IN THE CIRCUIT COURT OF WYOMING COUNTY, WEST VIRGINIA

GREG A. SHREWSBURY and
PHYLLIS A. SHREWSBURY,

Plaintiffs,

v. Civil Action No. 18-C-100

HOPE CLINIC, PLLC, a professional limited Liability corporation, JAMES H. BLUME, JR., D.O., SANJAY R. MEHTA, D.O., PPPFD ALLIANCE, LLC, A limited liability corporation, MARK RADCLIFFE, BECKLEY PAIN CLINIC, PLLC, a professional limited Liability corporation, NARCISO A. RODRIQUEZ-CAYRO, M.D., ACE MEDICAL, INC., a Virginia corporation, DAVID LEE MORGAN, D.O., DESCHNER MEDICAL SERVICES, PLLC., a professional limited Liability corporation, d/b/a DEBOSS NEUROLOGY & PAIN CLINIC, STEVEN H. DESCHNER, M.D., RHONDA'S PHARMACY, LLC, a limited liability corporation, RHONDA ROSE, R. Ph., EVAN D. BRUSH, R. Ph., BYPASS PHARMACY, INC., a West Virginia corporation, WESTSIDE PHARMACY, INC., DEVONNA L. MILLER-WEST, R. Ph., RITE AID OF WEST VIRGINIA, INC., A West Virginia corporation, d/b/a RITE AID DISCOUNT PHARMACY #1373, d/b/a RITE AID DISCOUNT PHARMACY #113, WALGREEN CO, a West Virginia corporation, DOE PHYSICIANS 1-99, DOE PHARMACIES 1-99, DOE PHARMACISTS 1-99, DOE CORPORATION 1-99,

Defendants.

ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND ACCOMPANYING FINDING OF FACT AND CONCLUSION OF LAW

On January 22, 2020 came Plaintiffs, by counsel, and came Defendants, by counsel for a hearing on Defendants Rhonda Rose, R.Ph., Evan D. Brush, R. Ph., Rite Aid of West Virginia,

Inc., Sanjay R. Mehta, D.O., Deschner Medical Services, PLLC, Steven H. Deschner, M.D., ByPass Pharmacy, Inc., Walgreen Co., and Devonna Miller-West's Motions to Dismiss with Incorporated Memorandum of Law. The plaintiff has responded to all motions.

After oral argument, counsel's arguments, the applicable legal authority, a full briefing, and mature consideration, and for the reasons that follow, the Court hereby **DENIES** Defendants' Motions to Dismiss.

LEGAL STANDARD

1. The standard under a Motion to Dismiss in West Virginia for dismissal of a complaint are as follows:

   a. "A Complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of [her] claim which would entitle [her] to relief." *Conrad v. ARA Szabo*, 198 W.Va. 362, 369-70, 480 S.E.2d 801, 808-09 (1996).

   b. "Although entitlement to relief must be shown, a plaintiff is not required to set out facts upon which the claim is based." *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 461 S.E.2d 516, 522 (1995).

   c. "In view of the liberal policy of the rules of pleading with regard to the construction of plaintiff's complaint, and in view of the policy of the rules favoring the determination of actions on the merits, the motion to dismiss for failure to state a claim should be viewed with disfavor and rarely granted. The standard which plaintiff must meet to overcome a Rule 12(b) motion is a liberal standard, and few complaints fail to meet it." *John W. Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W.Va. 603, 606, 245 S.E.2d 157, 159 (1978).

   d. "Complaints are to be read liberally as required by the notice pleading theory underlying the West Virginia Rules of Civil Procedure." *State ex rel. Smith v. Kermit Lumber & Pressure Treating Co.*, 200 W.Va. 221, 227, 488 S.E.2d 901, 907 (1997) (quoting *Scott Runyan*, 194 W.Va. at 776, 461 E.2d at 522).

2. It is well-settled under West Virginia law that a trial court, in determining the Sufficiency of a complaint on a Rule 12(b)(6) motion, "should not dismiss the complaint unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Cantley v. Lincoln County Comm'n, 221 W. Va. 486, 470 (2007) (quoting Chapman v. Kane Transfer Co., 160 W. Va. 530 (1977)). Moreover, "for the purposes of a motion to dismiss, the complaint is construed in the light most favorable to the plaintiff, and its allegations are to be taken as true." Id. (quoting John W. Lodge Distrib. Co., Inc. v. Texaco, Inc., 161 W. Va. 603, 605 (1978)). "For this reason, motions to dismiss are viewed with disfavor, and [the Supreme Court of Appeals] counsel lower courts to rarely grant such motions." Forshey v. Jackson, 222 W. Va. 743, 749 (2008) (emphasis added).

3. The Defendants seek dismissal on multiple grounds including assertions that the Plaintiff did not comply with the pre-suit requirements of the Medical Professional Liability Act (MPLA), WV Code 55-7b-6 specifically by filing the Complaint before service of the Notice of Claim, the Screening Certificate of Merit was not executed within the 60 days of serving the Notice of Claim, Plaintiff failed to file their Complaint with the two (2) year statute of limitations, the Notice of Claim and Certificate of Merit did not conform to the requirements of WV Code 55-7b-6, Plaintiffs' failed to state a claim upon which relief can be granted, the Complaint and Summons was not made within one hundred twenty (120) days after the filing of the Complaint, Plaintiffs' Complaint contained insufficient allegations against Dr. Blume, and the lack of personal jurisdiction against Deschner Medical Services, PLLC and Dr. Deschner.

