

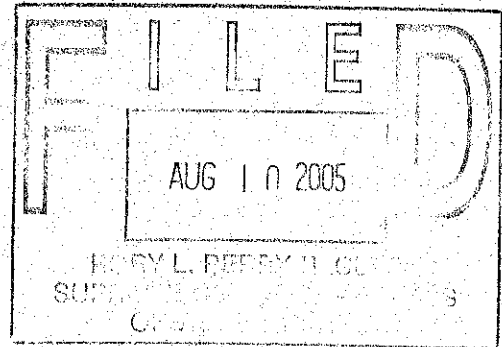
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.

**BRIEF OF APPELLEES
ASHRAF MENA KAMEL MENA, M.D.
AND PRINCETON ENDOCRINOLOGY, PLLC
AND MOTION TO DISMISS**

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. PROCEDURAL HISTORY AND STATEMENT OF FACTS 2

 A. Appellant’s Complaint Alleges a Sexual Assault During a Medical Examination by Dr. Mena While Under Dr. Mena’s Medical Care as an Admitted Patient at Princeton Community Hospital. 2

 B. Appellant’s Civil Case Information Sheet Identifies this Action as a “Professional Malpractice” Case, Further Evidence that Appellant Explicitly Recognized Her Allegations Constitute a Claim of Medical Malpractice. 3

 C. Appellant Never Alleged an Action Under, or Pursuant to, the MPLA 3

 D. Appellees Moved to Dismiss the Civil Action in the Circuit Court of Mercer County on the Grounds that Appellant Did Not Comply with the Pre-Suit Requisites of a Notice of Claim and Screening Certificate of Merit as Required by the MPLA. . . 4

 E. The Circuit Court Granted Appellees Motion to Dismiss. 4

 F. Appellant Petitioned this Court. 5

III. STATEMENT OF LAW AND ARGUMENT 5

 A. The Lower Court Properly Dismissed This Civil Action For Failure to Comply With The Pre-Suit Requirements Because An Alleged Sexual Assault By A *Health Care Provider*, Occurring During A Medical Examination In The Course Of *Health Care As Provided A Patient*, Is A *Medical Injury* Invoking *Medical Professional Liability* Per The West Virginia Medical Professional Liability Act. 6

 1. At the Time of Appellant’s Allegations, Appellees were “Health Care Providers” Who Were Acting in the Course of Providing a “Health Care Service.” 6

 2. Standard of Review: *de novo*. 7

 3. *West Virginia Code §§ 55-7B-2(i)*, As Drafted By The West Virginia Legislature, Is Clear and Unambiguous And Does Not Need Clarification Or Interpretation: “Any Tort” Includes an Alleged Sexual Assault Committed During a Medical Examination 7

4. While There is a Split of Authority, the Majority Of States Consider Alleged Intentional Torts Arising From Health Care Rendered By A Health Care Provider Subject to Their Medical Liability Acts. Each Determination is Fact Dependent and Relies Upon What is Considered a Medical 10

 a. MPLA Statutes in Other Jurisdictions 10

 b. Other Judicial Decisions Involving Allegations of Sexual Assault During Medical Care: Similar Cases Decided in Other Jurisdictions Depend on the Facts of Each Case. Below are 10

5. Appellant’s Argument Regarding Factual Scenarios of “Absurd” Application of the MPLA Have Been Submitted in Other Jurisdictions, and for the Reasoned Conclusions in Those Opinions, Should Be Rejected Here. 16

D. Appellant Filed Her Brief in Support of Appeal Out of Time; Therefore, This Petition For Appeal Must Be Denied. 17

CONCLUSION 19

TABLE OF AUTHORITIES

Cases:

<i>Ball v. NCRIC, Inc.</i> , 120 Fed Appx. 965 (Md. 4 th Cir. 2005)	11
<i>Blier v. Greene, et al.</i> , 263 Ga.App. 35,587 S.E.2d 190 (Ga. 2003).....	14
<i>Boggs v. Camden-Clark Memorial Hospital</i> , 216 W.Va. 656, 609 S.E.2d 917 (2004)	8
<i>Cf. Princeton Insurance Company v. Chunmuang</i> , 698 A.2nd 9 (N.J. 1997)	14
<i>Doe by Roe v. Madison Central Hospital</i> , 652 N.E.2d 101 (Ind. 1995)	13
<i>Goicochea v. Langworthy</i> , 694 A. 2d 474 (Md. 1997)	11
<i>Hagan v. Antonio</i> , 397 S.E.2d 810 (Va. 1990)	12
<i>Hagen v. Antonio</i> , 397 S.E.2d 810 (Va. 1990),	13, 16, 19
<i>Hoover v. W.Va. Board of Medicine</i> , 216 W.Va. 23, 602 S.E.2d 466 (2004), citing Syl. pt. 5, <i>Cable v. Hatfield</i> , 202 W.Va. 638, 505 S.E.2d 701 (1998)	3
<i>Jane Doe v. City and County of Honolulu, et al.</i> , 6 P.3d 362 (Hi. 2000)	13
<i>Jewell v. Malamet</i> , 587A.2d 474 (Md. 1991)	11
<i>Jewell, supra</i>	11
<i>Johnson v. Amethyst Corporation</i> , 463 S.E.2d 397 (Md. 1995)	12
<i>Jones v. Wilken, M.D.</i> , 905 P.2d 166 (Nev. 1995)	15
<i>Marx v. Hartford Accident and Indemnity Company</i> , 157 N.W. 2d 870 (Neb. 1968)	12
<i>Massengill v. Duke University Medical Center</i> , 515 S.E.2d 70 (N.C.1999).	12
<i>McQuay v. Guntharp, M.D.</i>	15
<i>Mock v. Allen</i> , 783 S.2d 828 (Ala. 2000)	13

