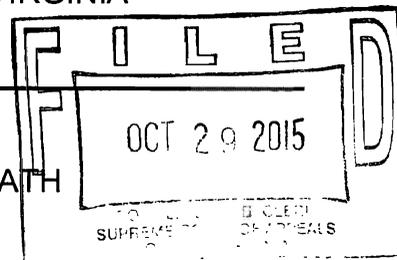


No. 15-0553

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

WANDA WILLIAMS, INDIVIDUALLY AND ON
BEHALF OF THE ESTATE AND WRONGFUL DEATH
BENEFICIARIES OF ROBERT THOMPSON,



Petitioner/Plaintiff Below,

v.

CMO MANAGEMENT, LLC
(AS TO NICHOLAS COUNTY NURSING
& REHABILITATION)

Respondent/Defendant Below.

Appeal from the Circuit Court of Nicholas County
Honorable Gary L. Johnson, Judge
Civil Action No. 13-C-92

BRIEF OF RESPONDENT/DEFENDANT BELOW
CMO MANAGEMENT, LLC

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STATEMENT OF THE CASE

Petitioner commenced the underlying civil action against Respondent/Defendant Below CMO Management, LLC¹ (“CMO Management” and/or “Respondent”) in the Circuit Court of Nicholas County, West Virginia on or about June 19, 2013. (App. 00008-00069.) In her Complaint, Petitioner, Individually and on behalf of the Wrongful Death Beneficiaries of Robert Thompson (“Mr. Thompson”), alleged that Respondent—a nursing home—breached various duties it owed to Mr. Thompson throughout the course of his residency at Nicholas Nursing and Rehabilitation Center (“Nicholas Nursing”) between June 14, 2001 and June 27, 2011. (*Id.*) Petitioner further alleged that, as a result of Respondent’s purportedly wrongful conduct, Mr. Thompson sustained “falls, [a] subdural hematoma, a hip fracture, malnutrition” and ultimately his death. (App. 00012.) On August 5, 2013, CMO Management filed its Answer, wherein it denied any and all allegations of wrongdoing. (App. 00071-00090.)

After over a year of discovery, on September 12, 2014, CMO Management² filed a Motion for Summary Judgment for Failure to Meet the Applicable Statute of Limitations Regarding Claims Accrued Prior to April 19, 2011 (“Motion for Summary Judgment”). (App. 00555-00564.) CMO Management argued that the MPLA mandates that “a cause of action for injury to a person . . . against a health care provider arises as of the date of injury, . . . and must be commenced within two years of the date of such injury . . .” (App. 00559.) As a result, Petitioner’s June 19, 2013 Complaint could only assert claims against CMO Management for care and treatment rendered to Mr.

¹ Petitioner’s Complaint was initially filed against CMO Management, LLC, and Belinda Stear. (App. 00008-00069.) Prior to the trial of the underlying civil action, however, Ms. Stear was dismissed as an individually named defendant.

² All of CMO Management’s pleadings regarding Petitioner’s failure to meet the MPLA’s two-year statute of limitations period were also filed on behalf of Belinda Stear, who was—as previously mentioned—dismissed from the underlying case prior to trial.

Thompson on or after June 19, 2011. (App. 00561.) That being said, because the MPLA requires that a Notice of Claim and Screening Certificate of Merit be furnished to a health care provider prior to the formal commencement of suit, CMO Management acknowledged that the two-year statute of limitations period may be tolled for an additional sixty (60) days following the provision of a Notice of Claim.³ (*Id.*) Thus, CMO Management took the position that, even giving Petitioner the benefit of the longest Notice of Claim/Screening Certificate of Merit tolling period available—an additional sixty (60) day period of time, Petitioner's June 19, 2013 Complaint could only assert claims regarding the care and treatment rendered to Mr. Thompson on or after April 19, 2011. (*Id.*) Any medical professional liability claims arising out of the care rendered to Mr. Thompson prior to April 19, 2011, would be time barred. (*Id.*)

The Motion for Summary Judgment was heard by the Circuit Court on October 6, 2014. (App. 00571.) In support of a contention that Mr. Thompson was mentally incompetent during his residency at Nicholas Nursing and that the statute of limitations was therefore tolled until his death, Petitioner directed the Circuit Court's attention to the case of *Mack-Evans v. Hilltop Healthcare Center, Inc.*, 226 W. Va. 257, 700 S.E.2d 317 (2010). (App. 00578.) By way of rebuttal, CMO Management argued that this Court, in the fairly recent decision of *Martin v. Charleston Area Medical Center*, 2013 W. Va. LEXIS 517 (May 17, 2013) (memorandum decision), had held that the MPLA's two-year statute of limitations applies in cases against health care providers even when the patient was deemed incompetent at the time of his injuries. (App. 00579-00580.)

Three days after the hearing, Petitioner filed her Response to CMO Management's Motion for Summary Judgment. (App. 00565-00570.) Therein, Petitioner maintained that the MPLA did not apply to all of her claims against CMO Management,

³This proposition is true so long as a claimant provides a Screening Certificate of Merit at the same time she furnishes her Notice of Claim, which is what occurred with regard to Petitioner's underlying civil action.

and that the discovery rule as well as the general “savings clause,” located at West Virginia Code § 55-2-15, prohibited the running of the statute of limitations as to claims that accrued before April 19, 2011. (*Id.*) On October 10, 2014, CMO Management filed its Reply Brief Regarding Motion for Summary Judgment for Failure to Meet the Applicable Statute of Limitations, in which it reiterated that the MPLA did indeed apply to all of Petitioner’s claims based upon CMO Management’s classification as a “health care provider” under the provisions of the MPLA. (App. 02756-02759.)

