No. 20-1818

IN THE

SUPREME COURT OF THE UNITED STATES

ASHLEE R. HULL, individually and in her capacity as Co-Executrix of the Estate of John Edward Hull, Sr., and MISTY G. ADKINS, individually and in her capacity as Co-Executrix of the Estate of John Edward Hull, Sr.,

Petitioners,

vs.

DR. MUHAMMED SAMAR NASHER-ALNEAM, NEUROLOGY & PAIN CENTER, PLLC, DR. CLARK DAVID ADKINS, BONE AND JOINT SURGEONS, INC., DR. DELENO H. WEBB, III, The Estate of ERIC S. WEBB, PLC, and AREA PSYCHIATRIC AND PSYCHOTHERAPY GROUP, INC., DOE PHYSICIANS 1-99, DOE PHARMACIES 1-99, DOE PHARMACISTS 1-99, and DOE CORPORATIONS 1-99,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of West Virginia

PETITION FOR WRIT OF CERTIORARI

Ashlee R. Hull
6089 Finn Glenn Drive
Westerville, Ohio 43081

Misty Hull Adkins
83 Burnside Drive
Elkview, WV 25071

John E. Hull, Jr.,
P.O. Box 2
Cabin Creek, WV 25035

Pro Se Applicants

June 4, 2021

QUESTIONS PRESENTED

1. Whether the denial of a person's right to pursue litigation based solely on the fact that the person died via suicide is a violation of the 14th Amendment.

2. Should a Motion to Dismiss be granted, when the evidence presented by the Defendants is based solely on the fact that the Plaintiff's decedent died from suicide?

3. The West Virginia Supreme Court disregards the due process problem created by the Court's precedent disallowing representatives of persons who died from suicide from pursing a wrongful death lawsuit.

4. Whether the West Virginia Supreme Court's decision is a violation of the State Court legislation outlined in West Virginia Code §55-7B-1 et seq.

5. Is the West Virginia Supreme Court's failure to recognize recovery by a plaintiff based upon a cause of action for wrongful death by suicide where the defendant is found to have actually caused the suicide a violation of the 14th Amendment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV

West Virginia Constitution

STATUTES

OTHER AUTHORITIES

PARTIES TO THE PROCEEDING

Petitioners, who were the Petitioners below, are Ashlee R. Hull and Misty Hull Adkins. John E. Hull, II joins the proceedings as additional Pro Se litigant.

Respondent, who was the Respondent below, are Dr. Muhammed Samar Nasher-Alneam, Neurology & Pain Center, PLLC, Dr. Clark David Adkins, and Bone and Joint Surgeons, Inc.

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Ashlee R. Hull, Misty Hull Adkins, and John E. Hull, II, respectfully petition for a writ of certiorari to review the order and judgment of the West Virginia Supreme Court of Appeals entered on July 23, 2020.

OPINION BELOW

The opinion of the West Virginia Supreme Court, *Hull, et al. v. Nasher-Alneam, et al.*, No. 18-1028, appears in the Appendix at 1.

JURISDICTION

The Circuit Court of Kanawha County, West Virginia had jurisdiction in this civil action. The West Virginia Supreme Court of Appeals had jurisdiction. The circuit court entered an order of dismissal on October 18, 2018. The West Virginia entered an order denying Petitioners' appeal on February 24, 2020 and thereafter denied rehearing on July 23, 2020. (Appendix at 1). This Court has jurisdiction pursuant Title 28 of the United States Code.

STATEMENT OF THE CASE

1. West Virginia has been in, and continues to be in an opioid epidemic.

The past two decades have been characterized by increasing abuse and diversion of prescription drugs, including opioid medications, in the United States. [1] For multiple years, the State of West Virginia has ranked in the top three of states for addiction and overdose rates.

2. Many Americans are now addicted to prescription opioids, and the number of deaths due to prescription opioid overdose is staggering. In 2016, drug overdoses killed roughly 64,000 people in the United States, an increase of more than 22 percent over the 52,404 drug deaths recorded the previous years.[2] The alarming prescribing numbers for opioids in West Virginia, as well as the rates of addiction, and overdose, have been reported for several years and in all forms of media, including national and local news and news publications. Additionally, the suicide rates due to the addiction to prescription opioids in West Virginia is among the top ten of states at a rate between 20.1 and 28.9 according to a report released in 2019 by the Commonwealth Fund, *States of Despair: A Closer Look at Rising State Death Rates from Drugs, Alcohol, and Suicide.*

3. In efforts to address addiction, the federal government and the State of West Virginia have taken steps to implement standards and guidelines regarding the prescribing of opioids by requiring that all physicians, regardless of their area of practice, become part of the equation to combat and address addiction and diversion.

4. Also, in an effort address the addiction, many criminal proceedings have been instituted by state's U.S. Attorney's Office and civil suits have been brought by state's Attorney General's Offices against physicians, medical facilities, pharmacies, pharmaceutical distributors, and pharmaceutical manufacturers. Due to these lawsuits and prosecutions the "pill mill" scheme has come to light, ie, the purposeful addiction of individuals to opioids by physicians and

---

1See Richard C. Dart et al, *Trends in Opioid Analgesic Abuse and Mortality in the United States*, 372 N.Eng.J.Med. 241 (2015).

[2] *See* Ctrs. For Disease Control and Prevention, U.S. Dep't of Health and Human Servs., Provisional Counts of Drug Overdose Deaths, (August 8, 2016), https://www.cdc.gov/nchs/data/health_policy/monthly-drug-overdose-death-estimates.pdf.

pharmacists and other entities who placed their own financial interests above the needs of patients for safe and appropriate healthcare.