<i>Osborne v. US</i> , 211 W.Va 667, 567 S.E.2d 677 (2002)	7
Syllabus point 2, <i>Osborne v. US</i> , 211 W.Va. 667, 567 S.E.2d 677 (2002) (internal citations omitted).	7
Syllabus Point 2, <i>State ex rel. McGraw v. Scott Runyan</i> <i>Pontiac-Buick, Inc.</i> , 194 W.Va. 770, 461 S.E.2d 516 (1995).	7

State Code:

<i>West Virginia Code</i> § 55-7B-2	1
<i>W. Va. Code</i> § 55-7B-2 (e), (i) [2003]	7, 15
<i>W.Va. Code</i> § 55-7B-2(g).	16
<i>West Virginia Code</i> § 55-7B-2 (i) [1986]	8
<i>West Virginia Code</i> § 55-7B-2 [2003]	9
<i>West Virginia Code</i> § 55-7B-2(i)	7
<i>West Virginia Code</i> § 55-7B-6	2
<i>West Virginia Code</i> § 55-7B-6(a)	4
<i>West Virginia Code</i> § 55-7B-6(c)	1
<i>West Virginia Code</i> §§ 55-7B-1, et seq.	1
<i>West Virginia Code</i> §§ 55-7B-2(i)	7

Miscellaneous

<i>Md.</i> §3-2A-01.	11
<i>A.C.A.</i> §§16-56-105, 16-114-201(3),	15
<i>Indiana Code</i> § 34-18-2-28.	10
Rule 15(e) of the <i>West Virginia Rules of Appellate Procedure</i>	19
<i>Va. Code</i> 8.01-581.1	10

I.

INTRODUCTION

COME NOW Appellees Ashraf Mena Kamel Mena, M.D. and Princeton Endocrinology, PLLC (hereinafter “Appellees” or “Dr. Mena”), by and through counsel Paul K. Reese, Heather D. Foster, and the law firm of Bailey & Wyant, P.L.L.C. with this Brief on the issue of whether an alleged sexual assault by a health care provider, in the course of providing health care services, is subject to the West Virginia Medical Professional Liability Act (2003). Dr. Mena submits that:

(1) as indicated in the direct language of her Complaint and Civil Case Information Sheet, Appellant knew that the tort allegations she pleads directly involve medical services (Appellate Record at 2, 3-6, hereinafter “R. at ___.”);

(2) those alleged torts and injuries, which by Appellant’s own pleading, occurred during the provision of health care services by a health care provider or health care facility, are subject to the West Virginia Medical Professional Liability Act, *West Virginia Code* §§ 55-7B-1, *et seq.*, (hereinafter “MPLA”);

(3) the MPLA is unambiguous when it includes within its jurisdictional application “any tort” committed by a healthcare provider during the provision of health care services in *West Virginia Code* §§ 55-7B-2(j);

(4) the MPLA provides a mechanism for tort allegations, such as those pled by Appellant, which provides for a notice of claim without a screening certificate, if such is unnecessary, in *West Virginia Code* § 55-7B-6(c);

(5) because the MPLA applies to Appellant’s allegations of tort, and because Appellant failed to file the notice of claim required by *West Virginia Code* § 55-7B-6, the ruling of the Mercer County Circuit Court, Swope, J., dismissing the underlying case, should be upheld; and,

(6) to rule otherwise would eviscerate the insurance coverage indemnification and defense of every physician who is charged with a sexual assault (or other intentional tort) during medical care.

II.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

A. Appellant's Complaint Alleges a Sexual Assault During a Medical Examination by Dr. Mena While Under Dr. Mena's Medical Care as an Admitted Patient at Princeton Community Hospital.

Appellant filed her Complaint on November 21, 2003, in the Circuit Court of Mercer County, West Virginia, essentially alleging that Dr. Mena sexually assaulted Ms. Gray during a medical examination, while his patient at Princeton Community Hospital. (R. at 3-6.)