I. FINDINGS OF FACT

4. In April of 2011, the Plaintiff was involved in an automobile accident. Mr. Shrewsbury sought medical treatment at the Raleigh General Hospital for injury to his lower back, shoulder, wrist, hand, as well as his hips. Mr. Shrewsbury was referred to the Beckley Pain Clinic and Dr. Narciso A. Rodriquez-Cayro by physicians from Raleigh General Hospital. Dr. Rodriquez-Cayro treatment of the Plaintiff consisted of taking the Plaintiff's blood pressure and obtaining his weight and then provided prescriptions to Greg Shrewsbury without any reasonable or proper medical examination or no examination at all and without any legitimate medical purpose while knowing, or having good reason to know, that the Plaintiff would become and/or had become addicted to the same.

5. Defendant Rite Aid Discount Pharmacy #1373 and Defendant Rite Aid Discount Pharmacy #113, by and through its principals, its agents, servants and employees, negligently filled the prescriptions for controlled substances for Greg Shrewsbury during the period of approximately 2011 to 2013. The negligence of Defendant Rite Aid Discount Pharmacy #1373 and Defendant Rite Aid Discount Pharmacy #113 was instrumental in the continuation of Plaintiff's addiction.

6. Plaintiff thereafter began treating at the Hope Clinic and Dr. Sanjay R. Mehta after the closure of the Beckley Pain Clinic. Dr. Mehta's treatment of the Plaintiff consisted of taking the Plaintiff's blood pressure and obtaining his weight and then provided prescriptions to Greg Shrewsbury without any reasonable or proper medical examination or no examination at all and without any legitimate medical purpose while knowing, or having good reason to know, that

the Plaintiff had become addicted to the same. The negligence of Dr. Mehta and the Hope Clinic was instrumental in the continuation of Plaintiff's addiction.

7. Defendant Bypass Pharmacy, by and through its principals, its agents, servants and employees, negligently filled the prescriptions for controlled substances for Greg Shrewsbury. The negligence of Bypass Pharmacy was instrumental in the continuation of Plaintiff's addiction.

8. Defendant Rhonda's Pharmacy, LLC, located in Pineville and Beckley, by and through its principals, its agents, servants and employees, negligently filled the prescriptions for controlled substances written by Dr. Mehta for Greg Shrewsbury. The negligence of Rhonda's Pharmacy, LLC was instrumental in the continuation of Plaintiff's addiction.

9. Plaintiff thereafter began treating at Ace Medical and Dr. David Morgan after the closure of the Hope Clinic. Plaintiff was treated at Ace Medical from April 28, 2015 until April 19, 2016. Similar to the other treating physicians and pain clinics, Dr. Morgan's treatment of the Plaintiff consisted of taking the Plaintiff's blood pressure and obtaining his weight and then provided prescriptions to Greg Shrewsbury without any reasonable or proper medical examination or no examination at all and without any legitimate medical purpose while knowing, or having good reason to know, that the Plaintiff had become addicted to the same.

10. Defendant Westside Pharmacy, by and through its principals, its agents, servants and employees, negligently filled the prescriptions for controlled substances for Greg Shrewsbury. The negligence of Westside Pharmacy was instrumental in the continuation of the Plaintiff's addiction.

11. Defendant Deschner Medical Services, PLLC d/b/a deboss Neurology & Pain Clinic and Dr. Steven Deschner began treating the Plaintiff after the closure of Ace Medical. Dr. Deschner's treatment of the Plaintiff consisted of taking the Plaintiff's blood pressure and obtaining his weight and then provided prescriptions to Greg Shrewsbury without any reasonable or proper medical examination or no examination at all and without any legitimate medical purpose while knowing, or having good reason to know, that the Plaintiff had become addicted to the same.

12. Each of these Defendants held themselves out as legitimate medical providers providing legitimate medical care and concealed their participation in the pill mill scheme. The Defendants acted in concert to conceal their pill mill activities and pills for cash scheme. Instead of providing legitimate medical care, the Defendants, on a continuous basis, merely prescribed and then filled prescriptions for opioid medications. The Defendants purposely prescribed and filled the prescriptions for opioids in a concerted effort to addict Greg Shrewsbury for monetary purposes. Mr. Shrewsbury sought medical treatment for legitimate injuries sustained in a car accident. Mr. Shrewsbury relied upon these Defendants to provide the proper and appropriate medical care to treat his injuries. Prior to the car accident, Mr. Shrewsbury operated a thriving logging company in Wyoming County, employing nine workers. Mr. Shrewsbury, through his logging company, contributed to economy of Wyoming County. However, once these Defendants negligently addicted Mr. Shrewsbury to opioids, he was unable to work and was unable to continue the operation of his logging company. Mr. Shrewsbury was forced to shutter his company and all of his employees lost their jobs. Wyoming County lost the economic contribution of the logging company and its employees.

13. The actions of each of the Defendants were continuous and repetitive acts of wrongful conduct. The Plaintiffs' complaint contains allegations of the continuous and repetitive acts of the wrongful conduct of the Defendants.

14. Plaintiffs filed their Complaint on September 12, 2018 in order to preserve the statute of limitations. Subsequent thereto Plaintiffs filed a Statement of Intent pursuant to the Medical Professional Liability Act (MPLA), West Virginia Code 55-7B-6(d). The initial Statement of Intent contained factual errors and subsequently on November 27, 2018, Plaintiffs filed a corrected Statement of Intent upon all of the Defendants. During Plaintiffs' counsel's investigation of the Defendants, multiple official addresses were identified. In an effort to comply with the provisions of the Medical Professional Liability Act, West Virginia Code 55-7B-6, Plaintiffs mailed the Statement of Intent to each of the addresses identified during counsel's investigation. Thereafter, the medical professional experts retained by the Plaintiffs notified Plaintiffs' counsel that due to emergency personal circumstances, there would be a delay in the preparation and filing of the Screening Certificate of Merit. Plaintiffs' counsel notified each of the Defendants of the delay in the receipt of the Screening Certificate of Merit via correspondence. At such time that Plaintiffs' counsel received the Certificate of Merit from the pharmacy expert, Plaintiffs caused the required Notice of Claim and Certificate of Merit to be served upon the pharmacy defendants via certified mail.