5. Also, in order to hold the "pill mill" physicians, pharmacies, pharmaceutical distributors, and pharmaceutical manufacturers responsible, wrongful death suits have been brought on behalf of victims due to the negligence of the "pill mill" entities.

6. States have instituted policies to address the over-prescribing and addiction. In 2013, the West Virginia Board of Medicine implemented their "Policy on the Use of Opioid Analgesics in the Treatment of Chronic Pain." Within the Policy the BOM states that:

> "[T]his policy has been developed to articulate the Board's position on the use of controlled substances for pain, particularly the use of opioid analgesics and with special attention to the management of chronic pain...[F]or the purposes of this policy, **inappropriate treatment of pain includes non-treatment, inadequate treatment, overtreatment, and continued use of ineffective treatments**." p.2.

7. The Policy also stated "All physicians and other providers should be knowledgeable about assessing patients' pain and function, and familiar with methods of managing pain... Physicians also need to understand and comply with federal and state requirements for prescribing opioid analgesics." p.2.

8. The Policy stated: "...The goal is the management of patient's pain while effectively addressing other aspects of the patient's functioning, including physical, psychological, social and work-related factors, and mitigating risk of misuse, abuse, diversion and overdose." p.5.

9. The Policy also stated: "Documented drug diversion...obvious impairment...require a firm, immediate response...**Indeed, failure to respond can place the patient and others at significant risk of adverse consequences**, including, accidental overdose, **suicide attempts**, arrests and incarceration, or even death..." p. 8.

10. Decedent, John E. Hull, Sr. was a patient of each of these Respondents. Upon information and belief from the medical records in the Petitioners' possession, Mr. Hull began treating with Respondent Nasher and the Neurology & Pain Center, PLLC in August 2012.

11. Mr. Hull presented to Respondent Nasher with complaints of chronic low back pain, chronic neck pain, chronic shoulder pain, chronic hip pain, pain from carpal tunnel syndrome, debilitating headaches and pain that radiated from his buttocks into his feet. Decedent also complained of the inability to sleep due to the intensity of the physical pain. Decedent complained of depression and anxiety and complained of an addiction to controlled substances.

Specifically, on September 13, 2012, Nasher noted that Decedent reported he was suffering from depression. Nasher's progress notes also report daily headaches beginning in November 8, 2012. Decedent reported to Nasher that he was taking more medication than prescribed and took medication that belonged to a friend. Decedent's medical history included multiple back surgeries relating to vehicle accidents and several work-related injuries while working as a coal operator for Appalachian Power at the John Amos Plant. Decedent's first back surgery was performed in the 1970s when he was a teenager. The injuries Decedent experienced throughout

his life left him in constant pain and agony which continued for over forty-four years. Also, Decedent began experiencing seizures in the 1980s which continued for the remainder of his life.

12. Decedent advised the treating physicians that the pain medication he was receiving was not controlling his pain and that he thought the pain medication was making his pain worse. This condition is otherwise known as hyperalgesia, often medically diagnosed as opioid-induced hyperalgesia.[3] Decedent also advised the Defendants that he believed he was suffering from PTSD.[4]Decedent repeatedly requested other medical interventions to alleviate and/or control his level of pain and requested referrals to specialists who could provide medical options which could address and repair the underlying medical issues, including migraines, which were the causes of his pain. Decedent advised the Respondents that he was depressed and in extreme physical pain. Decedent attempted to facilitate his bodily health and to control the pain by performing physical exercises as recommended by his treating physicians, by icing the areas of his body which were causing the pain, and by taking vitamins and supplements. Until the purposeful addiction of the Decedent to opioids by these Respondents, Decedent was a highly functioning adult who was the owner of several businesses which he maintained and operated by himself.

13. Despite Decedent's advisement of his addiction and the subsequent changes to his mental

---

[3] "Opioid-induced hyperalgesia (OIH) is defined as a state of nociceptive sensitization caused by exposure to opioids. The condition is characterized by a paradoxical response whereby a patient receiving opioids for the treatment of pain could actually become more sensitive to certain painful stimuli. The type of pain experienced might be the same as the underlying pain or might be different from the original and underlying pain.. OIH appears to be a distinct, definable, and characteristic phenomenon that could explain loss of opioid efficacy in some patients." A comprehensive review of opioid-induced hyperalgesia, Pain Physician. 2011 Mar-Apr;14(2):145-61.

[4] "Among US veterans of Iraq and Afghanistan, mental health diagnoses, especially PTSD, were associated with an increased risk of receiving opioids for pain, high-risk opioid use, and adverse clinical outcomes." Seal, KH, et al., *JAMA*, 2012 Mar 7;307(9):940-7. doi: 10.1001/jama.2012.234

status to his treating physicians, Decedent was not treated for his depression or PTSD or for his addiction. Instead, Respondents characterized Mr. Hull as a drug addict and would not render any medical assistance for Mr. Hull's legitimate medical conditions. Without proper medical care and the onset of the addiction, Decedent's mental health deteriorated to such a level that he would lay in the yard of his home and talk to the blades of grass. Decedent's mental health had deteriorated into a delirium which delirium was caused by the purposeful addiction of the Decedent to opioids by these Respondents and resulted in his death by suicide.

14. Chronic illness, including migraines, is one of the risk factors for suicide. Doctors and researchers have also drawn a link between addiction and suicide. Doctors and researchers have long drawn a link between migraine and depression. According to the medical literature, depression and anxiety are extremely common among migraine patients.

