

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,

vs.

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

Respondents.

**ON APPEAL FROM THE CIRCUIT COURT
OF KANAWHA COUNTY, WEST VIRGINIA**

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

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COUNTERSTATEMENT OF THE CASE

I. Procedural History

Petitioner/Plaintiff, Joyce E. Minnich, as Executrix of the Estate of Andrew Minnich, and on her own behalf, initiated the instant action by filing a Complaint in Civil Action on August 14, 2013, in the Circuit Court of Kanawha County, West Virginia. (JA 29-37). The Complaint alleges that, while on a visit by Petitioner/Plaintiff, Joyce Minnich and Plaintiff/Decedent, Andrew Minnich, to MedExpress Urgent Care – South Charleston on January 25, 2013, Mr. Minnich was injured when he fell while attempting to access an examination table. The Complaint asserts claims against MedExpress for premises liability, wrongful death and loss of consortium.

As a result of counsel for MedExpress' inadvertence to timely file an Answer to the Complaint, Petitioner submitted a request to the Circuit Clerk of Kanawha County for entry of default on January 16, 2014. Subsequently, an entry of default was entered by the Clerk on March 7, 2014. (JA 38). Upon discovering the entry of default, counsel for MedExpress immediately filed a Motion to Set Aside Default and supporting Brief on April 29, 2014. (App. at 18-39). Following a hearing held on July 15, 2014, the trial entered an "Opinion and Order Granting Defendant's Motion to Set Aside Entry of Default" ("Default Order") on September 3, 2014. (JA 39-54).

Following the entry of default being set aside, MedExpress filed its Answer on September 8, 2014. (JA 56-66). On October 24, 2014, MedExpress filed a Motion for Summary Judgment, asserting that the Medical Professional Liability Act ("MPLA"), West Virginia Code § 55-7B-1, *et seq.* was applicable to Petitioner's claims because the claims were based upon health services rendered, or that should have been rendered, to Mr. Minnich. (App. 68-87).

Following extensive briefing, the trial court granted the Motion on December 1, 2014. (JA 9-25). The Order granting summary judgment expressly gave leave to Petitioner to amend her Complaint to assert claims on the MPLA. (JA 25).

Rather than simply amend the Complaint to conform with the trial court's order and to move his case forward, Petitioner instead embarked on a series of procedural maneuvers to try to overturn the trial court's interlocutory order that has stalled any progress towards the ultimate resolution of this case. First, Petitioner sought review of the trial court's orders from this Court via a Petition for a Writ of Prohibition, a tactic which counsel for Petitioner should have known is rarely successful. (JA 148-196). In the Petition, Petitioner raised essentially the same allegations of error she asserts in the instant appeal. The Petition for a Writ of Prohibition was denied by this Court on March 11, 2015. (JA 346). Again, rather than simply amend the Complaint, on May 18, 2015, Petitioner filed a Motion for Reconsideration of the December 1, 2014 Order granting summary judgment. (JA. 346). Following briefing and argument, the trial court denied Petitioner's Motion for Reconsideration on October 29, 2016. (JA. 1-7). In the same order, the court certified the issue for immediate appeal pursuant to W.Va. R. Civ. P. 54(b). (JA 7).

II. Pertinent Facts

As noted at the outset, Petitioner's claims pertain to a fall occasioned by Mr. Andrew Minnich, deceased, from an examination table while a patient at MedExpress on January 25, 2013. Petitioner alleges a claim for negligence sounding in premises liability; loss of consortium; and wrongful death. The underlying facts, viewed in a light most favorable to Petitioner, establish that Mr. Minnich, along with his wife, Plaintiff/Petitioner, Joyce Minnich, presented to South Charleston MedExpress, an urgent care facility, on January 25, 2013. (JA

32). The purpose of the visit was to seek a medical evaluation and treatment for Mr. Minnich. *Id.* Mr. Minnich complained of shortness of breath, weakness, and questioning the development of pneumonia. *Id.* He was initially evaluated/triaged by a certified Medical Assistant (hereinafter “MA Hively”), Jessica Hively. Petitioner alleges that at the time that MA Hively inquired of the Minniches as to the reason for their visit, she was advised that Mr. Minnich had recently undergone hip surgery and had only recently began walking without the assistance of a walker. *Id.*

After being evaluated and assessed in the triage area, Mr. Minnich was escorted to an examination room by MA Hively at which time Plaintiff alleges that Mr. Minnich was purportedly directed to be seated on the exam table. (JA 32-33). According to the Complaint, MA Hively left the examination room despite having knowledge of Mr. Minnich’s medical conditions including recent hip surgery and complaints of weakness. *Id.* After MA Hively left the examination room, and as alleged, at the direction of MA Hively, Mr. Minnich attempted to get onto the exam table using a retractable step for the exam table. *Id.* As Mr. Minnich attempted to get onto the exam table, he fell back into Joyce Minnich and both individuals fell to the floor sustaining injury. (JA 33). Thereafter, the clinical staff dressed and treated skin tears to Mr. Minnich’s left forearm, wrist, and hand. Mr. Minnich’s chief complaints were also addressed, and a chest x-ray for Mr. Minnich was ordered. *Id.* Mr. Minnich was thereafter discharged from the subject urgent care facility. *Id.* In her Complaint, Petitioner alleges that Mr. Minnich suffered a subarachnoid hematoma (brain bleed) and a laceration of his forearm from the fall that occurred at Defendant’s facility on January 25, 2013. *Id.*