15. Due to the delay in the receipt of the Screening Certificate of Merit, Plaintiffs' counsel filed a Motion to Extend Time for Service of the Complaint. At that time Plaintiffs' counsel filed an Affidavit of Counsel pursuant to W.Va. Code 55-7B-6 (c),stating that counsel was providing the sworn statement setting forth the basis of allegations of liability against the

Defendant physicians and clinics herein. The statement was provided in lieu of a screening certificate of merit because the theory of liability presented against the medical Defendants was based upon well-established legal theory of liability which does not require expert testimony supporting a breach of the applicable standard of care. Subsequent thereto, Plaintiffs' counsel retained a medical professional expert, in further compliance with the provisions of the Medical Professional Liability Act. Plaintiffs caused the required Notice of Claim and Certificate of Merit to be served upon the physician and medical facility defendants via certified mail pursuant to the provisions of W.Va. Code 55-7B-6. Plaintiffs have demonstrated a good faith effort and reasonable effort to further the statutory purposes of "preventing the making and filing of frivolous medical malpractice claims and lawsuits; and promoting the pre-suit resolution of non-frivolous medical malpractice claims." Syl.Pt. 6, in part, *Hinchman v. Gillette*, 217 W.Va. 378, 618 S.E.12d 387 (2005).

II. CONCLUSIONS OF LAW

16. The Court, having reviewed the defendants' motion to dismiss and memorandum in support thereof and Plaintiffs' response to the same, in keeping with its duty to apply the above standard of review and having heard argument of counsel, **FINDS** as follows:

A. Plaintiffs Complied with the mandates and requirements of W.Va. Code §55-7B-6

17. The Court finds as a matter of law, that Plaintiffs complied with the requirements of the *Medical Professional Liability Act* (MPLA) – *West Virginia Code §55-7B-6* and the Notices of Claims and Screening Certificates of Merit are sufficient according to the *Medical*

Professional Liability Act (MPLA) – *West Virginia Code §55-7B-6* and the West Virginia Rules of Evidence.

According to *W.Va. Code §55-7B-6(b)*:

> [a]t least thirty days prior to the filing of a medical professional liability action against a health care provider, the claimant shall serve by certified mail, return receipt requested, a notice of claim on each health care provider the claimant will join in litigation. The notice of claim shall include a statement of the theory or theories of liability upon which a cause of action may be based, and a list of all health care providers and health care facilities to whom notices of claim are being sent, together with a screening certificate of merit. The screening certificate of merit shall be executed under oath by a health care provider qualified as an expert under the *West Virginia Rules of Evidence* and shall state with particularity: (1) The expert's familiarity with the applicable standard of care in issue; (2) the expert's qualifications; (3) the expert's opinion as to how the applicable standard of care was breached; and (4) the expert's opinion as to how the breach of the applicable standard of care resulted in injury or death. A separate screening certificate of merit must be provided for each health care provider against whom a claim is asserted. The person signing the screening certificate of merit shall have no financial interest in the underlying claim, but may participate as an expert witness in any judicial proceeding. Nothing in this subsection may be construed to limit the application of rule 15 of the rules of civil procedure.

W.Va. Code §55-7B-6(d) contemplates and outlines the steps to be taken when a Plaintiff does not have sufficient time to obtain a screening certificate of merit prior to the expiration of the statute of limitations:

> (d) If a claimant or his or her counsel has insufficient time to obtain a screening certificate of merit prior to the expiration of the applicable status of limitations, the claimant shall comply with the provisions of subsection (5) of this section except that the claimant or his or her counsel shall furnish the health care provider with a statement of intent to provide a screening certificate of merit within sixty days of the date of the health care provider receives the notice of claim.

18. Plaintiffs have in good faith complied with the provisions set forth in *W.Va. Code §55-7B-6 et seq.* According to *Gray v. Mena*, 218 W.Va. 564, 625 S.E.2d 326 (2005), citing *Hinchman*,

> The requirement of a pre-suit notice of claim and screening certificate of merit is not intended to restrict or deny citizens' access to the courts. Syl. Pt. 2, in part, *Hinchman v. Gillette*, 217 W.Va. 378, 618 S.E.2d 387 (2005).

19. In, *Hinchman v. Gillette*, 217 W.Va. 278, 618 S.E.2d 387 and at Syl.Pt. 2, the Supreme Court of Appeals of West Virginia stated that according to *West Virginia Code §55-7B-6*, the rationale "for requiring a pre-suit notice of claim and screening certificate of merit are (1) to prevent the making and filing of frivolous medical and malpractice claims and lawsuits: and (2) to promote the pre-suit resolution of non-frivolous medical malpractice claims." Further, '[t]he requirement of pre-suit notice of claim and screening certificate of merit is **not** [emphasis added] intended to restrict or deny citizens' access to the courts." before a court reviewing a claim of sufficiency of a notice and certificate has demonstrated a good faith and reasonable effort to further the statutory process." Also, in syllabus point four of *Elmore v. Triad Hospitals, Inc.*, 220 W.Va. 154, 640 S.E.2d 217 (2006), the West Virginia Supreme Court determined that "[t]he requirement of a pre-suit notice of claim and screening certificate of merit is not intended to restrict or deny citizens' access to the courts".

20. In the *Hinchman* decision, the Court outlined how healthcare providers must respond to notices of claim and certificates of merit if they are believed to be defective and/or insufficient and the healthcare providers' responsibility once a pre-suit notice of claim and certificate of merit are received and the provider believes the notice and certificate of merit are insufficient and legally defective.

> "W.Va. Code §55-7B-6(b), in part, The MPLA further permits a health care provider in receipt of a notice of claim to, within thirty days, state that he has a bona fide defense and/or demand pre-suit mediation."