15. Due to the Respondents' negligence, John E. Hull, Sr. succumbed to his delirium and died by suicide on January 7,2016. It should be noted that Mr. Hull was a devout Christian, as had his family been for decades. While Mr. Hull could not attend physically attend church due to his physical conditions, he attended church through television evangelist shows. Three ministers spoke at Mr. Hull's funeral and spoke about his love of God and the impact of mental illness on Christians. Mr. Hull fought to obtain medical treatment. Mr. Hull did not drink because of his faith, but because the opioids were prescribed by a licensed physician, he took the opioids to alleviate his pain, which pain was genuine. However, he became the victim of a "pill mil" physician's scheme to only treat patients with opioids in order to addict individuals, all for monetary gain. Addiction is a disease that does not disappear. Persons who are addicted to opioids require intervention and rehabilitation. Mr. Hull asked for addiction

treatment. He asked for medical treatment for his back, his shoulders, his knees, his hips, his depression, and addiction. He asked for referrals to other physicians. Mr. Hull's requests was ignored by the Respondents. Respondent Adkins responded to Mr. Hull's requests by stating that he would not give him opioids, although Mr. Hull had not requested opioids, and by referring Mr. Hull back to the "pill mill" physician, Respondent Nasher. Respondent Nasher would not treat the addiction because his cash flow would cease. These circumstances created a vicious circle of worsening pain, addiction, and mental health issues, which eventually led to John's death by suicide.

16. After our father's suicide, Respondents, through former counsel, began taking steps to comply with the pre-suit requirements mandated in the Medical Professional Liability Act ("MPLA"), West Virginia Code §55-7B-6. Prior to the filing of their Complaint, the Plaintiffs properly served via certified mail a Notice of Claim and a Certificate of Merit from Adnan A. Qureshi, M.D. and Carol A. Foster, M.D. to multiple medical providers and clinics, including Dr. Nasher, and the Neurology & Pain Center, PLLC.

17. In their Certificates of Merit, both Dr. Qureshi and Dr. Foster attested, affirmed and Opined to the following:

a. The issue of the breach in the standard of care for pain management was specifically addressed by Dr. Qureshi who opined that Defendants Dr. Nasher and the Neurology & Pain Center, PLLC, to a reasonable degree of medical certainty, breached the applicable standard of care within the scope of the practice of pain management by allowing the prescribed medications to be used on a chronic basis, despite the patient not having any significant relief in pain, and the development of

anxiety and depression secondary to pain. Dr. Qureshi also opined that Dr. Nasher and the Neurology & Pain Center, PLLC breached the applicable standard of care by treating Mr. Hull with a combination of multiple opioids and benzodiazepines which facilitated the development of addictive tendencies and a potential for systemic side effects. The experts also opined that the combination of inadequately treated chronic pain and associated anxiety with depression eventually led to and caused patient's injuries and subsequent suicide.

b. As a Board certified and licensed neurologist, Dr. Foster specifically addressed Dr. Nasher's and the Neurology & Pain Center, PLLC's breach of the standard of care for neurological pain management and headache medicine by "allowing controlled substances prescribed by these physicians to be used on a chronic basis and without the benefit of close monitoring which contributed to the progression of the patient's headache disorder and drug dependency. The chronic use of opioids and benzodiazepines exposed the patient's central nervous system and facilitated the chronic pain and headaches." Dr. Foster opined, to a reasonable degree of medical certainty that the Defendant's breach of the applicable standard of care, was the proximate cause of the patient's injuries and subsequent death.

c. Dr. Qureshi also opined that the "physicians' failure to follow the accepted standard of care limited the patient's ability to receive proper medical care, and proper pain management, which led to development of anxiety and depression secondary to pain, which was treated with anxiolytics, instead of treating the root cause of anxiety and the underlying medical issues. The combination of multiple

opioids and benzodiazepines also increased the risk of harm to the patient by facilitating the development of addictive tendencies and a potential for systemic side effects. The combination of inadequately treated chronic pain and associated anxiety with depression eventually led to patient's suicide."

18. After the filing of the wrongful death Complaint, and prior to discovery, Respondents Nasher-Alneam, Neurology & Pain Center, PLLC and Dr. Adkins and the Bone & Joint Surgeons, Inc. filed Motions to Dismiss.

19. Pertinent to the allegations contained in Respondents' complaint, the Neurology & Pain Center, PLLC was raided by federal agents and Dr. Nasher was subsequently indicted on charges of Illegal Drug Distribution, Distribution Causing Death and Maintaining a Drug Involved Premises, among others. The indictment stated that the Neurology & Pain Center, PLLC was a known operation for the distribution of controlled substances which resulted in multiple deaths. Respondent Nasher has subsequently pled guilty to Count 25 of the third superseding indictment which charged him with a violation of 21 U.S.C. §841 (a)(1) (illegal distribution of a controlled substance) and is incarcerated at USP Lewisburg, U.S. Penitentiary. Mr. Hull was a victim of Nasher and the Neurology & Pain Center, PLLC's failure to adhere to the usual course of medical practice, by dispensing opioids continuously over several years, despite the Decedent reporting minimal relief, and the failure to appropriately diagnose the Decedent's medical conditions, among others. Throughout the lower court proceedings and briefs filed in the Supreme Court, Respondent Nasher continued to deny that ever wrote prescriptions that were not for a legitimate purpose and denied that he operated a "pill mill" enterprise, even after he had pled guilty to those very charges.

20. The circuit court judge granted the Respondents' motions to dismiss based upon the fact that Petitioners' decedent died from suicide. Again, without hearing any evidence, and despite the submission of expert reports opining of each of the Respondents negligence that caused Mr. Hull's death.

