam*), that Petitioner was required and failed to produce evidence showing that (1) the owner had actual or constructive knowledge of the defective condition and (2) invitee had no knowledge of the substance or condition or was prevented by the owner from discovering it.

First, to the extent that the requirements of Hawkins, a *per curiam* opinion, diverge from Syl. Pt. 6 of Mallet, Mallet controls as all new law must be in a syllabus point. Syl. Pt. 13, State ex rel. Medical Assurance of W.Va., Inc. v. Recht, 213 W.Va. 457, 583 S.E.2d 80 (2003). Further, the second prong of Hawkins relies upon the open and obvious doctrine, which is derived from *dicta* in Burdette v. Burdette, 147 W.Va. 313, 127 S.E.2d 249 (1962). See, Hersh v. E-T Enter., Ltd. P'ship., 232 W.Va. 305, 313, 752 S.E.2d 336, 344 (2013). This Court has found that *obiter dicta* is text that is “unnecessary to the decision in the case and therefore not precedential.” Recht, 213 W.Va. at 472, 583 S.E.2d at 471 (citations omitted). Moreover, this Court abolished the open and obvious doctrine as inconsistent with West Virginia’s comparative negligence standard and to bring West Virginia in conformity with modern trends. Hersh, 232 W.Va. at 314-16, 752 S.E.2d at 345-47. Although the open and obvious doctrine was reinstated in 2015 by statute, it is inapplicable to Petitioner’s claim because the statute became effective after Petitioner’s cause of action accrued and was filed. W.Va. Code § 55-7-28 (2015). Further, as it diminishes substantive rights and there is no indication that the statute is to be applied retroactively, the statute must be applied prospectively. Syl. Pt. 2, Public Citizens, Inc. v. First Nat’l Bank in Fairmont, 198 W.Va. 329, 480 S.E.2d 538 (1996). Thus, Petitioner has produced uncontroverted evidence demonstrating each necessary element of a premises liability claim under the applicable standard.

Assuming *arguendo* that the Hawkins elements are applicable to Petitioner's claim, Petitioner still has produced evidence demonstrating each element. First, contrary to Respondent's assertion, Petitioner has shown a defect in the exam table – its footstool was not fully extended as required by Respondent's policy because of the dangers associated with such a condition. Next, as discussed when addressing Mallet's foreseeability requirement, Petitioner produced evidence that Respondent knew or should have known of the exam table's defect. Finally, Respondent argues that there is no evidence that Respondent prevented Petitioner from discovering the defect. However, Respondent simply ignores the disjunctive “or” in the second prong of Hawkins which states, “the invitee had no knowledge of the substance or condition or was prevented by the owner from discovering it.” *Id.*, 219 W.Va. at 279, 633 S.E.2d at 35. The disjunctive “or” denotes a choice – one or the other. In this case, Petitioner has presented evidence that the invitee had no knowledge of the exam table's defect. Petitioner testified that she was unaware the footstool was not fully extended until after the incident. JA 374. Thus, to the extent the Hawkins factors apply to Petitioner's claim, Petitioner has presented uncontroverted evidence satisfying them.

III. There is No Basis upon which to Conclude that Petitioner's Claim is Based upon a Fall Risk Assessment of Andrew Minnich

Having to connect Petitioner's premises liability claim to health care services rendered or that should have been rendered to Mr. Minnich for the MPLA to apply, Respondent relies upon the Circuit Court's erroneous conclusion that Petitioner's claim is based upon a fall risk assessment of Mr. Minnich. Response at 12, 23-24. Respondent reasserts this argument without addressing the Petitioner's arguments establishing not only is there no basis for such a finding in the record or the Complaint, but that the whole argument is disingenuous as Respondent's medical assistants never assess whether a patient can get on the exam table without assistance.

As Respondent filed a motion for summary judgment, the Circuit Court was required to review the record evidence to determine the basis of Petitioner's claim. Conrad, 198 W.Va. at 374 480 S.E.2d at 813. Although the record is replete with evidence demonstrating that Petitioner's claim is based upon Respondent's failure to maintain a reasonably safe environment, there is no evidence supporting the conclusion that Petitioner's claim is based upon a fall risk assessment of Mr. Minnich. Respondent makes no effort to argue otherwise.

