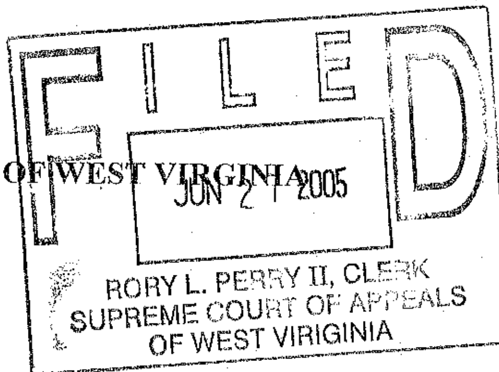

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

CASE NO: 32507

VICKY LYNN GRAY, APPELLANT

V.

ASHRAF MENA KAMEL MENA, M.D.,
PRINCETON ENDOCRINOLOGY, PLLC,
AND PRINCETON COMMUNITY HOSPITAL ASSOCIATION, INC.,
d/b/a PRINCETON COMMUNITY HOSPITAL, APPELLEES

APPELLANT'S BRIEF

Thomas K. Patterson
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State Bar No: 2832

PETITION FOR WRIT OF ERROR

KIND OF PROCEEDING AND NATURE OF RULING BELOW

Appellant seeks a writ of error from an order entered by the Circuit Court of Mercer County, Judge Derek C. Swope, on May 12, 2004 granting the Appellee's motion to dismiss for Appellant's failure to follow the pre-suit requirements set forth in West Virginia Code §55-7B-6. After a hearing on May 3, 2004, the court granted the Appellee's motion to dismiss for Appellant's failure to comply with the Medical Professional Liability Act set forth in West Virginia Code §55-7B-1 et seq., notwithstanding Appellant's contention that this was not a medical malpractice action, as her complaint alleged assault and battery, sexual assault and/or sexual abuse, outrage, intentional infliction of emotional and mental distress and/or negligent infliction of emotional or mental distress. Appellant argued that the Appellee's effort to invoke the provisions of §55-7B-6 in this case, ignored the nature of Appellant's complaint. As argued before the Circuit Court, if a janitor for a hospital sneaks into a patient's room and commits the same acts towards Appellant that are alleged in the complaint, Appellee's could scarcely argue that this was a medical malpractice action simply because it occurred with the confines of a clinic or hospital, even though the Appellant would not have been there unless she was seeking medical help. Appellant had alleged she was a victim of acts totally unrelated to the healthcare services she had sought, and that Dr. Mena's actions were a personal assault on her, totally divorced from his medical care of her. At any rate, the court granted Appellee's motion to dismiss, ruling that under the broad definition of "healthcare" set forth in West Virginia Code 55-7B-2(e), Ashraf Mena's alleged insertion of his fingers into Appellant's vagina was an act performed by a healthcare provider, even though a vaginal exam was not necessary, nor a part

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of the treatment contemplated by the Appellant.

STATEMENT OF THE FACTS OF THE CASE

As found by the lower court, in November, 2001, the Appellant was admitted to Princeton Community Hospital due to swelling of both legs and feet, abdominal pain, high blood sugar, adrenal hormone deficiency and Addison's Disease. On November 22, 2001, Dr. Mena entered the Appellant's hospital room and examined the Appellant. The Appellant alleges that Dr. Mena closed the privacy curtain and examined her without the presence of a nurse or other third party, and did not wear gloves during the examination. The Appellant alleges that Dr. Mena, without consent, unlawfully inserted his fingers into her vagina. The Appellant contends that the unlawful touching constituted the torts of outrage and/or intentional infliction of emotional and mental distress and/or negligent infliction of emotional and mental distress.

The Appellant also alleges that both Appellees, Princeton Endocrinology, P.L.L.C. and Princeton Community Hospital negligently hired or supervised the actions of its employee, Dr. Mena, and that the Appellees knew or should have known the of the alleged proclivities of Dr. Mena because Dr. Mena apparently had a pattern of practice of sexually assaulting female patients. The Appellees filed their motion to dismiss based upon the Appellant's failure to follow the pre-suit requirements as set forth in West Virginia Medical Professional Liability Act, West Virginia Code 55-7B-6.

ASSIGNMENT OF ERROR

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1. Appellant asserts the trial court erred in granting Appellee's motion to dismiss in

that this action does not involve a medical malpractice case, but instead involves common law torts totally beyond the scope of the medial care being provided.

