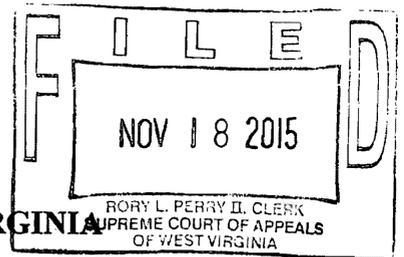


NO. 15-0553



**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**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**

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**PETITIONER'S REPLY BRIEF**

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## SUMMARY OF THE ARGUMENT

The trial court erred in applying the Medical Professional Liability Act (MPLA) statute of limitations to all of Petitioner's claims. It did so despite the fact that it subsequently determined that all of Petitioner's claims were not governed by the MPLA as indicated by its rulings and the verdict form submitted to the jury.<sup>2</sup> Further, the trial court erred in relying upon the distinguishable memorandum opinion in *Martin v. Charleston Area Medical Center, Inc.*, No. 12-0710, 2013 WL 2157698 (May 17, 2013), a case filed nearly five (5) years after the injury and involving a living injured party, rather than the controlling law of *Mack-Evans v. Hilltop Healthcare Center, Inc.*, 226 W.Va. 257, 267 (W.Va. 2010) which like this case *did* include wrongful death and survival claims and in which this Court held that the statute of limitations was tolled. These reasons alone are sufficient to warrant reversal in this matter.

Robert Thompson was an incompetent, vulnerable adult who did not have a legal guardian capable of protecting and asserting his legal rights under West Virginia law. Thus, *any* statute of limitations applicable to him should have been tolled based on his mental incapacity and pursuant to the discovery rule and applicable controlling case law in this State. By failing to apply the general savings statute for persons under a disability as codified in W. Va. 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 home facility.

In doing so, the trial court also erred in prohibiting the introduction of significant evidence of Respondent's conduct and Mr. Thompson's injuries that occurred during his residency. Respondents did not address the expert testimony related to other repeated falls Mr. Thompson suffered, occurring on September 4, 2009; June 10, 2010; June 15, 2010; and August

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<sup>2</sup> Notably, the jury found that 25% of Respondent's negligence and/or violation of the standard of care was non-medical negligence. App. 718-722

15, 2010, as well as injuries including skin tears, bruises, respiratory tract issues with aspiration, and problems with nutrition and hydration. Deposition of Petitioner'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 during Mr. Thompson's residency but which was excluded due to the narrowed statute of limitations 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 prohibited the trial court itself from making an accurate determination regarding both compensatory and punitive damages.

Contrary to Respondent's assertions, the state inspections or "surveys," conducted during Mr. Thompson's residency at Respondent's facility but outside of the statute of limitations period applied by the trial court, were relevant and the trial court erred in declining to admit them. App. 2070-2123. The jury should have been allowed to consider this evidence regardless of any applicable statute of limitations. 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 Respondent and its employees had notice and knowledge of similar problems within its facility before Mr. Thompson was injured.

Finally, Respondent's expert, Dr. Vincent DeLaGarza, was erroneously allowed, over Petitioner's objection, to offer unrelated, irrelevant testimony as well as exhibit a demonstrative aid, the use of which lacked proper foundation. App. 2780-2781. Despite the trial court agreeing with Petitioner's counsel and instructing Dr. DeLaGarza, his improper testimony continued. App. 2784-2785.

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 undoubtedly requires a new trial.

### ARGUMENT

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

**A. The trial court implicitly recognized that all of Petitioner’s claims were not “health care” claims governed by the MPLA as evidenced by its ruling regarding the MPLA “caps” and the verdict form provided to the jury, yet the Court erroneously applied the MPLA’s two year statute of limitations to all of Petitioner’s claims.**

Respondent has asserted that the trial court did not err 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” because Respondent CMO Management, LLC is and was a “health care provider” as defined by the MPLA. In doing so, Respondent incorrectly states that the “MPLA provides that a cause of action for injury against a health care provider must be commenced within two years of the date of an individual’s injury.” *See* Respondent’s brief at p. 8. However, the MPLA does not govern *all* causes of action for injury against a health care provider. It is well settled that the injury must be as a result of a “tort or breach of contract based on health care services rendered, or which should have been rendered.” *See* W. Va. Code § 55-7B-2(i); *see also Manor Care, Inc. v. Douglas*, 234 W. Va. 57, 72, 763 S.E.2d 73, 88 (2014) (citing *Boggs v. Camden–Clark Memorial Hospital Corp.*, 216 W.Va. 656, 609 S.E.2d 917 (2004)). Respondent misreads *Douglas*, which did not only hold that some claims did not fall under the MPLA because the entities were not “health care providers” but instead affirmed the prior decisions of *Boggs* and *Riggs*, *infra*. *See Douglas*, 763 S.E. 2d at 88 (“Thus, *Boggs* stands for the proposition that some claims that may be brought against a health care provider simply do not involve health care services and, therefore, are not subject to the MPLA. This Court has not

deviated from this conclusion.”).

