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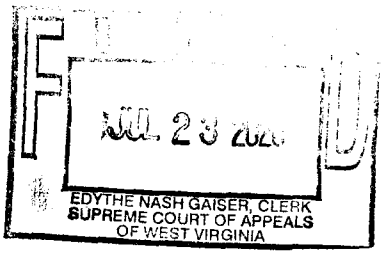
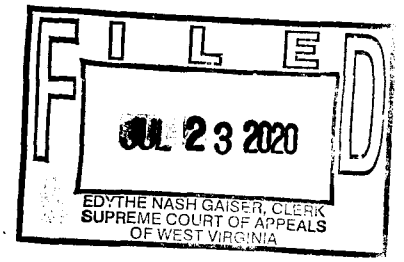
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

20-0410

HOPE CLINIC, PLLC,
JAMES H. BLUME, JR., D.O.,
SANJAY R. MEHTA, D.O.,
DESCHNER MEDICAL SERVICES, PLLC.,
d/b/a DEBOSS NEUROLOGY & PAIN CLINIC,
STEVEN H. DESCHNER, M.D.,
RHONDA'S PHARMACY, LLC,
RHONDA ROSE, R. Ph.,
EVAN D. BRUSH, R. Ph.,
BYPASS PHARMACY, INC.,
WESTSIDE PHARMACY, INC.,
DEVONNA L. MILLER-WEST, R. Ph.,
RITE AID OF WEST VIRGINIA, INC.,
WALGREEN CO,

Petitioners,





v.

THE HONORABLE WARREN R. MCGRAW,
JUDGE OF THE CIRCUIT COURT OF
WYOMING COUNTY, WEST VIRGINIA,

Respondent,

v.

GREG A. SHREWSBURY and
PHYLLIS A. SHREWSBURY,

Respondents.

RESPONDENTS' RESPONSE IN OPPOSITION TO VERIFIED PETITION FOR WRIT OF PROHIBITION

Respectfully Submitted

Joseph H. Spano Jr.
Pritt & Spano, PLLC
714 ½ Lee Street, E., Suite 204
Charleston, WV 25301
(304) 346-7748
WV State Bar ID No: 11373

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I. RESPONSE TO THE QUESTIONS PRESENTED

Respondents respectfully submit that the questions presented by the Petitioners are misleading and inaccurate. The question is not whether the Respondents filed a Certificate of Service prior to the filing of the Complaint. The proper question is whether **THE RESPONDENTS COMPLIED WITH THE PROVISION OF THE MPLA. The response to that question is yes.**

Respondents filed their Complaint pursuant to §55-7B-6(c) which contemplates and allows for the filing of a complaint without a Certificate of Merit if counsel believes the action is based upon a well-established legal theory of liability which does not require expert testimony. Many of the Petitioners had their licenses to practice medicine revoked prior to the filing of the Respondents' Complaint due to their departure from accepted standards of professional conduct due to their improper prescribing of controlled substances. The West Virginia Board of Osteopathic Medicine had either permanently revoked or ordered an emergency revocation of the licenses of Petitioners Mehta and Blume and the operating license of Petitioner Hope Clinic had also been revoked. These revocations and suspensions were based upon the exact allegations pled in the Respondents' Complaint, that these Petitioners engaged in conduct, practices, and acts that constituted a departure from accepted standards of professional conduct in the practice of osteopathic medicine and surgery. Petitioners Rhonda's Pharmacy (Pharmcare), Westside Pharmacy, Devonna Miller-West, Rite Aid, and Walgreens have been parties to regulatory Board actions, DEA actions, federal indictments/actions, and/or state actions. Other medical providers who are not Petitioners herein also had their licenses revoked and their clinics shuttered due to their departure from accepted standards of professional conduct due to their prescribing controlled substances or have been parties to DEA actions, federal indictments/actions and/or

state actions. This overwhelming and vast amount of documentation substantiates that a Certificate of Merit was not required before the filing of the Complaint and the filing of the Complaint pursuant to §55-7B-6(c) was proper and was in compliance with the provisions of the MPLA.