21. The Supreme Court expanded the interplay between parties during the pre-suit period, permitting a health care provider who believes the notice and/or certificate of merit to be defective to make "a written request to the claimant for a more definite statement of the notice of claim and screening certificate of merit." Syl.Pt 4 in part, *Hinchman.*

The Court further held that:

> "...the Plaintiff must have been given written and specific notice of, and an opportunity to address and correct, the alleged defects and insufficiencies."
> Syl. Pt. 3 *Hinchman*
>
> "Any objects not specifically set forth in response are waived."
> Syl.Pt 5 *Hinchman*

22. Although each of the Defendants herein were provided with a Statement of Intent, a Notice of Claim, and a Screening Certificate of Merit, only Defendants Dr. James H. Blume, Jr., Hope Clinic, PLLC, Devonna Miller, and Westside Pharmacy responded to the filings of the Plaintiffs by requesting a more definite statement pursuant to *Hinchman.* The Defendants who failed to respond to the Statement of Intent, Notice of Claim, and the Certificates of Merit are now asking this Court to dismiss the Plaintiffs' complaint due to a lack of compliance with the mandates and requirements of W.Va. Code §55-7B-6. Their requests for a dismissal are baseless and are hereby **DENIED**. Although Plaintiffs herein made a good faith effort to comply with the mandates and requirements of W.Va. Code §55-7B-6, the Defendants who did not respond to the Statement of Intent, Notice of Claim, and the Certificates of Merit are the parties who have failed

to comply with W.Va. Code §55-7B-6. Due to their failure to comply with the mandates and requirements of W.Va. Code §55-7B-6, these Defendants are barred from requesting a dismissal of the Plaintiffs' Complaint.

23. The Plaintiffs responded to Defendants Blume, Hope Clinic, PLLC, Devonna Miller, and Westside Pharmacy's request for a more definite statement. The Plaintiffs response was a good faith effort to address the Defendants' concerns outlined in their respective requests for a more definite statement by further explaining their position regarding the malpractice of these Defendants. Plaintiffs good faith effort to respond to the Defendants' requests for a more definite statement thereby placed Defendants on sufficient notice of the claim being pursued. In their response to Defendants' requests for a more definite statement, Plaintiffs invited the Defendants to set mediation to further discuss the case in its entirety. Thus, the Plaintiffs complied with and fully fulfilled their obligations set forth in West Virginia Code §55-7B-6 and the Defendants' Motions to Dismiss must be denied.

24. None of the remaining medical providers provided a written notice of any defects to Plaintiffs' Notices of Claim and Certificates of Merit as required by *Hinchman* and thus, any objections they now assert or may assert in a Motion to Dismiss are waived.

> Under *W.Va. Code*, 55-7B-6 [2003], the making of a request for a more definite statement in response to a notice of claim and screening certificate of merit preserves a party's objections to the legal sufficiency of the notice and certificate as to all matters specifically set forth in the request; all objections to the notice or certificate's legal sufficiency not specifically set forth in the request are waived."
> Syllabus Point 5, *Hinchman v. Gillette*, 217 W.Va. 378, 618 S.E.2d 387 (2005).

25. The Defendants who failed to provide written notice of any insufficiencies or defects to Plaintiffs' Notice of Claim or Certificate of Merit deprived the Plaintiffs of their ability to address any issues prior to filing the Complaint and thus the Defendants waived any objections thereto.

26. The Court finds, as a matter of law, that Plaintiffs acted in good faith to comply with the mandates and requirements of§55-7B-6. In *Elmore v. Triad Hospitals, Inc.*, 640 S.E.2d 217 (2006), the West Virginia Supreme Court concluded that there was "no reason to penalize [the Plaintiffs' with dismissal of [their] suit when the records fails to show that [they were] not acting in good faith or otherwise[were] neglecting to put forth a reasonable effort to further the statutory purposes." 640 s.E.2d at 223. Additionally, the West Virginia Supreme Court cautioned in *Westmoreland v. Vaidya*, 664 S.E.2d 90 (2008) that "dismissal based on procedural grounds is a severe sanction which runs counter to the general objective of disposing cases on the merit."

27. Accordingly, the Court finds, as a matter of law, that each of these Defendants' Motion to Dismiss pursuant to **W.Va. Code §55-7B-6** is denied.

B. Plaintiffs' Certificates of Merit Comply with the Mandates of the MPLA

28. West Virginia Code 55-7B-6 requires that a certificate of merit:

> "shall state with particularity that: (1) the expert's familiarity with the applicable standard of care in issue; (2) the expert's qualification; (3) the expert's opinion as to how the applicable standard of care was breached; and (4) the expert's opinion as to how the breach of the applicable standard of care resulted in injury or death."
> *Deel v. Lawrence*, No. 15-0223 (W.Va. 2015)

29. The Court finds, as a matter of law, that the Certificates of Merit are particular as to the Plaintiffs' experts' familiarity with the applicable standard of care; their qualifications; their opinions as to how each Defendant breached the standard of care; and how each Defendants' breach resulted in injury and damages to the Plaintiffs. Plaintiff's counsel conscientiously resonded to the requests of Dr. James H. Blume, Jr., Hope Clinic, PLLC, Devonna Miller, and Westside Pharmacy for a more definite statement. None of these Defendants requested that mediation occur to further discuss and outline the claims of the Plaintiff. Additionally, in response to Defendant Rite Aid's discovery requests, Plaintiffs provided medical records and pharmacy records to each of the Defendants.

30. The principal consideration before a court reviewing a claim of sufficiency of a notice or certificate should be whether a party challenging or defending the sufficiency of a notice and certificate has demonstrated a good faith and reasonable effort to further the statutory process. Plaintiffs made a good faith and reasonable effort to respond Defendants Dr. James H. Blume, Jr., Hope Clinic, PLLC, Devonna Miller, and Westside Pharmacy request for a more definite statement. Each of the remaining Defendants failed to demonstrate a good faith and reasonable effort to further the statutory process and they are barred from challenging Plaintiffs' Notice of Claim and Certificates of Merit.