The Complaint says that Dr. Mena "is a medical doctor specializing in internal medicine and endocrinology." (R. at 3; para. 3.) Ms. Gray was a patient, admitted to Princeton Community Hospital (hereinafter "PCH") on November 22, 2001, due to swelling in both legs and feet, abdominal pain, high blood sugar, adrenal hormone deficiency, and Addison's disease. (R. at 3-4; ¶ 5)

Continuing allegations of the Complaint clearly recognize that Dr. Mena was Appellant's treating physician who was engaged in the rendering of health care at the time of the alleged tortious conduct, noting on at least two occasions that the course of conduct which allegedly constitutes Appellant's cause(s) of action involve a single medical examination: "Dr. Mena entered her hospital room, 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.*" (R. at 4; ¶ 6.) (Emphasis added.)

The Complaint then alleges that, as a result of this conduct, Appellee Mena committed assault, battery, sexual assault, sexual abuse, outrage, intentional infliction of emotional and mental

distress, and/or negligent infliction of emotional and mental distress. (R. at 4; ¶ 7-9.) The Complaint further sets forth causes of action against Appellees PCH and Princeton Endocrinology, P.L.L.C., alleging negligent hiring and/or negligent supervision of the actions of an agent and/or employee, Appellee Mena. (R. at 4-5; ¶ 10-11.)

B. Appellant's Civil Case Information Sheet Identifies this Action as a "Professional Malpractice" Case, Further Evidence that Appellant Explicitly Recognized Her Allegations Constitute a Claim of Medical Malpractice.

The Civil Case Information Statement, filed simultaneously with the Complaint, identified the type of case as "Professional Malpractice", although "Other tort" and "Personal injury" were provided on the form as options. (R. at 2, "Type of Case".) See *Hoover v. W.Va. Board of Medicine*, 216 W.Va. 23, 602 S.E.2d 466 (2004), citing Syl. pt. 5, *Cable v. Hatfield*, 202 W.Va. 638, 505 S.E.2d 701 (1998) ("Rule 3 of the West Virginia Rules of Civil Procedure requires, in mandatory language, that a completed civil case information statement accompany a complaint submitted to the circuit clerk for filing. In the absence of a completed civil case information statement, the clerk is without authority to file the complaint."). The Civil Case Information Statement explicitly recognizes that Appellant understood her allegations involved medical malpractice claims.

C. Appellant Never Alleged an Action Under, or Pursuant to, the MPLA.

Appellant did not allege that Dr. Mena committed medical malpractice. Furthermore, Appellant failed to serve Appellees with a Notice of Claim prior to filing suit, as required by the West Virginia Medical Professional Liability Act (hereinafter "MPLA").

D. Appellees Moved to Dismiss the Civil Action in the Circuit Court of Mercer County on the Grounds that Appellant Did Not Comply with the Pre-Suit Requisites of a Notice of Claim and Screening Certificate of Merit as Required by the MPLA.

Therefore, these Appellees moved to dismiss the Complaint on February 19, 2004 on the grounds that Appellant failed to follow the statutory pre-suit notice requirements of the MPLA,

specifically *West Virginia Code* § 55-7B-6(a). (R. at 30-38.) PCH similarly moved to dismiss the Complaint on the same grounds.

E. The Circuit Court Granted Appellees Motion to Dismiss.

Hearing was had on the Motion to Dismiss on May 3, 2004. (R. at 48-50, 51-53.) The Court issued its written order on May 12, 2004. (R. at 66-71.) The Court found that “the issue raised - - whether the alleged acts of the Defendant Dr. Mena are within the applicable standard of care - - is a question that requires medical expert testimony, [therefore] the Defendants’ arguments are meritorious.” (R. at 68.) The Court further found that it was undisputed that the Defendants are “health care providers” and recognized that the dispute arose from whether the action fell under the definition of “medical professional liability”. (R. at 68.) The Court dismissed the civil action, setting forth its reasoning in its conclusions of law:

During hearing on this matter, the Defendants asserted that the issue of whether, under the appropriate standard of care, the Plaintiff’s symptoms necessitated a vaginal exam is a question that can only be answered based upon expert medical testimony. While the Court is troubled by the lack of any clear boundary for invoking the MPLA in actions alleging tort seemingly unrelated to medical services, this [sic] facts of the case at bar lead this Court to believe that the question of whether the vaginal exam was appropriate in this situation is a question that can only be answered by medical experts.

Additionally, the MPLA defines “health care” as: any act or treatment performed or furnished, by any health care provider for, to or on behalf of a patient during the patient’s medical care.” W.Va. Code § 55-7B-2(e). Based upon this definition, the vaginal exam was an act performed by a health care provider, Dr. Mena, to the Plaintiff during the Plaintiff’s medical care. Moreover, because medical expert testimony is required to determine whether the vaginal exam was “based on health care services,” the broad definition of “medical professional liability” encompasses the tortious acts alleged in the case at bar. Accordingly, the pre-suit requirements of the MPLA are applicable because the acts alleged fall under the broad language of “health care” and “medical professional liability.”

(R. at 69.)