Petitioner alleges that basic precautions as to assistance, supervision, and “customer’s” safety, were ignored while she and Mr. Minnich were on the premises for services offered and

provided by MedExpress. (JA 33). Petitioner further asserts that it was reasonably foreseeable that in directing Andrew Minnich to position himself on the exam table without assistance and/or observing him doing so, and without assuring that the retractable step was fully extended, that Mr. Minnich would sustain injury. (JA 34). Petitioner further purports MedExpress was negligent in failing to implement precautions and procedures to guard and protect the Minniches as such in failing to assist Mr. Minnich upon the examination table, to assure the table was fully functional, and to observe Mr. Minnich's positioning to assure he was not injured in doing so. *Id.* Mr. Minnich passed away on April 25, 2013. *Id.*

Following entry of the Court's Order of September 3, 2014, setting aside the entry of default, MedExpress promptly filed an Answer to the Complaint, which asserted an affirmative defense maintaining that the Medical Professional Liability Act, W.Va. Code §55-7B-1, *et seq.*, applied to this action which served, among other things, to cap non-economic damages. (JA 56-66). Based on this affirmative defense, MedExpress filed a Motion for Summary Judgment on October 24, 2014. Although Petitioner alleges Mr. Minnich's passing was caused as a result of injuries occasioned from Mr. Minnich's fall of January 25, 2013, the Motion for Summary Judgment asserted that Petitioner's claims are based upon "health care services" rendered, or which should have been rendered by MedExpress, a health care provider, and, as such, the suit does not qualify as a standard "premises liability case" that would fall outside the rubric of the MPLA. Accordingly, MedExpress asserted that Petitioner's claims as to Andrew Minnich regarding the fall which is the subject of the Complaint are subject to the MPLA and its pre-suit requirements.

Following extensive briefing and oral argument, the trial court granted MedExpress' Motion for Summary Judgment on December 1, 2014. Significantly, the Trial Court granted the

motion without prejudice for Petitioner to amend her Complaint to assert claims on Mr. Minnich's behalf "consistent, and in compliance with, the requirements for claims subject to the [MPLA]" (JA 25).

SUMMARY OF ARGUMENT

The trial court's opinion granting summary judgment was correct and should be affirmed. Petitioner's claims to the contrary, the Medical Professional Liability Act ("MPLA"), West Virginia Code § 55-7B-1, *et seq.* applies to Petitioner's claims because the claims were based upon health services rendered or that should have been rendered to Mr. Minnich are unfounded. The record provides that MedExpress is undisputedly a "health care provider" pursuant to the MPLA, and that Mr. Minnich had been admitted to the MedExpress facility and had been triaged prior to her fall from the examination table. Moreover, MA Hively, as MedExpress' employee who triaged Mr. Minnich, was also a health care provider whose actions were covered by the MPLA.

Perhaps realizing that the record is stacked against her, Petitioner attempts to raise false alarm bells by maintaining that this case will result in a slippery slope of non-health care related claims being tried under the rubric of the MPLA. The exaggerated example Petitioner provides is one where a patient, after admission, is struck by a ceiling tile while walking from the intake room to the examining room. (Petitioner Br., at 25.) Petitioner's attempts to raise this hypothetical straw man, though, are unavailing. The Circuit Court's decision is not, despite Petitioner's protestations to the contrary, a drastic deviation from the law of the MPLA. Rather, it is entirely consistent with the MPLA. Mr. Minnich was undisputedly a patient at MedExpress and was admitted as such. He was injured due to a fall from an examination table; among other things, he asserts medical negligence due to MedExpress' alleged failure

to properly evaluate, consider, supervise and assist Mr. Minnich, in his already weakened medical condition, as he attempted to alight on the table. This is not a random act or defect which caused the injury, unlike the hypothetical falling ceiling tile, which could occur in any office building open to the public. Thus, the MPLA clearly applies to this lawsuit, and the Circuit Court correctly dismissed Petitioner's premises liability claim.

STATEMENT REGARDING ORAL ARGUMENT

MedExpress believes the appeal is wholly without merit and therefore does not favor oral argument, pursuant to the provisions of Rule 18(a) of the West Virginia Rules of Appellate Procedure.

ARGUMENT

I. Counterstatement of Standard of Review

This Court's review of the order granting summary judgment is plenary, as it will be examining the grounds upon which the circuit court relied in granting summary judgment. See Syl. Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994) ("A circuit court's entry of summary judgment is reviewed *de novo*"). As this Court stated in syllabus point three of *Painter*, "[t]he circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." *Id.* at 190, 451 S.E.2d at 756. This Court views the facts in the light most favorable to Petitioners, as the losing party. See *Masinter v. WEBCO Co.*, 164 W.Va. 241, 242, 262 S.E.2d 433, 435 (1980).

When granting a motion for summary judgment, a circuit court must make factual findings sufficient to permit meaningful appellate review. See Syl. Pt. 3, *Fayette Cty. Nat'l Bank v. Lilly*, 199 W.Va. 349, 484 S.E.2d 232 (1997) *overruled on other grounds by Sostaric v. Marshall*, 234 W.Va. 449, 766 S.E.2d 396 (2014) ("Although our standard of review for

summary judgment remains de novo, a circuit court's order granting summary judgment must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the circuit court finds relevant, determinative of the issues and undisputed."). "If there is no genuine issue as to any material fact summary judgment should be granted but such judgment must be denied if there is a genuine issue as to a material fact." Syllabus Point 4, *Aetna Casualty & Surety Company v. Federal Insurance Company of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963).

II. The Circuit Court Correctly Determined That There Was No Valid Premises Liability Claim And That The Evidence Supported The Finding That The Claim Was Properly Styled As One For Professional Liability Pursuant To the MPLA. (Assignment of Error I).

According to the Petitioner, the Circuit's Court's summary judgment ruling "inexplicably transformed Petitioner's clear liability case into a medical professional liability claim subject to the MPLA." (Petitioner Br., at 16.) She also accuses the Circuit Court of ignoring a "substantial amount of record evidence" that would demonstrate that this is actually a premises liability claim and not a medical professional liability case under the MPLA. This argument distorts the record in this case, as Petitioner is seemingly confused as to what amounts to a "genuine issue of material fact," the governing standard for deciding a motion for summary judgment. Indeed, and 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.