31. As demonstrated by the record before the Court and contained herein, the Plaintiffs have made every effort to explain to defendants their theory of the case and resolve any and all misunderstandings. Plaintiffs, through their counsel, submitted the requisite Certificates of Merit, and responded in good faith to the Defendants' *Hinchman v. Gillette* letter. As such,

Plaintiffs have in good faith attempted to further the statutory purpose of providing Defendant with ample information regarding their negligence, and proper notice of, a meritorious claim.

32. Finally, Plaintiffs' burden at this juncture is only to establish that their claim has merit. They are not required to prove their claims by a preponderance of the evidence, nor are they required to provide Defendant with more than one theory of liability. As Justice Starcher asserted in Hinchman, "[s]creening certificates of merit are meant to escort the case through the threshold and allows the case to come to the door." As such, Plaintiffs have satisfied their burden at this time.

33. A Motion to Dismiss an action under Rule 12(b)(6) raises the question of whether the pleadings state a valid claim. The opinions in Drs. Ranieri's and Breve's Certificates of Merit support the allegations in the Plaintiffs' Complaint that the treatment rendered by these Defendants was negligent and the prescribing of opioids and benzodiazepines repeatedly for multiple years was not for legitimate medical purposes and was not in the usual course of professional medical practice and was beyond the bounds of medical practice.

34. Because the Plaintiffs' Notices of Claim and Certificates of Merit are sufficient according to the *MPLA – W.Va. Code §55-7B-6* and the *West Virginia Rules of Evidence*, and Plaintiffs complied with all of the requirements of the MPLA, the Court finds, as a matter of law, that Defendants' Motion to Dismiss the Plaintiffs' Complaint are **Denied**.

C. **Plaintiffs Complied with the Mandates of W.Va.R.Civ.P. 4(d)4 and Rule 4(k) , Service of the Complaint Upon the Defendants was Proper Service**

35. On January 11, 2019, Plaintiffs filed a Motion to Extend Time for Service of the Complaint. As Plaintiffs stated in their motion, Rule 4(k) of the West Virginia Rules of Civil Procedure provides that the summons and complaint shall be served on a defendant within 120 days after the filing of the complaint. However, if that deadline cannot be met, the Rule allows for the Court to extend the time for the service. In order to preserve the statute of limitations, the complaint in this action was filed on September 12, 2018. After the filing of the Complaint, Plaintiffs served the Defendants with a Statement of Intent pursuant to Chapter 55, Article 7B, Section 6 of the MPLA which provides an additional sixty days in which to provide the Defendants with a Certificate of Merit. Thus, the Defendants were aware of and were on notice of Plaintiffs' allegations of medical malpractice.

36. Plaintiffs requested an extension of time in which to serve the complaint and summons upon the Defendants in order to allow time for all parties to comply with the provisions of the MPLA. The requirements of *W.Va. Code §55-7B-6 et seq*, necessitated the delay in the service of the Complaint until such time as those requirements and procedures could be fulfilled. Once all of the parties had complied with the provisions of the MPLA, the Plaintiffs effectuated service of the Complaint and Summons upon the Defendants. Plaintiffs made their request for an extension of time in which to serve the complaint in good faith and had good cause for the relief they sought. Until full compliance with the provisions of the MPLA had been undertaken, service of the summons and complaint on the Defendants was improper and did not comply with the statutory provisions of the MPLA. Rule 4(k) provides for an extension of time

to serve the complaint and summons upon a Defendant per a showing of good cause. *State ex rel. Charleston Area Medical Center, Inc. v. Kaufman*, 197 W.Va. 282, 475 S.E.2d 374 (1996).

> Under *W.Va. Code*, 55-7B-6 [2003], when a healthcare provider receives a pre-suit notice of claim and screening certificate of merit that the healthcare provider believes to be legally defective or insufficient, the healthcare provider may reply within thirty days of the receipt of the notice and certificate with a written request to the claimant for a more definite statement of the notice of claim and screening certificate of merit...A claimant must be given a reasonable period of time, not to exceed thirty days, to reply to a healthcare provider's request for a more definite statement, and all applicable periods of limitation shall be extended to include such periods of time." Syllabus Point 4, *Hinchman v. Gillette*, 217 W.Va. 378, 618 S.E.2d 387 (2005).

37. Plaintiffs' request for an extension of time to serve the Complaint in order that the parties comply with the provisions of the MPLA, extends the time for the service of the Complaint upon the Defendants. Pursuant to Rule 4(k), Plaintiffs have established and shown good cause for the extension of time to serve the complaint and summons.

38. The Court finds, as a matter of law, that Plaintiffs complied with the Mandates of W.Va.R.Civ.P. 4(d)4 and Rule 4(k) , Service of the Complaint Upon the Defendants was proper service and the Defendants' Motion to Dismiss upon these grounds are **DENIED.**

D. Defendant's Assertion that Plaintiffs' Claims are Barred by The Statute of Limitations are Without Merit and should Be Dismissed

39. Defendants have alleged that the Plaintiffs' Complaint is time barred by the Statute of Limitations. The pre-suit requirements of the *MPLA* stay the statute of limitations until such time as those requirements have been met. The Plaintiffs filed their Complaint on

September 12, 2018 which is within the limits of the applicable statute of limitations from the last date of the prescribing and filling of an opioid prescription by these Defendants. Thus, the Defendant's Motion to Dismiss must be dismissed.

40. In addition, the running of the 2-year limitation period are stayed because of the "discovery rule." Per the discovery rule, a statute of limitations is tolled until such time as the claimant knows or by reasonable diligence knows of their claim.