21. Suicide is often closely related to mental illness and addiction. Both of these conditions involve stigma. Suicide is a controversial topic and is increasingly recognized as a public health issue. Society views suicide as an immoral act that flies in the face of strongly held religious principles. As a result, in tort cases, courts apply a strict rule of causation in suicide cases and have singled out suicide cases for special treatment. This is true even where the defendant is alleged to have engaged in intentional acts as opposed to mere negligence. Issues of morality have frequently appeared throughout court decisions involving suicide, with courts sometimes referring to suicide as sinful and immoral, as well as noting that suicide was wrong from a religious and a moral point of view. This singling out of suicide cases for special treatment is a violation of due process and equal protection under the 14th Amendment to United States Constitution.

REASONS FOR GRANTING THE WRIT

This case represents several questions surrounding the judicial system's singling out of suicide cases for special treatment and its violation of due process and equal protection under the 14th Amendment to the United States Constitution.

Section 1 of the Fourteenth Amendment to the U.S. Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Beginning in 1986, the West Virginia Legislature passed legislation governing medical malpractice actions, West Virginia Code §55-7B-1 et seq. This statute sets forth guidelines regarding the institution of and pre-requisites for the filing a medical malpractice case. The statute also sets forth the criteria for who can and cannot institute a suit for medical malpractice. §55-7B-5(d) states:

> "No action related to the prescription or dispensation of controlled substances may be maintained against a health care provider pursuant to this article by or on behalf of a person whose damages arise as a proximate result of a violation of the Uniform Controlled Substances Act, as set forth in chapter sixty-a of this code, the commission of a felony, a violent crime which is a misdemeanor, or any other state or federal law related to controlled substances: Provided, That an action may be maintained pursuant to this article if the plaintiff alleges and proves by a preponderance of the evidence that the health care provider dispensed or prescribed a controlled substance or substances in violation of state or federal law, and that such prescription or dispensation in violation of state or federal law was a proximate cause of the injury or death.

Also, the West Virginia Legislature enacted legislation regarding wrongful death suits, §55-7-1 et seq. This statute sets forth guidelines regarding the institution of and the filing a wrongful death action.

Both of these statutes govern the lawsuit filed by the Petitioners on behalf of our father. Both of these statutes plainly set out who can and cannot bring suit for medical malpractice and wrongful death. Neither of these statutes bar the filing of a lawsuit on behalf of an individual who died by suicide.

The West Virginia Supreme Court has repeatedly ruled that each and every case for medical malpractice must strictly adhere to the statutory provisions of West Virginia Code §55-7B-1 et seq., Medical Professional Liability Act, and that they are not at liberty to ignore the plain and unambiguous language of a West Virginia statute.

This Court has articulated the same reliance upon the plain meaning of a statute. According to this Court in *Caminett v. United States*, 242 U.S. 470 (1917), "Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise."

The West Virginia Supreme Court failed to apply the plain meaning of the both the Medical Professional Malpractice Act and the Wrongful Death Statute in their decision to affirm the dismissal of this case. The lower court based their decision to dismiss this case based upon the common law decisions regarding suicide. Although this case involves suicide, West Virginia has not decided a case regarding the purposeful addiction of an individual to opioids which addiction causes suicide.

The West Virginia courts' decisions are a violation of rights of a person who dies of suicide and denies them their constitutional right to due process and fundamental rights as a

person. The clear intent of the West Virginia Legislature was to bar persons who had committed or was convicted of a crime from filing a medical malpractice action, not to bar individuals who had died by suicide. The West Virginia Legislature has not established any law infringing upon the rights of a person who dies by suicide.

As a comparison, had Mr. Hull experienced an overdose or had died of an overdose, he could have sustained a medical malpractice case against these Respondents and his case would have been decided upon the merits of the case instead of societies opinions regarding suicide.

The ruling of the lower court and the decision by the West Virginia Supreme Court dismissing this action based upon the suicide death of John Hull, violates the equal protection clause and the due process provision of the United States Constitution and provision of the West Virginia Constitution Bill of Rights 3-11.

In essence, the ruling of the West Virginia Supreme Court establishes a classification of persons who are being denied equal protection and due process and discriminates among persons due to the type of death the individual experiences and is a violation of the Fourteenth Amendment to the United States Constitution and provisions of the West Virginia Constitution. *Barbier v. Connolly*, 113 U.S. 27 (1885). Classifications which are purposefully discriminatory fall before the Equal Protection Clause. *Barbier v. Connolly*, 113 U.S. 27, 30 (1885). In a review of classifications, this Court has held that when certain fundamental liberties and interests are involved, a government classification which adversely affect them must be justified by a showing that the distinctions are required to further the government purpose. *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969) and *Shapiro v. Thompson*, 394 U.S. 618 (1969). Despite the clear intent of the West Virginia Legislature, the West Virginia Supreme Court is providing

dissimilar access to the court for persons who died of suicide and for persons who did not die of suicide and is a clear violation of the West Virginia Constitution and to the United States Constitution. The West Virginia Supreme Court cannot demonstrate a compelling interest in denying Respondents equal protection and due process.

Access to the Courts and equal protection are fundamental rights proscribed to every individual under state and federal Constitutions and are expressly guaranteed by the Constitution. Due process, like voting, is expressly guaranteed by the Constitution. Previously, Chief Justice Warren observed that, "since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

The basis for the lower court ruling is *Moats v. Preston County Commission*, 206 W.Va. 8, 521 S.Ed.2d 180 (1999). In *Moats*, the West Virginia Supreme Court expressly states that "seeking damages for the suicide of another have generally been barred because the act of suicide is considered deliberate and intentional, and therefore, an intervening act that precludes a finding that the defendant is responsible... Thus, without the taking of any evidence, and without knowledge of Mr. Hull's state of mind, the lower court and the West Virginia Supreme Court dismissed and affirmed the dismissal of Respondents' Complaint. Although suicide is not defined as a criminal act, Mr. Hull was found to be guilty of suicide and was thereafter denied due process rights and equal protection under the law.

