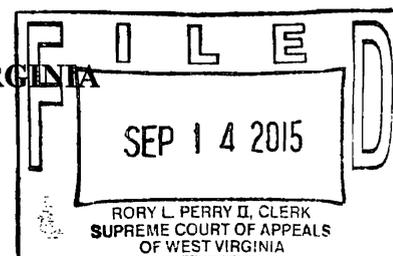


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
NO. 15-0553



**Wanda Williams, Individually and on behalf  
of the Estate and Wrongful Death Beneficiaries  
of Robert Thompson,**

**PETITIONER / PLAINTIFF BELOW**

v.

On Appeal from Nicholas County  
Civil Action No. 13-C-92

**CMO Management, LLC;  
(as to Nicholas County Nursing & Rehabilitation)  
Defendant Below**

**RESPONDENT / DEFENDANT BELOW**

---

**PETITIONER'S BRIEF**

---

**McHUGH FULLER LAW GROUP, PLLC**

James B. McHugh, WV Bar No. 10350

jim@mchughfuller.com

Michael J. Fuller, Jr., WV Bar No. 10150<sup>1</sup>

mike@mchughfuller.com

D. Bryant Chaffin, WV Bar No. 11069

bryant@mchughfuller.com

Amy J. Quezon, WV Bar No. 11036

amy@mchughfuller.com

A. Lance Reins, WV Bar No. 11548

lance@mchughfuller.com

97 Elias Whiddon Rd.

Hattiesburg, MS 39402

Phone: 601-261-2220

Facsimile: 601-261-2481

*Counsel for Petitioner / Plaintiff*

---

<sup>1</sup> Counsel of Record pursuant to W. Va. R. App. P. 3(a).

**TABLE OF CONTENTS**

**Table of Contents.....i**

**Table of Authorities.....iii**

**Cases.....iii**

**Statutes and Other Authorities.....iv**

**Assignments of Error.....1**

**Statement of the Case.....1**

**Summary of Argument.....3**

**Statement Regarding Oral Argument and Decision.....6**

**Standard of Review.....6**

**Argument.....7**

**I.    THE TRIAL COURT ERRED IN IMPROPERLY APPLYING THE  
      STATUTE OF LIMITATIONS IN THIS MATTER.....7**

**A.    THE TRIAL COURT ERRED IN FAILING TO APPLY THE  
          DISCOVERY RULE.....7**

**B.    THE LOWER COURT INCORRECTLY APPLIED THE STATUTE  
          OF LIMITATIONS AS THOUGH THE MPLA APPLIED TO ALL  
          OF PETITIONER’S CLAIMS.....10**

**C.    BECAUSE ROBERT THOMPSON WAS AN INCOMPETENT,  
          VULNERABLE ADULT AND DID NOT HAVE A LEGAL  
          GUARDIAN, ANY STATUTE OF LIMITATIONS APPLICABLE  
          TO HIM WAS TOLLED BASED ON HIS MENTAL INCAPACITY  
          AND THE DISCOVERY RULE.....12**

**D.    THE TRIAL COURT ERRED IN RELYING UPON *MARTIN* IN A  
          MANNER THAT CONTRADICTED PUBLISHED, CONTROLLING  
          CASE LAW ON THIS ISSUE.....13**

**II. THE TRIAL COURT ERRED IN DENYING THE ADMISSION OF SURVEYS, FROM OUTSIDE OF THE MEDICAL PROFESSIONAL LIABILITY ACT STATUTE OF LIMITATIONS PERIOD, AS THESE SURVEYS SHOWED THE RESPONDENT HAD NOTICE AND KNOWLEDGE THE SURVEYS' PROBATIVE VALUE OUTWEIGHED ANY POTENTIAL PREJUDICIAL EFFECT.....14**

**III. THE TRIAL COURT ERRED IN ALLOWING RESPONDENT'S EXPERT, DR. VINCENT DELAGARZA, TO PROVIDE UNRELATED, IRRELEVANT TESTIMONY ALONG WITH THE ADMISSION OF A DEMONSTRATIVE AID THAT LACKED PROPER FOUNDATION.....18**

**A. TESTIMONY REGARDING "ONE OF HIS PATIENTS".....19**

**B. THE POSEY VEST.....20**

**Conclusion.....21**

**Certificate of Service.....22**

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page #</u>
<i>Andrews v. Reynolds Mem'l Hosp., Inc.</i> , 201 W.Va. 624, 499 S.E.2d 846 (1997).....	7
<i>Blankenship v. Ethicon, Inc.</i> , 221 W. Va. 700, 656 S.E.2d 451 (2007).....	10, 11
<i>Boggs v. Camden-Clark Memorial Hospital Corp.</i> , 216 W.Va. 656, 609 S.E.2d 917 (2004).....	11
<i>Boyd v. Goffoli</i> , 216 W.Va. 552 (W. Va. 2004).....	5, 18
<i>Burke-Parsons-Bowlby Corp. v. Rice</i> , 230 W. Va. 105, 736 S.E.2d 338, 339 (2012).....	6
<i>Davis v. Celotex Corp.</i> , 187 W. Va. 566, 575 (W. Va. 1992).....	17
<i>Donley v. Bracken</i> , 192 W.Va. 383, 387 (W. Va. 1994).....	12, 13
<i>Dunn v. Rockwell</i> , 225 W.Va. 43, 51 (W.Va. 2009).....	8
<i>Gaither v. City Hosp. Inc.</i> , 199 W.Va. 706 (W.Va. 1997).....	7, 8, 10
<i>Garnes v. Fleming Landfill, Inc.</i> , 186 W. Va. 656, 413 S.E.2d 897 (1991).....	5, 17, 18
<i>Gunthorpe v. Daniels</i> , 257 S.E.2d 199 (Ga. 1979).....	18
<i>In re State Public Building Asbestos Litigation</i> , 193 W. Va. 119, 454 S.E.2d 413 (1994).....	6
<i>Huddleston v. U.S.</i> , 485 U.S. 681, 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988).....	17
<i>Jones v. Singer Mfg. Co.</i> , 38 W. Va. 147, 18 S.E. 478 (1893).....	19
<i>Mack-Evans v. Hilltop Healthcare Center, Inc.</i> , 226 W.Va. 257 (W.Va. 2010).....	9, 10, 13, 14
<i>Manor Care, Inc. v. Douglas</i> , 234 W. Va. 57, 763 S.E.2d 73 (2014).....	10, 11, 16
<i>Martin v. Charleston Area Medical Center, Inc.</i> , No. 12-0710, 2013 WL 2157698 (May 17, 2013).....	7, 8, 13, 14
<i>Martin v. Naik</i> , 228 P.3d 1092 (2010).....	9, 14
<i>Pacific Mutual Life Insurance Co. v. Haslip</i> , 499 U.S. 1, 111 S.Ct. 1032 (1991).....	17
<i>Pendleton v. Norfolk &amp; W. Ry. Co.</i> , 95 S.E. 941 (W.Va. 1918).....	17
<i>Perrine v. E.I. DuPont de Nemours</i> , 225 W. Va. 482, 694 S.E.2d 815 (2010).....	5, 18