Additionally, Respondents respectfully submit that the questions presented by the Petitioners is actually a prohibited substitute for an appeal of the lower court ruling by Judge Warren R. McGraw in denying Petitioners' Motion to Dismiss. Respondents submit that Petitioners fail to meet their burden of showing entitlement to the extraordinary relief for which they seek, and that Judge McGraw's Order did not exceed its jurisdiction and did not usurp a jurisdiction in law. None of the Petitioners' arguments or assertions rise to the high standard required to obtain a Writ of Prohibition and their Writ must be denied.

II. STATEMENT OF THE CASE

West Virginia has been in, and continues to be in an opioid epidemic. The past two decades have been characterized by increasing abuse and diversion of prescription drugs, including opioid medications, in the United States. [1] For multiple years, the State of West Virginia has ranked in the top three of states for addiction and overdose rates. According to DEA ARCOS records, between the years 2006 through 2014, Wyoming County ranked in the top four of counties in the entire United States for overdose deaths and Raleigh County ranked in the top four of counties in the entire United States for overdose deaths due to the excessive distribution of oxycodone and hydrocodone. Rhonda's Pharmacy ranked #2 in Raleigh County

[1] *See* Richard C. Dart et al, *Trends in Opioid Analgesic Abuse and Mortality in the United States*, 372 N.Eng.J.Med. 241 (2015).

for distribution of oxycodone and hydrocodone, distributing 3,820,600. ByPass Pharmacy ranked #5 in Raleigh County for distribution of oxycodone and hydrocodone, distributing 3,278,920. In order for these distributions to have occurred, a prescription was written by a health care provider and thereafter was dispensed by a pharmacy. It is well known and established through records of West Virginia medical boards, DEA records, and DHHR records that in order for such distributions to have been made, it was through the improper actions of health care providers and pharmacies who turned a blind eye to standards for medical care and pharmacy care and instead provided narcotics to individuals for their own personal monetary gain.

Many Americans are now addicted to prescription opioids, and the number of deaths due to prescription opioid overdose is staggering. In 2016, drug overdoses killed roughly 64,000 people in the United States, an increase of more than 22 percent over the 52,404 drug deaths recorded the previous years.[2] The alarming prescribing numbers for opioids in West Virginia, as well as the rates of addiction, and overdose, have been reported for several years and in all forms of media, including national and local news and news publications.

In efforts to address addiction, the federal government and the State of West Virginia have taken steps to implement standards and guidelines regarding the prescribing of opioids by requiring that all physicians, regardless of their area of practice, become part of the equation to combat and address addiction and diversion.

The purpose of the West Virginia Medical Practice Act, West Virginia Code §30-3-1, et seq is to provide for the licensure and professional discipline of physicians and podiatrists and for the licensure and professional discipline of physician assistants and to provide a professional environment that encourages the delivery of quality medical services within West Virginia.

Plaintiffs filed their Complaint on September 12, 2018 and filed an Affidavit of Counsel per §55-7B-6(c) of the West Virginia Code stating that counsel was providing the sworn statement setting forth the basis of allegations of liability against the Respondents herein. The statement was provided in lieu of a screening certificate of merit because the theory of liability presented against the 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. The Affidavit of Counsel was based upon information and documentation, including the indictments of several of the Defendants herein, including Petitioners Hope Clinic, James H. Blume, Jr., D.O., and Sanjay R. Mehta, D.O. The indictments charged the Petitioners with maintaining a drug involved premises, distribution of oxycodone, distribution of oxycodone causing death, and conspiracy to distribute a controlled substance, among other charges. The Affidavit of Counsel was also based upon DEA data regarding the distribution of controlled substances into Wyoming County and Raleigh County, West Virginia, as well as the suspension and revocation of the medical licenses of several of the Petitioners. The West Virginia Board of Osteopathic Medicine revoked Petitioner James H. Blume's license to practice medicine on February 22, 2017, concluding that Respondent Blume engaged in conduct, practices, and acts that constituted a departure from accepted standards of professional conduct in the practice of osteopathic medicine and surgery.