F. Appellant Petitioned this Court.

Thereafter, Appellant filed her Petition for Appeal to this Court. Appellant failed to timely perfect the appeal by not serving Appellees with the petition until February 14, 2005, after the appeal was accepted. All Appellees filed Motions to Dismiss the appeal for failure to serve. On February 28, 2005, this Court ordered Appellees to file a Response to the Petition for Appeal within thirty days of receipt of the order. Therein the Court also denied Appellees' Motions to Dismiss, without prejudice. Appellee continues to abuse the process of this Court by filing her memorandum in support of her appeal in a timely fashion. Thus, these Appellees move this Honorable Court to utilize those powers available to it as set forth in Rule 15 of the West Virginia Rules of Appellate Procedure.

III.

STATEMENT OF LAW AND ARGUMENT

A. The Lower Court Properly Dismissed This Civil Action For Failure to Comply With The Pre-Suit Requirements Because An Alleged Sexual Assault By A *Health Care Provider*, Occurring During A Medical Examination In The Course Of *Health Care* As Provided A *Patient*, Is A *Medical Injury* Invoking *Medical Professional Liability* Per The West Virginia Medical Professional Liability Act.¹

1. At the Time of Appellant's Allegations, Appellees were "Health Care Providers" Who Were Acting in the Course of Providing a "Health Care Service."

The assignment of error, as set forth by Appellant in her brief, as re-stated immediately above, first turns upon the interpretation and application of definitions as set forth in the West Virginia MPLA. The circuit court's Order granting Appellees' Motions to Dismiss concludes that the alleged causes of action fall within the parameters of the West Virginia MPLA and require expert

¹Italicized words are to be construed as defined in West Virginia Code § 55-7B-2 [2003].

testimony to determine if Appellee Mena deviated from the applicable standard of care in health care rendered. (R. at 66-71.) Appellant argues that the allegations of the Complaint concern only intentional torts that do not fall within the parameters of the MPLA. She further argues that a screening certificate of merit from an expert is not required. In its order granting Appellees' Motion to Dismiss, the circuit court found that the only issue of law in dispute was the applicability of the MPLA to the particular allegations of this civil action — allegations of intentional tort and the definition of "medical professional liability".² (R. at 68.)

Upon a review of the statute, it is clear that the circuit court properly found that an intentional tort allegedly committed by a health care provider during a medical examination is within the course of *health care* provided a patient, meets the definition of medical injury, thereby creating an issue of *medical professional liability*, invoking the statutory scheme and parameters of the MPLA. (R. at 66-71.)

2. Standard of Review: *de novo*.

Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.

Syllabus point 2, *Osborne v. US*, 211 W.Va. 667, 567 S.E.2d 677 (2002) (internal citations omitted).

Additionally, "[a]ppellate review of a circuit court's order granting a motion to dismiss a complaint is *de novo*." Syllabus Point 2, *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516 (1995).

²These Appellees are in receipt of Appellee Princeton Community Hospital, Inc.'s Response to the Petition for Appeal. These Appellees concur with and adopt the arguments set forth in PCH's Responsive brief as regarding the definition of "health care" and as regarding the federal court's interpretation of such in *Redden v. Purdue Pharmaceuticals, L.P., et al.*, Civil Action No. 5:03-2222 (S.D. W.Va. 2003), to the extent that such are not incongruous to the arguments contained herein.

3. ***West Virginia Code §§ 55-7B-2(i), As Drafted By The West Virginia Legislature, Is Clear and Unambiguous And Does Not Need Clarification Or Interpretation: "Any Tort" Includes an Alleged Sexual Assault Committed During a Medical Examination***

West Virginia Code § 55-7B-2(i), as drafted by the West Virginia Legislature, is clear and unambiguous.

"**Medical professional liability**" means any liability for damages resulting from the death or injury of a person for **any tort** or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient.

W. Va. Code § 55-7B-2 (e), (i) [2003] (emphasis added).

In *Osborne v. US*³, 211 W.Va 667, 567 S.E.2d 677 (2002), this Court undertook a statutory analysis of *West Virginia Code § 55-7B-2 (i)* [1986] to determine whether that the definition of "medical professional liability" is ambiguous, confusing, or capable of more than one interpretation. In the 1986 version of the MPLA, as interpreted in *Osborne*, the definition of medical professional liability contained the same language at issue in the present case - "**any tort**". This Court found that:

Upon reading the definition of "medical professional liability" contained in *W.Va. Code § 55-7B-2(d)*, we are not left with the impression that its terms are ambiguous, confusing, or capable of more than one interpretation. Simply stated, this provision recognizes a health care provider's legal responsibility for damages, in tort or in

³ In *Osborne* the United States District Court for the Southern District of West Virginia certified the following question to this Honorable Court: "Does West Virginia's Medical Professional Liability Act provide a cause of action by a third party against a health care provider for foreseeable injuries to the third party proximately caused by the health care provider's negligent treatment of a patient/tortfeasor?" See generally *Osborne, supra*. This Court concluded that the West Virginia MPLA [1986] does indeed permit a third party to bring a cause of action against a health care provider for foreseeable injuries that were proximately caused by the health care provider's negligent treatment of a tortfeasor patient. *Id.* The Court further found that to maintain such a third party action under the MPLA, the plaintiff must establish the elements of proof contained in *W.Va. Code § 55-7B-3* [1986]. *Id.*

contract, to a person who has sustained injuries or death as a result of such provider's provision of, or failure to provide, health care services to a patient.