When deciding this question, it is useful first to briefly outline the nature and operation of the MPLA. As this Honorable Court is aware, the MPLA is the governing body of law for *all* negligence claims involving "medical professional liability" in West Virginia. *See, generally*, W.Va. Code §55-7B-1, *et seq.* The West Virginia Legislature's intent in passing the MPLA was to provide *an exclusive remedy* to address any claims related "to health care services rendered, or

that should have been rendered” by a “health care provider”. *Boggs v. Camden-Clark Mem. Hosp.*, 216 W.Va. 656, 662, 609 S.E.2d 917, 923 (2004) (emphasis added). *Boggs* and its progeny has established that the MPLA applies to claims resulting from the death or injury of a person *for any tort or breach of contract based on health care services rendered, or which should have been rendered by a health care provider or health care facility to a patient.* *Boggs*, 609 S.E.2d at 923. (emphasis added).

“Health care” as defined under the MPLA is recognized to include: “any act or treatment performed or furnished, or which should have been performed or furnished, by a health care provider for, to or on behalf of a patient during the patient’s medical care, treatment or confinement”. *See*, W.Va. Code §55-7B-2(e) (2010); *see, also, Blankenship v. Ethicon*, 221 W.Va. 700, 656 S.E.2d 451, 458 (2007). Further, “health care provider” is defined under W.Va. Code §55-7B-2(g) as:

A person, partnership, corporation, professional limited liability company, health care facility or institution licensed by, or certified in, the state or another state, to provide 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 course and scope of such officers, employees or agents employment.*

W.Va. Code §55-7B-2 (2010) (Italics Added).

When a claim is subject to the MPLA, a claimant is required to adhere to the statutorily mandated requirements as provided under W.Va. Code §55-7B-6(b) (2010). Specifically, a claimant must file a “Notice of Claim” and may be required to submit a “Screening Certificate of Merit” prior to filing a complaint in civil action. *See, Id.* Failure to do so prohibits a claimant from asserting a claim for medical professional liability. *See*, W.Va. Code §55-7B-6(a) (2010). The Courts of West Virginia have previously cautioned counsel regarding the failure to comply

with the pre-suit mandates of the MPLA. Specifically, in *Cline v. Kresa Reahl M.D.*, 728 S.E.2d 87, 96 (W. Va. 2012), the West Virginia Supreme Court of Appeals recognized the Court's cautionary warning in *Gray v. Mena*, 218 W.Va. 564, 625 S.E.2d 326 (2005), providing: "we would strongly encourage litigants to err on the side of caution by complying with the requirements of the act if any doubt exists. . ." *Cline*, quoting *Gray*, 218 W.Va. at 571, 625 at 333.

In the instant matter, there is no dispute that MedExpress is a health care provider as recognized and defined under the MPLA. *See*, W.Va. Code §44-7B-2(g), a fact Petitioner cannot deny. Curiously, however, Petitioner characterizes Mr. Minnich as a "customer" in her Complaint. (JA 33). It is apparent that Petitioner's characterization is deliberately intended to disassociate Petitioner's claim from a medical provider/patient setting, and ultimately, from the MPLA. Despite Petitioner's artful characterization, however, the allegations in the Complaint, and the record, clearly establish that Mr. Minnich presented to MedExpress on January 25, 2013, for the express purpose of receiving medical evaluation, treatment and care. (JA 32). Mr. Minnich presented to MedExpress as a patient on January 25, 2013, and consented to be treated as a patient prior to the time of the alleged incident which is the subject of the Complaint. *Id.*

Syl. Pt. 4 of *Blankenship* clarifies that whether the MPLA applies to a claim is not driven by the characterization of a claim assigned by Plaintiff's counsel in the four corners of a Complaint. Rather, as the Court in *Blankenship* recognized:

The failure to plead a claim as governed by the Medical Professional Liability Act, W.Va. Code §55-7B-1, *et. seq.*, does not preclude application of the Act. Where the alleged tortious acts or omissions are committed by a health care provider within the context of the rendering of 'health care' as defined by W.Va. Code §55-7B-2(e) (2006) (Supp. 2007), the Act applies regardless of how the claims have been plead.

Syl. Pt. 4, *Blankenship*, 656 S.E.2d at 453.

In *Boggs*, the Court further delineated what claims are subject to the MPLA. The *Boggs* Court noted that the Legislature has granted special protection to medical professionals, while they are acting as such. Consequently, this protection does not extend to intentional torts or acts *outside the scope of 'health care services.'* *Boggs*, 609 S.E.2d at 923. (emphasis added).

In the instant case, Petitioner attempted to creatively circumvent the MPLA to assert a “premises liability” claim, ignoring the aspects of health care involved, stating that the alleged injuries arose from MedExpress’ purported failure to “provide assistance, supervision, and to implement basic precautions and procedures to guard and protect the safety of its customers.”

(JA 34). Petitioner also claims that it was:

reasonably foreseeable that directing an individual weakened by illness and only recently walking without assistance to get on an exam table without making certain that the retractable step is fully extended, without assisting him/her to get on the table and without observing him/her to get on the table and with observing him/her getting on the exam table would result in injury.

(JA 34).