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[2] *See* Ctrs. For Disease Control and Prevention, U.S. Dep't of Health and Human Servs., Provisional Counts of Drug Overdose Deaths, (August 8, 2016), https://www.cdc.gov/nchs/data/health_policy/monthly-drug-overdose-death-

The Board also concluded that Petitioner Blume opened the Hope Clinic in conjunction with PPPFD, parties herein, and was responsible for the development of physician progress notes and developed the "medical aspect" of the clinic. OHFLAC conducted surveys of the Hope Clinics in Beckley and Charleston and found many violations and that the Hope Clinics were operating in a manner that was contrary to the statutory and regulatory scheme governing pain clinics, including the 125 fully filled out prescriptions, according to Blume was a "pot of gold," for narcotic medication with the same patient information were maintained in the clinic. **(App, 0373-0403)**. After OHFLAC's investigation into the activities of the Hope Clinics, these clinics were closed. The basis of the revocations and emergency suspensions by the regulatory agency for Hope Clinic and the licensing Board for Petitioner Blume mirror the allegations contained in the Respondents' complaint. Petitioner Blume's license to practice medicine and the shuttering of the Hope Clinic occurred more than a year prior to the filing of the Respondents' Complaint.

Likewise, Petitioner Sanjay Mehta, who was involved in the Hope Clinic, had his license to practice medicine suspended by the West Virginia Board of Osteopathic Medicine on July 26, 2016 finding that Petitioner Mehta "is an immediate danger to the public as demonstrated by his actions in the death of five patients." The Board concluded that "there is probable cause to believe that Respondent (Mehta) has engaged in unprofessional conduct and has engaged in conduct, practices and acts that constitute a departure from the accepted standards of professional conduct in the practice of osteopathic medicine and surgery." **(App. 0404-0414).** The findings of the Board stated that Mehta deviated from the accepted standards of practice through his prescribing of controlled substances to patients at the Hope Clinic without taking reasonable and prudent precautions to prevent their misuse and abuse contributing to the death of several

patients. The findings of the Board mirror the allegations contained in the Respondents' Complaint.

Subsequently, Devonna Miller as owner and operator of Petitioner Westside Pharmacy, was indicted July 7, 2019 and was charged with Conspiracy to Distribute and Dispense a Controlled Substance "outside of the scope of professional practice and not for a legitimate medical purpose," and Conspiracy to dispense and distribute oxycodone and hydrocodone, Schedule II and III controlled substances, outside of the scope of professional practice and for a legitimate medical purpose. **(App, 0414-0427)**. During the investigation, Westside Pharmacy was found to have purchased 618,000 oxycodone doses and 605,800 hydrocodone doses in 2011 specifically and ordered 7.8 to 14 times for oxycodone and 2.0 to 4.6 times more hydrocodone in the years 2010 through 2014 than the average rural West Virginia pharmacy.

Dr. Paul W. Burke and Dr. Roswell Lowry, who were employed by Hope Clinic, entered guilty pleas for the actions at the Hope Clinic. Within Dr. Lowry's plea agreement, he stipulated to facts including the distribution of controlled substances not for a legitimate practice and beyond the bounds of medical practice and stipulated that he and his co-defendant practitioners wrote prescriptions that were not for a legitimate medical purpose and were beyond the bounds of medical practice. He also stipulated that "The doctors at HOPE Clinc had little to no interaction with the customers, they performed minimal or no physical exams, the charts did not contain sufficient medical records justifying the treatment with opioids, the doctors did not discuss other treatment for pain besides opioids, and the doctors ignored or overlooked clear signs of abuse, addiction, and diversion, all of which fell so far below the standard of medical practice generally recognized and accepted in the professional medical community as to make

the prescriptions illegal." **(App, 0428-0447).** Within Burke's plea, he admitted to the conspiracy with other physicians at the Hope Clinic to "distribute Schedule II controlled substances, including a mixture and substance containing oxycodone, not for a legitimate medical purpose in the usual course of professional practice and beyond the bound of medical practice." The information in the stipulations, and informations mirror and substantiate the allegations in the Affidavit of Counsel and in Respondents' Complaint and thus substantiates and justifies the filing of this action pursuant to §55-7B-6(c) of the West Virginia Code.

Also, Respondents' counsel's review of information and documentation it was determined that the actions of the Petitioners fell below the standards for medical practice in that the Petitioners were adjudicated by the West Virginia Board of Osteopathic Medicine to have breached the applicable standard of care and therefore the Respondents' filing of the Arffidavit of Counsel and the filing of the Complaint pursuant to §55-7B-6(c) was proper and a Certificate of Merit was not required.