<i>Sanders v. Georgia–Pac. Corp.</i> , 159 W.Va. 621, 225 S.E.2d 218 (1976).....	7
<i>Stafford v. Rocky Hollow Coal Co.</i> , 482 S.E.2d 210 (W.Va. 1996).....	16
<i>State ex rel. AMFM, LLC v. King</i> , 230 W. Va. 471, 480, 740 S.E.2d 66, 75 (2013).....	3, 9
<i>State ex rel. Tinsman v. Hott</i> , 424 S.E.2d 584 (W.Va. 1992).....	16
<i>State v. McKinley</i> , 234 W. Va. 143, 764 S.E.2d 303 (2014).....	14
<i>Tennant v. Marion Health Care Found., Inc.</i> , 194 W.Va. 97, 459 S.E.2d 374 (1995).....	6, 7
<i>TXO Prod. Corp. v. Alliance Resources Corp.</i> , 187 W. Va. 457, 419 S.E.2d 870 (1992).....	17
<i>Williams v. Charleston Area Medical Center, Inc.</i> , 215 W.Va. 15, 592 S.E.2d 794 (2003).....	7
<i>Worley v. Beckley Mechanical, Inc.</i> , 220 W.Va. 633, 638 (W. Va. 2007).....	12

**Statutes**

W. VA. Code §55-2-15.....	3, 12, 13
W. Va. Code § 55-7B-1.....	11
W.Va. Code § 55-7B-2.....	10

**Rules**

W. Va. Civil Procedure Rule 105.....	17
W. Va. R. Evid. 404.....	16

## ASSIGNMENTS OF ERROR

- I. **THE TRIAL COURT ERRED IN IMPROPERLY APPLYING THE STATUTE OF LIMITATIONS IN THIS MATTER.**
  
- II. **THE TRIAL COURT ERRED IN DENYING THE ADMISSION OF SURVEYS, FROM OUTSIDE OF THE MEDICAL PROFESSIONAL LIABILITY ACT STATUTE OF LIMITATIONS PERIOD, AS THESE SURVEYS SHOWED THE RESPONDENT HAD NOTICE AND KNOWLEDGE THE SURVEYS' PROBATIVE VALUE OUTWEIGHED ANY POTENTIAL PREJUDICIAL EFFECT**
  
- III. **THE TRIAL COURT ERRED IN ALLOWING RESPONDENT'S EXPERT, DR. VINCENT DELAGARZA, TO PROVIDE UNRELATED, IRRELEVANT TESTIMONY ALONG WITH THE ADMISSION OF A DEMONSTRATIVE AID THAT LACKED PROPER FOUNDATION**

## STATEMENT OF THE CASE

This matter arises from injuries suffered by Robert Thompson, an incompetent, vulnerable adult, during his residency at Nicholas County Nursing & Rehabilitation, a facility owned, operated, and managed by CMO Management, LLC from on or about June 14, 2001 through on or about June 27, 2011. App. 8-70. At trial, the evidence showed that while a resident at Nicholas County Nursing & Rehabilitation, Robert Thompson suffered numerous injuries including falls, subdural hematoma, hip fracture, malnutrition, violations of his personal dignity, extreme and unnecessary pain, and ultimately death. App. 1221-1497. As a result, Petitioner/Plaintiff below ("Petitioner") filed this action in the Circuit Court of Nicholas County on June 18, 2013, alleging that Robert Thompson's injuries and death were the result of neglect and abuse at the hands of Nicholas County Nursing & Rehabilitation. App. 1, 8-70. She alleged systemic problems regarding staffing, budgeting and allocation of resources, inappropriate policies and procedures, among other failures, and sought to recover for Robert Thompson's injuries from 2009 until his death on July 2, 2011. *Id.* at 8-70.

Respondent/Defendant CMO Management, LLC (“Respondent”) filed a Motion for Summary Judgment for Failure to Meet the Applicable Statute of Limitations Regarding Claims Accrued Prior to April 19, 2011. App. 555-564. In its motion, Respondent argued that the Medical Professional Liability Act (“MPLA”) applied to all of Petitioner’s claims, such that the two year statute of limitations found in the MPLA barred any of Petitioner’s claims that accrued prior to April 19, 2011. *Id.* Following a hearing, the trial court held that the MPLA’s statute of limitations applied and was not tolled despite Mr. Thompson’s stipulated incompetency and the discovery rule. App. 578-580. As a result, approximately two years of Mr. Thompson’s residency and the injuries that occurred during those years were eliminated from presentation to the jury at trial. Petitioner filed a Petition for Writ of Prohibition and attempted to stay the trial of this matter, but the requested relief was denied. App. 583-657, 2760. This matter proceeded to trial with jury selection beginning on Tuesday, October 21, 2014, and trial continuing through October 28, 2014. During trial, due to the trial court’s ruling on the statute of limitations, Petitioner was limited to presenting evidence from only the last few months of Mr. Thompson’s residency.