Just as the Circuit Court incorrectly did, Respondent rests its argument upon the Complaint's allegations. Respondent makes no attempt to explain how Petitioner alleged a claim based upon a fall risk assessment without using the term fall risk or alleging that Mr. Minnich was evaluated properly or not by anyone. Undeterred by the lack of necessary allegations, Respondent asks this Court to infer the existence of such a claim from the Complaint's allegations relating to Mr. Minnich's physical condition, which Petitioner alleged was obvious to any lay person. JA 32. These allegations have nothing to do with a fall risk assessment; instead, these allegations show that Respondent owed Mr. Minnich a heightened duty because of its awareness of his physical condition. See, 62A Am. Jur. 2d Premises Liability § 476 (stating that "[t]he owner of a ... commercial premises not only must maintain his or her premises in a condition reasonably safe for the well and strong, but he or she must also exercise due care to keep such premises reasonably safe for the elderly, the infirm and the disabled, and such owner may owe a special duty to warn them of hazards which are more dangerous to them because of their infirmity"). In fact, Respondent's employee acknowledged when noting that although the failure to fully extend the footstool was potential dangerous to all, it was particularly dangerous to people with Mr. Minnich's physical conditions. JA 379 at 90-91. Essentially, Respondent,

the movant, asks this Court to give it the benefit of all inferences and ambiguities that are owed to Petitioner, the non-movant. Hanlon, 195 W.Va. at 105, 464 S.E.2d at 747.

Next, Blankenship instructs one must examine the facts of a claim to determine whether the MPLA applies. Id., 221 W.Va. at 706, 656 S.E.2d at 457. Respondent's employees testified not only that Mr. Minnich was not instructed to get on the exam table,⁸ but it is Respondent's policy that patients are never told to get on the table, while awaiting a provider. JA 377 at 75; JA 389 at 93. Further, Ms. Hively testified as to the tasks she performed with regard to Mr. Minnich and a fall risk assessment was not identified. JA 387 at 60. Taking Ms. Hively's testimony as true, no fall risk assessment is ever necessary or done by employees like Ms. Hively to determine if a patient, including Mr. Minnich, is capable of getting on the exam table. Thus, Respondent's defense of this matter is not the sufficiency of a medical evaluation; instead, Respondent argues that it was not foreseeable that Mr. Minnich would access the table without being so instructed. JA 61 at ¶31. In other words, a link in the causal events leading to the incident is missing.

Finally, Respondent fails to explain how a fall risk assessment constitutes medical care when its non-clinical employees receive training to make such judgments. JA 376 at 57.

IV. Mr. Minnich Received No Medical Care Services Prior to His Fall

Previously, Petitioner argued that the Circuit Court did not rely upon and Respondent did not submit, any evidence supporting the finding that Mr. Minnich was evaluated and triaged by a health care provider prior to his fall. Petition at 18. In response thereto, Respondent directs this Court to a portion of Ms. Hively's testimony wherein she asserts that she triaged Mr. Minnich.⁹ Response at 13. Respondent never brought this testimony to the Circuit Court's attention, nor did the Circuit Court cite this evidence. Instead, the Circuit Court cited the Complaint, which is

⁸ JA 388 at 89; Respondent's Answer denying that Mr. Minnich was told to get on the exam table. JA 61 at ¶31.

⁹ For the reasons set forth in Section VI, Ms. Hively is not a health care provider as defined by the MPLA.

devoid of the word triage,¹⁰ to support its finding. JA 9-25. Thus, the Circuit Court’s finding was not based on this evidence, but upon phantom allegations of the Complaint.¹¹

Respondent does not address the Circuit Court’s failure to cite any case from any jurisdiction supporting its finding that intake functions such as inquiries into one’s medical history or the purpose of his/her visit constitutes health care services. To this day, Respondent has been unable to cite a single case supporting its argument. Petitioner cited Dawkins v. Union Hosp. Dist., 758 S.E.2d 501 (S.C. 2014) for the proposition that inquiries regarding current medications and complaints did not constitute medical care. The Supreme Court of South Carolina found these intake functions constituted nonmedical, administrative, ministerial, and/or routine care, which are subject to ordinary negligence. Id., at 503-4. In response to Dawkins, Respondent asserts that Petitioner failed to inform the Court that the Dawkins Court reached its holding based on how the plaintiff’s claims were pled. Response at 22-23. Respondent apparently missed pages 20 through 21 of the Petition, which addressed this absurd argument proffered by Respondent and adopted by the Circuit Court. The lack of case law supporting Respondent’s argument is telling.