> "under the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury."
> *Syl.Pt.4, Gaither v. City Hospital, Inc.,* 199 W.Va. 706, 487 S.E.2d 901 (1997).

41. There is no clear statutory prohibition to the application of the discovery rule and the Plaintiffs had no obligation to file a medical malpractice action until the Plaintiffs knew that Greg Shrewsbury's injuries were caused by these Defendants' negligent and wrongful acts. "...knowledge sufficient to trigger the limitation period requires something more than a mere apprehension that something may be wrong." *Gaither* citing *Hill v. Clarke*, 161 W.Va. at 262, 241 s.E.2d at 574." Additionally, "Even if a patient is aware that an undesirable result has been reached after medical treatment, a claim will not be barred by the statute of limitations so long as it is reasonable for the patient not to recognize that the condition might be related to the treatment." *Gaither.* The court in *Gaither* concluded, based on reasons of judicial economy, and considerations of fairness, that "[T]he law does not and should not require a patient to assume that his medical provider has committed malpractice, or worse, has engaged in a conspiracy to

conceal some misconduct every time medical treatment has less than perfect results." Per the discovery rule, the Defendants' Motions to Dismiss should be denied.

42. Additionally, the discovery rule originated from circumstances that often times an injured party is unable to know of the existence of injury or its cause. Plaintiffs contend that these Defendants did act and that they continue to assert in its pleadings as to pretend that they were acting in the capacity of medical practitioners who provided proper medical care. Plaintiffs also contend that each of these Defendants held themselves out to be legitimate medical providers providing legitimate medical services and operated a pill mill operation under the guise of providing proper medical diagnosis, treatment, and care.

43. Plaintiffs, in their response to the Defendants' Motions to Dismiss, set for the example of this pretense by the actions of Defendants Mehta, Blume, the Hope Clinic. Dr. Mehta and Dr. Blume who were owners/employees of the Hope Clinic and purportedly provided medical care at Hope Clinic, PLLC. In February 2018, Drs. Mehta and Blume, and Defendant Radcliffe, among others, were indicted for their pill mill activities and engaging in the practice of prescribing and dispensing controlled substances without a legitimate medical purpose and outside the scope of professional practice. The indictment, which had been previously sealed was unsealed and made available to the public on February 15, 2018. Prior to investigations by law enforcement officials, the Defendants concealed their lack of adherence to applicable medical standards by writing controlled substance prescriptions without a legitimate medical purpose and in noncompliance with the applicable standards of care. It was common practice among pill mill facilities to coordinate their efforts by referring patients to other physicians, clinics, and pharmacies that were also participating in the same pills for cash scheme.

The West Virginia Supreme Court stated in *Gaither:*

"The 'discovery rule' is generally applicable to all torts, unless there is a clear statutory prohibition of its application." Syllabus Point 2, *Cart v. Marcum*, 188 W.Va. 241, 423 S.E.2d 644 (1992)

In tort actions, unless there is a clear statutory prohibition to its application, under the discovery rule the statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1)that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury.

The question of when plaintiff knows or in the exercise of reasonable diligence has reason to know of medical malpractice is for the jury." Syllabus Point 4, *Hill v. Clarke*, 161 W.Va. 258, 241 S.E.2d 572 (1978)."

44. Plaintiffs' argue that: (1) each of these Defendants held themselves out as legitimate medical providers providing legitimate medical care and concealed their participation in the pill mill scheme. (2) the Defendants acted in concert to conceal their pill mill activities and pills for cash scheme. (3) that instead of providing legitimate medical care, the Defendants, on a continuous basis, merely prescribed and then filled prescriptions for opioid medications. (4) that the Defendants purposely prescribed and filled the prescriptions for opioids in a concerted effort to addict Greg Shrewsbury for monetary purposes. Plaintiffs' argue that Mr. Shrewsbury sought medical treatment for legitimate injuries sustained in a car accident and relied upon these Defendants to provide the proper and appropriate medical care to treat his injuries. Prior to the car accident, Mr. Shrewsbury operated a thriving logging company in Wyoming County, employing nine workers. Mr. Shrewsbury, through his logging company, contributed to economy of Wyoming County. However, once these Defendants negligently addicted Mr. Shrewsbury to opioids, he was unable to work and was unable to continue the operation of his logging company. Mr. Shrewsbury was forced to shutter his company and all of his employees

lost their jobs. Wyoming County lost the economic contribution of the logging company and its employees.

45. Plaintiffs' also argue that according the U.S. Department of Human Services, "Drug addiction, including an addiction to opioids, is a disability under Section 504 of the Rehabilitation Act, the Americans with Disabilities Act, and Section 1557 of the Affordable Care Act, when the drug addiction substantially limits a major life activity." Fact Sheet: Drug Addiction and Federal Disability Rights Law. 10/25/18. This Fact Sheet listed examples of major life activities to include: "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." Due to the drug addiction caused by these Defendants, Mr. Shrewsbury experienced substantial limitations of these major life activities which culminated in a loss of his once very successful logging company.

46. The West Virginia Supreme Court determined in *Martin v. Charleston Area Medical Center, Inc.*, 2013 WL 2157698 (W.Va. May 17, 2013) that "[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." 2013 WL 2157698 at *2. The Court determined in *Martin* that individuals bringing a medical malpractice case under the MPLA have a two-year statute of limitations **except in cases where discovery is at issue.** Mr. Shrewsbury discovered the negligence of each of these Defendants at such time that he was no longer addicted to opioids, and at such time as the true nature of these Defendants' pill mill activities were unearthed.