The lower court stated that a negligence action seeking damages for suicide have generally been barred because the act of suicide is considered deliberate and intentional, and is

an intervening act that precluded a finding that the defendant is responsibly relying upon *Moats v. Preston County Commission*, 206 W.Va. 8, 521 S.E.2d 180 (1999) (citing *McLaughlin v. Sullian*, 123 N.H. 335, 461 A.2d 123, 124-125 (1983). The court also stated that there are recognized exceptions to the general rule that bars such claims such as when the defendant is found to have a duty to prevent the suicide from occurring such as jails, hospitals, reform schools, and others having physical custody and control over such persons.

Each of these Respondents had a duty to Mr. Hull to treat his medical conditions, including his depression and addiction, both of which are linked to suicide. Respondent Nasher and NPC and Mr. Hull signed a contract which contract is required by the State of West Virginia when a treating physician prescribes opioids. This contract formed a relationship such that Respondent Nasher had a duty to take affirmative steps to help refer Mr. Hull for treatment for his opioid dependence and related depression. Nasher who was providing pain management services and NPC, as a pain management clinic necessarily was aware of the risks associated with opioid abuse and opioid dependence. The veritable cocktail of drugs that Mr. Hull was on and Mr. Hull's repeated reports that the medications being prescribed provided little to no assistance in the subsidence of pain and requests for painkillers certainly provided enough evidence that any doctor could have responsibly foreseen Mr. Hull's opioid addiction and/or dependence. Mr. Hull would have reasonably depended on Respondent Nasher and NPC to provide medical advice and adequate treatment vis-à-vis his on-going pain management and treatment of his headaches. Instead, Mr. Hull was prescribed more and more opioids. Respondent Nasher and NPC was in a superior position to understand the risks associated with opioid abuse. Mr. Hull relied on Nasher and NPC. Nasher and NPC failed to exercise that

degree of care, skill and learning required or expected of a reasonable, prudent health care provider in the profession. Nasher and NPC had formed a relationship with Mr. Hull such that they had a duty to prevent Mr. Hull's suicide by referring him to specialists for his mental and physical deteriorations. Nasher and NPC did nothing.

Had the case been allowed to proceed, a motion for judicial notice would have been filed regarding the guilty plea of Respondent Nasher and his role as a "pill mill" physician and the subsequent death of some of his patients due to his prescribing of opioids not for a medical purpose. Within the federal case, evidence was brought forth regarding the lack of proper maintenance of patient charts.

The rulings of the Circuit Court of Kanawha County, West Virginia and the decision by the West Virginia Supreme Court are a violation of state statute, specifically, the Medical Professional Liability Act (MPLA). The only bar to bringing a wrongful death suit based upon medical malpractice is outlined by West Virginia Statute. Petitioners complied with the provisions of the MPLA and therefore their claims are not barred by statute. The rulings of the Circuit Court of Kanawha County, West Virginia and the West Virginia Supreme Court violates West Virginia Statute and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution.

Many states and jurisdictions have reexamined the issue of suicide due to advances in technology and societal views. Recent cases involving the criminalization of causing suicide via texting as in *Commonwealth of Massachusetts v. Carter*, SCJ 12502, and causing suicide through the posting of compromising photos, and bullying and cyberbullying are a few of the

types of cases that courts are reexamining. The recognition by courts that bullying can lead to suicide has allowed both civil and criminal actions to proceed.

Due to the emergence of the "pill mills" and their role in the opioid epidemic, courts are now rendering decisions based upon these types of cases being brought before the courts. These types of cases are novel in many ways, as are cases filed on behalf of persons who died by overdose and suicide as a result of the addiction brought about by the "pill mill" individuals and entities. These cases do not fit the mold of cases previously decided by courts regarding suicide. While suicide is considered an immoral act, the purposeful addiction of an individual by a physician who is sworn to do no harm, is equally immoral and it is criminal. The fundamental right to due process and equal protection under both the West Virginia Constitution and the United States Constitution should not be violated because of a suicide that is caused by the immoral and criminal actions of persons who had a sworn duty to do no hàrm.

This Court succinctly outlined the history of the evolution of societal views and common law regarding suicide in *Washington v. Glucksbegt*, 521 U.S. 702 (1997). This evolution continues to date due to the changes in technology and societal views regarding suicide. And mental health. According to statistics, mental illness is responsible for suicide deaths approximately 90 percent of the time. Mr. Hull suffered from mental illness and addiction. He did not have the mental capacity to distinguish between right or wrong. Opioid medications destroy a persons' brain and takes over an individual's brain. The rulings of the Circuit Court of Kanawha County, West Virginia and the West Virginia Supreme Court violates the due process and equal protection of the West Virginia Constitution, and the United States Constitution.

West Virginia has recognized that suicide is a serious public-health problem and it has an interest in preventing suicide, and treating its causes. West Virginia has also recognized that addiction is a serious public-health problem and it has an interest in preventing, and treating addiction. West Virginia has enacted laws to address both of these public-health issues. Additionally, West Virginia has recognized the serious issue of entities, including physicians and pharmacists, who purposely addict individuals to opioids for monetary gain. The ramifications of addiction are raging throughout West Virginia and this nation. Prior cases decided by the courts in West Virginia and other jurisdictions involving suicide involve the more "normal" fact set, ie, a defendant who is acting within the boundaries of their profession. The advent of a recent phenomena of "pill mills" and their actors, do not fall within the fact sets of any of the prior case law. Thus, a reexamination of suicide within the context of "pill mill" cases needs to occur.