V. Ms. Hively is Not a Health Care Provider as Defined by W.Va. Code § 55-7B-2(g)

The definition of “health care provider” in effect when Petitioner’s Complaint was filed omitted medical assistants like Ms. Hively. W.Va. Code § 55-7B-2(g) (2006). Further, although the Legislature greatly expanded the definition of “health care provider” in 2015, it elected not to include medical assistants. W.Va. Code § 55-7B-2(g) (2015). Still, Respondent argues that this Court should read the term “health care provider” broadly to include medical assistants despite

¹⁰ JA 30-37.

¹¹ Respondent makes issue of Petitioner’s counsel use of the word triage during Ms. Hively’s deposition. Upon review of the questions leading to the one cited by Respondent, it is clear that Petitioner’s counsel used the deponent’s term to move the deposition forward. JA 387.

their omission from the definition. Respondent makes this argument while conceding that this Court rejected an identical argument made with regard to pharmacies in Phillips, 220 W.Va. 484, 647 S.E.2d 920. In hopes of avoiding the Phillips holding, Respondent argues the case is distinguishable. Response at 24-25. In Phillips this Court distinguished Short v. Appalachia OH-9, Inc., 203 W.Va. 246, 507 S.E.2d 124 (1998), wherein it expanded the definition of health care provider to include EMTs despite the term's absence from the definition based upon the fact EMTs provide hands-on medical services to patients and pharmacies lacked this type of patient relationship. Phillips, 220 W.Va. at 492-93, 647 S.E.2d at 928-29. In accordance with Short, Respondent argues that medical assistants like Ms. Hively should be read into the definition of health care provider because she triaged Mr. Minnich and, thus had a hands-on relationship him.

There is a vast difference between the emergency medical care provided by a licensed EMT, the sole health care provider during an emergency, and the intake functions provided by an unlicensed medical assistant.¹² Respondent ignores the other basis for this Court's refusal to expand the definition to include pharmacies. This Court found the Short holding was "of dubious value because there is no mention of the rule of construction that statutes in derogation of the common law are to be given narrow, not expansive and liberal, interpretation." Id., 220 W.Va. at 493, 647 S.E.2d at 929. This long standing maxim requires the MPLA be given a narrow construction¹³ and taken with the familiar maxim *expressio unius est exclusio alterius* dictate that MPLA cannot be read broadly to include that which is specifically omitted. Respondent fails to explain why these maxims of statutory construction are inapplicable to this case. Finally, unlike with EMTs, the Legislature has shown no interest in adding medical assistants to the list of health care providers.

¹² In Short, this Court stressed the importance of the fact that EMTs are licensed by West Virginia. Id., 203 W.Va. at 128, 507 S.E.2d at 250. As more fully addressed herein, medical assistants are not licensed by West Virginia.

¹³ The maxim dates back to this Court's holding in Kellar v. James, 63 W.Va. 139, 59 S.E. 939 (1907).

Citing W.Va. Code § 55-7B-2(g) (2010), Respondent argues that Ms. Hively is a health care provider because she is an “employee or agent [of MedExpress] acting in the course and scope of such ... employment.” Response at 25. Respondent is mistaken. During 2015, the Legislature added to the term health care provider, “any person supervised by or acting under the direction of a licensed professional, any person taking actions or providing service or treatment pursuant to or in furtherance of a physician’s plan of care, a health care facility’s plan of care, medical diagnosis or treatment...” without deleting or altering the text relied upon by Respondent. W.Va. Code § 55-7B-2(g) (2015). Clearly, the purpose of this new text is to designate people like Ms. Hively –who are not health care providers, but are working at their direction or according to their plans – as health care providers under the MPLA. Although this revised statute is inapplicable to Petitioner’s claim, it provides insight into the meaning of the text relied upon by Respondent. If Respondent is correct and the text it quotes renders Ms. Hively a health care provider, then W.Va. Code § 55-7B-2(g)’s new text is superfluous and duplicative of text already part of the statute. This Court has held:

It is presumed that the legislature had a purpose in the use of every word, phrase and clause found in a statute and intended the terms to be effective, wherefore an interpretation of a statute which gives a word, phrase or clause thereof no function to perform, or makes it, in effect, a mere repetition of another word, phrase or clause thereof must be rejected as unsound, if it be possible so to construe the statute as a whole, as to make all of its parts operative and effective.

L.H. Jones Equip. Co. v. Swenson Spreader LLC, 224 W.Va. 570, 575, 687 S.E.2d 353, 358 (2009) (citations omitted). It is presumed that the Legislature was aware of the text relied on by Respondent, but felt it necessary to add new text to the statute designed to cover people like Ms. Hively. As Respondent’s interpretation of W.Va. Code § 55-7B-2(g) (2006) would render the new text of W.Va. Code § 55-7B-2(g) (2015) superfluous, Respondent’s interpretation is

impermissible. Moreover, under Respondent's interpretation, janitors and secretaries working for a health care facility could be considered health care providers as no limitation is found in the phrase "in the scope of such ... employee's ... employment." W.Va. Code § 55-7B-2(g). A statute cannot be interpreted to reach an absurd result. Davies v. W.Va. Office of Ins. Com'r, 227 W.Va. 330, 336, 708 S.E.2d 524, 530 (2011).

Finally, W.Va. Code § 55-7B-2(g) (2006) requires that health care providers be "licensed by, or certified in, this state or another, to provide health care or professional health care services...." Id. Respondent fails to address the fact that Ms. Hively is not licensed or, contrary to the finding of the Summary Judgment Order,¹⁴ certified by a professional group. As Ms. Hively is neither licensed nor certified, she is not a health care provider. Thus, as Mr. Minnich had no contact with a health care provider prior to his fall, the MPLA is inapplicable to Petitioner's claim.

VI. The Continuity of Care Argument Cannot be Reconciled with West Virginia Law

The crux of Respondent's argument that the MPLA is applicable to Petitioner's claim is the unprecedented expansion of the MPLA's scope through the adoption of the continuity of care argument. Respondent requires a rewrite of the MPLA because, as the Response demonstrates, Respondent can only show that Mr. Minnich was a patient, Respondent is a health care facility and the incident occurred on Respondent's premises. Furthering this purpose, the continuity of care argument contends that once a person becomes a patient at a health care facility, any injury suffered within that facility prior to discharge falls within the MPLA's purview as part of continuity of care. Respondent fails to explain how this argument squares with West Virginia law. In fact, Respondent never mentions Manor Home, Inc., in which this Court held that an injured party's status as a patient at a health care facility was insufficient, without more, to bring

¹⁴ The Circuit Court provides no citation for its finding that Ms. Hively is a certified medical assistant. JA 10 at ¶7.

a claim within the MPLA's purview. Id., 234 W.Va. at 73, 763 S.E.2d at 89. Further, Respondent ignores the fact that the continuity of care argument renders superfluous the MPLA's text limiting its scope to claims based upon health care services rendered or which should have been rendered, by a health care provider or facility to a patient. W.Va. Code § 55-7B-2(i). In so doing, the argument vastly expands the MPLA's scope in violation of controlling precedent requiring the MPLA be narrowly construed. Phillips, 220 W.Va. at 492, 647 S.E.2d at 928.