However, subsequent thereto, Respondents' counsel retained medical professional experts, in further compliance with the provisions of the Medical Professional Liability Act. Respondents 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, Respondents filed a corrected Statement of Intent upon all of the Petitioners. During Respondents' 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. **(App, 0453-0459)**.

Thereafter, the medical professional experts retained by the Respondents notified Respondents' counsel that due to emergency personal circumstances, there would be a delay in the preparation and filing of the Screening Certificate of Merit. Respondents' counsel notified each of the Defendants of the delay in the receipt of the Screening Certificate of Merit via correspondence. At such time that Respondents' counsel received the Certificate of Merit from the pharmacy expert, Respondents caused the required Notice of Claim and Certificate of Merit to be served upon the pharmacy defendants via certified mail.

The Petitioners have stated that the Respondents failed to service the Notice and Certificates of Merit upon them. Respondents utilized the addresses listed on the Secretary of State Business Organization Detail document. Although Respondents utilized the Notice of Process Address for Rhonda's Pharmacy as listed on the Secretary of State website for the service address for Rhonda's Pharmacy and for Petitioner Rhonda Rose personally, the mailings were returned as "Attempted – Not Known." Thereafter, Respondents investigated and learned of additional addresses for Rhonda's Pharmacy and mailed notices relating to these two Petitioners to both the official address listed on the Secretary of State website and to the second address identified per an internet investigation of addresses for Rhonda's Pharmacy. **(App, 0460-0464)**. It should be noted that many of the certified mailings were refused by some of the Defendants and/or were unclaimed. Respondents made multiple attempts to serve Notices and Certificates of Merit to the Defendants at any address that could be identified through investigation. **(App, 0465-0475)**.

Due to the delay in the receipt of the Screening Certificate of Merit, Respondents' counsel filed a Motion to Extend Time for Service of the Complaint. Thereafter, Respondents caused the

required Notice of Claim and Certificate of Merit to be served upon the Petitioners via certified mail pursuant to the provisions of W.Va. Code 55-7B-6.

Respondents 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).

This Court has held that:

> When reviewing for a good faith effort, court do not equate individual deficiencies in the certificate of merit with failure to comply with the MPLA. Rather, courts should look for an attempt by the plaintiff to comply with the MPLA. Rectifiable deficiencies are generally insufficient to warrant dismissal unless the plaintiff has willfully ignored them and made no attempt to correct.
> *Westmoreland v. Vaidya*, 664 S.E.2d 90, 97 (W.Va. 2008)

This Court has also held that a reasonable belief of compliance was satisfactory and Plaintiff should be afforded an opportunity to correct deficiencies where plaintiff thought he was statutorily exempt from filing a certificate. *Gray v. Mena*, 625 S.E.2d 326, 333 (W.Va. 2005) (explaining dismissal is not favored where adjustments can be readily made to permit adjudication on the merits.)

As pled in the Respondents' Complaint, the actions of these Defendants do not fall within the legitimate practice of medicine or pharmacy. It is known to medical professionals and lay persons alike that the purposeful prescribing and distribution of controlled substances to individuals in an effort to further a conspiracy to prescribe and distribute controlled substances is not the practice of medicine or the practice of pharmacy and is undeniably below the standard of care. The "pill mill" actions of many of these Petitioners has been substantiated by the

regulatory Boards. These adjudicated findings, facts, and conclusions substantiate the filing of the complaint pursuant to §55-7B-6(c) and falls within the exemption for providing a certificate of merit. Respondents filed an Affidavit of Counsel outlining the reasons why a Certificate of Merit was unnecessary.

Notwithstanding, that the claims of the Respondents fall within §55-7B-6(c), Respondents subsequently filed Notices of Claim and Certificates of Merit for each of the Respondents. "We have expressly and repeatedly warned litigants to err on the side of caution in complying with the MPLA." *Cline v. Kresa-Reahl*, 229 W.Va. 203, 214, 728 S.E.2d 87, 98 (2012). Respondents believed with certainty that their compliance both during the initial filing of the Complaint and the Affidavit of Counsel, as well as the subsequent submissions of the Notice of Claim and Certificates of Merit, was satisfactory and comported with the exceptions to and the provisions of the MPLA. Each of the actions taken by the Respondents are contemplated and allowed both by the MPLA provisions and case law.