The Motion for Summary Judgment was granted by order dated October 10, 2014. The Circuit Court first recognized that the MPLA requires that a cause of action against a health care provider for injuries be brought within two years of the date of such injury, or within two years of the date when the individual discovers or, with the exercise of reasonable diligence, should have discovered such injury. (App. 00578.) In no event may such an action be commenced, however, more than ten years after the date of the individual’s injury. (*Id.*) The Circuit Court also acknowledged that the MPLA’s two-year statute of limitations period may be tolled for an additional sixty (60) days following the provision of a Notice of Claim as required by West Virginia Code § 55-7B-6(b). (*Id.*)

Thereafter, the Circuit Court concluded that the *Mack-Evans* case stood for the proposition that a personal injury claim brought under West Virginia Code § 55-7-8a—not West Virginia Code § 55-7B-1, *et seq.*—may be tolled by West Virginia Code § 55-2-15 during any period of mental disability experienced by the injured party. (App. 00578-00579.) The Court next noted that the *Martin* decision relied upon by CMO Management explicitly addressed the question of whether West Virginia Code § 55-2-15’s general “savings clause” had any effect on the MPLA’s two-year statute of limitations. (App. 00579.) Because the *Martin* decision found unpersuasive the

argument that the general disability “savings clause” in West Virginia Code § 55-2-15 tolls a claim brought under the MPLA. (App. 00580.), the Circuit Court concluded that the MPLA’s two-year statute of limitations period strictly applied to Petitioner’s claims against CMO Management. (App. 00580.) Since the Complaint was filed on June 19, 2013, and giving Petitioner the benefit of the additional sixty (60) day tolling period associated with the provision of a Notice of Claim, the Circuit Court held that all of Petitioner’s claims against CMO Management regarding the care and treatment rendered before April 19, 2011 were time-barred. (*Id.*)

Petitioner subsequently filed an Emergency Motion for Stay as well as a Petition for Writ of Prohibition with this Court on October 13, 2014. (App. 00583-00600.) On October 16, 2014, CMO Management filed its Response in Opposition to Petition for Writ of Prohibition. (App. 00658-00682.) Petitioner’s writ was thereafter refused by this Court in an Order dated October 20, 2014. (App. 02760-02761.) Trial then commenced on October 21, 2014. On October 28, 2014, a verdict was returned in favor of Petitioner. (App. 00719-00721.) The verdict included an award of \$10,000 for damages suffered by Mr. Thompson as well as \$90,000 for damages suffered by his Estate. (App. 00720.)

After entry of the Judgment Order, the Petitioner filed a Motion for New Trial on or about February 10, 2015. (App. 00728-00879.) Petitioner maintained that a new trial was warranted because the Circuit Court erred in: improperly applying the MPLA’s statute of limitations to limit her claims against Respondent; denying the admission of surveys conducted outside of the MPLA’s statute of limitations period; and, allowing into evidence certain testimony of CMO Management’s expert, Dr. DeLaGarza. (App. 00731-00761.) On April 13, 2015, CMO Management responded to the Motion for New Trial. (App. 00880-00906, 00907-00910.) Following a hearing on the matter and after consideration of the parties’ respective filings, the Circuit Court denied the Motion for

New Trial by Order dated May 11, 2015. (App. 00926-00935.) It is from that May 11, 2015 Order that Petitioner now appeals.

SUMMARY OF ARGUMENT

The Circuit Court did not commit reversible error in the trial of Petitioner's underlying claims against CMO Management. First, in light of the clear and unambiguous mandates of the MPLA as well as a previous decision of this Court, the Circuit Court correctly applied the MPLA's two-year statute of limitations period and properly precluded Petitioner from pursuing any claims against CMO Management that accrued prior to April 19, 2011. 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, or within two years of the date when such individual discovers—or with the exercise of reasonable diligence should have discovered—such injury. W. Va. Code § 55-7B-4. The discovery exception was not applicable here because the Petitioner as well as a medical power of attorney (“MPOA”) for Mr. Thompson conceded that they had concerns regarding the care and treatment rendered to Mr. Thompson as early as 2009. The reliance by Petitioner upon *State ex rel. AMFM v. King*, 230 W. Va. 471, 740 S.E.2d 66 (2013), was properly rejected by the Circuit Court because the decision stands only for the proposition that MPOAs and health care surrogates (“HSCs”)—both of whom possess the authority to make medical decisions on behalf of another—do not have the authority to bind a decedent or his/her beneficiaries to the terms and conditions of arbitration agreements. *Id.* at 480-1, 740 S.E.2d at 75-6. (See also, App. 00907- 00909.) Instead, the knowledge of MPOAs and HSCs is clearly binding on the incompetent with respect to medical issues, a point embraced by this Court in *Martin v. Charleston Area Medical Center*, 2013 W. Va. LEXIS 517 (2013) (memorandum decision). Since the Petitioner and a MPOA were aware of concerns

back in 2009, the Circuit Court properly refrained from applying the discovery rule to toll the statute of limitations applicable to Petitioner's claims.