Osborne v. US, 211 W.Va. at 673, 567 S.E.2d at 683.⁴

Thereafter, this Court issued the opinion of *Boggs v. Camden-Clark Memorial Hospital*, 216 W.Va. 656, 609 S.E.2d 917 (2004), which, although *dicta*, contains language in the majority opinion indicating that "intentional torts or acts outside the scope of 'health care services'" do not fall within the purview of the MPLA. *Id.* The Court, in *dicta*, opined that if "a doctor or nurse intentionally assaulted a patient, stole their possessions or defamed them, such actions would not require application of the MPLA. . . ." However, such does not account for factual situations such as that presented to the Court herein where the allegations of intentional tort clearly arise from the rendering of "health care" by a "health care provider" during the rendering of the health care. The facts in *Boggs* are clearly distinguishable from the facts of this case in that the intentional tort allegations in the *Boggs* case occurred well after the health care treatment was rendered, which seems obvious pursuant to the language of the statute. Thus, *Boggs* is not controlling in the instant scenario. However, *Boggs* does require clarification to accommodate for factual scenarios as are found in the instant case.

These Appellees contend that the statutory scheme in question is unambiguous, particularly the most relevant of those sections in the MPLA bearing on the instant action, *West Virginia Code* § 55-7B-2 [2003], which sets forth definitions to be applied in the Act. The statute is straightforward and uses unambiguous language to describe what actions the statute, in fact, addresses. As set forth in sub-part (I) of section 2, medical professional liability means any liability for damages resulting

⁴The 1986 version of the MPLA is commonly referred to as MPLA 1.

from *any tort* arising from health care. Appellees emphasize the Legislature's use of the words "*any tort*" and would focus this Court's attention thereon. The Legislature was clear in its intent regarding what actions should fall within the MPLA and, therefore, require compliance with the statute's pre-suit notice requirements. The Legislature put the language "*any tort*" in the MPLA for a purpose, that being that "*any tort*" committed within the providing of "health care services" by a "health care provider" would fall under the MPLA, regardless of whether the tort be an intentional tort.

The statute does not exclude intentional torts which arise in the course of medical care. The focal issue in this case is whether the alleged tort occurred during a medical service, *e.g.* could the alleged actions have been a legitimate part of the medical examination and health care rendered. Other jurisdictions have addressed the question of whether a sexual assault by a health care provider is subject to respective medical liability acts.

4. While There is a Split of Authority, the Majority Of States Consider Alleged Intentional Torts Arising From Health Care Rendered By A Health Care Provider Subject to Their Medical Liability Acts. Each Determination is Fact Dependent and Relies Upon What is Considered a Medical Service.

Some guidance may be gleaned from statutes and reported decisions in other jurisdictions on the issue before the Court, though there is a split of authority. These Appellees undertake to provide a reasoned overview of Medical Professional Liability Acts, similar to the West Virginia MPLA, throughout the United States, along with Court interpretations of analogous issues.

a. MPLA Statutes in Other Jurisdictions

Some states, as does West Virginia's statute, specifically allow causes of action based upon intentional torts within their medical malpractice statutory scheme, specifically all torts are treated as malpractice if committed by a health care provider in the course of rendering health care services.

See Va. Code 8.01-581.1 and Indiana Code § 34-18-2-28. However, other statutory schemes have specifically excluded assault and battery torts. See A.R.S. § 12-562(B) (found unconstitutional finding the section violates Arizona's anti-abrogation clause); see *Duncan v. Scottsdale Medical Imaging, LTD.*, 70 P.3d 435 (Az. 2003) (finding A.R.S. § 12-562(B) unconstitutional.)

b. Other Judicial Decisions Involving Allegations of Sexual Assault During Medical Care: Similar Cases Decided in Other Jurisdictions Depend on the Facts of Each Case. Below are Cases Finding a Nexus Sufficient to Invoke Medical Malpractice Statutes.

In reviewing decisions from courts around the country that have addressed cases of sexual assault in the purview of medical care, it appears that the courts base their decisions of malpractice liability statute applicability on the fact patterns as alleged per case.

Although Maryland's statute does not specifically address intentional torts in the context of medical malpractice, Maryland has what appears to be the most extensive record of judicial decisions and a well-developed collection of law regarding sexual assault in the context of medical malpractice. See *Md. § 3-2A-01*.

Judicial interpretation of Maryland's malpractice statute regarding intentional torts, specifically of alleged sexual assaults, began in *Jewell v. Malamet*, 587A.2d 474 (Md. 1991), a case very close to the circumstances present in this claim. In *Jewell*, a patient brought a civil action against a physician for an assault and battery based on the physician's alleged sexual misconduct during the course of a medical evaluation. Plaintiff presented for a physical. Plaintiff alleged that during the physical examination her genitalia and breasts were fondled by the physician. In its analysis, the *Jewell* Court looked at the factual basis for the cause of action as alleged. The Court made clear that the determination of jurisdiction in cases involving an intentional tort of a professional nature lies not in an examination of the label given to the tort as alleged by any Plaintiff,

but on the factual context in which the tort was allegedly committed. *Id. Jewell* concluded that under its circumstances, plaintiff's claim was an action for medical malpractice.