Following deliberations, the jury returned its verdict for the Petitioner finding that 25% of Respondent’s negligence and/or violations of the standard of care were non-medical negligence, such as inadequate staffing or training, and 75% was medical negligence. App. 718-722. The jury awarded \$10,000 for damages suffered by Robert Thompson and \$90,000 for damages suffered by the Estate of Robert Thompson. *Id.* at 720. Petitioner filed a timely Motion for New Trial, which the trial court denied. App. 728-730, 926-935.

The Circuit Court of Nicholas County deprived the Petitioner of a fair and complete trial for the following reasons:

- By improperly applying the MPLA's two year statute of limitation for an incompetent individual,
- By improperly limiting evidence of notice and knowledge based on an inapplicable statute of limitations, and
- By improperly admitting testimony and evidence through Respondent's expert witness

As set forth herein, the trial court committed reversible error requiring the retrial of this case.

### **SUMMARY OF ARGUMENT**

The trial court committed fundamental errors in the trial of this matter that are contrary to longstanding West Virginia precedent. Because Robert Thompson was an incompetent, vulnerable adult and did not have a legal guardian capable of protecting and asserting his legal rights, any statute of limitations applicable to him should have been tolled based on his mental incapacity and pursuant to the discovery rule in this State. By failing to apply the general savings statute for persons under a disability, West Virginia Code §55-2-15, the trial court improperly eliminated Petitioner's claims for Robert Thompson's injuries that accrued during the majority of his residency at Respondent's nursing facility.

Specifically, the trial court erred in determining that the general savings provision, W. Va. Code §55-2-15, was inapplicable where a medical power of attorney purportedly existed, despite the fact that this Court has held that a medical power of attorney, much like a health care surrogate, only has the authority to make "health care decisions" on behalf of an incapacitated person. *State ex rel. AMFM, LLC v. King*, 230 W. Va. 471, 480, 740 S.E.2d 66, 75 (2013). A medical power of attorney does not qualify as a "legal representative" that can bring suit on behalf of an incapacitated individual. *Id.* at fn. 9.

Further, the trial court erred in strictly construing the MPLA statute of limitations and determining that it applied to all of Petitioner's claims in this matter, prior to hearing testimony

or seeing evidence from the earlier portion of Mr. Thompson's residency. This was inconsistent with later rulings where the trial court recognized that the entire matter was not medical malpractice as evidenced by its instructions to the jury and the verdict form. Notably, the jury was allowed to determine what percentage of Respondents' negligence was medical and non-medical based upon the evidence, finding that 25% of Respondent's negligence and/or violations of the standard of care were non-medical negligence. App. 720.

The trial court also erred in prohibiting the introduction of significant evidence of conduct and injuries that occurred during Mr. Thompson's residency, but outside of the improperly applied MPLA's statute of limitations. For example, state inspections or "surveys" were conducted during Mr. Thompson's residency at Respondent's facility but outside of the statute of limitations period applied by the trial court. App. 2070-2123. The jury should have been allowed to consider this evidence, regardless of the trial court's ruling on the applicable statute of limitations because Respondent's facility was cited for care issues that were directly at issue in this case and such evidence would have further supported Petitioner's claims that not only did the facility fail to provide adequate care and supervision to Robert Thompson, but the owners, operators, and managers had notice and knowledge of similar problems within its facility before Mr. Thompson was injured. The surveys also showed an absence of mistake regarding the conditions that existed at the facility during Robert Thompson's residency. *Id.* Petitioner should have been allowed to provide evidence that Respondent's failures were not merely mistakes, but rather that Respondent knew of these conditions during Robert Thompson's residency because it had been specifically informed by the State of West Virginia that the care that it was providing to its residents was substandard and was likely to result in harm to its residents.

In addition to supporting Petitioner's claims for compensatory damages, the surveys at

issue should have been admitted as evidence relevant to Plaintiff's claims for punitive damages. The conduct contained in the surveys is sufficiently similar to the conduct at issue here to warrant admission. *Id.* These surveys are evidence that Respondent was aware of its conduct and how long the conduct had been committed, both of which are reprehensibility factors set forth in this Court's decisions in *Boyd v. Goffoli*, 216 W.Va. 552 (W. Va. 2004), *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991), and *Perrine v. E.I. DuPont de Nemours*, 225 W. Va. 482, 694 S.E.2d 815 (2010). These factors are relevant because evidence showing a) that the Respondent knew that its alleged conduct would likely result in injury to the Petitioner, b) that such carelessness on its part had resulted in similar injuries to others in the past, yet c) Respondent continued in this course of conduct, has a legitimate tendency to show that the Respondent acted with conscious or reckless disregard.

Other evidence related to both compensatory and punitive damages was also excluded by the trial court due to its ruling on the statute of limitations. Such evidence would have included expert testimony related to other repeated falls Mr. Thompson suffered, occurring on September 4, 2009, June 10, 2010, June 15, 2010, and August 15, 2010, as well as injuries including skin tears, bruises, respiratory tract issues with aspiration, and problems with nutrition and hydration. Deposition of Plaintiff's expert, Dr. Loren Lipson, at pp. 33, 86-90; App. 2276, 2329-2333. This evidence also would have included the testimony of Defendant's own employees, such as Amanda Adkins, who was prepared to testify that Defendant purposely increased the amount of staff or "staffed up" for state surveys prior to the statute of limitations limited time frame allowed by the trial court. *See* Trial Transcript at Day 5, pp. 32-35; App. 1916-1919. Thus, the trial court's decision regarding the statute of limitations prohibited Petitioner from presenting all of the necessary evidence to the jury and for the trial court itself to make an accurate determination regarding both compensatory and punitive damages.

Finally, the trial court committed additional errors in allowing Respondent's expert, Dr. Vincent DeLaGarza, over the objection of the Petitioner, to offer unrelated, irrelevant testimony as well as exhibit a demonstrative aid that lacked proper foundation. App. 2780-2781. As such, Dr. DeLaGarza's testimony improperly influenced and prejudiced the jury. Despite the trial court agreeing with Petitioner's counsel and instructing Dr. DeLaGarza, his improper testimony continued. Dr. DeLaGarza was also allowed to testify and demonstrate a restraint device that had not previously been mentioned by any other expert or fact witness and lacked any foundation related to Mr. Thompson or Respondents' facility. App. 2804-2807, 2830-2834.