In West Virginia, a plaintiff must demonstrate the following elements to establish a premises liability claim: (1) that the owner had actual or constructive knowledge of the foreign substance or defective condition and (2) that the invitee had no knowledge of the substance or condition or was prevented by the owner from discovering it. *See, Hawkins v. U.S. Sports Ass’n, Inc.*, 219 W. Va. 275, 279, 633 S.E.2d 31, 35 (2006) (*quoting, McDonald v. University of West Virginia Board of Trustees*, 191 W.Va. 179, 44 S.E.2d 57 (1994) (internal citations omitted)); *see, also, Eichelberger v. United States*, 2006 WL 533399 (N.D. W.Va. 2006). Petitioner did not present *any* evidence that the subject examination table was defective, or that MedExpress had actual or constructive knowledge that the examination table was “defective.” Further, there is no evidence to suggest that MedExpress prevented Mr. Minnich from discovering any purported

“defect” of the subject exam table if such was the case. Accordingly, Petitioner cannot demonstrate the necessary elements for a premises liability claim based upon a “defective examination table”.

Petitioner relies upon Mr. Minnich’s alleged weakened condition as the basis for her asserted “premises liability” claim. She alleges Mr. Minnich’s medical history necessitated that Mr. Minnich be assisted or observed getting on to the exam table. Again, Mr. Minnich’s alleged injury occurred immediately after he was triaged by a health care provider and as part of the continuity of care being provided. Any act or treatment performed or furnished, or which should have been performed or furnished, by a health care provider contemplates all activities of health care providers and/or its employees ancillary to, and inherently involved in, providing medical services to a patient. *See*, W.Va. Code §55-7B-2(e) (2010).

In an attempt to create an issue of fact supporting her claim of premises liability, Petitioner argues that the alleged negligence occurred as a result of MedExpress’ purported “failure to prepare the examination table for use prior to directing Mr. Minnich to sit on it.” (Petitioner Br., at 14.) Thus, Petitioner mischaracterizes her Complaint as simply involving MedExpress’ purported failure to fully extend a foot-step, thereby creating an unsafe environment for “business invitees” such as Mr. Minnich. *Id.* Of note, Petitioner expressly asserts at ¶ 31 of her Complaint that MedExpress purportedly failed to: “provide assistance, supervision and attempt to take basic precautions and procedures to guard and protect the safety of its customers” to support its claims for negligence. (JA 34). Further, Petitioner asserts that it was:

reasonably foreseeable that directing an individual weakened by illness and only recently walking without assistance to get on an exam table without making certain that the retractable step is fully extended, without assisting him/her to get on the table and without observing him/her to get on the table and with observing him/her getting on the exam table would result in injury.

See, Complaint ¶ 31. (JA 34).

Petitioner's Complaint, through the express allegations, suggests that MedExpress, and its health care providers, failed to exercise proper clinical judgment in evaluation of patients while providing health care. Further, the Complaint asserts claims for negligence based on individuals presenting as potential fall risks upon consideration and evaluation of their: medical and clinical history; physical presentation; chief complaints; and purportedly failing to implement health care policies and procedures to address the same. Such allegations and suggestions clearly involve the administration of health care and professional judgment and decisions being undertaken and made by health care providers and do not amount to a "simple" claim for premises liability.

In order for there to be an issue of fact to preclude the grant of summary judgment, the issue of fact must be "genuine" and "material." Thus, despite Petitioner's protestations that the record evidence purportedly supports a finding that MedExpress and MA Hively were negligent, (Petitioner Br., at 14) those "facts" are not material to the question that the Circuit Court decided. "A material fact is one that has the capacity to sway the outcome of the litigation under the applicable law." Syllabus Point 5, in part, *Jividen v. Law*, 194 W.Va. 705, 461 S.E.2d 451 (1995). That is, even if the allegations of negligence were accepted as true, it does not change the fact that MedExpress' purported actions (or inactions) were grounded in the administration of health care services. Thus, for Petitioner to argue that the Circuit Court ignored record evidence that would have created a "genuine issue of material fact" is simply untrue. The facts asserted to be "material" are not so, period.

III. The Circuit Court Did Not Commit “Multiple Errors” In Granting Summary Judgment In Finding That The MPLA Applied To This Case (Assignment of Error II).

A. Andrew Minnich Received Medical Services At MedExpress Prior To His Fall (Assignment of Error IIa).

In support of Petitioner’s claim that this case should be deemed to be one of premise liability, rather than one for medical professional liability, Petitioner states that there is “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.” (Petitioner Br., at 18.) This is demonstrably false. Indeed, MA Hively’s deposition testimony details the triage that occurred:

Q: Tell me everything that happened in triage.

A: Mr. Minnich sat down in our triage chair. And I reviewed the – why he was there and his history, medications, surgeries, past medical history, social history, family history with him. I took all of his vitals.

(JA 129). “Triage” is defined as the “[m]edical screening of patients to determine their relative priority for treatment order.” See medicallexicon.com (definition of “triage”) (emphasis added). Interestingly, it was Petitioner’s counsel who posed this question to Ms. Hively, and it is clear that he himself assumed at the time that a triage had occurred (as confirmed by her subsequent answer). Now, however, Petitioner’s counsel argues that there was no evidence of a triage by a health care professional. Thus, Petitioner’s claim that there was no medical evaluation of Mr. Minnich prior to his fall is simply disingenuous and untrue.

B. Petitioner’s Claim Was Correctly Found To Be Based On Health Services Rendered To Mr. Minnich (Assignment of Error IIb).

Having utterly failed to demonstrate that Mr. Minnich did not receive medical services prior to his fall, Petitioner then attempts to argue that Mr. Minnich’s fall itself, and its causes, had nothing to do with MedExpress’ provision of “medical services.” This argument, though, fails as well. As in *Blankenship*, Petitioner’s claims in the instant matter arise from “health

care” services that allegedly were or should have been rendered while Mr. Minnich was a patient at MedExpress. As provided hereinabove, Mr. Minnich presented to MedExpress for the express purpose of medical evaluation and treatment. 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. 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 being provided.