Similarly, Petitioner is incorrect in her assertion that the general "savings clause," located at West Virginia Code § 55-2-15, operated to toll the statute of limitations with regard to her underlying civil action, thus permitting the inclusion of claims regarding injuries allegedly sustained prior to April 19, 2011. (See Pet'r's Brief at pgs. 12-3.) Generally, W.Va. Code § 55-2-15 permits permanently mentally incapacitated individuals up to twenty (20) years to file a lawsuit. An exception to the general "savings clause" exists, however, with regard to causes of action against health care providers under the MPLA. Specifically, this Court has already held that "[the] argument that the general disability savings statute in West Virginia Code § 55-2-15 should toll [a] claim under the MPLA is unpersuasive," and that instead "adults alleging a medical professional liability action under the MPLA have a two-year statute of limitations" *Martin v. Charleston Area Medical Center*, 2013 W. Va. LEXIS 517, *6 (2013) (memorandum decision). Because the Circuit Court correctly concluded that the MPLA applied to all of the allegations asserted against Respondent as a nursing home, the Circuit Court also appropriately followed *Martin* to reach the conclusion that Petitioner's pre-April 19, 2011 claims were not subject to the general savings provision.

The Circuit Court also did not err in denying the admission into evidence of surveys conducted at Nicholas Nursing from outside of the MPLA's statute of limitations period. The surveys proffered by Petitioner—one dated June 4, 2009 and another dated November 24, 2009—were not relevant to her claims that Respondent breached various duties it owed to Mr. Thompson during his residency at Nicholas Nursing. Nor did they demonstrate that CMO Management had notice or knowledge of the particular conditions that allegedly injured Mr. Thompson. Specifically, the June 4, 2009 and

November 24, 2009 survey reports merely demonstrated that Nicholas Nursing was substantially in compliance with specific regulatory standards. (App. 02070-02100, 02109-02112.) They did not identify any deficiency whatsoever with regard to the care and treatment rendered to Mr. Thompson or, for that matter, any issues that are even remotely similar to Petitioner's claims against Respondent.

Finally, the Circuit Court properly allowed Dr. DeLaGarza to provide brief testimony regarding falls experienced by his own patients and usage of the Posey Vest. Such evidence was relevant to his qualifications and opinions. Under Rule 702 of the *West Virginia Rules of Evidence*, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." W. Va. R. Evid. 702 (emphasis added). When Dr. DeLaGarza testified that some of his own patients had experienced falls which resulted in their dependency and/or death, he was laying the foundation necessary to demonstrate his qualifications to offer expert opinions regarding the course of treatment rendered to Mr. Thompson. Similarly, Dr. DeLaGarza's testimony and presentation regarding the potential utilization of a Posey Vest as a restraint mechanism was also relevant given that he presented it as an alternative means the facility could have utilized to prevent residents from falling. (App. 02804-02805.) Simply, it cannot be said that the Circuit Court abused its discretion permitting such testimony. Consequently, the judgment rendered below should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

CMO Management does not believe this appeal satisfies the criteria for oral argument set forth in Rule 18(a) of the Rules of Appellate Procedure. The issues have

either been authoritatively decided by this Court or are adequately presented by the briefs and the record on appeal. Thus, the decisional process will not be significantly aided by oral argument.

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR IN APPLYING THE MPLA'S STATUTE OF LIMITATIONS IN A MANNER THAT PRECLUDED PETITIONER FROM PURSUING CLAIMS THAT ACCRUED PRIOR TO APRIL 19, 2011.

Contrary to Petitioner's misguided contention, the Circuit Court did not err in applying the statute of limitations in the underlying civil action to preclude Petitioner from pursuing claims against CMO Management that accrued prior to April 19, 2011. In light of the unambiguous mandates of the MPLA and a prior decision of this Court, the Circuit Court properly declined to apply the discovery rule and the "savings clause," located at West Virginia Code § 55-2-15, to toll the statute of limitations period applicable to Petitioner's claims. It was also appropriate for the Circuit Court to conclude that the MPLA's provisions applied to all of Petitioner's claims against CMO Management, because it is a "health care provider" as defined by the MPLA.

A. The Circuit Court properly refrained from applying the discovery rule to the underlying claims against CMO Management.

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. W. Va. Code § 55-7B-4. Petitioner is correct, however, that the MPLA's statute of limitations allows the running of the statute to be tolled when certain circumstances are present. According to the "discovery rule" embedded within the MPLA's statute of limitations provision, if the statute of limitations does not immediately begin to run at the time of the infliction of an injury, it is usually tolled until a "person **discovers, or with the exercise of reasonable diligence, should have discovered,**" his or her injury. W.

Va. Code § 55-7B-4(a) (emphasis added). In other words, the running of the applicable statute of limitations may be tolled until a claimant knows or by reasonable diligence should know of his potential claim. *Legg v. Rashid*, 222 W. Va. 169, 174, 663 S.E.2d 623, 628 (2008) (citing *Gaither v. City Hospital, Inc.*, 199 W. Va. 706, 487 S.E.2d 901 (1997)). Based upon this discovery exception, Petitioner argues that she should have been permitted to pursue claims against CMO Management stemming as far back as 2009. (See Pet'r's Brief at pgs. 7-10.)

Although Petitioner accurately notes that in *Martin v. Charleston Area Medical Center*, 2013 W. Va. LEXIS 517 (2013) (memorandum decision), this Court did not apply the discovery rule because the incompetent plaintiff's legal representative was aware of his injuries at the time they accrued, she incorrectly asserts that the opposite conclusion should be reached in this case because Mr. Thompson was incompetent and had no representative capable of being aware of any potential claims against CMO Management. Even though Petitioner, as well as a MPOA of Mr. Thompson, conceded that they had concerns regarding the care and treatment rendered to Mr. Thompson as early as 2009, she disingenuously argues that the case of *State ex rel. AMFM v. King*, 230 W. Va. 471, 740 S.E.2d 66 (2013) stands for the proposition that statutes of limitations are tolled in personal injury and wrongful death claims involving incompetent persons until a guardian or conservator is appointed. This argument ignores that *King* had nothing to do with application of the statute of limitations. Rather, *King* stands for the proposition that a MPOA or a HCS does not have the authority to bind a decedent or his/her beneficiaries to arbitration agreements. *Id.* at 480-1, 740 S.E.2d 66, 75-6. Specifically, the opinion of Justice Davis provides:

