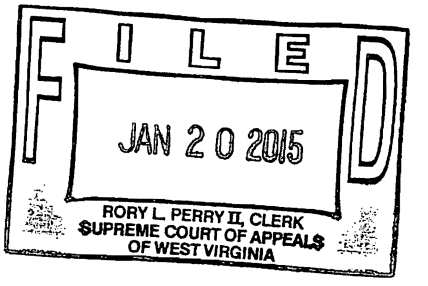
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 14-0788



L. Linda Mays,
Plaintiff Below, Petitioner

v.

Appeal from a final order of the
Circuit Court of Cabell County
Civil Action No. 13-C-124

The Marshall University
Board of Governors,
Defendant Below, Respondent

PETITIONER'S REPLY BRIEF

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Introduction

Mays will reply to Marshall's arguments in the order presented.

Argument

I. Mays can pursue her claims for breach of confidentiality and invasion of privacy against Marshall under *Tabata v. Charleston Area Medical Center, Inc.* and *Rohrbaugh v. Wal-Mart Stores, Inc.*

A. *Tabata* permitted claims for breach of confidentiality and invasion of privacy against a healthcare provider for improperly disclosing its patients' confidential information.

Marshall cites *Tabata v. Charleston Area Medical Center, Inc.*, 233 W.Va. 512, 759 S.E.2d 459 (2014), for its language noting the existence of a cause of action for a doctor's breach of confidentiality, first recognized in *Morris v. Consolidation Coal Co.*, 191 W.Va. 426, 446 S.E2d 648 (1994), but does not discuss its holdings, which mandate reversal of the circuit court's order granting Marshall's motion for summary judgment. (The parties were unable to address *Tabata* in their briefs before the circuit court because it was decided on May 28, 2014, the same day as the hearing before the circuit court on Marshall's motion for summary judgment involving Mays' claims for negligence, breach of confidentiality, and invasion of privacy.)

In *Tabata,* a putative class consisting of patients whose healthcare provider allegedly mistakenly placed their personal and medical information on the

Internet asserted claims for breach of duty of confidentiality, invasion of privacy, and negligence. The trial court found that the class representatives lacked standing to assert their claims because they failed to show that they had suffered a concrete and particularized injury that was not hypothetical or conjectural. The court also found that the representatives had failed to satisfy various provisions of W. Va. R. Civ. P. 23 dealing with commonality, typicality, and predominance of common issues of law and fact.

On appeal, the class representatives argued that the common injury they shared with the putative class is the increased risk of future identity theft. Discovery had not revealed any attempted or actual access to the patients' information, nor had the class representatives suffered any property injuries or any actual economic losses. Thus, the Court agreed with the circuit court "that the risk of future identity theft alone does not constitute injury in fact for the purpose of showing standing." *Tabata* at 517, 464.

The representatives had also asserted claims for breach of confidentiality and invasion of privacy, however. The Court noted that it had recognized a cause of action for a doctor's breach of confidentiality, holding in Syllabus Point 4 of *Morris, supra,* that "'[a] patient does have a cause of action for the breach of the duty of confidentiality against a treating physician who wrongfully divulges confidential information.'" *Tabata* at 517, 464.

The *Tabata* Court reasoned, in applying the law on standing to the breach of confidentiality claim, that "the petitioners, as patients of CAMC, have a legal interest in having their medical information kept confidential. In addition, this legal interest is concrete, particularized, and actual. When a medical professional wrongfully violates this right, it is an invasion of the patient's legally protected interest. Therefore, the petitioners and the proposed class members have standing to bring a cause of action for breach of confidentiality against the respondents." *Id.*

The Court's holding applies directly to Mays' claim for breach of confidentiality. Mays has a legal interest in having her medical information—in this case, photographs showing her naked body and identifying her by name—kept confidential. Marshall's wrongful violation of her right to confidentiality was an invasion of her legally protected interest and entitles her to recover damages.