Each of these errors in and of themselves are sufficient to warrant a new trial in this matter. The cumulative effect of all of these errors requires a new trial.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

Petitioner requests Rule 20 argument in light of the length of the trial, the volume of the evidence, and the subtle nuances and distinctions that must be made in response to the arguments set forth by Respondents.

#### **STANDARD OF REVIEW**

This Court reviews the trial court's ruling on a motion for a new trial using an abuse of discretion standard. *Burke-Parsons-Bowlby Corp. v. Rice*, 230 W. Va. 105, 736 S.E.2d 338, 339 (2012). This Court has explained that in regard to its standard for reviewing a circuit court's ruling on a motion for a new trial:

[a]s a general proposition, we review a circuit court's rulings on a motion for a new trial under an abuse of discretion standard. *In re State Public Building Asbestos Litigation*, 193 W. Va. 119, 454 S.E.2d 413 (1994).... Thus, in reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a de novo review." *Tennant v. Marion Health Care Found., Inc.*,

194 W.Va. 97, 104, 459 S.E.2d 374, 381 (1995). Furthermore, “[a]lthough the ruling of a trial court in granting or denying a motion for a new trial is entitled to great respect and weight, the trial court's ruling will be reversed on appeal when it is clear that the trial court has acted under some misapprehension of the law or the evidence.” *Andrews v. Reynolds Mem’l Hosp., Inc.*, 201 W.Va. 624, 630, 499 S.E.2d 846, 852 (1997) (quoting Syl. pt. 4, *Sanders v. Georgia–Pac. Corp.*, 159 W.Va. 621, 225 S.E.2d 218 (1976)).

*Williams v. Charleston Area Medical Center, Inc.*, 215 W. Va. 15, 18, 592 S.E.2d 794, 797 (2003) (citations in original).

## ARGUMENT

### **I. The trial court erred in improperly applying the statute of limitations in this matter.**

The trial court erred in granting Respondent’s Motion for Summary Judgment for Failure to meet the Applicable Statute of Limitations Regarding Claims Accrued Prior to April 19, 2011 for multiple reasons. App. 555-564. The trial court erred in failing to apply the discovery rule in this case, a well-settled legal theory designed to avoid the type of injustice at issue here, namely the running of a statute of limitations, against an injured individual who lacked the mental competency to protect himself by asserting his own claims. Further, the trial court erred by finding that all of Petitioner’s claims were subject to the MPLA, in contradiction of a recent decision by this Court on this matter. Finally, the trial court erred in relying upon a memorandum opinion instead of published, controlling decisions of this Court.

#### **A. The trial court erred in failing to apply the discovery rule.**

This Court explained in *Martin v. Charleston Area Medical Center, Inc.*, No. 12-0710, 2013 WL 2157698 (May 17, 2013) that “adults alleging a medical professional liability action under the MPLA have a two-year statute of limitations, *except in cases where discovery is an issue.*” *Martin v. Charleston Area Medical Center, Inc.*, No. 12-0710, 2013 WL 2157698 (May 17, 2013)(emphasis added). Under the discovery rule, a statute of limitations is tolled until a claimant knows or by reasonable diligence should know of his claim. *See* Syl. Pt. 4, *Gaither v.*

*City Hosp. Inc.*, 199 W.Va. 706 (W.Va. 1997). Specifically, this Court explained that “the discovery rule should be applied to determine when the statute of limitation began to run by determining when the plaintiff knew or by the exercise of reasonable diligence should have known of the elements of a possible cause of action.” *Id.* “The discovery rule is generally applicable to all torts, unless there is a statutory prohibition to its application.” *Dunn v. Rockwell*, 225 W.Va. 43, 51 (W.Va. 2009).

In *Martin*, this Court did not apply the discovery rule specifically because the incompetent plaintiff in that case had a legal representative. *Martin, supra*, at fn. 3 (“The discovery rule was inapplicable to his case because petitioners do not contest that Mrs. Martin, as her husband’s legal representative, was aware of the ulcers Mr. Martin obtained during his hospital stay”). Thus, there was a person with awareness of the incompetent plaintiff’s injuries and the legal authority to act on his behalf such that through reasonable diligence the claims could have been discovered.

Application of the discovery rule in this case, which *Martin* does not prohibit, tolls any statute of limitations applicable to Robert Thompson, even if the two-year limitations period found in the MPLA is applied to all of Petitioner’s claims. Robert Thompson, as Respondent’s counsel admitted and agreed to at the pre-trial hearing, was incompetent and therefore incapable of discovering his claim. App. 957-958. He could not have known, through any exercise of reasonable diligence, of the elements of a possible cause of action. Further, Robert Thompson *did not* have a legal representative to act on his behalf, unlike the plaintiff in *Martin*. There was no one to discover his cause of action and assert his rights during his incompetency.

Respondent asserted to the trial court that Mr. Thompson had a medical power of

attorney that served as his legal representative.<sup>2</sup> App. 2066-67. However, a medical power of attorney does not have the authority to act as his legal representative. In *State ex rel. AMFM, LLC v. King*, 230 W. Va. 471, 740 S.E.2d 66 (2013), this Court clarified that a medical power of attorney does not qualify as a “legal representative” who can waive the right to a lawsuit on another’s behalf. See *King, supra*, at fn. 9 (“Furthermore, the foregoing analysis applies with equal force to a person who has been appointed as a medical power of attorney for an incapacitated person because a medical power of attorney is the functional equivalent of a health care surrogate. In other words, both a medical power of attorney and a health care surrogate have, as their *sole function*, the authority to make *health care decisions* on behalf of an incapacitated person.”) (emphasis added). Pursuant to this definition, a medical power of attorney does not qualify as a “legal representative” who could bring a suit on another’s behalf.