[f]rom both the statutory pronouncements defining and clarifying the scope of a health care surrogate's authority and the actual form used by physicians to select a health care surrogate, it is clear that a decision to

arbitrate disputes regarding care provided by a nursing home to an incapacitated person is not within the ambit of a health care surrogate's authority. This is particularly true in the case *sub judice* where both McDowell Nursing and Ms. Baker concede that acquiescence to the Arbitration Agreement was optional and not required for Ms. Wyatt's receipt of services from McDowell Nursing. Further evidence of the understanding that the Arbitration Agreement was not a precondition to admission into McDowell Nursing's facility is the fact that, once signed, the signatory had thirty days within which to rescind his/her decision to be bound by the Agreement. In light of the foregoing authorities and consistent with the facts of the case *sub judice*, we therefore hold that an agreement to submit future disputes to arbitration, which is optional and not required for the receipt of nursing home services, is not a health care decision under the West Virginia Health Care Decisions Act, W. Va. Code § 16-30-1 *et seq.* Because the subject Arbitration Agreement was *not* a health care decision, Ms. Belcher, whose role as Ms. Wyatt's health care surrogate permitted her to make only health care decisions, was not a "competent part[y]" to the Agreement because she did not have the authority to sign this document on Ms. Wyatt's behalf. See Syl. pt. 3, in part, *Dan Ryan Builders*, 230 W. Va. 281, 737 S.E.2d 550. Therefore, the circuit court correctly refused to compel arbitration based upon Ms. Belcher's lack of authority to bind Ms. Wyatt to the Arbitration Agreement. Accordingly, we find that McDowell Nursing is not entitled to relief in prohibition because the circuit court did not err in rendering its rulings. See Syl. pt. 4, in part, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12.

Id. From this language, it is evident that *King* does not stand for the proposition that, in order for one to be capable of being aware of any health care problems, one must be a guardian or conservator. Instead, *King* fairly holds that the representative can only bind the incompetent on matters directly related to the scope of the representation. Here, a MPOA or HCS—both of whom are responsible for making health care decisions—is a sufficient legal representative for the purpose of being on notice of any issues regarding negligent health care and/or treatment. That is precisely within their charge. Accordingly, just as in *Martin*, the Circuit Court appropriately found the discovery rule inapplicable to Petitioner's action because Mr. Thompson had a MPOA who voiced concerns as early as 2009 about the care rendered to him during his residency at Nicholas Nursing.

Even if the discovery rule was applicable to the facts and circumstances of Petitioner's action—a point which CMO Management adamantly denies---, the MPLA's two-year statute of limitations nevertheless operates to bar Petitioner's claims that accrued before April 19, 2011. This is because Petitioner, as well as a MPOA, reasonably should have known of any potential cause of action regarding Mr. Thompson's care as early as 2009 based upon deposition admissions that they often complained to family members about the care Mr. Thompson received while a resident at Nicholas Nursing. (App. 00892-00893.) Petitioner even testified that she spoke with family members about having Mr. Thompson transferred to another nursing facility. (App. 00892.) Of even greater significance, however, is the fact that Petitioner conceded that she recalled an instance in 2009 where both she and her mother (a MPOA of Mr. Thompson) met with West Virginia Department of Health and Human Resources representatives to discuss the care Mr. Thompson was receiving at Nicholas Nursing. (App. 00892-00893.) Thus, it is evident that Petitioner and a MPOA had enough information at their disposal in 2009 to trigger an affirmative duty to make further inquiry into additional facts surrounding Mr. Thompson's care. Consequently, the Circuit Court's statute of limitations ruling was appropriate even if a discovery rule analysis was utilized.

B. The Circuit Court appropriately applied the MPLA's provisions to all of Petitioner's claims against CMO Management.

As this Court is well aware, “[m]edical professional liability,” to which the MPLA applies, has been defined as “any liability for damages resulting from the death or injury of a person for any tort or breach of contract based on health care services rendered, or which should have been rendered, by a health care provider or health care facility to a patient.” W. Va. Code § 55-7B-2(i). By way of further definition, “health care” within the

meaning of “medical professional liability” has been defined 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). It is important to note that nursing homes are specifically included within the definition of “health care facility,” W. Va. Code § 55-7B-2(f), while the term “health care provider” includes employees working within nursing homes. W. Va. Code § 55-7B-2(g) (“ . . . an officer, employee or agent thereof acting in the course and scope of such officer’s, employee’s or agent’s employment.”) And, as even Petitioner acknowledges, “[t]he determination of whether a particular cause of action is governed by the [MPLA] is a legal question to be decided by the trial court.” *Manor Care, Inc. v Douglas*, 234 W. Va. 57, 74, 763 S.E.2d 73, 90 (2014) (emphasis added).

Given that Petitioner alleged in the underlying civil action that Respondent, a nursing home, deviated from the applicable standard of care with regard to its care and treatment of Mr. Thompson, such allegations constitute claims that are governed by the MPLA. See e.g., Syl. Pt. 3, *Grey v. Mena*, 218 W. Va. 564, 625 S.E.2d 326 (2005); *Blankenship v. Ethicon, Inc.*, 221 W. Va. 700, 707, 656 S.E.2d 451, 458 (2007) (“Where the alleged tortious act or omissions are committed by a health care provider within the context of the rendering of ‘health care’...the [MPLA] applies regardless of how the claims have been pled.”). Despite this obvious conclusion, however, Petitioner incorrectly attempts to argue that the MPLA does not apply to all of her claims by citing to this Court’s decision in the case of *Manor Care*. (See Pet’r’s Brief at pgs. 10-12.) That being said, there is a major distinction between *Manor Care* and the present case.