The Court also considered the class representatives' claim for invasion of privacy and reviewed its prior holdings on that cause of action. In Syllabus Point 1 of *Roach v. Harper*, 143 W.Va. 869, 105 S.E.2d 564 (1958), the Court held that "[t]he right of privacy, including the right of an individual to be let alone and to keep secret his private communications, conversations and affairs, is a right the unwarranted invasion or violation of which gives rise to a common law right of action for damages." *Tabata* at 517, 464.

In Syllabus Point 8 of *Crump v. Beckley Newspapers, Inc.*, 173 W.Va. 699, 320 S.E.2d 70 (1984), the Court identified four ways an invasion of privacy could occur, including "(1) an unreasonable intrusion upon the seclusion of another; (2) an appropriation of another's name or likeness; (3) unreasonable publicity given to another's private life; and (4) publicity that unreasonably places another in a false light before the public." *Tabata* at *id.* The Court also noted that in Syllabus Point 2 of *Cordle v. Gen. Hugh Mercer Corp.*, 174 W.Va. 321, 325 S.E.2d 111 (1984), it held that "[i]n West Virginia, a legally protected interest in privacy is recognized." *Tabata* at *id.*

Consequently, the Court held in *Tabata* that, based on *Roach*, *Crump*, and *Cordle*, the class representatives had standing to bring a claim for invasion of privacy because they had a legal interest in their privacy that was concrete, particularized, and actual and the alleged violation of that interest gave rise to their claim.

As with Mays' claim for breach of confidentiality, the Court's holding in *Tabata* regarding the claim for invasion of privacy also applies to her. Marshall invaded Mays' privacy through its wrongful conduct and she can assert a claim against Marshall for that invasion under *Tabat*a.

B. The Court also recognized a claim for invasion of privacy in *Rohrbaugh v. Wal-Mart Stores, Inc.*

Several years before *Tabata,* however, this Court affirmed the existence of a claim for invasion of privacy in *Rohrbaugh v. Wal-Mart Stores, Inc.*, 212 W.Va. 358, 572 S.E.2d 881 (2002). In *Rohrbaugh,* a former employee sued Wal-Mart alleging that his right to privacy had been invaded by its requirement that he submit to blood and alcohol tests and also alleged that his termination from employment constituted disability discrimination and workers' compensation discrimination.

The jury determined that Wal-Mart had invaded Rohrbaugh's privacy by requiring the blood and alcohol testing, but did not award any compensatory damages, choosing instead to award punitive damages. The trial court declined to hold a hearing on the punitive damages because there was no underlying award of compensatory damages, and Rohrbaugh appealed.

1. *Rohrbaugh* specifically provided that damages for emotional distress are recoverable in a claim alleging invasion of privacy.

The Court addressed first the jury's failure to award any compensatory damages. Although Wal-Mart claimed that Rohrbaugh had failed to present any evidence of harm resulting from the invasion of privacy and therefore was not entitled to an award of damages, the Court disagreed.

The Court observed that Section 652H of the Restatement (Second) of Torts (1977) dealt with damages for invasion of privacy and provided that:

> One who has established a cause of action for invasion of his privacy is entitled to recover damages for
>
> (a) the harm to his interest in privacy resulting from the invasion;
>
> (b) his mental distress proved to have been suffered if it is of the kind that normally results from such an invasion; and
>
> (c) special damage of which the invasion is a legal cause.

212 W.Va. at 364, 572 S.E.2d at 887 (footnote omitted).

The Court reviewed the majority and minority positions regarding the Restatement's position on damages and concluded "we believe that the better rule to follow is that of allowing recovery for nominal damages when no actual injury is shown in an invasion of privacy action. We take this position for a fundamental reason. 'For every wrong there is supposed to be a remedy somewhere.' *Sanders v. Meredith*, 78 W.Va. 564, 572, 89 S.E. 733, 736 (1916) (Lynch, J., dissenting)...." *Rohrbaugh* at 364, 887.

The Court went on to say that "To permit a defendant to engage in conduct that constitutes an invasion of a plaintiff's privacy, but prevent the plaintiff from recovering damages because no compensatory damages are shown, is an illogical and unacceptable result. 'As for public policy, the strongest policy which appeals

to us is that fundamental theory of the common law that for every wrong there should be a remedy.' *Lambert v. Brewster*, 97 W.Va. 124, 138, 125 S.E.2d 244, 249 (1924)." *Rohrbaugh* at 365, 888.