Thus, *King* supports Petitioner’s argument that Mr. Thompson had no “legal representative” who could have initiated legal action. As an incompetent adult with no legal representative to assert his rights, any statute of limitations could not commence until after his death. See *Mack-Evans v. Hilltop Healthcare Center, Inc.*, 226 W.Va. 257, 267 (W.Va. 2010) (citing *Martin v. Naik*, 228 P.3d 1092, 1099-1100 (2010)) (“[B]ecause [the decedent] could not reasonably ascertain the facts of his injury, his medical malpractice claim...did not accrue so as to start the statute of limitations clock running until his death, so the 2-year limitation period...did not commence to run at any time during the period of [decedent’s] incapacity.”). Accordingly, the discovery of Robert Thompson’s injuries was an “issue,” and even under *Martin* the strict two year statute of limitations found in the MPLA should not have been applied to Petitioner’s claims.

---

<sup>2</sup> Petitioner notes that while there was testimony that a medical power of attorney for Mr. Thompson existed, neither party has made such document part of the record.

According to *Hilltop* and *Gaither v. City Hosp. Inc.*, 199 W.Va. 706, Syl. Pt. 4 (W.Va. 1997), because Robert Thompson could not have discovered his injuries and the disability of his incompetency was not removed prior to his death, the statute of limitations would have been tolled until his death on July 2, 2011. Therefore, the trial court erred, exceeding its legitimate authority, by dismissing all of Petitioner's claims arising prior to April 19, 2011. As Petitioner was improperly and prejudicially kept from offering significant evidence regarding these claims, this Court should reverse the trial court's decision and remand this matter for a new trial.

**B. The lower court incorrectly applied the statute of limitations as though the MPLA applied to all of Petitioner's claims.**

According to W.Va. Code § 55-7B-2 and this Court, the MPLA is *only* applicable to a cause of action based on the provision of "health care services" by a "health care provider." See *Blankenship v. Ethicon, Inc.*, 221 W.Va. 700, 707-08 (2007). The MPLA does not apply to contemporaneous or related claims that do not involve "health care." *Id.* The MPLA defines "health care" as "any act or treatment performed or furnished, or which should have been performed or furnished, by any health care provider for, to or on behalf of a patient during the patient's medical care, treatment or confinement." W. Va. Code § 55-7B-2(e).

This Court recently considered the question presented here, namely whether the MPLA is the exclusive remedy for a plaintiff's claims in a nursing home setting. After examining a complaint similar to that filed by Petitioner in this matter, this Court, in *Manor Care, Inc. v. Douglas*, 234 W. Va. 57, 763 S.E.2d 73 (2014), found that claims of both ordinary and medical negligence can exist in a nursing home setting and that the MPLA need not be applied exclusively. The *Douglas* decision notes that through the MPLA "the Legislature has granted special protection to medical professionals, while they are acting as such. This protection does not extend to intentional torts or acts outside the scope of 'health care services.'" *Id.* (citing

*Boggs v. Camden-Clark Memorial Hospital Corp.*, 216 W.Va. 656 (W. Va. 2004)). Thus, in order to qualify for the protections of the MPLA, a defendant must both be a “health care provider” and the claim must arise from the rendition of “health care services.” For example, as this Court held in *Douglas*, “claims related to business decisions, such as proper budgeting and staffing by entities that do not qualify as health care providers under the MPLA simply do not fall within that statutory scheme.” *Douglas*, 763 S.E.2d at 91.

Contrary to this decision, the trial court’s Order of October 10, 2014 subjected the entirety of Petitioner’s Complaint to the MPLA’s limitations.<sup>3</sup> App. 571-582. This was clear error based on *Douglas*. The determination of what claims fall under the MPLA is a fact based determination that had not yet been concluded when the October 10, 2014 Order was entered. *See Douglas*, at 74 (“[W]hile the applicability of the [Medical Professional Liability Act, W. Va.Code § 55-7B-1 et seq.,] is based upon the facts of a given case, the determination of whether a particular cause of action is governed by the [Act] is a legal question to be decided by the trial court.”), citing *Blankenship*, 221 W.Va. at 706 n. 12, 656 S.E.2d at 457 n. 12. The trial court was aware of the fact based nature of this determination, as evidenced by its decision to hold in abeyance the “cap” portion of the MPLA noting that “the decision will depend largely on the evidence presented by the Petitioner and developed at trial.” *Id.* at 577. The trial court’s decision to take this issue under advisement pending the close of Petitioner’s case at trial highlights its improper decision to strictly apply the MPLA statute of limitations in its Order of October 10, 2014.

This decision was not only internally contradictory but incorrect pursuant to applicable case law in this state. The trial court inappropriately subjected the entirety of Petitioner’s action

---

<sup>3</sup> As argued above, even if the MPLA applied to all of Petitioner’s claims, the applicable statute of limitations should have been tolled due to the stipulated incompetency of Mr. Thompson and the lack of a legal representative capable of bringing claims on his behalf in a court of law.

to the MPLA, wholly disregarding her allegations and the nature of her claims. Importantly, once the evidence was ultimately presented, the jury found that 25% of Respondent's negligence and/or violation of the standard of care was non-medical negligence, such as inadequate staffing or inadequate training, and this conduct would not have been limited by the inappropriately applied MPLA statute of limitations. App. 718-722. This verdict was made without the jury having the opportunity to hear testimony and evidence regarding earlier portions of Robert Thompson's residency at Respondent's facility, which were improperly excluded based on an inapplicable statute of limitations.

**C. Because Robert Thompson was an incompetent, vulnerable adult and did not have a legal guardian, any statute of limitations applicable to him was tolled based on his mental incapacity and the discovery rule.**

Even if the MPLA did apply to all of Petitioner's claims, by statute, West Virginia does not allow a statute of limitations to run against an unrepresented incompetent person. Rather,

[i]f any person to whom the right accrues to bring any such personal action, suit or scire facias, or any such bill to repeal a grant, shall be, at the time the same accrues, an infant or insane, the same may be brought within the like number of years after his becoming of full age or sane that is allowed to a person having no such impediment to bring the same after the right accrues, or after such acknowledgment as is mentioned in section eight of this article, except that it shall in no case be brought after twenty years from the time when the right accrues.