As Chief Justice Davis determined in her concurring opinion in *Riggs v. West Virginia University Hospitals, Inc.*, 656 S.E.2d 91 (W.Va. 2007), generic, administrative functions applicable to everyone such as the development of policies and procedures in a hospital, and the hospital’s subsequent failure to maintain a sterile environment due to these procedures, are simply not within the purview of medical malpractice statutes. *Riggs*, 656 S.E.2d at 104, 113 (citing *Methodist Hospital v. Ray*, 551 N.E.2d 463 465-69 (Ind.Ct.App.1990)). Similarly, Petitioner’s claims regarding staffing and budgeting, as well as custodial care, or the lack thereof, were not within the purview of the MPLA. The West Virginia legislature recognized that the version of the MPLA that existed during the trial of this matter excluded such claims and evidence when it amended W. Va. Code § 55-7B-2. The only applicable version of the statute at the time of trial defined “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), eff. 90 days after March 11, 2006, through March 9, 2015. The subsequent version, however, was expanded to define “health care” as follows:

- (1) Any act, service or treatment provided under, pursuant to or in the furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis or treatment;
- (2) Any act, service or treatment performed or furnished, or which should have been performed or furnished, by any health care provider or person supervised by or acting under the direction of a health care provider or licensed professional for, to or on behalf of a patient during the patient's medical care, treatment or confinement, including, but not limited to, **staffing, medical transport, custodial care or basic care, infection control, positioning, hydration, nutrition and similar patient services;** and
- (3) **The process employed by health care providers and health care facilities for the appointment, employment, contracting, credentialing, privileging and supervision of health care providers.**

W. Va. Code § 55-7B-2(e), eff. March 10, 2015, emphasis added. Thus, claims and evidence

related to these acts would not have been “health care” at the trial of this matter in October 2014.

Respondent is correct that this Court held in *Douglas* that “[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.” *Manor Care, Inc. v. Douglas*, 234 W. Va. 57, 763 S.E.2d 73, 79 (2014); *see also* Respondent’s brief at p. 12. However, contrary to Respondent’s assertion, this matter did not only involve “health care” as defined by the MPLA. Importantly, the trial court acknowledged this fact and the fact-based nature of such a 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.” App. at 577.

In *Douglas*, this Court held that the trial court “implicitly found that some of Mr. Douglas’ claims were governed by the MPLA while some were not. *Douglas*, 763 S.E. 2d at 90. “This determination by the circuit court is demonstrated by the court’s adoption of a verdict form that allowed the jury to allocate its negligence award between ordinary negligence and medical negligence.” *Id.* Likewise, in this matter, the trial court implicitly found that some of Petitioner’s claims were governed by the MPLA while some were not by adopting a verdict form that allowed the jury to allocate its negligence award between ordinary negligence and medical negligence. The jury did just that, finding 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. App. 718-722. Thus, the application of the MPLA statute of limitations to *all* of Petitioner’s claims prior to trial is inconsistent with the trial court’s subsequent rulings and clear error.

**B. The trial court erred in failing to apply the discovery rule and tolling provisions under West Virginia law.**

Respondent argues that this Court's unpublished memorandum decision in *Martin v. Charleston Area Medical Center, Inc.*, No. 12-0710, 2013 WL 2157698 (W. Va. May 17, 2013) is not in conflict with *Mack-Evans v. Hilltop Healthcare Center, Inc.*, 226 W.Va. 257 (2010) and thus prohibits tolling of the statute of the limitations. See Respondent's brief at p. 15. This is incorrect. While the facts of the above cited cases somewhat differ, there is nonetheless a direct conflict in the law articulated. Pursuant to *State v. McKinley*, 234 W. Va. 143, 764 S.E.2d 303, 306 (2014), "where a conflict exists between a published opinion and a memorandum decision, the published opinion controls." *Id.* at Syl. Pt. 5. Further, *Martin* can be distinguished from this matter and *Hilltop* as it does not involve wrongful death or survival claims.