Petitioner maintains that, because Mr. Minnich’s injury occurred between two medical/physical assessments for purposes of receiving medical treatment, the MPLA does not apply. This interpretation of the MPLA is incompatible with this Court’s prior interpretations of the MPLA in *Blankenship* and *Boggs*, which focuses on whether the injury occurred while rendering, or in the course of, health care services. Petitioner fails to consider that, while administering health care services, a health care provider may require a patient to perform a variety of tasks, such as moving to and from an examination table, or that a patient may be evaluated by different medical providers during the same visit. Based on facts of the instant claim developed through discovery, it is apparent that Mr. Minnich sustained any of the alleged injuries which are the subject of this action during the course of his medical treatment, evaluation and/or confinement. *See, Blankenship, supra.*

As previously stated, there is no dispute that Mr. Minnich presented to MedExpress’ facility for the purpose of receiving health care; that MedExpress and its employees are health care providers as recognized by the MPLA; and that the Petitioner’s Complaint pertains to “health care services” rendered, or which should have been rendered by MedExpress. Just as in *Blankenship*, Petitioner is not permitted to flout the application of the MPLA by artful or creative

pleading. The Circuit Court saw through this façade and, correctly, determined that the MPLA applies.

C. The Circuit Court Correctly Recognized That A Continuity Of Care Extends From The Time Mr. Minnich Was First Triaged At MedExpress. (Assignment of Error IIc).

As discussed above, the MPLA applies to all claims and/or causes of action related to, or resulting from death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered by a health care provider or health care facility to a patient. *See, Boggs, supra*. Other Courts have addressed the instant issue, under state statutes identical to West Virginia’s MPLA; specifically, *Palmese v. Med-Help, P.C.*, 2013 WL 3617085 (Conn.Super. 2013); *Bardo v. Liss*, 273 Ga. App. 103, 614 S.E. 2d 101 (2005), and the Circuit Court found these opinions to be persuasive. The reasoning by these courts, which analyzed statutes very similar to the West Virginia MPLA, is identical to the West Virginia Supreme Court of Appeal’s reasoning in upholding the Circuit Court’s decision to dismiss plaintiffs’ complaint in *Blankenship, supra*. Similar to the instant facts, in *Blankenship*, the plaintiffs, who alleged that they sustained infections, injuries, and damages after contaminated sutures were used at two defendant hospitals, asserted numerous causes of action against defendant-hospitals, including claims for products liability, violations of the West Virginia Consumer Credit and Protection Act (hereinafter “CCPA”), fraud, and outrage. *See, Blankenship*, 656 S.E.2d at 454. In *Blankenship*, the defendant-hospitals filed a joint motion to dismiss upon the contention that plaintiffs’ claims were subject to the MPLA. *See, Id.* at 455. The trial court granted defendant-hospitals’ motion finding that plaintiffs’ failed to provide a “Notice of Claim” and “Screening Certificate of Merit” and that they failed to plead mandatory elements of the MPLA. *See, Id.*

On appeal, the Court affirmed, in part, and reversed, in part, the Circuit Court's ruling. *See, Id.* In determining whether the MPLA was the exclusive remedy for plaintiffs' claims, the Court revisited its holdings in *Boggs, supra*, and *Gray v. Mena*, 218 W.Va. 564, 625 S.E.2d 326 (2005). *See, Id.* at 456. *Boggs* and *Gray* both recognized that medical professional liability "includes liability for damages resulting from the death or injury of a person for *any* tort based upon health care services rendered or which should have been rendered." *Blankenship*, 656 S.E.2d at 457 (emphasis original) (internal citations omitted). The *Blankenship* Court also reaffirmed the definition of "health care" as specified under W.Va. Code §55-7B-2(e) (2007) as:

any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to or on behalf of a patient during the patient's medical care, treatment or confinement.

See, Id. at 458 (emphasis added).

In *Blankenship*, the Court recognized that all of the claims asserted against the defendant-hospitals, including the plaintiffs' statutory claims, arose from the same factual event: the defendants implanting contaminated sutures. *See, Id.* The Court noted that this was a "classic example of health care" stating:

There is no dispute that plaintiffs received health care services and the complaint resolves around an integral part of the health care services rendered The plaintiffs seek recovery against the defendants on a variety of tort and quasi-contractual theories. The fact that they label them as "products" claims does not change the fundamental basis of this tort action.

Id. Accordingly, the Court in *Blankenship* found no error in the Circuit Court's conclusions and affirmed its ruling that plaintiffs' claims must be asserted under the MPLA. *See, Id.* at 458-59.

As in *Blankenship*, Petitioner's claims arise from "health care" services that allegedly were, or should have been rendered while Mr. Minnich was a patient at MedExpress. 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 at a health care facility and during the continuity of health care being provided. This is manifestly not the same situation as hypothesized by Petitioner in her brief, where a patient, after admission, is struck by a ceiling tile while walking from the intake room to the examining room. (Petitioner Br., at 25.) In this case, unlike the hypothetical, the instrumentality was a patient examination table, not a random tile that falls from the ceiling. The medical professionals who are tasked with care of the patient are charged with the responsibility for ensuring that the instrumentalities used for patient care services for the administration of health care are in good working order. A ceiling tile, which is presumably something that can be found in any office building open to the public, cannot by any stretch of the imagination be compared to an instrumentality used in patient care such as an examination table.¹