Consequently, the Court held in *Rohrbaugh* that "when a plaintiff has established liability for invasion of privacy, the plaintiff is entitled to recover damages for (1) the harm to his/her interest in privacy resulting from the invasion; (2) his/her mental distress proved to have been suffered if it is of a kind that normally results from such an invasion; (3) special damages of which the invasion is a legal cause; and (4) if none of the former damages is proven, nominal compensatory damages are to be awarded." *Id.* at 366, 889 (footnotes omitted).

C. Marshall's lack of intent in causing Mays' injuries is irrelevant.

In this case, punitive damages are not an issue because under West Virginia Code § 29-12A-7(a), Mays is prohibited from recovering punitive damages against Marshall, which is a political subdivision of the State of West Virginia.

And precisely because punitive damages are unavailable and Mays is not appealing the dismissal of her claim for intentional infliction of emotional distress, Marshall's lack of intent in causing Mays' injuries is irrelevant. Throughout its brief, Marshall repeatedly refers to its good faith and its lack of intent to cause her harm. Mays is not required to prove Marshall's intent as an element of her claims,

however. Indeed, Marshall's lack of intent or its good faith does not lessen the effect of its invasion of her privacy and its breach of her confidentiality.

Also, Mays notes that the healthcare provider in *Tabata* who allegedly placed its patients' records on the Internet did so accidentally, 233 W.Va. at 515, 759 S.E.2d at 462, but that did not affect the class representatives' ability to pursue claims for breach of confidentiality, invasion of privacy, and negligence.

D. Mays has established the elements of a claim for negligence against Marshall.

Although *Tabata* does not specifically address the class representatives' claim for negligence, the Court should reverse the circuit court's dismissal of Mays' claim for negligence. The elements of a claim for negligence, as set forth in *Sewell v. Gregory*, 179 W.Va. 585, 371 S.E.2d 82 (1988)—the existence of a legal duty, the breach of that duty, and damages resulting from the breach—are present here in Marshall's obligation to maintain the confidentiality of Mays' private health information, its failure to do so, and her resulting emotional distress.

II. Mays' testimony and psychiatric diagnoses represent facts sufficient to guarantee that her claim for the negligent infliction of emotional distress is not spurious.

What a plaintiff must prove under Syllabus Point 2 of *Ricottilli v. Summersville Memorial Hospital*, 188 W.Va. 674, 425 S.E.2d 629 (1992), in order to

establish a claim for the negligent infliction of emotional distress is clear: "An individual may recover for the negligent infliction of emotional distress absent accompanying physical injury upon a showing of facts sufficient to guarantee that the emotional damages claim is not spurious."

Marshall's response is to argue that Mays' claim is spurious or at least insufficient to support her claim for the negligent infliction of emotional distress in the absence of any physical injury because Marshall lacked any intent to harm her.

But as Mays discussed in Section I.C., Marshall's lack of intent towards her is of no importance. Whether Marshall intended to harm Mays does not matter; this is a claim for the negligent, not intentional, infliction of emotional distress.

Mays has been unable to find any language explaining what a "spurious" claim is in the context of the negligent infliction of emotional distress, nor does Marshall provide any explanation. Thus, Mays relies on the ordinary meaning of "spurious." According to the online version of the Merriam-Webster Dictionary, spurious means "not genuine, sincere, or authentic."[1]

Under that definition, Mays' claim for emotional distress caused by Marshall's wrongful conduct is not spurious. Her testimony and the facts of her case demonstrate that her claim is genuine, sincere, and authentic.

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[1] http://www.merriam-webster.com/dictionary/spurious

Although Marshall focuses on the facts at issue in *Marlin v. Bill Rich Const., Inc.*, 198 W.Va. 635, 482 S.E.2d 620 (1996), what is more important for this appeal is the *Marlin* Court's elaboration on Syllabus Point 2 in *Ricottilli* that "a claim for emotional distress without an accompanying physical injury can only be successfully maintained upon a showing by the plaintiffs in such an action of facts sufficient to guarantee that the claim is not spurious **and upon a showing that the emotional distress is undoubtedly real and serious.**" 198 W.Va. at 652, 482 S.E.2d at 637 (emphasis added).