Additionally, many courts have ruled that civil cases wherein a defendant caused the suicide death of an individual did not constitute an intervening cause.

As stated in 74 Am.Jur.2d Torts §27, 642-43. "[i]n respect of wilful acts, there is authority for the rule that persons may be held liable for the consequences that flow therefrom as a proximate cause thereof, whether they could have been foreseen or anticipated or not." Id. At §28, 643. "The defendant's interest have been accorded substantially less weight in opposition to the plaintiff's claim to protection when moral iniquity is thrown into the balance." W. Page Keeton et al., Prosser and Keeton on The Law of Torts §8, at 37 (5th ed.1984). Liability for intentional torts extends beyond foreseeability because "it is better for unexpected losses to fall upon the intentional wrongdoer than upon the innocent victim." Id. §9, at 40. Moreover, "[i]n

cases involving unlawful acts, intervening causes are especially likely not to be held to preclude liability of the wrongdoer." 74 AM.Jr.2d §29, 644.

With respect to intentional acts, the Restatement (Second) Torts §435B (1965) states:

> Where the negligent conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability....

Comment b to §442B further clarifies as follows:

> If the actor's conduct has created or increased the risk that a particular harm to the plaintiff will occur, and has been a substantial factor in causing that harm, it is immaterial to the actor's liability that the harm is brough about in a manner which no one in his position could possibly have been expected to foresee or anticipate...This is to say that any harm which is in itself foreseeable, as to which the actor has created or increased the recognizable risk, is always "proximate," no matter how it is brought about...

Recently, two cases have been decided by the United States Court of Appeals for the Fourth Circuit involving suicide, *Wickersham, et al. v. Ford Motor Company*, Appellate Case No. 2018-001124 in the State of South Carolina in the Supreme Court and *young v. Swiney*, ___ F.Supp.2d ___, 2014 WL 2458405 (D.Md., May 30, 2014).

In *Wickersham* the Fourth Circuit opined:

> South Carolina does not recognize a general rule that suicide is an intervening act that always breaks the chain of causation in a wrongful death action...If the court determines the suicide was not unforeseeable as a matter of law, the jury must consider foreseeability. The jury must also consider causation-in-fact,

> including whether the defendant's tortious conduct caused a decedent to suffer from an involuntary and uncontrollable impulse to commit suicide.

In *Young v. Swiney*, the Court stated that the general rule that one may not recover damages in negligence for another's suicide, in that the suicide serves as an intervening act that precludes a finding of proximate cause. The court further held that this general rule does allow for an exception for suicide committed during insanity or delirium, if that mental state was caused by the defendant's negligent conduct.

The West Virginia Supreme Court's failure to recognize recovery for wrongful death by the Petitioners based upon suicide when the Respondents have actually caused the suicide is a violation of the 14th Amendment.

Suicide is not an absolute bar to litigation. *Moats* did not establish a complete barring of cases involving suicide, it established an exception which must be decided upon the facts and evidence submitted. *Moats* established that a possibility exists that a case involving suicide is not an absolute bar to recovery. This case in the posture at the time of the dismissal by the Circuit Court of Kanawha County, West Virginia does not present a complete exploration of the death of John Hull, the physician/patient relationship, the treatment rendered by the Respondents, nor the actions or inactions by the Respondents within the physician/patient context. The only pertinent information before the lower Court, in addition to the complaint, was the Affidavit of prior counsel and Petitioners' experts' Certificates of Merit. The Respondents did not put forth any evidence. Respondents simply denied the allegations in the Petitioners' Complaint and stated that they did not commit malpractice, that they prescribed opioids per the guidelines, did not know that Mr. Hull was suicidal, and had not duty to prevent his suicide.

Because of the absence of a complete factual record, the Petitioners have been precluded from any opportunity to provide additional proof to further establish a claim, such as Respondent Nasher's guilty plea and the corresponding evidence of Respondent Nasher's "pill mill" actions.

> The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader."
> *Scheuer v. Rhodes*, ___ U.S. ___ (1974).

The lower court incorrectly accepted as a fact that the Respondents did not commit malpractice, did not know of the foreseeability of suicide, and no duty to prevent John's suicide existed. By dismissing the complaint, "there was no opportunity afforded petitioners to contest the facts assumed in that conclusion." *Scheuer.*

The rulings of the Circuit Court of Kanawha County, West Virginia and the West Virginia Supreme Court violates the due process and equal protection of the West Virginia Constitution, West Virginia Statute, and the United States Constitution and these rulings must be overturned.

Statutory Prima Facia Negligence

While Respondents disagree with Petitioners' assertion that the Circuit Court erred by failing to recognize the *prima facie* negligence Respondents, Petitioners' argument is, in fact, relevant to the Circuit Court's decision. Respondents violated W.Va. Code § 55-7-9 and § 30-3A-1 *et seq.* and their violations were the actual and proximate cause of decedent's death.