In *Manor Care*, this Court permitted ordinary negligence claims to stand because plaintiff presented evidence demonstrating that **control of Heartland Nursing Home—**

both as to budgeting and staffing—was exercised by various corporate entities that did not qualify as “health care providers” under the definitions provided by the MPLA. *Id.* at 75, 763 S.E.2d at 91. Specifically, the *Manor Care* court held:

[c]laims 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. Therefore, the MPLA did not provide the exclusive remedy for Mr. Douglas’ negligence claims.

Id. (emphasis added). Unlike in *Manor Care*, however, there are no corporate parents making daily staffing decisions for Nicholas Nursing in the underlying civil action. (App. 00888.) To the contrary, the claims set forth in Petitioner’s Complaint are asserted against a “health care provider”—Nicholas Nursing—which was responsible for making all of its own staffing decisions. (*Id.*) Moreover, the crux of all of the claims asserted in Petitioner’s Complaint factually relate to Respondent’s rendering of health care services to Mr. Thompson. (*Id.*) Accordingly, Petitioner’s reliance on *Manor Care* is misplaced and the Circuit Court was correct in concluding that the MPLA’s provisions applied to all of Petitioner’s claims.

C. The Circuit Court properly declined to apply the “savings clause,” located at West Virginia Code § 55-2-15, to toll the statute of limitations period applicable to Petitioner’s claims.

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. (App. 00886, 00957-00958.) What CMO Management disputes, however, is Petitioner’s inaccurate contention that the general “savings clause” of West Virginia Code § 55-2-15 tolled the applicable statute of limitations in order to permit claims regarding injuries allegedly sustained by Mr. Thompson prior to April 19, 2011. (See Pet’r’s Brief at pg. 12.)

In general, West Virginia Code § 55-2-15 (“General saving as to persons under disability”) provides a “savings clause,” which allows permanently mentally incapacitated individuals up to twenty (20) years to file a lawsuit. Specifically, West Virginia Code § 55-2-15 provides:

If 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. An exception to the general “savings clause” exists, however, with regard to causes of action for injuries against health care providers brought pursuant to the provisions of the MPLA. This Court has held that, although those under a disability have up to twenty years to file suit under West Virginia Code § 55-2-15 for most general causes of action, “adults alleging a medical professional liability action under the MPLA have a two-year statute of limitations . . .” *Martin v. Charleston Area Medical Center*, 2013 W. Va. LEXIS 517, *6 (2013) (memorandum decision). Therefore, because the Circuit Court appropriately held that the MPLA’s two-year statute of limitations period applied to all of Petitioner’s claims against Respondent (which falls within the definition of a “health care provider” for the purposes of bringing suit under the MPLA), the Circuit Court did not err when it followed the holding of the *Martin* decision to reach the conclusion that Petitioner’s claims that accrued prior to April 19, 2011 were not “saved” by West Virginia Code § 55-2-15.

D. Because it does not conflict with any published opinion, it was appropriate for the Circuit Court to rely upon the *Martin* decision.

Once a determination has been made that the factual allegations of a given complaint fall within the definitional contours of the MPLA, the Circuit Court is required

to apply the MPLA's provisions. See Syl. Pts. 3-4, *Blankenship*, 221 W. Va. 700, 656 S.E.2d 451. Here, upon correctly arriving at the conclusion that the MPLA applied to Petitioner's Complaint, the Circuit Court was required to apply the MPLA's provisions in order to reach a resolution of the allegations.

Petitioner argues that because Mr. Thompson had Alzheimer's and was considered mentally incompetent, the case of *Mack-Evans v. Hilltop Healthcare Center, Inc.*, 226 W. Va. 257, 700 S.E.2d 317 (2010), is applicable. (See Pet'r's Brief at pgs. 13-4.) In *Mack-Evans*, this Court held that a "two-year statute of limitations applies to causes of action for personal injury and wrongful death." *Id.* at 261, 700 S.E.2d at 322. This Court also held that a personal injury claim brought under West Virginia Code § 55-7-8a is tolled pursuant to West Virginia Code § 55-2-15 during any period of mental disability experienced by the injured party. *Id.* at 266, 700 S.E.2d at 326. In the event the injured person dies before the mental disability ends, however, the statute of limitations begins to run on the date of the injured person's death. *Id.* Based upon *Mack-Evans*, Petitioner incorrectly asserts that the MPLA's two-year statute of limitations was tolled—by operation of West Virginia Code § 55-2-15—until the date of Mr. Thompson's death.

Unlike the *Mack-Evans* decision, this Court's memorandum decision in the *Martin* case explicitly addressed the interplay between West Virginia Code § 55-2-15 and the MPLA's two-year statute of limitations. In *Martin*, this Court found unpersuasive the argument that the general disability "savings clause" in West Virginia Code § 55-2-15 should toll a claim brought under the MPLA. 2013 W. Va. LEXIS at *6. By way of further explanation, this Court found that, although "[f]or most general causes of action, those under a disability have up to twenty years to file suit pursuant to West Virginia Code § 55-2-15 . . .," adults bringing suit under the MPLA have a two-year statute of limitations.

Id. Consequently, this Court held that the MPLA's two-year statute of limitations barred a plaintiff's 2012 complaint to the extent that it sought recovery for injuries that occurred in 2007 despite the fact the injured individuals had been mentally incompetent since 2007. *Id.* at *6-*7.