Rectifiable deficiencies are generally insufficient to warrant dismissal unless the Plaintiff has willfully ignored them and made no effort to correct. See *Westmoreland v. Vaidya*, 664 S.E.2d 90, 97. Respondents have made multiple efforts to correct any perceived deficiencies.

With respect to the majority of the Petitioners, Respondents first learned of many of the Petitioners' assertions of deficiencies with the COM occurred when the petitioners filed their motions to dismiss. Only Petitioners Blume, Hope Clinic, Devonna Miller, and Westside Pharmacy responded to the Certificates of Merit and filed a Motion for More Definite Statement. Respondents responded to the issues outlined in these Petitioners' Motion for More Definite Statement.

Respondents subsequent filing of the Statement of Intent, Notice of Claim and Certificates of Merit were filed in an effort to err on the side of caution. During the time that the negligent acts of the Petitioners occurred, these Petitioners were licensed medical practitioners. However, at the time of the filing of the Affidavit of Counsel and the Complaint, Petitioners Blume, Mehta, and Hope Clinic' licenses to practice medicine and to operate a pain clinic had been revoked. Under the MPLA, a health care facility "means any clinic....in and licensed, regulated or certified by the State of West Virginia under state or federal law..." Under the MPLA, a health care provider "means a person, partnership, corporation, professional limited liability company, health care facility, entity or institution licensed by, or certified in, this state or another state...taking actions or providing service or treatment pursuant to or in furtherance of a physician's plan of care, a health care facility's plan of care, medical diagnosis or treatment..." §55-7B-6. Prerequisites for filing an action against a health care provider; procedures; sanctions states "(a) Notwithstanding any other provision of this code, no person may file a medical professional liability action against any **health care provider** without complying with the provisions of this section." It is clear that a notice of claim and certificate of merit were not required to be served upon Petitioners Blume, Mehta, and Hope Clinic and to the other parties whose licenses had been revoked prior to the filing of the Complaint and the Affidavit of Counsel. Respondents have complied with the provisions of the MPLA and the Petitioners' Writ of Prohibition must be denied.

III. SUMMARY OF THE ARGUMENT

Petitioners completely fail to meet their burden of showing entitlement to the extraordinary Relief of a Writ of Prohibition, and the Court should refuse the Petition. This Court has frequently explained that it examines the following factors in a Writ of Prohibition:

> (1)whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in any way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and whether the lower tribunal's order raises new and important problems or issues of law of first impression.

(Quoting, in part, *Syl Pt 4, State ex rel Hoover v. Berger*, 199 W.Va. 12, 482 S.E.2d 12 (1996). The Court went on to state that "[t]hese factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five need not be satisfied, it is clear that the third factor, the existence of a clear error as a matter of law, should be given substantial weight." *Id.*

> "'[T[his Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.' Syl. Pt. 2 *State of West Virginia Ex Rel. West Virginia Regional Jail Authority v. Honorable Carrie Webster, et al.*, No. 19-0595 (2019)

Examination of these factors clearly results in refusal of the Writ. Despite the arguments of Petitioners, Judge McGraw's Order is not clearly erroneous as a matter of law. As shown herein, the lower court properly denied the Petitioners' Motions to Dismiss.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents submit that the Writ of Prohibition should be summarily refused, and that oral argument is unnecessary. If the Court deems that oral argument is necessary, oral argument is appropriate pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure to aid in this Court's consideration of the important legal issues raised by this case.

V. ARGUMENT

A. Petitioners Have Not Met Their Burden for Issuance of a Writ of Prohibition

A Writ of Prohibition is inapplicable and inappropriate to the case at bar.

This Court has further stated that "[t]raditionally, the writ of prohibition speaks purely to jurisdictional matters. It was not designed to correct errors which are correctable upon appeal." *State ex rel. Williams v. Narick*, 164 W.Va. at 635, 264 S.E.2d at 854. The Court further explained that the writ does not lie to correct "mere errors" and that *it cannot serve as a substitute for appeal*, writ of error or certiorari. *Id.* (emphasis added).