¹ Petitioner oversimplifies the instances that the MPLA applies to falls occasioned by patients at health care facilities; in fact, her analysis is contrary to previous pronouncements by this Court. For example, *Banfi v. American Hospital for Rehabilitation*, 207 W.Va. 135, 529 S.E.2d 600 (2000), involved a fall occasioned by a patient (hereinafter “Plaintiff-wife”) at a health care facility. In *Banfi*, the Plaintiff-wife was found lying on the floor of the bathroom for her assigned room. According to testimony of the Plaintiff-wife’s husband, the Plaintiff-wife had repeatedly requested assistance to use the restroom, but plaintiff’s calls were not answered by the staff of the facility. Accordingly, the Plaintiff-wife walked to the restroom unassisted and fell, sustaining injuries. As a result of the injuries occasioned by Plaintiff-wife, Plaintiff-husband instituted a civil action alleging that the health care facility had been negligent in the care and treatment of Plaintiff and failed to provide for her safety. The health care providers filed Motions for Summary Judgment asserting that they were entitled to judgment as a matter of law as the Plaintiffs had not produced an expert witness to testify as to the applicable standard of care as required by W. Va. Code §55-7B-7. On appeal, this Court recognized the Circuit Court, in considering the health care Defendant’s Motion for Summary Judgment: “[found] that this case is governed by the West Virginia Medical Professional Liability Act as found in Chapter 55, Article 7B of the West Virginia Code.” *See, Banfi*, 207 W.Va. at 139, 529 S.E.2d at 604. Clearly, at the time of the fall occasioned by the Plaintiff-wife in *Banfi*, Plaintiff-wife was not receiving “hands on” health care services as the Plaintiff-wife was alone in her bathroom. Yet, the trial court held the case *was* subject to the MPLA, and as this Honorable Court recognized on appeal, the requirements of the MPLA. *Banfi, supra*.

Further, this Court has previously addressed the application of the MPLA to health care instrumentalities which are in “disrepair” and which are involved in patients sustaining injuries at health care facilities. Specifically, in *Daniel v. Charleston Area Medical Center*, 209 W.Va. 203, 544 S.E.2d 905 (2001),

D. The Circuit Court Correctly Utilized Case Law From Other Jurisdictions To Support Its Summary Judgment Ruling (Assignment of Error II).

Petitioner's arguments that the Circuit Court erred by considering non-binding authorities from outside West Virginia, most notably an unpublished opinion from Connecticut, *Palmese v. Med-Help P.C.*, 2013 WL 3617005 (Conn. Super. June 20, 2013). No one is disputing that *Palmese* is not binding on the West Virginia courts as it is an out-of-state opinion. Thus, any discussion as to whether *Palmese* is binding in the Connecticut courts is simply superfluous. *Palmese*, while not binding, however, is certainly instructive as it is factually similar to the instant case.

In *Palmese*, the Court addressed whether a Plaintiff-patient's fall from an examination table at an urgent care facility constituted professional negligence. In *Palmese*, plaintiff-patient presented to an urgent-care facility for a cut on her hand. *Med-Help*, 2013 WL 3617005 at *1. Plaintiff-patient was escorted to an examination room by an intake worker or physician assistant. *See, Id.* While in the examination room, plaintiff-patient advised the intake worker or physician's assistant that "she felt woozy, light-headed and became nauseous and fearful of the sight of her blood." *See, Id.* The intake worker/physician assistant responded by placing antibiotic solution on plaintiff-patient's hand and then left the room. *See, Id.* Thereafter, the plaintiff-patient fell from the examination table and injured herself. *See, Id.* Plaintiff-patient filed a complaint alleging her injury was due to the urgent-care facility's negligence in failing to address plaintiff-patient's concerns regarding her lightheadedness and for "failing to provide a

Plaintiff was placed in a wheelchair to transport the Plaintiff from a recovery area of the hospital back to the assigned room. After the Plaintiff was seated in the wheelchair, the back of the reclining wheelchair broke. This resulted in Plaintiff falling backwards, and sustaining injuries. In *Daniel*, the Court recognized that: "because this case has been determined to fall within the parameters of the Medical Professional Liability Act, the provisions of the Act necessarily control our decision in this case." *Daniel*, 209 W.Va. at 206, 544 S.E.2d at 908.

safe environment in which to treat [p]laintiff and [leaving] [p]laintiff alone when it was imprudent to do so” *See, Id.*

In response to plaintiff’s complaint in *Palmese*, defendant filed a motion to dismiss asserting that the plaintiff-patient had failed to comply with Connecticut’s medical professional liability statute. *See, Id.* Specifically, defendant argued that, because plaintiff-patient’s claim sounded in medical negligence, plaintiff-patient was required to comply with the pre-suit filing requirements prior to filing her complaint. *See, Id.* Plaintiff-patient filed her objection to defendant’s motion. *See, Id.*

Upon review, the Superior Court granted defendant’s motion to dismiss finding that plaintiff-patient’s complaint asserted claims for medical negligence and not ordinary negligence, and that plaintiff-patient had failed to comply fully with the Medical Negligence Statute. *See, Id.* at *4. In reaching its holding, the Superior Court applied a three-prong test to determine whether Plaintiff-patient’s allegations sounded in medical malpractice:

- (1) the defendants are sued in their capacities as medical professionals; (2) the alleged negligence is of a specialized medical nature that arises out of the medical professional-patient relationship; and (3) the alleged negligence is substantially related to medical diagnosis or treatment involved and the exercise of medical judgment.

See, Id. at *2 (internal citations omitted).