47. Plaintiffs' argue that Mr. Shrewsbury, as a patient of these Defendants, followed the Defendants medical orders as he believed, due to their pretense of legitimately practicing medicine, that his pain was caused by the injuries he sustained in his car accident. Mr. Shrewsbury, as a non-medical person, could in no way be aware that his pain was caused by the failure of each of the Defendants to properly treat his underlying medical condition, that the long-term use of opioid medications was inappropriate, and could not know that the long-term use of opioid medications actually causes increased pain. This condition is otherwise known as hyperalgesia, often medically diagnosed as opioid-induced hyperalgesia.

48. Plaintiffs argue that the actions of each of the Defendants were continuous and repetitive acts of wrongful conduct. The Plaintiffs' complaint contains allegations of the continuous and repetitive acts of the wrongful conduct of the Defendants. The West Virginia Supreme Court held that: "essential material facts must appear on the face of the complaint." *Forshey v. Jackson*, 671 S.E.2d 748 (W.Va. 2009) citing *Greschler v. Greschler*, 71 A.D.2d 322, 325, 422 N.Y.S.2d 718, 720 (1979).

49. There is no clear statutory prohibition to the application of the discovery rule in this case and the Plaintiffs had no obligation to file a medical malpractice action until they knew that Mr. Shrewsbury's injuries were caused by these Defendants' negligent and wrongful acts.

> "Our conclusion today is based on reasons of judicial economy, as well as obvious considerations of fairness. the law does not and should not require a patient to assume that his medical provider has committed malpractice, or worse, has engaged in a conspiracy to conceal some misconduct every time medical treatment has less than perfect results. "To hold otherwise would require that whenever any medical treatment fails to promptly return the patient to full health, the patient would necessarily hire attorneys and experts to

> investigate the possibility of malpractice, lest the statute run. Such wasteful over-abundance of caution is not the goal of our statute of limitations."
> *Gaither v. City Hospital, Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997). Citing *Szpynda v. Pyles*, 433 Pa.Super.1, 639 A.2d 1181, 1184-85 (1994).

The Court also held in *Gaither*:

> In our holding today, we find on the one hand that knowledge sufficient to trigger the limitation period requires something more than mere apprehension that something may be wrong. *See Hill v. Clarke*, 161 W.Va. at 262, 241 S.E.2d at 574. ("[P]ain, suffering and manifestation of the harmful effects of medical malpractice do not, by themselves, commence running of the statute of limitation"). Even if a patient is aware that an undesirable result has been reached after medical treatment, a claim will not be barred by the statute of limitations so long as it is reasonable for the patient not to recognize that the condition might be related to the treatment...We simply hold that once a patient is aware, or should reasonably have become aware, that medical treatment by a particular party has caused a personal injury, the statute begins."

50. Plaintiffs argue that Mr. Shrewsbury became aware of the Defendants' negligent actions at the point when he kicked his addiction in August of 2018 and discovered the Defendants' malpractice was the cause of his injuries.

51. The purpose of a motion to dismiss pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure is to test the formal sufficiency of the complaint. *John W. Lodge Distrib. Co. v. Texaco, Inc.*, 161 W.Va. 603, 604-05, 245 S.E.2d 157, 158 (1978). For purposes of the motion, the complaint is construed in the light most favorable to plaintiff, and its allegations are to be taken as true. *Id.* As set forth in *McGraw v. Scott Runyan Pontiac-Buick,*

Inc., 194 W.Va. 770, 776, 461 S.E.2d 516, 522 (1995), Rule 12(b)(6) is designed to "wee out unfounded suits."

52. In order to survive a motion to dismiss pursuant to Rule 12(b)(6), "[a]ll that the pleader is required to do is to set forth sufficient information to outline thee elements of his claim or to permit inferences to be drawn that these elements exist. The trial court should not dismiss a complaint merely because it doubts that the plaintiff will prevail in the action, and whether the plaintiff can prevail is a matter properly determined on the basis of proof and not merely on t he pleadings." *Lodge*, 161 W.Va. at 605-06, 245 S.E.2d at 159, quoting Wright & Miller, Federral Practice and Procedure: Civil § 1216 (1969). The Plaintiffs' Complaint provides "grounds of...'entitlement to relief' in more factual detail than mere 'labels and conclusions'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Plaintiffs' complaint set forth specific allegations relating to each Defendant and the negligence of each Defendant. Allegations of pill mill activities are not conjecture and are factual allegations.

53. Construing Plaintiffs' Complaint in the light most favorable to Plaintiffs, and taking the allegations to be true, the Court finds that Plaintiffs' Complaint does not fail to state claim upon which relief may be granted pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. Therefore, Defendants' Motion to Dismiss Plaintiffs' Claims based upon the expiration of the statute of limitations is **DENIED.**

E This Court Has Personal Jurisdiction of Defendants Deschner Medical Services, PLLC and Steven H. Deschner, M.D.

54. Defendants Deschner Medical Services, PLLC and Steven H. Deschner, M.D. have asked this Court to dismiss the claims against them due to a lack of personal jurisdiction in that Defendants are non-state residents. In determining whether personal jurisdiction can be exercised against a non-resident party,

> "A court must use a two-step approach when analyzing whether personal jurisdiction exist over a foreign corporation or other nonresident. The first step involves determining whether the defendant's actions satisfy our personal jurisdiction statutes set forth in W.Va Code 31-1-15 [1984] and W.Va. Code, 56-3-33 [1984]. The second step involves determining whether the defendant's contacts with the forum state satisfy federal due process." Syl.pt.5, *Abbott v. Owens-Corning Fiberglas Corp.*, 191 W.Va. 198, 444 S.E.2d 285 (1994).