Factor number one (1) outlined in Syl.pt. 4, *State ex rel. Hoover v. Berger*, 483 S.E.2d 12 (W.Va. 1996), is "whether the party seeking the writ has no other adequate means, such as a direct appeal, to obtain the desired relief." Petitioners are attempting to appeal a denial of their Motions to Dismiss through a Writ of Prohibition due to the fact that the Petitioners failed to timely file an appeal.

Factor number two (2) in *State ex rel. Hoover*, whether the petitioner will be damaged or prejudiced in any way that cannot be correctable on appeal. Petitioners herein will not be damages or prejudiced if their Writ of Prohibition is denied. The issues presented by the Petitioners in their Writ are issues that should have been brought in a direct appeal to this Court.

However, having failed to timely file an appeal, the Petitioners are attempting to circumvent proper procedure by filing this Writ. Petitioners have failed to meet the burden of the issuance of the writ of prohibition and the writ must be denied.

Petitioners have failed to meet any of the criteria outlined in *State ex rel. Hoover*, including factor (3), whether the lower tribunal's order is clearly erroneous as a matter of law. The Respondents complied with the provisions of the MPLA and the lower court correctly ordered that it maintained subject matter jurisdiction over this matter when it denied Petitioners' Motions to Dismiss. Therefore, Petitioners' Writ of Prohibition must be denied

B. The Circuit Court Did Not Commit Legal Error in Denying Petitioners' Motions To Dismiss on Subject Matter Jurisdiction Grounds.

1. The Circuit Court Did Not Err When it Determined it had Subject Matter Jurisdiction in that the Respondents' Clearly Complied with the Requirements of the West Virginia Medical Professional Liability Act.

Each of the cases relied upon by the Petitioners involve fact sets unlike the facts of this case. None of the cases cited by the Petitioners involve a former health care provider who had been adjudicated by the State licensing Board to have committed the very actions that were set out in the parties' Complaint. By the filing of the Affidavit of Counsel, Respondents complied with the MPLA. That is the question that should be determined by this Court or that the Notice of Claim and Certificates of Merit were not filed pre-suit or the subsequent filing of the Notice of Claim and Certificates of Merit. Due to the Respondents compliance of the provisions of the MPLA, the lower court had subject matter jurisdiction of this matter and the ruling of the lower Court was proper.

The Petitioners rely upon this Court's ruling in *State ex. Rel. PrimeCare Med. Of W.Va. Inc. v. Faircloth*, 835 S.E.2d 579 (W.Va. 2019) in support of their assertions that the lower court did not have subject matter jurisdiction. In *Primecare*, the Plaintiffs asserted that the allegations contained in the Complaint did not fall under the requirements of the MPLA and therefore failed to provide a pre-suit notice under the Act because the case did not involve complex medical issues. This Court found that the allegations contained in the Complaint were based on the complex urological issues and that Certificates of Merit were warranted.

In *State Ex Rel. PrimeCare*, this Court stated that *"[N]o person may file* a medical professional liability action against any health care provider *without complying with the provisions of this section* [i.e. W.Va. Code §55-7B-6]" (emphasis added). Respondents complied with provision §55-7B-6(c) which an exemption to filing Certificates of Merit pre-suit. Compliance with this provision was proper as this case does not involve complex medical issues and many of the Petitioners had their licenses to practice medicine revoked by the regulatory Boards which adjudicated and opined that these Petitioners acted below the standard of care in committing the very actions alleged in the Respondents' Complaint.

Unlike the facts in *Primecare*, these Respondents complied with the provisions of the MPLA, specifically, §55-7B-6(c) which states:

> Notwithstanding any provision of this code, if a claimant or his or her counsel, believes that no screening certificate of merit is necessary because the cause of action is based upon a well-established legal theory of liability which does not require expert testimony supporting a breach of the applicable standard of care, the claimant or his or her counsel, **shall file a statement specifically setting forth the basis of the alleged liability of the health care provider in lieu of a screening certificate of merit.** (emphasis added)

Respondents filed an Affidavit of Counsel setting forth the basis of the liability of these health care providers and the filing of the Affidavit of Counsel and the Complaint are in compliance with the provisions of the MPLA. Provision §55-7B-6(c) contemplates that there would be instances in which a Screening Certificate of Merit was unnecessary. The fact that many of the Petitioners herein had been found by State regulatory Boards to have acted below the standard of care in committing the very actions contained in the Respondents' Complaint establishes that the submission of Screening Certificates of Merit was not required prior to the filing of the Complaint and that the Respondents were in compliance with provisions of the MPLA.