The Superior Court in *Palmese* answered the first prong in the affirmative as plaintiff-patient’s alleged injury occurred at a medical facility in the course of seeking urgent medical assistance. *See, Id.* at *3. The defendant also satisfied the second prong as the “*incident at issue occurred in the context of ongoing medical treatment*” *See, Id.* (emphasis added). The Superior Court recognized that the physician assistant’s decision to leave plaintiff-patient unsupervised required the agent to utilize medical judgment in determining whether it was permissible to do so. *See, Id.* Finally, the court found that the physician assistant’s decision to

leave the plaintiff-patient unattended was substantially related to treatment involved and the exercise of medical judgment. *See, Id.* The court noted that plaintiff-patient's fall occurred in the context of ongoing medical treatment/examination by defendant. *See, Id.* at *4. The court further noted that: "a physical examination is related to medical diagnosis and treatment of a patient; therefore, any alleged negligence in the conducting of such an examination is 'substantially related' to medical diagnosis or treatment." *See, Id.* Accordingly, the Superior Court granted defendant's motion to dismiss as plaintiff-patient failed to fully comply with the Medical Negligence Statute prior to filing her complaint.

Further, in *Bardo v. Liss*, 273 Ga. App. 103, 614 S.E. 2d 101 (2005), plaintiff-patient sustained injury while she attempted to step down from an examination table after being examined by the defendant-physician. *See, Bardo*, 614 S.E.2d at 103. In her complaint, plaintiff-patient alleged that, *because of her medical condition*, defendant-physician's failure to provide assistance to the plaintiff-patient as she stepped down from the examination table was both professional negligence and ordinary negligence. *See, Id.* (emphasis added). Defendant-doctor filed a motion to dismiss based upon the contention that plaintiff-patient asserted a claim for professional negligence rather than ordinary negligence and that she did not attach an accompanying expert affidavit to her complaint as required by the applicable medical negligence statute. *See, Id.* The trial court granted the defendant-physician's motion and dismissed plaintiff-patient's complaint, from which the plaintiff-patient filed an appeal. *See, Id.*

Upon review, the Georgia Appellate Court upheld the trial court's decision to dismiss plaintiff-patient's complaint. *See, Id.* The Court stated that a complaint's characterization of the claims for professional or ordinary negligence does not control. *See, Id.* Rather, where the alleged negligence requires the exercise of professional skill and judgment to comply with a

standard of conduct, the action sounds in professional negligence. *See, Id.* Applying this standard, the Georgia Court of Appeals reasoned that the alleged negligence constituted professional negligence because the “degree of physical assistance needed by a patient *to prevent a fall in light of the patient’s medical condition* required the exercise of expert medical judgment.” *See, Id.* at 103-104 (emphasis added) (internal citations omitted).

The Georgia Appellate Court and the Connecticut’s Superior Court’s reasoning is identical to the West Virginia Supreme Court of Appeal’s reasoning certainly applies here. Mr. Minnich was a patient at MedExpress and came to MedExpress for the express purpose of medical evaluation and treatment. (App. at 59). Again, 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 being provided.

Despite Petitioner’s recognition of non-binding authority, Petitioner is not shy about relying on non-binding authorities when Petitioner believes such opinions support her position. The cases relied upon by Petitioner are easily distinguished. Most notably, Petitioner relies on *Feifer v. Galen of Florida, Inc.*, 685 S.O.2d. 882 885 (Fla. App. 1996), to support her assertion that the instant matter is one only for claims of premises liability. As stated by Petitioner, in *Feifer*, the plaintiff was told to walk to various areas of the building without assistance, down long corridors. (Petitioner Br., at 32.) The corridors in *Feifer* had no handrails or chairs for sitting. *Id.* The plaintiff occasioned a fall sustaining a hip fracture. In relying on *Feifer*, however, Petitioner fails to provide that there is no reference to the plaintiff in *Feifer* having received any medical care or evaluation at the defendant facility *prior to* the subject fall.

Petitioner further fails to recognize that the Court in *Feifer* acknowledged that the defendant hospital employees involved with the plaintiff in *Feifer* were non-professional employees at the entrance of the health care provider and in the reception area of the hospital. Further, Petitioner fails to recognize that the plaintiff's claims in *Feifer* did not involve medical care but, rather, ordinary business procedures concerning entry of a client upon a premises.

Feifer is easily distinguished. Mr. Minnich presented to MedExpress for the express purpose of receiving medical care. (JA 32). Further, he was undertaking and receiving medical care and evaluation at the time, and as part of the continuity of the health care process while at MedExpress on January 24, 2013.

Petitioner ignores more contemporary case law provided by Florida Courts addressing falls occasioned by patients at health care providers constituting as claims for medical negligence. For instance, in *Buck v. Columbia Hospital Corporation of South Broward*, -SO.3d-, 2014 Westlaw 4426480 (Fla. App. 4 Dist.), a patient's estate asserted claims against the hospital-defendant that in the course of moving the patient from a gurney to an x-ray table, the hospital's employees dropped the patient onto the x-ray table surface causing the plaintiff to sustain a fracture of her lumbar spine which ultimately, as alleged, caused the death of the patient. In *Buck*, the plaintiff attempted to assert that the injuries sustained by the patient were claims for ordinary negligence. The Court held that the injuries occasioned by the plaintiff-decedent were subject to Florida's Medical Professional Liability Act. *Id.* at *4.

Petitioner also relies on *Dawkins v. Union Hospital Dist.*, 758 S.E.2d 501 (S.C. 2014) in asserting that her claims are not subject to the MPLA. (Petitioner Br., at 19-20). *Dawkins* involved a fall occasioned by a patient who presented to the emergency department of a hospital, while left unattended using the restroom. Petitioner fails to mention that the *Dawkins* court, in

arriving at its holding that the plaintiff's claims were not subject to medical negligence, relied on *how* the plaintiff's claims were plead. In arriving at its holding that the plaintiff's claims were not for medical negligence, the court in *Dawkins* stated: "Appellant's complaint makes clear that she had not begun receiving medical care at the time of her injury, nor does it allege the hospital's employees negligently administered medical care. Rather, the complaint states that appellant's injury occurred when she attempted to use the restroom unsupervised, prior to receiving medical care." *Dawkins*, at 178-179, 758 S.E.2d at 504-505.