A. Under *Heldreth*, the reasonableness of Mays' reaction to Marshall's conduct is a question for the jury.

Marshall disagrees that whether Mays has established a claim for the negligent infliction of emotional distress is a jury question—despite the clear language in *Marlin*—and instead relies on language from *Heldreth v. Marrs*, 188 W.Va. 481, 425 S.E.2d 157 (1992) that is not inconsistent with Mays' position.

In *Heldreth*, the Court, quoting the Supreme Court of Washington in *Hunsley v. Giard*, 87 Wash.2d 424, 436, 553 P.2d 1096, 1103 (1976), stated that "Fear, fright or distress for the peril of another poses a troublesome problem, yet provides another safeguard against boundless liability. We decline to draw an absolute boundary around the class of persons whose peril may stimulate the mental distress. This usually will be a jury question bearing on the reasonable reaction to

the event unless the court can conclude as a matter of law that the reaction was unreasonable." *Heldreth* at 491, 167.

Mays submits that the type of ruling the *Heldreth* Court had in mind was made by the federal court in *Peters v. Small,* 413 F.Supp.2d 760 (S.D.W.Va. 2006), in which the plaintiff claimed to have experienced emotional distress as a result of witnessing the death of a stranger who was killed in the same automobile accident that injured the plaintiff. The court granted the defendant's motion *in limine* as to the plaintiff's claim for the negligent infliction of emotional distress under *Heldreth* because the plaintiff did not witness the serious injury or death of someone to whom he was closely related. That determination was properly a question of law, not of fact, which is entirely different from the situation here.

B. Because Mays' reaction was reasonably foreseeable under *Heldreth,* she can recover for the negligent infliction of emotional distress, irrespective of her underlying condition.

Marshall hardly makes a reference in its brief to Mays' emotional condition without describing it as "unique" or "uniquely severe" or "idiosyncratic"—all of which seem intended to convey the impression that Mays' reaction to the disclosure and dissemination of photographs of her naked body was extreme or beyond the bounds of what could be expected.

(Indeed, like Captain Renault, Claude Rains' character in *Casablanca*, who pronounces himself "shocked, shocked" to find that gambling is going on in Rick's bar (even as the croupier hands him his winnings), Marshall seems amazed to learn that wrongfully sending photographs of a patient's naked body to her place of employment where they were seen by her co-workers could traumatize her and produce emotional distress.)

Marshall goes to these lengths in order to argue that Mays is not a "reasonable person, normally constituted[,]" as discussed in *Heldreth*. The *Heldreth* Court stated that "we recognize that the *Paugh* [*v. Hanks*, 6 Ohio St.3d 72, 451 N.E.2d 759 (Ohio 1983)] court found that 'serious emotional distress may be found where a *reasonable person, normally constituted*, would be unable to cope adequately with the mental distress engendered by the circumstances of the case.'" *Heldreth* at 166, 490 (quoting *Paugh*, 451 N.E.2d at 765 (citations omitted) (emphasis in original)). The Court went on to say that "A 'reasonable person' in this context, has been found to be an 'ordinarily sensitive person and not the supersensitive "eggshell psyche" plaintiff." *Heldreth* at *id.* (quoting *Salley v. Childs*, 541A.2d 1297, 1300 n. 4 (Me. 1988)).

The Court in *Heldreth* then quoted the Supreme Judicial Court of Maine's explanation in *Theriault v. Swan*, 558 A.2d 369 (Me. 1989), of what a plaintiff must demonstrate regarding the "ordinarily sensitive person":

> In order to recover for either negligent or reckless infliction of emotional distress, a plaintiff must demonstrate that the harm alleged reasonably could have been expected to befall the ordinarily sensitive person. *Gammon v. Osteopathic Hospital of Maine, Inc.*, 534 A.2d 1282, 1285 (Me.1987). When the harm reasonably could affect only the hurt feelings of the supersensitive plaintiff-the eggshell psyche-there is no entitlement to recovery. *Id.* If, however, the harm reasonably could have been expected to befall the ordinarily sensitive person, the tortfeasor must take his victim as he finds her, extraordinarily sensitive or not. *Restatement (Second) of Torts* § 461 (1975).