The Maryland Supreme Court further clarified its holding in *Jewell, supra*, in its decision *Goicochea v. Langworthy*, 694 A.2d 474 (Md. 1997). *Goicochea* reaffirmed that where a Plaintiff alleges that he or she was injured by a health care provider during the rendering of medical treatment or services, the Maryland Healthcare Malpractice Claims Act is implicated, regardless of whether the claim sounds in negligence or intentional tort. Other Maryland cases conform with the reasoning of the decisions in *Goicochea* and *Jewell*. See also *Ball v. NCRIC, Inc.*, 120 Fed Appx. 965 (Md. 4th Cir. 2005); *Johnson v. Amethyst Corporation*, 463 S.E.2d 397 (Md. 1995).

In Virginia, *Hagan v. Antonio*, 397 S.E.2d 810 (Va. 1990) established that in a similar scenario as herein where a physician allegedly committed malpractice by allegedly running his fingers over patient's nipples during breast examination and asking her if she was excited the malpractice statute was implicated. Therefore, the patient plaintiff was required to give notice prior to suit being filed because the allegedly tortious action was based on health care and professional services rendered.

Additionally, pursuant to interpretation of its statute, in North Carolina, when unlawful sexual acts are alleged, it is considered a medical malpractice action where the health care provider is rendering professional services to the patient. *Massengill v. Duke University Medical Center*, 515 S.E.2d 70 (N.C.1999). North Carolina is among those states that look at what a professional service is in determining whether a tort is within the purview of a medical malpractice statute.

In many cases it is an agreed principle that the factual context, or circumstances, upon which the claim is based, in addition to the roles of the actors involved, must be addressed by courts when determining whether an intentional tort will fall within a medical malpractice statutory scheme.

Marx v. Hartford Accident and Indemnity Company, 157 N.W. 2d 870 (Neb. 1968), is the leading case and most often-cited decision as defining “professional services.” In defining “professional services,” the Court therein stated:

The act or service must be such as exacts the use or application of special learning or attainment of some kind. The term 'professional' in the context used in the policy provision means something more than mere proficiency in the performance of a task that implies intellectual skill as contrasted with that used in an occupation for production or sales of commodities. A 'professional' act or service is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill involved is predominantly mental or intellectual, rather than physical or manual. . . . In determining whether a particular act is of a professional nature or a 'professional service' we must look not to the title or character of the party performing the act, but to the act itself.

Most states look to the actual acts claimed by plaintiff in addition to whether expert testimony may be necessary to determine if the acts as alleged fall within a medical malpractice statute's purview. See *Jane Doe v. City and County of Honolulu, et al.*, 6 P.3d 362 (Hi. 2000) (Where submission of a medical tort claim to a conciliation panel and rejection of panel's decision by a party to the panel's hearing are prerequisites to a suit for damages premised on alleged malpractice, a “medical tort” would include intentional acts, negligent acts, acts for proper purposes and acts for improper purposes; accordingly, charges of sexual assault were required to be submitted to the MCCP before lawsuit could be lawfully filed.); *Mock v. Allen*, 783 S.2d 828 (Ala. 2000) (A patient sued his physician for sexual assault. The jury returned a verdict for the physician. The Supreme Court affirmed. The Court held that the Alabama Medical Liability Act governed the case because the misconduct occurred as a part of the physician's examination and treatment of the patient, citing *Hagen v. Antonio*, 397 S.E.2d 810 (Va. 1990), wherein the Virginia court found that in cases where the alleged sexual misconduct occurs as part of a physician's examination and/or

treatment of a patient, the conduct is considered to have occurred during the delivery of professional services, and is therefore cognizable as a medical-malpractice claim.); *Doe by Roe v. Madison Central Hospital*, 652 N.E.2d 101 (Ind. 1995) (the Indiana Medical Malpractice Act does not specifically exclude intentional torts from the definition of malpractice; clarifying, however, that the Act pertains to curative or salutary conduct of a healthcare provider acting within his or her professional capacity, and is designed to exclude conduct unrelated to promotion of patient's health or provider's exercise of professional expertise, skill or judgment.⁵); *Cf. Princeton Insurance Company v. Chunmuang*, 698 A.2d 9 (N.J. 1997)(Court found that an alleged sexual assault of a patient during a gynecological exam occurred in the course of furnishing professional services, and thus constituted "medical incident" under policy's insuring agreement, but was barred by the policy's criminal acts exclusion.)

c. Cases Which Do Not Find a Sufficient Nexus to Invoke Medical Malpractice Statutes Also Examine the Acts Alleged.

Court decisions which do not find that specific instances of alleged sexual assault and intentional torts are covered by the state's medical malpractice liability statute also examine the circumstances and context of allegations themselves, *e.g.* did the allegation of a sexual assault involve medical examination or treatment.