The Circuit Court here correctly saw through Petitioner's transparent efforts to paper over the fact that Mr. Minnich was admitted to the MedExpress facility and had been triaged there when he fell. Consistent with the language and stated intent of the MPLA, this case is unquestionably one for professional negligence rather than for premises liability.

E. The Circuit Court's Order Granting Summary Judgment Correctly Found That The Complaint Alleges That MedExpress And Its Employees Violated A Standard Of Care Grounded In Medical Professional Negligence (Assignment of Error IIe).

Petitioner argues that the record here reflects that the Petitioner's claims of injury does not reflect any type of medical professional evaluation of Mr. Minnich's condition prior to his fall. (Petitioner Br., at 28-30.) However, this argument directly contradicts the allegation in the Complaint, which clearly charges MedExpress with failing to adequately assist a weakened individual who had difficulty walking. According to the Complaint, it was:

reasonably foreseeable that directing an individual weakened by illness and only recently walking without assistance to get on an exam table without making certain that the retractable step is fully extended, without assisting him/her to get on the table and without observing him/her getting on the exam table would result in injury.

(JA 34).

Additionally, in making this argument, Petitioner again misstates the record concerning what happened at the MedExpress facility prior to Mr. Minnich's fall, as she states that "Mr. Minnich received no health care service until after his fall." (Petitioner Br., at 29.) As pointed out earlier, at 13, *supra*, the uncontroverted evidence is that Mr. Minnich was triaged when he arrived at the MedExpress facility. (JA 129). Thus, it was Petitioner who alleged that MedExpress committed professional negligence when it purportedly left Mr. Minnich alone and failed to adequately determine whether someone in Mr. Minnich's medical condition, consideration of clinical history, and chief complaints, was capable of negotiating the examination table without assistance. Therefore, this argument lacks all merit.

F. The Circuit Court Correctly Found That MA Hively Was A Health Care Provider Pursuant To The MPLA (Assignment of Error IIf).

Petitioner argues that the Circuit Court erred when it determined that MA Hively was a "health care provider" pursuant to the definition contained in W.Va. Code § 55-7B-2(g). Petitioner's contention is that a "medical assistant", such as Ms. Hively was not specifically contained in the statute, and that, as a result, the statute must be strictly construed to exclude medical assistants. In support, Petitioner relies on this Court's prior decision in *Phillips v. Larry's Drive-In-Pharmacy, Inc.*, 220 W.Va. 484, 647 S.E.2d 920 (2007), which held that a pharmacy is not a "health care provider" as defined in § 55-7B-2(g). *Phillips* is, however, easily distinguished. While it is true that this Court in *Phillips* held that the language in § 55-7B-2(g) did not specifically include pharmacies as health care providers, it also found that a pharmacist's job does not involve "a hands-on independent medical relationship" with a patient, "but rather sees a patient only as a customer purchasing a product in a drug store after the patient has visited his or her doctor and received a prescription." *Id.* at 492-93, 647 S.E.2d at 928-29. Thus, the *Phillips* court concluded that "to accept the defendant's argument would be to afford major

commercial retail establishments such as Wal-Mart, Target or K-Mart with the protections of the MPLA merely because they dispensed a prescription to a customer.” *Id.* at 493, 647 S.E.2d at 929.

The situation presented here is nothing like that which the Court in *Phillips* considered. First, unlike the pharmacy in *Phillips*, there is no dispute that Ms. Hively’s employer, MedExpress, is a “health care provider” pursuant to § 55-7B-2(g). (JA 14). MedExpress is a health care provider that provides medical care and treatment for patients through its agents and employees. Second, Mr. Minnich presented himself to MedExpress as a patient seeking and requiring medical services. Third, Ms. Hively, as a medical assistant, did provide “hands on” medical services to Mr. Minnich as she triaged Mr. Minnich (which included taking his vitals), evaluated Mr. Minnich, and directed him to the examination room for further examination and/or treatment. Fourth, although W.Va. Code §55-7B-2(g)(2006) does not expressly mention “medical assistants,” the list of identified “health care providers” was not meant to be exhaustive; as the statute expressly states that the list provided therein “includ[es], but [is] not limited to” certain professions. Certainly a medical assistant who provides professional health care services at a health care facility, for a recognized health care provider who has obtained a certification from an accredited institution, is a health care provider as provided and contemplated under the MPLA. Particularly considering MA Hively as an “employee or agent [of MedExpress] acting in the course and scope of such . . . employment.” W.Va. Code § 55-7B-2(g) (2010). Thus, this issue raised by Petitioner also lacks merit.

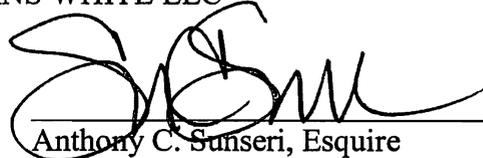
CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Respondent MedExpress Urgent Care, Inc. – West Virginia d/b/a MedExpress Urgent Care – South Charleston respectfully prays that this Honorable Court affirm the decision of the Circuit Court.

Respectfully submitted,

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Dated: April 13, 2016

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **BRIEF OF RESPONDENTS, MEDEXPRESS URGENT CARE, INC. – WEST VIRGINIA D/B/A MEDEXPRESS URGENT CARE – SOUTH CHARLESTON** was served upon all counsel of record, via first-class United States mail, postage prepaid, this 13th day of April, 2016, as follows:

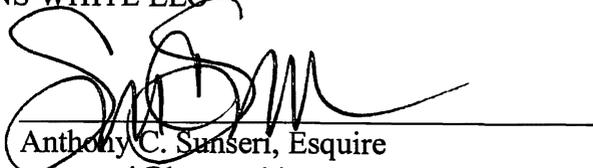
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