CMO Management acknowledges that signed opinions "should be the primary sources relied upon in the development of the common law." *State v. McKinley*, 234 W. Va. 143, 153, 764 S.E.2d 303, 313 (2014). CMO Management further recognizes that, while memorandum decisions constitute legal authority, "where a conflict exists between a published opinion and a memorandum decision, the published opinion controls." *Id.* What CMO Management contests is Petitioner's illogical belief that a conflict exists between the *Martin* and *Mack-Evans* holdings. Given that this Court addressed the general "savings clause" in the context of actions brought pursuant to West Virginia Code § 55-7-8a in *Mack-Evans* while addressing the general "savings clause" in the context of the MPLA in the *Martin*, no conflict exists between the published decision and the memorandum decision. Indeed, the decisions can readily be reconciled. Accordingly, the Circuit Court properly relied upon *Martin* in crafting the statute of limitations ruling.

CMO Management would also note that the MPLA incorporates a specific statute of limitations with regard to minors and changes the statute of repose from the general twenty year period set forth in West Virginia Code §55-2-15 to ten years. See W. Va. Code § 55-7B-4. Significantly, the Legislature left out—arguably intentionally—language regarding incompetent persons. Because the Legislature was so specific in its inclusion of a statute of repose as well as its implementation of a minor-specific provision, one is left with the clear impression that the Legislature intended to create a very specific and all encompassing statute of limitations with regard to medical malpractice cases. The

fact that the Legislature left out any type of “saving” provision for incompetent individuals in the MPLA is further evidence that West Virginia Code §55-2-15 is simply not applicable in the context of medical negligence cases. Such a conclusion is supported by this Court’s well-established holding that “a **specific** statute be given precedence over a **general** statute relating to the same subject matter where the two cannot be reconciled.” Syl. Pt. 1, *UMWA by Trumka v. Kingdon*, 174 W. Va. 330, 325 S.E.2d 120 (1984). Consequently, the Circuit Court did not err when it relied upon the *Martin* decision.

II. THE CIRCUIT COURT DID NOT ERR IN DENYING THE ADMISSION OF SURVEYS FROM OUTSIDE OF THE MPLA’S STATUTE OF LIMITATIONS PERIOD BECAUSE THE SUBJECT SURVEYS ARE IRRELEVANT AND DO NOT DEMONSTRATE THAT CMO MANAGEMENT HAD NOTICE OR KNOWLEDGE OF THE PARTICULAR CONDITIONS THAT ALLEGEDLY INJURED MR. THOMPSON.

Prior to the trial of the underlying civil action, the Circuit Court ruled that Petitioner would not be permitted to present as evidence surveys conducted at Nicholas Nursing prior to April 19, 2011. (App. 00571-00582.) Petitioner incorrectly maintains that such a ruling was in error, however, because of the purported relevance of two particular surveys—one conducted on June 4, 2009, and one conducted on November 24, 2009—to the determination of compensatory and punitive damages. (See Pet’r’s Brief at pgs. 14-8.)

Rulings on the admissibility of evidence are largely within the discretion of the trial court and should not be disturbed on appeal unless there has been an abuse of discretion. *State v Mills*, 219 W.Va. 28, 631 S.E.2d 586 (2005). Here, the Circuit Court did not abuse its discretion in not admitting the two surveys. Rule 401 of the *West Virginia Rules of Evidence* provides that “[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence;

and (b) the fact is of consequence in determining the action.” W. Va. R. Evid. 401. The allegations in Petitioner’s Complaint relate to the care and treatment rendered to Mr. Thompson while he was a resident of Nicholas Nursing. (App. 00008-00069.) The June 4, 2009 and November 24, 2009 survey reports that Petitioner desired to introduce to the jury, however, merely measure the extent of Nicholas Nursing’s compliance with specific regulatory standards—not whether Nicholas Nursing deviated from the applicable standard of medical care with regard to its residents. (App. 02070-02101, 02109-02112.) Also of note, neither of the subject surveys identify any deficiency whatsoever with regard to the care and treatment rendered to Mr. Thompson. Thus, they both fail to meet the definitional threshold of relevance set forth in Rule 401

Although evidence of the commission of other “offenses” or “acts of misconduct” is inadmissible to prove that a party acted consistent with such prior behavior in the case at hand, Rule 404(b) of the *West Virginia Rules of Evidence* does permit the presentation of such evidence “for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” W. Va. R. Evid. 404(b). Rule 404(b) is, however, similarly unavailing as a mechanism for the admission of the surveys. Petitioner ignores the fact that a survey identifying a regulatory non-compliance or a deficient practice includes a rating as to the gravity of the cited deficiencies. In “grading” the severity of cited deficiencies during the course of Medicare and Medicaid certification surveys, a uniform system is employed by state survey agencies. Through the use of this system, the surveyor reaches a conclusion as to the level of harm posed to residents by the cited issue as well as the scope of the issue within the context of the entire facility’s environment. Based upon these determinations, the surveyor assigns an alphabetical scope and severity value. These values range from “A” through “L”—“A” being the least serious and “L” being the

most serious. A cursory review of the deficiencies cited by Petitioner from the June 4, 2009 and November 24, 2009 surveys, as well as their corresponding grades, clearly evidences that neither survey is relevant nor of a character sufficient to impute to CMO Management knowledge or notice of those specific conditions alleged to have harmed Mr. Thompson.