In Georgia, because an alleged sexual assault and battery by a clinical therapist did not involve the exercise of professional judgment, it was not construed as medical or professional malpractice. The Georgia Court appeared to focus on the issue of professional judgment and

⁵It should be noted further that *Doe by Roe, supra*, clarified that where there is a sexual relationship between a physician and a patient that is continuous in nature, such is not covered by the medical malpractice statute. This is the controlling view across the nation. However, in the instant action, it is not alleged that there was a sexual relationship between Defendant Doctor and Plaintiff.

services, as opposed to the nature of the allegations, leaving open the question that, under certain circumstances, an alleged sexual assault may constitute medical malpractice if it involved the exercise of professional judgment or medical services. *Blier v. Greene, et al.*, 263 Ga.App. 35,587 S.E.2d 190 (Ga. 2003).

In *Jones v. Wilken, M.D.*, 905 P.2d 166 (Nev. 1995), the court opinion made it clear there are cases where claims of intentional torts may indeed fall within the purview of Nevada's medical malpractice act. In *Jones*, the Nevada court based its decision on N.R.S. 41A.009, defining medical malpractice as "the failure of a physician, hospital, or employee of a hospital, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances." The Nevada Court found that plaintiff's cause of action could not be characterized as a medical malpractice suit simply because the underlying acts were tangentially compared to doctor/patient and hospital/patient relationship, finding that every tortious act that a healthcare professional commits cannot be described as medical malpractice but leaving open that there are certainly instances that would constitute such.

In *McQuay v. Guntharp, M.D.*, 986 S.W.2d 850 (Ark. 1999), the court found that the act of a physician fondling a woman's breast during an examination, if proven, did not fall within the parameters of professional services, being rendered by a medical care provider under the medical malpractice act per *A.C.A.* §§16-56-105, 16-114-201(3), looking to the facts as alleged and whether those facts could be construed to be necessary medical treatment.

d. An Analysis of the Facts alleged is Required by the Majority of States Regardless of the Ultimate Conclusion or whether the Alleged Acts are Covered by a State's MPLA.

It is clear, upon a review of statutes and jurisprudence from around the country, that the label attached to a cause of action involving the rendering of professional services is less important than

the factual basis set forth to support the cause of action. This is particularly so when a state has a statutory scheme such as West Virginia wherein all torts committed by a health care provider in the rendering of health care services that result in medical injury are anticipated to be covered by the Act as set forth in the plain language of the Act. *See W.Va. Code* § 55-7B-2(i).

The clear majority of jurisdictions look to the specific circumstances of a plaintiff's complaint in finding whether a plaintiff's allegations allege sexual misconduct during the course of medical care and treatment thereby invoking a MPLA.⁶

5. Appellant's Argument Regarding Factual Scenarios of "Absurd" Application of the MPLA Have Been Submitted in Other Jurisdictions, and for the Reasoned Conclusions in Those Opinions, Should Be Rejected Here.

In her brief, Appellant advances arguments that are clearly distinguishable from the facts of this case as presented and further advances arguments that analyze causes of action that are clearly outside the scope of the MPLA. Appellant argues that the MPLA would not apply if a hospital janitor sneaks into a patient's room and commits a sexual assault to a patient. (*See Appellant's Brief* at ¶ 1.) This goes without saying in that a hospital janitor is not a "health care provider" pursuant to the statute. *See W.Va. Code* § 55-7B-2(g).

Other Court's have recognized the absurdity of this reasoning, as in *Hagen, supra*, wherein the Court responded to such an argument stating:

In a rather frenetic argument, the plaintiff posits that an affirmance of the trial court's decision will mean that any time a physician, during examination or treatment of a patient, commits any one of a number of criminal acts which could be classified as torts, such as robbery or rape, such conduct could be classified as "health care" and thus be "malpractice." The answer to such a suggestion should be obvious, aside from the fact that this is not such a case. If

⁶These Appellees incorporate and adopt PCH's discussion at pp. 9-11 of its brief, also discussing cases in other jurisdictions.

is undisputed that a breast examination, including the touching, is an inseparable part of a typical, complete physical examination of a woman. Rape or robbery during such an examination, or during treatment of a patient, could never arguably be classified as an inseparable part of examination or treatment.

This conclusion is illustrated by our two prior cases on the issue. In *Glisson*, an alleged battery arising from a patient's lack of consent for performance of arthroscopic surgery was held to have arisen from health care and to be "malpractice." 235 Va. at 69, 366 S.E.2d at 72. In *Gonzalez*, the patient's toe was lacerated during a physical therapy session by a sharp metal object inside a whirlpool tub. We rejected the plaintiff's contention that the action was not one for "malpractice," but was a claim merely based upon "ordinary, traditional negligence." 239 Va. at 309-10, 389 S.E.2d at 459-60. In both cases, the respective claims were based upon conduct that was an inseparable part of the health care being rendered and, under the broad language of the Act, amounted to "malpractice," requiring the statutory notice.