Mr. Martin suffered injury during a stay at a hospital in 2007. *Martin*, at \*1. Although Mr. Martin was mentally incapacitated, Mr. Martin's wife was appointed his guardian and conservator less than a year after his injuries in 2008. *Id.* Despite this fact, Mr. and Mrs. Martin did not file suit until February 2012, nearly five (5) years after his residency at the defendant hospital. This Court held 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* at \*2, emphasis added. This Court did not allow tolling under W. Va. Code § 55-2-15 holding instead that the more specific provisions of the MPLA did not provide for tolling. *Id.*

*Mack-Evans v. Hilltop Healthcare Center, Inc.*, 226 W.Va. 257 (W.Va. 2010) involved an Estate bringing suit against both a hospital and a nursing home, although notably the appeal involved only the claims against the hospital. *Hilltop*, 226 W.Va. at 260. Ms. Mack was injured at the hospital in January 2004. She died approximately seven months later on August 9, 2004. *Id.* Although her Estate was opened within weeks of her death on August 20, 2004, suit was not

filed until August 16, 2006, nearly two years later and over two years after Ms. Mack's death. *Id.* Contrary to Respondent's assertion, *Hilltop* directly involved the application of the MPLA. *Id.* at 261 ("The circuit court found, and the parties do not dispute, that a two-year statute of limitations applied to both causes of action.") and fn. 8, referencing the MPLA specifically. Examining both the wrongful death act, W. Va. Code § 55-7-6, and the survival statute, W. Va. Code § 55-7-8a, this Court held that the statute of limitations for a personal injury claim brought under the survival statute is tolled during a period of mental disability as defined by W. Va. Code § 55-2-15. *Id.* at Syl. Pt. 5. "In the event the injured person dies before the mental disability ends, the statute of limitations begins to run on the date of the injured person's death." *Id.* Accordingly, the statute of limitations for wrongful death began to run on the date of Ms. Mack's death. *Id.* at 264.

"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 (2007). 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 (1994). *Hilltop* clearly provided for tolling of the MPLA's two year statute of limitations due to the mental disability of the plaintiff pursuant to W. Va. Code § 55-2-15. *Id.* at 267 ("[T]he statute of limitations did not begin to run on the date of Ms. Mack's alleged injury because the trial court implicitly found that W. Va. Code § 55-2-15 tolled the statute of limitations while Ms. Mack was under a mental disability. That mental disability ended when Ms. Mack died on August 9, 2004. Therefore, the statute of limitations began to run on the date of her death.").

To the extent *Martin* holds that the MPLA statute of limitations is not tolled by mental disability by W. Va. Code § 55-2-15, *Hilltop*, as a published decision, is controlling, and the

trial court erred in relying upon *Martin*.

However, as noted above, *Martin* can be distinguished from *Hilltop* and this matter, as the plaintiff in *Martin* was living at the time of the action and had a court appointed guardian and conservator during the applicable statute of limitations period. Contrastingly, this case and *Hilltop* involve both survival and wrongful death claims brought by an Estate. In *Hilltop*, unlike this matter, the complaint was filed more than two years after the death of the injured party. *Hilltop* makes clear, however, that Petitioner's claims pursuant to W. Va. Code § 55-7-6 and W. Va. Code § 55-7-8a should have been tolled pursuant to the discovery rule and W. Va. Code § 55-2-15, due to Mr. Thompson's mental disability, a fact that is undisputed. See Respondent's brief at p. 13 ("CMO Management does not contest that, for the time period relevant to Petitioner's claims, Mr. Thompson was considered mentally incompetent as a result of Alzheimer's.", citing App. 00886, 00957-00958).

Unlike the plaintiff in *Martin*, *supra*, Mr. Thompson, like Ms. Mack in *Hilltop*, did not have anyone with authority to bring a claim on his behalf. Respondents assert that Mr. Thompson had a medical power of attorney that "voiced concerns as early as 2009 about the care rendered to him during his residency." See Respondent's brief at p. 10. As noted in Petitioner's brief, while there was testimony that a medical power of attorney for Mr. Thompson existed, neither party has made such document part of the record. More importantly, however, a medical power of attorney **would not** have the authority to act as Mr. Thompson's legal representative, unlike the guardian and conservator in *Martin*. 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. In fact, a medical power of authority does not even have sufficient authority to obtain medical records of the individual in order to prepare to file suit.

As an incompetent adult with no legal representative to assert his rights, any statute of limitations could not commence until after Mr. Thompson’s death. *See Hilltop*, 226 W.Va. 257, 267 (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.