DISCUSSION OF LAW AND AUTHORITIES

Judge Swope, in dismissing the case, relied heavily on Judge Hayden's opinion in *Redden, et al vs. Perdue Pharmacy*, a memorandum opinion and order entered in the United States District, Southern District of West Virginia, Charleston Division, in Civil Action No: 5-03-2222. The *Redden* case, however, while it does stand for the proposition that the definition of "healthcare services rendered" should be given a broad interpretation, is completely factually distinguishable from appellant's case. In *Redden*, the plaintiff had apparently sought to impose liability for negligent prescription of medications, resulting in the plaintiff's subsequent addiction to Oxycontin, whereas Appellant's case involves common law torts which are completely unrelated to the medical care which she had sought from the Appellees. The trial court opined from the bench during the hearing in this matter, that if the Appellee's contention that the Medical Professional Liability Act bars this case, is taken to its logical extreme, then a doctor who pulls out a gun and shoots a patient can theoretically invoke the provisions of the Medical Professional Liability Act. The *Redden* court finding, that the drugs could not be prescribed without a medical examination first, would obviously constitute "healthcare services rendered", should not be extrapolated to other cases to allow Appellee's in the healthcare industry to commit common law torts, as alleged here, with impunity to hide behind the Medical Professional Liability Act for acts which are totally unrelated to the healthcare services provided.

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Stripped to it's essence, the Medical Professional Liability Act was designed or intended to prevent frivolous lawsuits against doctors, and other healthcare providers arising out of the care of their patients. As the practice of medicine is not an exact science, some patients are going to continue to be sick, or injured, or perhaps even die, notwithstanding the fact that the doctor may have provided the best care humanly possible, and breached no duty to their patient whatsoever. The Medical Professional Liability Act requires, among other things, that a potential plaintiff have expert opinion that the applicable standard of care has ben breached before a medical malpractice suit can proceed. The legislature made this accommodation to the healthcare industry (and the insurers of same), ostensibly because many plaintiff's attorneys were apparently filing medical malpractice suits whenever a patient suffered a bad result regardless of the level of care which had been given. The pre-suit requirements of West Virginia Code §55-7B-6 were obviously designed to limit frivolous medical malpractice litigation by essentially barring plaintiff's lawyers from the courthouse, unless they already had expert opinion that the standard of care had been breached.

As none of Appellant's claims against Dr. Mena hinge on the standard of medical care he provided, but instead turn on whether he had license to assault her during his examination of her, it would be a gross distortion of the intended purpose of the act, if it will be allowed to bar Appellant's case. Surely no expert is needed to tell us that, if true, Appellant's claims against Dr. Mena could subject him to civil liability for the torts he is alleged to have committed.

As this Court stated in Boggs v. Camden-Clark Memorial Hospital Corporation, 216 W.Va. 656, 609 S.E.2nd 917 (2004), by its own terms the Medical Professional Liability Act applies only to "medical professional liability actions." The protection accorded thereunder

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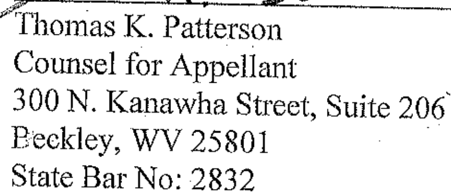
"does not extend to intentional torts or acts outside the scope of 'health care services'. The Boggs opinion states that "if for some reason a doctor or nurse intentionally assaulted a patient...such action would not require application of the Medical Professional Liability Act any more than if the doctor or nurse committed such acts outside of the health care context." This is exactly the argument made before the trial court to no avail.

CONCLUSION

For the reasons stated hereinabove, the order dismissing Appellant's case should be set aside, and she should be granted a writ of error and her day in court.

VICKY LYNN GRAY
By Counsel



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CERTIFICATE OF SERVICE

Service of the foregoing **APPELLANT'S BRIEF** have been made on the following counsel of record by mailing a true copy thereof to them on this the 24th day of June, 2005.

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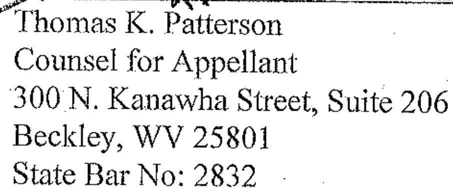

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