With regard to the June 4, 2009 survey, a citation was issued as a result of the surveyor's observation that the facility did not assure that three out of fifteen sampled residents with lap buddies were given the opportunity to dine—free from restrictive devices—in community dining areas. (App. 02073.) This deficiency received an alphabetical grading value of "D." (*Id.*) According to the CMS.gov website, a "D" grading means that the cited deficiency was an **isolated occurrence** that **caused no actual harm** to the involved residents. Additionally, the "D" rating indicates that the cited deficiency posed no immediate jeopardy to any other facility residents.

The facility was next given a "D" citation as the result of the June 4, 2009 survey based upon the surveyor's conclusion that one out of fifteen sampled patients did not quickly receive medication after complaining of a headache, and further because the facility failed to ensure that one resident's medical records were "accurately documented" given the fact that the resident's capacity form noted "capacity" while at the same time providing that his "incapacity" was expected to be short term. (App. 02070-02101.)

Additionally, the facility received "E" citations for: not developing comprehensive care plans for four out of fifteen residents based upon a failure to provide any specific activities relating to those residents' documented interests; not appropriately ensuring that resident environments remained free of accident hazards based upon the fact that rugs placed over white metal covers created tripping hazards; not locking a medication

cart located in the hall; and not locking a bottle containing a corrosive disinfectant in a storage room. (*Id.*) According to the CMS.gov website, an alphabetical grading value of “E” indicates that the deficiency did not result in any harm to the subject resident or pose immediate jeopardy throughout the facility. Finally, the facility was cited as a result of the June 4, 2009 survey for not completing comprehensive restraint assessments on three out of fifteen patients, which was evidenced by a failure to provide documentation as to how use of a lap buddy enhanced the residents’ quality of life, a failure to ensure individualized activities were provided for the residents during restraint-free times, and a failure to implement processes to reduce or eliminate the need for restraints. (*Id.*)

With regard to the November 24, 2009 survey, the facility was cited for failing to meet professional standards of quality with regard to the provision of services because LPNs were found to be completing RN duties. (App. 00398-00401.) This particular deficiency received an alphabetical grading value of “E,” which—as mentioned above—demonstrates that the surveyor’s finding did not result in any harm to the subject resident or pose immediate jeopardy throughout the facility.

As previously mentioned, Petitioner alleges that Nicholas Nursing breached various duties of care it owed to Mr. Thompson, thus causing him to experience falls, a subdural hematoma, a hip fracture, malnutrition, and—ultimately—his death. (App. 00012.) In reviewing the survey deficiencies detailed above, however, it is immediately apparent that the issues identified are not sufficiently similar to any of Petitioner’s claims against Respondent, particularly in light of the fact that several of the deficiencies relate to administrative tasks—not to direct patient care—and that none of the deficiencies were determined to have caused any actual harm to residents. Furthermore, the surveys—when viewed in their entirety—indicate that deficiencies were rare occurrences, and that CMO Management was substantially in compliance with

applicable nursing home regulations. Thus, Petitioner's contention that these surveys demonstrate that CMO Management had knowledge or notice of the alleged deficiencies existing at Nicholas Nursing that purportedly resulted in harm to Mr. Thompson is utterly baseless.

Because of the dissimilarity between the subject surveys and the conduct at issue in Petitioner's underlying cause of action, the surveys were also appropriately excluded from consideration regarding any award of punitive damages. In *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408, 423-4, 123 S. Ct. 1513, 1524 (2003), the United States Supreme Court held:

[a]lthough evidence of other acts need not be identical to have relevance to the calculation of punitive damages, **the reprehensibility guidepost, under the due process clause, does not permit courts to expand the scope of the case so that a defendants may be punished for any malfeasance.**

(emphasis added). The Supreme Court further elaborated on this notion by acknowledging that courts must not award punitive damages to punish and deter conduct **bearing no relation to the harm alleged by a plaintiff in a pending case.** *Id.* at 422, 123 S. Ct. at 1523. Thus, civil action courts “must ensure that the conduct in question replicates the prior transgressions.” *Id.* at 423, 123 S. Ct. at 1523. As such, the Supreme Court posited that a defendant should be punished in a given case only for the conduct that harmed the plaintiff—not for generally being “an unsavory individual or business.” *Id.* As the deficiencies cited in the subject surveys were not sufficiently similar to those claims asserted regarding the care and treatment of Mr. Thompson, they were appropriately prohibited from consideration for the purpose of establishing the propriety of punitive damages.

Even had the subject surveys been determined by the Circuit Court to be somehow relevant—which CMO Management adamantly denies—, any potential

relevance would have been substantially outweighed by the prejudicial impact of such evidence. According to Rule 403 of the *West Virginia Rules of Evidence*, relevant evidence may be excluded “if its probative value is substantially outweighed by danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” W. Va. R. Evid. 403. The only rational reason Petitioner would have for wanting to introduce the survey results would be to substantially prejudice CMO Management’s ability to adequately litigate its position by presenting evidence related to the care of a small number of other residents that was found to be deficient—regardless of whether such deficiencies were related to Mr. Thompson’s care or whether such deficiencies even had an impact on the subject residents. Therefore, in order to ensure that CMO Management was only tried for the conduct that was alleged by Petitioner to have harmed Mr. Thompson, the Circuit Court appropriately denied the admission into evidence of surveys conducted at Nicholas Nursing from outside of the MPLA’s two-year statute of limitations period.

III. THE CIRCUIT COURT DID NOT ERR IN ALLOWING CMO MANAGEMENT’S EXPERT TO PROVIDE BRIEF TESTIMONY REGARDING FALLS EXPERIENCED BY HIS PATIENTS AND THE USE OF THE POSEY VEST.