W. Va. Code § 55-2-15. "The general purpose of W. Va. Code § 55-2-15 is to toll the commencement of the running of the statute of limitations so that the legal rights of infants and the mentally ill may be protected." *Worley v. Beckley Mechanical, Inc.*, 220 W.Va. 633, 638 (W. Va. 2007). This Court has explained that this general savings statute is designed to protect "some of the weakest and most vulnerable people who, because they are unwilling victims of a terrible illness are temporarily incapable of asserting their rights in court." *Id.* at 639. Further, this Court has explained that W. Va. Code § 55-2-15 is clear on its face, tolling the statute of limitations "to those plaintiffs suffering from disabilities such as infancy or incompetency." *Donley v. Bracken*,

192 W.Va. 383, 387 (W. Va. 1994). “In cases where the disability has not been cured earlier, the plaintiff has twenty years from the date the cause of action ‘accrued’ to bring the lawsuit.” *Id.*

Here, the parties *stipulated* that Robert Thompson was incompetent. App. 957-958. Thus, the general savings provision of W. Va. Code § 55-2-15 was triggered to toll any statute of limitations relevant to him, easily allowing the inclusion of Petitioner’s claims regarding Robert Thompson’s injuries accruing from 2009 until his death in 2011. Yet the trial court inexplicably excluded evidence related to the majority of that time period.

The trial court erred in concluding that Petitioner’s claims from 2009 until April 18, 2011, were not subject to the general savings provision of W.Va. Code § 55-2-15, finding instead that the MPLA applied to all of Petitioner’s claims before the evidence had been presented. App. 571-582. The trial court’s conclusion that the statute of limitations found within the MPLA must be strictly applied in a way that does not allow tolling for Petitioner’s mental incapacity was clearly erroneous as the MPLA is not the exclusive remedy available to Petitioner, and the trial court relied on a memorandum opinion in contradiction with published, controlling case law on this issue.

**D. The trial court erred in relying upon *Martin* in a manner that contradicted published, controlling case law on this issue.**

Respondent argued and the trial court relied upon the proposition that this Court’s decision in *Martin, supra* holds that the general savings statute does not apply to a medical professional liability action under the MPLA. App. 578-580. The trial court found that *Martin* does not allow for the statute of limitations in a medical professional liability action to be tolled by an individual’s mental incapacity under any circumstances. *Id.*

This finding was clearly erroneous as it disregards the controlling decision in *Mack-Evans v. Hilltop Healthcare Center, Inc.*, 226 W.Va. 257 (W.Va. 2010), argued by Petitioner at

the hearing on this issue. App. 955-956. In *Hilltop*, this Court held that the statute of limitations for personal injury claims is tolled during the period of mental disability. *Hilltop*, 226 W. Va. at 267. “[B]ecause [the decedent] could not reasonably ascertain the facts of his injury, his medical malpractice claim...did not accrue so as to start the statute of limitations clock running until his death, so the 2-year limitation period...did not commence to run at any time during the period of [decedent’s] incapacity.” *Id.* (citing *Martin v. Naik*, 228 P.3d 1092, 1099-1100 (2010)). Accordingly, this Court decided “the rule to be that where a statute of limitation is tolled because of incompetency, the tolling of the statute ends upon the death of the incompetent.” *Id.* at 267. In contrast, the trial court found that this Court held in *Martin* that a plaintiff’s incompetency does not toll a statute of limitation under the MPLA in any situation. App. 578-580.

This Court recently clarified that published opinions “should be the primary sources relied upon in the development of the common law.” Syl. Pt. 3. *State v. McKinley*, 234 W. Va. 143, 764 S.E.2d 303, 306 (2014). “While memorandum decisions may be cited as legal authority, and are legal precedent, their value as precedent is necessarily more limited.” *Id.* at Syl. Pt. 5. In fact, most importantly, “where a conflict exists between a published opinion and a memorandum decision, the published opinion controls.” *Id.* at Syl. Pt. 5. To the extent that *Hilltop* and *Martin* differ, according to *State v. McKinley*, the published opinion, *Hilltop*, controls. Thus, it was erroneous for the trial court to rely on *Martin* in a manner that contradicted *Hilltop*.

**II. The trial court erred in denying the admission of surveys from outside of the MPLA statute of limitations period, as these surveys showed the Respondent had notice and knowledge and the surveys’ probative value outweighed any potential prejudicial effect.**

The trial court erred in failing to allow the admission of surveys conducted at Respondent’s facility outside of the MPLA’s statute of limitations at the trial in this matter. For

example, a survey conducted in June 2009, during Mr. Thompson's residency at the facility, found that the facility was cited for failing to "promote care for residents in a manner and in an environment that maintains or enhances each resident's dignity and respect in full recognition of his or her individuality." App. 2073, generally 2070-2123. In the same survey, the facility was cited for failing "to develop comprehensive care plans to address the individualized needs of residents in this survey." App. 2076-2077. The facility was also cited for failing to "ensure each resident was provided with the necessary care and services to attain or maintain his or her highest practicable level of well-being." *Id.* The facility was cited for failing to ensure the "resident environment remains as free of accident hazards as possible; and each resident receives adequate supervision and assistance devices to prevent accidents" and failing to maintain clinical records on each resident in accordance with accepted professional standards and practices that are complete, accurately documented, readily accessible, and systematically organized. App. 2083-2085. Finally, the facility was cited for two different restraint-related issues, both improperly assessing residents for them and failing to have care plans that fully set forth their use. App. 2096-2101. These care issues were directly at issue in this case and this evidence would have further supported Petitioner's claims that not only did the facility fail to provide adequate care and supervision to Robert Thompson, but the owners, operators, and managers had notice and knowledge of similar problems before Mr. Thompson was injured.

Another survey from November of 2009 also shows that Respondent was cited for failing to "assure that services provided by the facility met professional standards of quality." App. 2109, generally 2109-2112. This included Licensed Practical Nurses (LPNs) performing jobs that are supposed to be reserved for Registered Practical Nurses (RNs), including completing Minimum Data Sets, Resident Assessment Protocols (RAP) and RAP summaries, and making care plan decisions and the formulation of care plans. App. 2109-2110. Again, these issues are

directly related to Mr. Thompson, as Petitioner put forth evidence that Mr. Thompson's care plans were inadequate.