In response to the plaintiff's demand that we read the Act more narrowly, we repeat what was said in *Gonzalez*. "When there is a claim that the language employed in a statute is too broad in its scope, the fault, if any, should be corrected by the General Assembly, not by this Court." 239 Va. at 310-11, 389 S.E.2d at 460.

To entertain this ludicrous line of reasoning is a disservice to not only future plaintiffs under the MPLA but also to those health care providers who are entitled to those protections offered by the MPLA.

D. Appellant Filed Her Brief in Support of Appeal Out of Time; Therefore, This Petition For Appeal Must Be Denied.

Appellant failed to timely file her brief in support of her appeal; therefore, the Appeal should be subject to those sanctions outlined in Rule 15(e) of the West Virginia Rules of Appellate Procedure for noncompliance with Rule 15(a) of the same, which state as follows:

(a) Appellant's Brief. Within thirty days of the date of the notice of the filing of the appellate record, or within thirty days of the receipt of the granting order establishing a briefing schedule, the appellant shall file an original and nine copies of a brief with the Clerk of the

Supreme Court. One copy thereof shall be served by the appellant upon each party to the appeal.

(e) Failure to File Brief. The failure to file a brief **in accordance with this rule** may result in the Supreme Court imposing the following sanctions: refusal to hear the case, denying oral argument to the derelict party, dismissal of the case from the docket, or such other sanctions as the Supreme Court may deem appropriate.

This Honorable Court entered its Order granting the appeal and denying Appellees' Motions to Dismiss for failure to timely perfect the appeal on May 11, 2005. Set forth in the Order are the requirements that Appellant file her brief within thirty days of receipt of the Order. Appellee received the Order on May 16, 2005, thereby calendaring Appellant's response as being due on June 16, 2005. However, Appellant failed to file her Brief within the timeframe ordered by the Court. Instead, she filed her Brief on June 24, 2005.

As this Court is aware, Appellee failed to serve her Petition for Appeal upon Appellees when she filed such with this Court. Appellees filed a Motion to Deny the Petition for failure to timely perfect the appeal. Appellant continues to disregard the rules of this Court by her failure to timely file her Brief in support of the Appeal even after the Court gave her great latitude in accepting the Petition for Appeal regardless of her not having served Appellees with such and not perfecting such.

Appellees move this Court to dismiss the instant appeal for failure to abide by the rules of the court for timing of such filing as set forth in Rule 15(a). Pursuant to rule 15(e), this Court has given itself remedies to discourage such practice and such should be utilized in an instance such as this when an Appellant continually disregards the rules of the court.

Furthermore, there need be no caselaw within this jurisdiction authorizing this Court to dismiss the appeal upon the objection of Appellees for "[i]t has been held by the United States

Supreme Court that courts have inherent power over their own process to prevent abuse, oppression, and injustice." See *Krippendorf v. Hyde*, 110 U.S. 276, 4 S.Ct. 27, 28 L.Ed. 145, adopted in *State ex rel. Casey v. Wood*, 156 W.Va. 329, 334, 193 S.E.2d 143, 145 (1972). If a party is going to bring an issue to this Court, then that party must adhere to the rules and face denial of the relief sought if they do not so do.

Appellant continues to abuse the process of this Honorable Court, and Appellees move the Court to act within its authority to remedy such abuse of process by sanctioning Appellant pursuant to the remedies set forth in Rule 15(e) of the *West Virginia Rules of Appellate Procedure*.

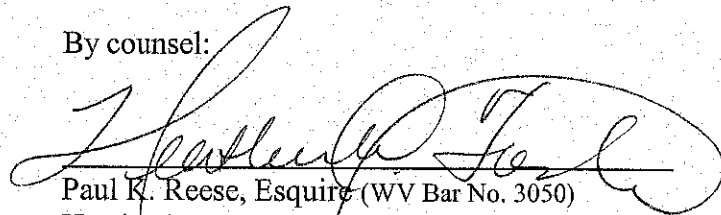
IV.

CONCLUSION

Assuming, *arguendo*, this Honorable Court does not wish to dismiss the appeal for its procedural inadequacies, it still remains that the Circuit Court's Order dismissing the underlying civil action should be upheld and this Appeal should be denied based upon the foregoing reasons and arguments contained herein.

**ASHRAF MENA KAMEL MENA, M.D.
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
CHARLESTON

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,

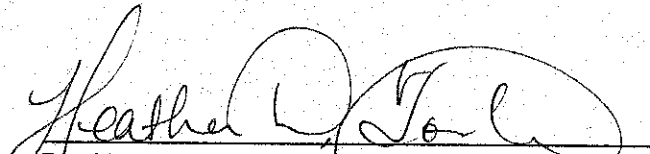
CERTIFICATE OF SERVICE

The undersigned does hereby certify that the foregoing "**Brief of Appellees Ashraf Mena Kamel Mena, M.D. and Princeton Endocrinology, PLLC and Motion to Dismiss**" was served upon the following counsel of record by this day mailing true copies thereof to:

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Done this 10th day of Aug, 2005.



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