55. In syllabus point 4 of *State ex rel. Bell Atlantic-West Virginia, Inc. v. Ranson*, 201 W.Va. 402, 497 S.E.2d 755 (1997), the West Virginia Supreme Court explained:

> When a defendant files a motion to dismiss for lack of personal jurisdiction under W. Va. R Civ. P. 12(b)(2), the circuit court may rule on the motion upon the pleadings, affidavits and other documentary evidence or the court may permit discovery to aid in its decision. At this stage, the party asserting jurisdiction need only make a prima facie showing of personal jurisdiction in order to survive the motion to dismiss. In determining whether a party has made a prima facie showing of personal jurisdiction, the court must view the allegations in the light most favorable to such party, drawing all inferences in favor of jurisdiction.

56. Plaintiffs' argue that Mr. Shrewsbury was continuously provided prescriptions for opioid medications by each of these Defendants, many of whom were affiliated with the other. Each of the Defendants acted as pill mill enterprises that set out to purposely addict citizens of Wyoming County to opioid medication, including Mr. Shrewsbury, all for monetary gain. Dr. Deschner and the Deschner Medical Services, PLLC (Deschner defendants) operating in their pill mill capacity treated patients from many states including West Virginia, Kentucky, and Maryland. The Deschner Defendants accepted many, many patients from West Virginia, all for monetary gain. The actions of these Deschner Defendants caused tortious injury to the citizens of West Virginia and Wyoming County, including Mr. Shrewsbury for which the Deschner Defendants derived substantial revenue. The prescriptions written by the Deschner Defendants were filled at West Virginia pharmacies, including these Defendant pharmacies, who are widely-known to accept prescriptions for filling that were not written for a legitimate medical purpose.

In *Abbott*, the West Virginia explained that:

> "The primary long-arm statute is *W.Va. Code*, 55-3-33(a) [1984] which confers *in personam* jurisdiction on a nonresident in the nonresident engages in one of the acts specified below:
>
> (1) Transacting any business in this State;
> (2) Contracting to supply services or thing in this State;
> (3) **Causing tortious injury by an act or omission in this State;**
> (4) **Causing tortious injury in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State.... (emphasis supplied)**

57. The Deschner Defendants entered into a contract with Mr. Shrewsbury to provide medical services. The Deschner Defendants wrote prescriptions for opioids on a continuous monthly basis which monthly prescriptions were filled at a West Virginia pharmacy. Defendants Deschner's negligence furthered the continuous addiction of Mr. Shrewsbury which negligence caused tortious injury to Mr. Shrewsbury. The tortious injury caused by the Deschner Defendants occurred in the State of West Virginia. "In ruling on a motion to dismiss for lack of personal jurisdiction, the allegations of the complaint, except insofar as controverted by the defendant's affidavit, must be taken as true." (emphasis added and citation omitted)); Morgan v. Morgan, 679 So. 2d 342, 346 (Fla. Ct. App. 1996); Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 66 (3d Cir. 1984). *Lane v. Boston Scientific Corp.*, Syl.Pt. 1, 481 s.E.2d 753 (W.Va. 1996).

58. The second step when determining personal jurisdiction is to determine whether the nonresident's contacts with West Virginia satisfy the United States Constitution's due process requirements. "The standard of jurisdictional due process is that a maintenance of an action in the forum does not offend traditional notions of fair play and substantial justice." *S.R. v. City of Fairmont*, 167 W.Va. 880, 280 S.E.2d 712 (1981) citing *Syl. Pt 1, Hodge v. Sands Manufacturing Company*, 151 W.Va. 133, 150 S.E.2d 793 (1966).

59. The West Virginia Supreme Court has stated that "[t]he critical element for determining minimum contacts is not the volume of activity but rather 'the quality and nature of the activity in relation to the fair and orderly administration of the laws.'" *Norfolk S. Ry. Co. v.*

Maynard, 190 W.Va. 113, 116, 437 S.E.2d 277, 280 (1993) (quoting *International Shoe Co.* v. Washington, 326 U.S. 310, 319 (1945)). The United States Supreme Court reaffirmed that a state court may exercise specific personal jurisdiction over a nonresident defendant so long as minimum contacts exist between the defendant and the forum state. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). "At the core of the minimum contacts requirements is the notion, rooted in concerns of fundamental fairness, that before a non-resident individual or corporation can be haled into the courts of another state, there must first be a showing of sufficient ties or connections to that state which demonstrate a purposeful interjection in the forum state. *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980). ...[t]o what extent a nonresident defendant has minimum contacts with the forum state depends upon the facts of the individual case." *Pries* v. *Watt*, 186 W.Va. 49, 489 S.E.2d 285 (1991).

60. **Plaintiffs have set forth sufficient facts and allegations against the Deschner Defendants in their Complaint. The medical services provide by the Deschner Defendants directly relate to Plaintiffs' cause of action. Additionally, per the facts of this case, these** nonresident Defendants have sufficient contacts with the State of West Virginia to comply with federal due process.

61. **Plaintiffs have established that this Court has jurisdiction over the Deschner Defendants and therefore the Deschner Defendants' Motion to Dismiss is DENIED.**

F. Because the Certificates of Merit at issue satisfy the statutory requirements of *West Virginia Code* §55-7B-6(b), Defendants' Motion to Dismiss on the Grounds that Plaintiffs Failure to Comply with the MPLA Deprives the Court of Subject Matter Jurisdiction Are DENIED

62. Based on the arguments above, Plaintiffs have complied with all of the requirements of the MPLA. Therefore, this Court has matter jurisdiction to hear the claims before it and each of these Defendants' motions to dismiss on the grounds of lack of subject-matter jurisdiction are **DENIED**.

DECISION

It is hereby **ORDERED** that the Defendants' Motions to Dismiss are **DENIED**.

The objections of any party aggrieved by this Order are noted and preserved.

The Clerk of this Court if hereby directed to send copies of this Order to all counsel of record.

ENTERED March 13, 2020

THE HONORABLE WARREN R. McGRAW

A TRUE COPY, ATTEST.
DAVID "BUGS" STOVER, CLERK
This the 17th day of March, 2020
By: K. Colen
Deputy.