Pursuant to *Douglas, supra*, it is clear that survey evidence is admissible. Regardless of the statute of limitations issue discussed above, these particular surveys show Respondent's notice and knowledge, as well as the absence of mistake, regarding the conditions that existed at the facility during Robert Thompson's residency. Rule 404(b) of the West Virginia Rules of Evidence states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he or she acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, **knowledge**, identity, or **absence of mistake or accident**[.]

*See* W. Va. R. Evid. 404(b) (emphasis added). *See also Stafford v. Rocky Hollow Coal Co.*, 482 S.E.2d 210 (W.Va. 1996) (court's discussion of proper 404(b) analysis). Clearly the noted survey deficiencies establish the Respondent's knowledge of prior instances of substandard care directly related to the conditions suffered by Robert Thompson that ultimately led to his injuries. Petitioner should have been allowed to provide evidence that the failures on the part of Respondent were not simple mistakes, and that Respondent knew of the conditions existing on the premises during Robert Thompson's residency because they had been specifically informed by the State of West Virginia that the care that they were providing to their residents was substandard and could result in harm to their residents.

In addition to the surveys' admissibility for the purposes of compensatory damages, the surveys set forth above in addition to any surveys subsequent to Robert Thompson's residency and related to Petitioner's claims in this matter, should have been deemed admissible as evidence relevant to Petitioner's claims for punitive damages. In addition to *Douglas, supra*, in *State ex rel. Tinsman v. Hott*, 424 S.E.2d 584 (W.Va. 1992), this Court held that evidence of the

defendant's earlier sexual harassment of other employees was properly excluded on the issue of liability but was admissible on the issue of punitive damages, and that a single trial on both issues with an instruction pursuant to Rule 105 of the West Virginia Rules of Civil Procedure would avoid prejudice against the defendant without sacrificing the goals of judicial economy and convenience of the parties. According to this Court, the evidence of similar conduct must be sufficient "to support a finding by the jury that the defendant committed the similar act." *Id.* at 590 (citing *Huddleston v. U.S.*, 485 U.S. 681, 685, 108 S.Ct. 1496, 1499, 99 L.Ed.2d 771 (1988); *TXO Production v. Alliance Resources*, 187 W.Va. 457, 468-71, 419 S.E.2d 870, 881-84 (1992), petition for cert. filed, 61 U.S.L.W. 3206 (U.S. Sept. 17, 1992)).

Further, this Court has held that where there is, at a minimum, conflicting evidence of malice, wanton, or reckless disregard of the rights of the plaintiff, and "where it may be said that if one theory of the case is correct there may be ground for the imposition of such damages, the matter is properly submitted to the jury in order that it may be determined whether or not one theory is true or the other." *Pendleton v. Norfolk & W. Ry. Co.*, 95 S.E. 941, 944 (W.Va. 1918). More specifically, this Court has set forth five factors to be considered by the fact finder in awarding punitive damages:

In *Garnes*, we discussed the history of punitive damages with particular emphasis on *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). In Syllabus Point 3 of *Garnes*, we outlined five factors that should be considered by the jury in awarding punitive damages. These factors may be summarized: (1) Such damages should bear a reasonable relationship to the harm occurring from defendant's conduct; (2) the jury should consider elements pointing to the reprehensibility of the defendant's conduct; (3) the defendant's profit from the wrongful conduct should be less than the punitive damages; (4) punitive damages should bear a reasonable relationship to the compensatory damages; (5) the financial condition of the defendant is relevant.

*Davis v. Celotex Corp.*, 187 W. Va. 566, 575 (W. Va. 1992).

Among the factors that the jury should consider in determining the reprehensibility of the

Respondent's conduct are: how long the defendant continued in his actions, whether he was aware that his actions were causing or likely to cause harm, and whether/how often the defendant engaged in similar conduct in the past. *Boyd v. Goffoli*, 216 W.Va. 552 (W. Va. 2004); *see also* *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991), and *Perrine v. E.I. DuPont de Nemours*, 225 W. Va. 482, 694 S.E.2d 815 (2010). These factors are relevant because evidence showing that the defendant knew that the alleged conduct on its part would probably result in injury to the plaintiff, because it knew that such carelessness on its part in the past had resulted in similar injuries to others, but continued in this course of conduct in utter indifference to the consequences, has a legitimate tendency to show that the defendant acted with conscious or reckless disregard. *Gunthorpe v. Daniels*, 257 S.E.2d 199 (Ga. 1979).

The fact that Respondent's conduct was repeated continually is also probative of the reprehensibility of Respondent's conduct according to this Court:

Although [o]ur holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance, "*Gore, supra*, at 577, 116 S. Ct. 1589, in the context of civil actions[,] courts must ensure [that] the conduct in question replicates the prior transgressions.

*Id.* at 1523.

Thus, for the reasons set forth above, the trial court erred in limiting the admission of surveys in this matter to those within a short proximity to the MPLA statute of limitations, and a new trial is warranted.

**III. The trial court erred in allowing Respondent's expert, Dr. Vincent DeLaGarza, to provide unrelated, irrelevant testimony along with the admission of a demonstrative aid that lacked proper foundation.**

Respondent's expert, Dr. Vincent DeLaGarza, over the objection of the Petitioner, was allowed to offer unrelated, irrelevant testimony as well as a demonstrative aid that lacked proper foundation. App. 2780-2781, 2804-2807, 2830-2834. As such, Dr. DeLaGarza's testimony

improperly influenced and prejudiced the jury and a new trial is warranted. This Court has held that if the admission of irrelevant testimony could possibly prejudice the opposite party, it is a ground for a new trial. *See Jones v. Singer Mfg. Co.*, 38 W. Va. 147, 18 S.E. 478, 480-81 (1893).