According to *Hilltop* and *Gaither v. City Hosp. Inc.*, 199 W.Va. 706, Syl. Pt. 4 (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.

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

Respondent asserts that the surveys at issue were not relevant and any relevance would have been substantially outweighed by prejudicial impact of such evidence; thus they were not admissible pursuant to the West Virginia Rules of Evidence. *See* Respondent's brief at pp. 17-22. Contrary to Respondent's assertions, however, the surveys were relevant and were more probative than prejudicial. Further, as set forth above, they were not remote in time but occurred during or immediately prior to the time period in which Mr. Thompson suffered injuries and which *should* have been included in the statute of limitations.

The survey conducted in June 2009, during Mr. Thompson's residency at the facility, revealed 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, " 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," 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. 2076-2077; App. 2083-2085. Finally, the facility was cited for two different restraint-related issues, both improperly assessing residents for restraints 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 Respondent and its employees had notice and knowledge of similar problems before Mr. Thompson was injured by suffering multiple falls at their facility.

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 and that these inadequate care plans led to his injury.

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 specifically provides for the admission of such evidence, stating:

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).

Petitioner should have been allowed to provide evidence that Respondent’s failures were not simple mistakes, and that Respondent knew of the conditions existing on the premises during Robert Thompson’s residency because it had been specifically informed by the State of West

Virginia that the care provided to its residents was substandard and exposed them to possible harm.

Additionally, the surveys were admissible as evidence relevant to Petitioner's claims for punitive damages. *See Douglas, supra, State ex rel. Tinsman v. Hott*, 424 S.E.2d 584 (W.Va. 1992); *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 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).

Thus, for the reasons set forth above and in Petitioner's opening briefing, the trial court erred in limiting the admission of surveys in this matter to those occurring within a short proximity to the MPLA statute of limitations. Such an error warrants Petitioner's requested relief, and requires a new trial.

**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 argues that its expert, Dr. Vincent DeLaGarza, was properly allowed to testify regarding anonymous "patients" in order to demonstrate he was qualified and to present an alternative restraint device. *See* Respondent's brief at pp. 23-24. Contrary to this argument, however, Dr. DeLaGarza's testimony regarding anonymous patients was wholly improper, as it was irrelevant to the injuries suffered by Mr. Thompson and discussion of these instances improperly prejudiced the jury. Petitioner was deprived of any meaningful cross examination as

she had no way of knowing if the falls to which Dr. DeLaGarza testified actually occurred or any specific information regarding the anonymous individuals' propensity to fall.

Notably, Respondents do not address the sidebar in which Petitioner's counsel 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. The trial 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", an identical proposition to testimony regarding Dr. DeLaGarza's mother, and the trial court erred in allowing such testimony to be admitted. App. 2779.

As to the restraint device or "Posey Vest," Respondent does not dispute that testimony regarding such a device lacked foundation, as neither Petitioner's expert nor any witness at trial testified that such a device would be a reasonable option for Mr. Thompson or that the particular device was used at or even available to the facility. App. 2804-2805. Further, Respondent fails to address that the trial court, in overruling Petitioner's objection, clearly indicated not to demonstrate the use of the Posey Vest by putting it on, yet Dr. DeLaGarza did exactly that, demonstrating its use for the jury. App. 2805, 2831. 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, when there was no indication that the Respondent's facility had or could have obtained a similar device during Mr. Thompson's residency. On this error alone, a new trial is warranted.

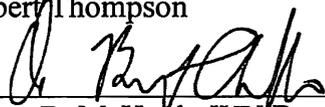
## CONCLUSION

This Court has explained that the general savings statute, W. Va. Code §55-2-15, 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.” *Worley*, 220 W.Va. at 639. Robert Thompson, sadly, fit this definition all too well. He had no legal representative to bring an action on his behalf, and yet, the trial court refused to apply the savings clause. Furthermore, despite ultimately holding that all of his Estate and wrongful death beneficiaries’ claims did not fall under the MPLA, the trial court erroneously applied the two year MPLA statute of limitations to the entire case. This error, along with the other errors set forth above, are each independently sufficient to warrant a new trial in this matter. More importantly, the cumulative effect of all of these errors discussed require it.

Wherefore, for the reasons set forth above and in Petitioner’s opening brief, 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: \_\_\_\_\_

  
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**CERTIFICATE OF SERVICE**

The undersigned does hereby certify that on this 18<sup>th</sup> day of November, 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:

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