Instead of addressing these issues, Respondent erroneously argues that Blankenship, *supra*, supports the adoption of the continuity of care argument. Blankenship was filed primarily as a products liability claim against health care facilities stemming from the implantation of unsterile sutures. This Court found the MPLA applied to the plaintiffs' claims because "[t]he core allegations of the complaint center upon the performance of surgical procedure." Id., 221 W.Va. at 707, 656 S.E.2d at 458. In other words, the act or omission occurred while health care was being rendered and the act – implantation of unsterilized sutures – was a key part of the care requiring professional medical skill. Blankenship confirms that the MPLA applies only to claims based upon health care services rendered or that should have been rendered to a patient. It certainly does not support an interpretation of the MPLA rendering W.Va. Code § 55-7B-2(i) superfluous. A review of Justice Davis' concurrence in Riggs further shows how the continuity of care argument conflicts with West Virginia law. In Riggs, Justice Davis found:

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 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).¹⁵ Thus, despite the fact the plaintiff's injury occurred in a health care facility, while she 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, thus, not covered by the MPLA. See, Mobley v. Gilbert E. Hirschberg, P.A., 915 So.2d 217, 219 (Fla. 4th DCA 2005) (holding that if negligence does not arise from rendering health care, the professional liability statute does not apply even if the injury occurs after the delivery of medical services have commenced).

The continuity of care argument propounded by Respondent removes the necessity that a claim need be based upon health care services rendered or that should have been rendered to a patient to fall within the MPLA's purview. If Mr. Minnich sat in the chair in the exam room while waiting to see the provider and it collapsed, the continuity of care argument requires that his claim be filed under the MPLA despite the fact the chair's collapse has nothing to do with medical care rendered or that should have been rendered to him.¹⁶ This Court has found the MPLA's special protections do not afford health care professionals protection for all of their acts. Gray, 218 W.Va. at 568, 625 S.E.2d at 330. The continuity of care argument seeks to alter this fundamental limitation.

¹⁵Justice 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.

¹⁶ Respondent cites Banfi v. American Hospital for Rehabilitation, 207 W.Va. 135, 529 S.E.2d 600 (2000) to support the assertion that MPLA applies to falls. Response at 17 fn1. However, Respondent fails to advise the Court that the issue on appeal was not the MPLA's applicability to a claim, but whether an expert was necessary to address whether a patient was properly restrained. Further, Respondent cites Daniel v. CAMC, 209 W.Va. 203, 544 S.E.2d 905 (2001) for the proposition that the MPLA applies to defective equipment. However, this Court was not asked to determine whether the MPLA applied to the claim, but whether the trial court should have given the plaintiff time to obtain an expert once it found that an expert was necessary to prove causation. Thus, both cases are irrelevant to his action.

VII. Respondent Fails to Articulate Any Viable Basis for Finding Petitioner's Claim is based upon Health Care Services Rendered or that should have been Rendered to Mr. Minnich

The MPLA only applies 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). To make this determination, one must examine the facts of the claim and determine its fundamental basis. Manor Care, Inc., 234 W.Va. at 73-74, 763 S.E.2d at 89-90. In this case, as demonstrated in Section II, the record evidence clearly shows that the fundamental basis of Petitioner's claim is Respondent's failure to maintain a safe environment by exposing business invitees, like Mr. Minnich, to defective equipment. Thus, to bring Petitioner's claims within the MPLA's purview, Respondent must prove that failing to fully extend a footstool stemmed from health care service rendered or that should have been rendered to Mr. Minnich. Obviously, the two cannot be connected. Perhaps, this why Respondent made no attempt to do so and, instead, hoped to sustain the grant of summary judgment on the discredited continuity of care argument and the unsupported assertion that Petitioner's claim are based upon a fall risk assessment.

The duty breached in this case is Respondent's general duty to maintain a safe environment for its business invitees, patient and nonpatients alike, and not a specific duty relating to Mr. Minnich's medical treatment: a duty Justice Davis already found does not fall within the MPLA's purview. Riggs, 221 W.Va. at 666; 656 S.E.2 at 111. Justice Davis' holding finds support in situations similar to the instant action, where injuries were precipitated by defective equipment. For example, Dwyer v. Bio-Medical Application of CT, Inc., 2013 WL 3388874 (Conn. Super.)(Unpublished), is eerily similar to the instant action. In Dwyer, the plaintiff went to the defendant's dialysis center for treatment. The plaintiff alleged: he was led

onto a scale prior to dialysis; he was left unassisted and without his walker on the scale; the defendant knew that the plaintiff needed assistance or a walker to get on and off the scale; the defendant failed to keep the premises safe by allowing a lip to form around the scale creating a trip hazard; and the defendant failed to use due care by maintaining the facility in a condition it knew or should have known would cause injury to those like the plaintiff and failed to provide the plaintiff assistance in stepping off the scale. Id. at *1. The defendant argued that the plaintiff's claims sounded in medical malpractice as the defendant was sued in its capacity as a dialysis provider, assessing the plaintiff's weight was part of his care and treatment, and ambulatory ability requires medical judgment. Id. at *2.