**A. Testimony regarding “one of his patients”**

Dr. DeLaGarza testified regarding his patients “fall[ing] and hurt[ing] themselves severely and [being] dependent afterwards and even die[ing].” *See* Trial Testimony of Dr. DeLaGarza, App. 2780-2781. Dr. DeLaGarza continued stating, “I mean, just last week one of my patients fell and – and just like in Mr. Thompson’s case,” to which Petitioner’s counsel objected as to this testimony being irrelevant. *Id.* The trial court overruled Petitioner’s objection, and Dr. DeLaGarza was allowed to testify about a patient of his that allegedly fell the week before Dr. DeLaGarza gave his testimony at trial. *Id.* Dr. DeLaGarza testified that falls happen “over and over again.” App. 2782.

This testimony was wholly improper. Petitioner had no information related to the falls to which Dr. DeLaGarza testified as there were no medical records or other facts provided. It was therefore impossible for Petitioner to offer *any* possible defense to these falls. For example, perhaps the situations were completely different from Robert Thompson’s, either in patient condition or ground conditions, but without information related to these patients and their falls, Petitioner would only be speculating in trying to differentiate them. The falls suffered by Dr. DeLaGarza’s patients are ultimately wholly irrelevant to what happened to Mr. Thompson and discussion of these instances improperly prejudiced the jury. Taken by themselves, Petitioner has no way of knowing if the falls to which Dr. DeLaGarza testified even actually occurred.

In a sidebar, Petitioner requested that Dr. DeLaGarza not be allowed to testify regarding his mother falling, as he had in his deposition, since this would be yet another “undefendable” situation. App. 2784. This Court agreed with Petitioner’s counsel and allowed Respondent’s

counsel to approach Dr. DeLaGarza and instruct him not to mention his mother during his testimony. App. 2784-2785. Nevertheless, Dr. DeLaGarza was improperly allowed to testify regarding random “patients” that “fall fairly frequently”, and the trial court erred in allowing such testimony to be admitted. App. 2779.

### **B. The Posey Vest**

Dr. DeLaGarza was also allowed to testify as to a restraint device known as a “Posey Vest.” Respondent’s counsel first addressed this with the trial court outside of the jury and sought to have Dr. DeLaGarza testify regarding the vest as a “further step if Mr. Thompson was continuing to have problems with falls.” App. 2804. Petitioner presented a two-fold objection – first, there had been no mention of a Posey Vest by Petitioner’s expert or any witness at trial that such a device would be a reasonable option for Mr. Thompson, and second, there was no foundation for the particular type of restraint that Respondent sought to display to the jury. *Id.* None of the witnesses for either side testified that the particular device at issue was used at or even available to the facility. App. 2804-2805.

The trial court overruled Petitioner’s objection and stated that it was Dr. DeLaGarza’s opinion and the objection was not understood. App. 2805. Petitioner’s counsel then clarified the objection as to the particular vest at issue and that it could be “literally like a strait jacket.” *Id.* The trial court then questioned, “I mean nobody’s going to take it out and *put it on*; right?” *Id.*, (emphasis added). Respondent’s counsel replied “No, no one’s going to *put it on*.” *Id.*, (emphasis added). The argument continued before the objection was again overruled. App. 2806.

When the testimony regarding the vest actually occurred and Dr. DeLaGarza was handed the Posey Vest, Petitioner renewed her objections to the testimony and aid. App. 2831. Respondent’s counsel then told Dr. DeLaGarza that he “[didn’t] have to put it on or anything if

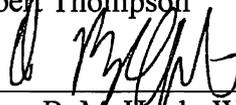
you don't want to." *Id.* Dr. DeLaGarza replied, however, "I was going to put it on. It goes over like this (demonstrated), and these things cross your body and they go against the chair like this (indicated), you know. Right there. They hold you against it like this (indicated). *Id.* This is the *exact* situation that Petitioner attempted to prevent and to which the trial court even referred when it asked counsel for Respondent if anyone was going to put the vest on. App. 2805. There was no testimony or evidence that the vest shown to the jury was even available to Respondent's facility during Mr. Thompson's residency, let alone that the facility had them and could have or would have used them. Instead, Dr. DeLaGarza's testimony confused the jury and improperly prejudiced them into believing that the restrictive Posey Vest "causes hallucinations, agitation" and makes "your last months of life a hell." App. 2833. This testimony was highly prejudicial and the jury should not have been allowed to hear said testimony or see the demonstrative aid, let alone its application, by Respondent's expert. On this error alone, a new trial is warranted.

### CONCLUSION

Petitioner submits that each of these errors are sufficient to warrant a new trial in this matter. More importantly, the cumulative effect of all of these errors discussed herein mandate a new trial.

Wherefore, for the reasons set forth above, Petitioner requests that the Court reverse the trial court's decision denying her Motion for New Trial, remand this matter for a new trial before the Nicholas County Circuit Court, and for all other relief, both general and specific, to which she is entitled.

Wanda Williams, Individually and on behalf of  
the Estate and Wrongful Death Beneficiaries of  
Robert Thompson

By: 

James B. McHugh, WV Bar No. 10350

Michael J. Fuller, Jr., WV Bar No. 10150

D. Bryant Chaffin, WV Bar No. 11069  
Amy J. Quezon, WV Bar No. 11036  
A. Lance Reins, WV Bar No. 11548  
**McHUGH FULLER LAW GROUP, PLLC**  
97 Elias Whiddon Rd.  
Hattiesburg, MS 39402  
Telephone: 601-261-2220  
Facsimile: 601-261-2481

Attorneys for Petitioner / Plaintiff

**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that on this 14<sup>th</sup> day of September, 2015, the foregoing Petitioner's Brief was deposited in the U.S. Mail contained in a postage paid envelope addressed to Counsel for all other parties to this appeal as follows:

Mark Robinson, Esq.  
Ryan Brown, Esq.  
Flaherty, Sensabaugh & Bonasso, PLLC  
P. O. Box 3843  
Charleston, WV 25338-3843

Peter J. Molinelli, Esq.  
Quintairos, Preto, Wood & Boyer, PA  
4905 W. Laurel Street, 2nd Floor  
Tampa, FL 33607



---

James B. McHugh, WV Bar No. 10350  
Michael J. Fuller, Jr., WV Bar No. 10150  
D. Bryant Chaffin, WV Bar No. 11069  
Amy J. Quezon, WV Bar No. 11036  
A. Lance Reins, WV Bar No. 11548