Respondents statutory violations are a presumption of liability until proven to the contrary. Their violations bring into question the impact their violations had upon the suicide death of John Hull and relate to the standards to be followed in considering a motion to dismiss. The Respondents' violations create questions that require factual development that must be answered prior to any ruling upon a motion to dismiss. The West Virginia Board of Medicine's investigation into Respondent Nasher rendered peer review determinations of multiple violations of multiple statutes. Respondent Nasher's patient files are incomplete and are not reliable, nor are his denials of the Petitioners' allegations. Respondent Nasher could not produce evidence contrary to the Petitioners' allegations contained in the complaint despite Respondent Nasher's incorrect assertions in his pleadings and briefs. An independent peer review investigation of Nasher is independent proof of the Petitioners' allegations. It is not necessary for Petitioners' to paint Dr. Nasher in a bad light. His peers have deemed his actions to be malpractice and in violation of West Virginia statutes. The peer review investigation opinions were not available to the public at the time of the filing of the complaint. The peer review documents only became available to the public on March 6, 2019 when the documents were filed in the district court case *United States v. Muhammed Samer Nasher-Alneam*, Criminal No. 2:18-00151. The peer review investigation reports confirm the allegations as asserted in Petitioners' complaint and in their appeal brief. Dr. Robert G. Kaniecki was asked by the West Virginia Board of Medicine to provide an opinion regarding Dr. Nasher's practice of medicine. Dr. Kaniecki reviewed multiple patient files during his peer review of Dr. Nasher and his pain clinic practice. With respect to Patient D, Dr. Kaniecki stated that:

1. On 3/27/12 hydrocodone was advanced to #100 tablet per month after worsening back pain from a fall, and on 3/27/12 Oxycontin 10mg #30 was added to the regimen (total plus 50MME/day);
2. Fall risk was not formally assessed;
3. On 4/30/12 worsening pain following a fall was addressed by an increased dose of hydrocodone to 10g #120, Oxycontin was advanced to 10m #60;
4. These dosages were then renewed monthly until the final visit of 3/5/14;
5. Initial medication list and past medical history difficult to determine from the brevity of the record, Neurologic examination was normal. Diagnosis was difficult to elicit from the records but eventually the chart referenced neuropathy, chronic back pain, knee pain, fibromyalgia, and "pain all over."
6. The medical record revealed multiple inconsistencies and was not adequately updated for a patient with this degree of medical complexity;
7. The basis for multiple medication adjustments was unclear;
8. Medical basis for advancing opioid or combining the opioid with other medications are never mentioned in the record;
9. The patient in fact realized a decrease in function, moving from normal ambulation to cane to wheelchair to motorized wheelchair despite medication dosage escalations.

With respect to Patient G Kaniecki stated:

1. On 6/10/14 the patient complained of chronic headaches and neck pain;
2. An inadequate history of the present illness was taken;

3. At no time were the risks of dependence, addiction, or overdose reviewed;

4. At no time is improvement in function documented;

5. Rebound headache, now referred to as medication-overuse headache, is managed by discontinuation of the offending agent and institution of appropriate migraine management while avoiding regular use (10 days per month) of acute pain medications. Step 1 in this process was achieved when Dr. Nasher recommended discontinuation of Ibuprofen and Naproxen, although the basis for this decision is purely speculative. Step 2 was poorly addressed and step 3 violated.

From his review of patient files Dr. Kaniecki opined in multiple reports that:

" 1.It is my opinion that Dr. Nasher engaged in malpractice and failed to practice with that level of care, skill and treatment, which is recognized by a reasonable, prudent physician engaged in the same or similar specialty as being acceptable under similar conditions and circumstances;

2.It is my opinion Dr. Nasher departed from the standards of acceptable medical practice by prescribing excessive amounts of controlled substances;

3.It is my opinion Dr. Nasher prescribed a prescription drug other than in good faith and in a therapeutic manner in accordance with accepted medical standards, and in the course of his professional practice Dr. Nasher failed to keep written records justifying the course of treatment.

4.These opinions have led me to conclude the Dr. Nasher has violated the professional standards of physician practice in West Virginia by failing to follow clauses outlined in Articles 30-3A-2 and 30-3A-3 of the West Virginia Board of Medicine Medical Practice Act. "

The West Virginia Supreme Court previously stated in *Courtney v. Courtney*, 413 S.E.2d 418 (W.Va. 1991) that "One who engages in affirmative conduct, and thereafter realizes or should realize that such conduct has created an unreasonable risk of harm to another, is under a duty to exercise reasonable care to prevent the threatened harm." *Courtney* citing Syllabus

pt. 2 *Robertson v. LeMaster*, 171 W.Va. 607, 301 S.E.2d 563 (1983); *Overbaugh v. McCutcheon*, 183 W.Va. 386, 396 S.E. 153(1990); *Price v. Halstead, 177 W.Va. 592, 355 S.E.2d 380 (1987); People v. Oliver*, 210 Cal.App.3d 138, 258 Ca. Rptr. 138 (1989). In *Courtney,* Frances Courtney, individually and on behalf of her infant son, sued her ex-husband, Denzil Courtney, and his mother, Maud Courtney. The Plaintiffs' complaint alleged that during their marriage Denzil physically abused her and her son and thus sued Denzil and his mother for the damages they sustained from the physical abuse. The Complaint asserted four counts 1) intentional assault and battery 2)that Maud was liable for Denzil's tort because she, while aware that Denzil was a manic depressive and an alcoholic, nonetheless supplied him with alcohol and drugs, which she knew would cause him to become abusive; 3) intentional affliction of emotional distress; and 4) that Denzil intentionally assaulted and battered their son. Further, the plaintiffs alleged that Maud was negligent when she gave Valium and alcohol to her son because she knew of his medical conditions and that the alcohol and Valium would cause him to become violent and abusive. The Defendants filed motions to dismiss pursuant to Rule 12(b)(6). Thereafter, the Taylor County Circuit Court dismissed Counts II and III of the Complaint. Plaintiffs appealed the ruling.