Lastly, Petitioner contends that the jury was “improperly influenced and prejudiced” by CMO Management’s expert’s brief testimony regarding falls experienced by his patients and use of a Posey Vest as a restraint—all of which were admitted into evidence over Petitioner’s objections. (See Pet’r’s Brief at pgs. 18-9.) In an unpersuasive effort to support her contention that the admission of such testimony was improper, Petitioner asserts that “[i]f the admission of irrelevant testimony could possibly prejudice the opposite party, it is a ground for granting a new trial.” (*Id.* at 19.)

(misstating *Jones v. Singer Mfg., Co.*, 38 W. Va. 147, 155, 18 S.E. 478, 480-1 (1983), which actually provides that “[t]he admission by the court of **irrelevant testimony**, if it be of such a character that it could not possibly prejudice the opposite party before the jury, is not good ground for granting a new trial.”). Petitioner’s argument that a new trial is warranted based upon the admission of the testimony by Dr. DeLaGarza, however, is misguided because the testimony was actually relevant to Dr. DeLaGarza’s qualifications to testify as well as the opinions he rendered.

A. Testimony regarding “one of his patients”

Under Rule 702 of the *West Virginia Rules of Evidence*, “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge skill a **witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion** or otherwise.” W. Va. R. Evid. 702 (emphasis added). When Dr. DeLaGarza testified that some of his patients have fallen, causing them to become dependent or even die, Dr. DeLaGarza was laying the foundation necessary to demonstrate that he was qualified to offer expert opinions regarding the care and treatment of Mr. Thompson, who we also know experienced falls and ultimately passed away. (App. 02779-02781.) Consequently, because it was relevant to establishing Dr. DeLaGarza’s expert qualifications, the Circuit Court did not err when it permitted Dr. DeLaGarza to basically mention in passing that he himself has had patients who have experienced falls.

B. Posey Vest

Similarly, Dr. DeLaGarza’s testimony and presentation regarding the potential utilization of a Posey Vest as a restraint mechanism was also relevant to the trial of the underlying civil action. Specifically, the Posey Vest was presented by Dr. DeLaGarza as

an alternative that could be utilized to help prevent a resident from falling. (App. 02804-02805.)

In the context of the care and treatment rendered to Mr. Thompson, Dr. DeLaGarza noted that the Posey Vest would have presented a more restrictive fall restraint measure than the lap buddy actually utilized by the facility. (App. 02830-02831.) Because Dr. DeLaGarza appreciated the fact that Mr. Thompson was known by staff to enjoy ambulating throughout the facility, more restrictive measures would likely have been frustrating and counterproductive to Mr. Thompson's well-being. As such, Dr. DeLaGarza offered his opinion that the facility appropriately chose to utilize the lap buddy in an effort to prevent Mr. Thompson from falling. (App. 02833-02834.) Moreover, Dr. DeLaGarza's testimony and presentation of the Posey Vest was not highly prejudicial to Petitioner's case in light of the fact that Dr. DeLaGarza never testified that the Posey Vest was used on Mr. Thompson, let alone that it was even available for use at Nicholas Nursing. (App. 2804-2805.) Again, it was merely presented to support Dr. DeLaGarza's opinion that, based upon Mr. Thompson's preferences and condition, the facility's decision to use a lap buddy to prevent Mr. Thompson from falling was appropriate. Consequently, the Circuit Court did not err in permitting Dr. DeLaGarza to testify regarding the Posey Vest.

CONCLUSION

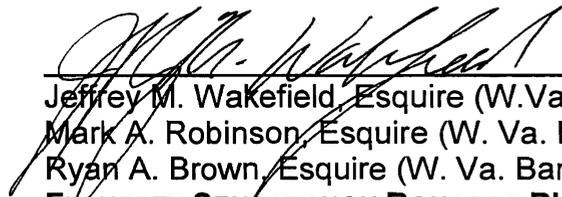
The Circuit Court did not err when it applied the MPLA's statute of limitations in a manner that precluded Petitioner from pursuing any claims against CMO Management that accrued prior to April 19, 2011. Nor did the Circuit Court err when it denied the admission into evidence of surveys conducted at Nicholas Nursing from outside of the MPLA's two-year statute of limitations period. Finally, the Circuit Court did not err when it allowed Dr. DeLaGarza to provide brief testimony regarding falls experienced by his

own patients and the use of the Posey Vest. As a result, the judgment entered by the Circuit Court of Nicholas County should be affirmed.

WHEREFORE, based upon the foregoing reasons, Respondent/Defendant Below, CMO Management, LLC, respectfully requests that this Court deny Petitioner/Plaintiff Below's appeal and affirm the judgment entered below together with such other and further relief as this Court deems proper.

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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.

Appeal No.: 15-0553

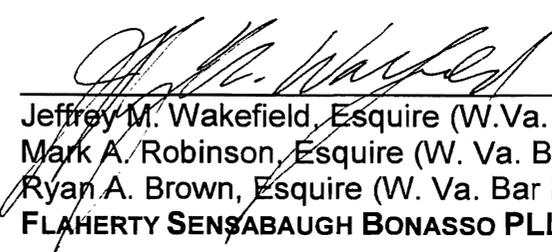
CMO MANAGEMENT, LLC
(as to Nicholas County Nursing
& Rehabilitation)

Respondent/Defendant Below.

CERTIFICATE OF SERVICE

I, Mark A. Robinson, counsel for Respondent/Defendant Below, do hereby certify that I have served the foregoing **Brief of Respondent/Defendant Below CMO Management, LLC** upon counsel of record this 29th day of October, 2015, by depositing true and correct copies in the United States mail, postage prepaid, addressed as follows:

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