In determining that the alleged negligence was unrelated to medical diagnosis or treatment or medical judgment, the Superior Court 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.

Id., at *3. Thus, the Superior Court held that the plaintiff's claims sounded in ordinary negligence.

In Lefkimiatis v. Luchini Orthopedic Surgeons, P.C., 2012 WL 1624059 (Conn. Super.) (Unpublished), the Superior Court also faced a situation similar to the instant action. In the case, 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, 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. Thus, the Superior Court found the plaintiff's claim sounded in ordinary negligence.

VIII. The Foreign Case Relied by Circuit Court has Key Factual Differences Rendering the Case Law Irrelevant to the Instant Action

The Response and Summary Judgment Order rely on Palmese v. Med-Help, P.C., 2013 WL 3617085 (Conn.Super.)(Unpublished), without ever addressing the glaring, controlling difference between Palmese and the instant action – Palmese did not involve an injury caused by defective equipment. By ignoring this dispositive issue, Respondent avoids discussing two Connecticut Superior Court cases that directly parallel the instant action – Dwyer, 2013 WL 3388874 and Lefkimiatis, 2012 WL 1624059. Both cases involve falls occurring at health care facilities as a consequence of defective equipment. The cases so closely parallel the instant action that they even include allegations relating to the known physical condition of the plaintiff and the corresponding heightened duty owed to the plaintiff that Respondent takes issue with in this case. In both cases, the Superior Court, applying the same standard relied upon in Palmese, found that the plaintiff's fall from defective equipment sounded in ordinary negligence. Thus, the primary flaw with the Circuit Court reliance on Palmese is not that it does not constitute

precedent anywhere or that this Court has not adopted the Palmese test, but that Palmese is so factually different than the instant action as to render its analysis irrelevant. This is particularly true in light of the fact that when Connecticut Superior Courts are faced with situations factually similar to the instant action, they reached a different conclusion than the Palmese Court.

Just like Palmese, Bardo v. Liss, 614 S.E.2d 101 (Ga. App. 2005), is irrelevant to this matter because the injury at issue was not caused by defective equipment. Further, just as the Connecticut Superior Court found, the Georgia Appellate Court found claims based upon defective equipment did not constitute claims for professional malpractice. See, Ambrose v. Saint Joseph's Hospital of Atlanta, Inc., 745 S.E.2d 135, 138 (Ga. App. 2014).

CONCLUSION

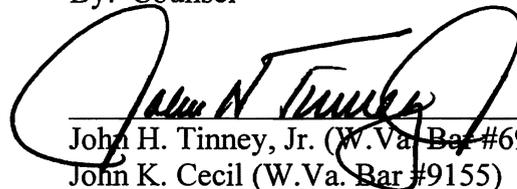
For the reasons set-forth in the Petition and herein, Petitioner requests this Court reverse the Circuit Court's October 27, 2015 Order as set-forth in the Petition.

Dated: May 4, 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.

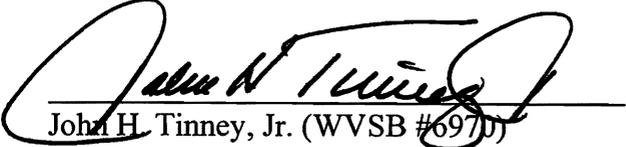
MEDEXPRESS URGENT CARE, INC. –
WEST VIRGINIA D/B/A MEDEXPRESS
URGENT CARE – SOUTH CHARLESTON,

Respondent.

CERTIFICATE OF SERVICE

I, John H. Tinney, Jr., hereby certify that service of the foregoing *Petitioner's Reply Brief* was made upon counsel of record, this 4th day of May, 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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