Heldreth at 167, 491 (quoting *Theriault* at 372).

Perhaps the clearest explanation of when a plaintiff can recover for the negligent infliction of emotional distress is found in *Gammon v. Osteopathic Hospital of Maine, Inc.*, 534 A.2d 1282 (Me. 1987), cited by the Court in *Theriault*, in which the Supreme Judicial Court of Maine stated that "We do not provide compensation for the hurt feelings of the supersensitive plaintiff-the eggshell psyche. A defendant is bound to foresee psychic harm only when such harm reasonably could be expected to befall the ordinarily sensitive person." *Id.* at 1285.

Here, because the harm alleged reasonably could have been expected to befall the ordinarily sensitive person, Marshall must take Mays as it finds her, regardless of her underlying condition—or, in the words of the *Theriault* Court interpreting the Restatement (Second) of Torts § 461 (1975), "extraordinarily sensitive or not." *Heldreth* at 167, 491 (quoting *Theriault* at 372).

III. A reversal of either or both of the circuit court's orders dismissing Mays' claims necessarily also reverses the order granting the motion *in limine* so that Mays can introduce evidence to the extent permitted by this Court's ruling.

If the Court determines that Mays can pursue any or all of her claims against Marshall, any ruling in her favor should also reverse the circuit court's order granting Marshall's motion *in limine* so that she can introduce evidence at trial consistent with the Court's order.

Conclusion

This Court stated in *Rohrbaugh* (quoting *Sanders v. Meredith*) that "For every wrong there is supposed to be a remedy somewhere." For Mays, that remedy is the reversal of the circuit court's orders granting Marshall's motions for summary judgment and *in limine* and for partial summary judgment.

Tabata and *Rohrbaugh* establish unquestionably that Mays can bring claims for breach of confidentiality and invasion of privacy against Marshall. Accordingly, the Court should reverse the circuit court's order granting Marshall's motion for summary judgment on Mays' claims.

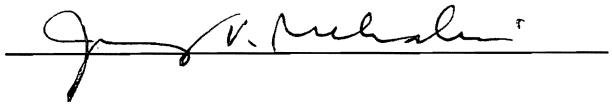
Mays can also bring a claim for negligent infliction of emotional distress because her emotional distress resulting from Marshall's conduct is real and serious and is properly a jury question, not a question of law as the circuit court

ruled. And because Mays' reaction reasonably could be expected to befall her, Marshall must take her as it finds her and cannot rely on mischaracterizations of her underlying condition.

Finally, if the Court reverses either or both of the circuit court's orders dismissing Mays' claims, its ruling should also reverse the order granting Marshall's motion *in limine*, so that Mays can introduce evidence to the extent permitted by this Court's ruling.

WHEREFORE, Petitioner L. Linda Mays prays that this Honorable Court reverse the May 23, 2014 and July 15, 2014 orders of the Circuit Court of Cabell County and remand this action to that court for further proceedings, and grant any other relief the Court deems just and proper.

L. LINDA MAYS
By Counsel



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Docket No. 14-0788

L. Linda Mays,
Plaintiff Below, Petitioner

v.

Appeal from a final order of the Circuit Court of Cabell County Civil Action No. 13-C-124

The Marshall University Board of Governors,
Defendant Below, Respondent

CERTIFICATE OF SERVICE

I, Jeffrey V. Mehalic, hereby certify that on this 20th day of January, 2015, I served the foregoing **PETITIONER'S REPLY BRIEF** upon the following counsel of record by electronic mail and/or facsimile and/or depositing a true copy thereof in the United States mail, postage prepaid, addressed to them at their last known office address as listed below:

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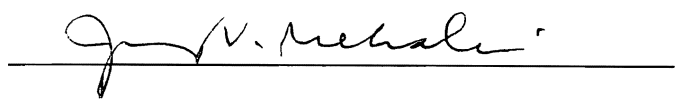

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