In their consideration of the appeal, this Court stated:

> "W.Va. Code, 55-7-9 (1923), expressly authorizes civil liability on a violation of statute. Our case law has consistently recognized the mandates of W.Va. Code, 55-7-9, and in Syllabus Point 1 of *Anderson v. Moulder*, 183 W.Va. 77, 394 S.E.2d 61 (1990).. 'Violation of a statute is *prima facie* evidence of negligence. In order to be actionable, such violation must be the proximate cause of the plaintiff's injury.'"
> *Price v. Halstead, supra; Jenkins v. J.C. Penney Causalty Ins. Co.,*

167 W.Va. 597, 280 S.E.2d 252 (1981); _____

The Court found that Maud supplying Valium to her son was a violation of the West Virginia Uniform Controlled Substance Act. This Court stated that when, viewing the facts in the light most favorable to the plaintiff, the trial court erred in dismissing both of those Counts and remanded the case for further proceedings. The Court also stated that there was a possibility that plaintiffs could show that the Valium, in combination with Denzil's mental state and the alcohol, would make it foreseeable to an ordinary person that Maud knew Denzil would become violent and abusive. If an ordinary citizen who is not trained in the medical field and is not a licensed and practicing physician can be assigned a duty to prevent the harm and assigned as having foreseeability and is assigned negligence, it is axiomatic that the Respondent physicians would have the knowledge, by training and education, that providing excessive opioid medications to a patient for multiple years under the guise of providing appropriate medical care, and subsequently failing to treat the patient's addiction which ensued from the ingestion of the opioids would make it foreseeable that harm would come to the patient, including the risk of suicide and that the Respondents had a duty to prevent the harm.

The West Virginia Supreme Court in *Courtney* also stated that even if Maud did not violate any statute, her alleged actions might still entitle the plaintiffs to the requested relief and that the lower Court erred by granting the defendants' motion to dismiss under additional circumstances. The Court's reasoning was that if Maud could have foreseen that her actions of supply Valium, a controlled substance, to Denzil would create an unreasonable risk of physical harm to the plaintiffs, she had a duty to act reasonably by not giving him alcohol and drugs.

Syllabus Point 2 of *Robertson v. LeMaster*, 171 W.Va. 607, 301 S.E.2d 563 (1983). See also *Overbaugh v. McCutcheon*, 183 W.Va. 363, S.E.2d 153 (1990); *Price* supra.

> "One who engages in affirmative conduct, and thereafter realizes or should realize that such conduct has created an unreasonable risk of harm to another, is under a duty to exercise reasonable care to prevent the threatened harm."

Due to the level of education and medical training each of the Respondents had, they knew that failing to treat a patient appropriately creates a risk of harm and as John's treating physicians they had a duty to prevent the harm. This is especially true since both physicians were intimately aware of the powerful opioid medications John was prescribed and was taking, had intimate knowledge of John's depression, sleep disturbances, extreme pain throughout his body, his mental status, and his self-advisement of addiction to the opioids. They had a duty to prevent John's death. It would be foreseeable to a physician who is required by West Virginia Statute to have training in addiction medicine that there was a risk of harm to a patient such as John Hull who was prescribed and was taking Fentanyl 100 mcg, Opana 40 mg, Oxymorphone 30 mg, and Morphine 30 mg IR on a daily basis. These medications were prescribed by Respondent Nasher.

In reaching their conclusions in *Courtney*, the West Virginia Supreme Court referred to multiple cases that proscribed a duty to individuals to prevent harm including an employer who required an employee to work very long hours and then set him loose on the highway in such a condition of profound exhaustion has potentially created a foreseeable risk of harm to others which the employer had a duty to guard against. *Robertson*, 171 W.Va. 607, 301 S.E.2d 563 at 569. This Court also applied the same reasoning in *Price* wherein the Court ruled that passengers in a motor vehicle were jointly liable with the driver for a collision with another

vehicle. The driver was intoxicated, and the passengers continued to supply him with beer and marijuana. In *Price* the Court opined that "For harm resulting to a third person form the tortious conduct of another, one is subject to liability if he...(b) knows that the other's conduct constitutes a breach of duty and give substantial assistance or encouragement to the other so to conduct himself." 177 W.Va. at 597, 355 S.E.2d at 386.

In *Courtney*, this Court ultimately ruled that they were:

> "unable to determine whether the plaintiffs can establish liability under this theory because the facts are not sufficiently developed. We do believe that the complaint states a claim for accomplice liability, and the plaintiffs should be able through discovery to develop facts to support the claim. Consequently, we find the circuit court erred in granting the motion to dismiss Count II."

Similarly, because the facts of this case was not fully developed, and the complaint sets forth facts proven through independent evidence, there exists a question whether the Respondents' relationship with John Hull created a duty to prevent John's death and thus comports with the exception outlined in *Moats* and survives the Respondents' motions to dismiss.

The only true distinction between this case and others cited herein is that John died by suicide. Had John overdosed and/or overdosed and died, the civil suit would have survived the motion to dismiss. Thus, the rulings of the Circuit Court of Kanawha County, West Virginia and the West Virginia Supreme Court violates the due process and equal protection of the West Virginia Constitution, West Virginia Statute, and the United States Constitution and therefore these rulings must be overturned.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

Ashlee R. Hull
6089 Finn Glenn Drive
Westerville, Ohio 43081

Misty Hull Adkins
83 Burnside Drive
Elkview, WV 25071

John E. Hull, Jr.,
P.O. Box 2
Cabin Creek, WV 25035

Pro Se Applicants

June 4, 2021