Therefore, the lower Court's finding that it maintained subject matter jurisdiction was correct. Because the Plaintiffs complied with the requirements of the *Medical Professional Liability Act* (MPLA) – *West Virginia Code §55-7B-6* by submitting an Affidavit of Counsel and the subsequent filings of 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, Defendant's Writ of Prohibition must be **DENIED**.

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).

In, H*inchman 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".

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."

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*

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 Petitioners who failed to respond to the Statement of Intent, Notice of Claim, and the Certificates of Merit are now asking this Court to grant a Writ of Prohibition to dismiss the Plaintiffs' complaint due to a lack of compliance with the mandates and requirements of W.Va. Code §55-7B-6. Their request for a Writ of Prohibition is baseless and must be denied. Although Respondents herein made a good faith effort to comply with the mandates and requirements of W.Va. Code §55-7B-6, the Petitioners who did not respond to the Statement of Intent, Notice of Claim, and the Certificates of Merit are actually 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 Petitioners are barred from requesting a Writ of Prohibition.

The Respondents responded to Petitioners 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 Petitioners. Respondents good faith effort to respond to the Defendants' requests for a more definite statement thereby placed Petitioners on sufficient notice of the claim being pursued. In their response to Petitioners' requests for a more definite statement, Respondents invited the Petitioners to set mediation to further discuss the case in its entirety. Thus, the Respondents complied with and fully fulfilled their obligations set forth in West Virginia Code §55-7B-6 and the Defendants' Writ of Prohibition must be denied.

None of the remaining parties provided a written notice of any defects to Respondents' Notices of Claim and Certificates of Merit as required by *Hinchman* and thus, any objections they now assert or may assert 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).

The parties who failed to provide written notice of any insufficiencies or defects to Respondents' Notice of Claim or Certificate of Merit deprived the Respondents of their ability to address any issues and remedy and supposed deficiencies and thus the parties waived any objections thereto.

The 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."

Thus, for the reasons stated above, the Petitioners' Writ of Prohibition must be denied.

C. Respondents Certificates of Merit Comply with the Mandates of the MPLA and Petitioners' Writ of Prohibition Must Be Denied

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)

The Notice of Claim and the Certificates of Merit prepared by Respondents' experts 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. **(App, 0311-0324).** Respondent did not attach every Certificate of Merit to their Response to the Motions to Dismiss. App, 0311-0324 are representative of the Certificates of Merit provided to all Defendants and Petitioners herein. It should be noted that the Certificates of Merit provided to each Defendant included the experts' CV. Respondents' counsel was conscientious in responding to the requests of Dr. James H. Blume, Jr., Hope Clinic, PLLC, Devonna Miller, and Westside

Pharmacy for a more definite statement. None of the Defendants requested that mediation occur to further discuss and outline the claims of the Plaintiff. Also, in response to Defendant Rite Aid's discovery requests, Plaintiffs provided medical records and pharmacy records to each of the Defendants.

Additionally, 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. As stated above, the only Defendants who made a response to Plaintiffs' Notice of Claim and Certificate of Merit are Dr. James H. Blume, Jr., Hope Clinic, PLLC, Devonna Miller, and Westside Pharmacy. Each of the remaining parties 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.

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.

Finally, Respondents' burden at that juncture was 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.

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.

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, Petitioners' Writ of Prohibition must be **Denied**.

D. The Circuit Court's Finding that Respondents Filed Suit Within the Applicable Statute of Limitations is Proper

1. The Circuit Court's Finding that the "Discovery Rule" Applied is Proper

The Respondents filed their Complaint within the applicable statute of limitations period. The running of the 2-year limitation period is stayed for multiple reasons including 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).

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." The Petitioners have not sufficiently proven they are entitled to the granting of this extraordinary writ and the Writ of Prohibition must be denied.

2. Respondents' Complaint was Timely Filed

The Respondents Timely filed their Complaint. The discovery rule originated from circumstances that often times an injured party is unable to know of the existence of injury or its cause. These Petitioners continue to assert in their pleadings as to pretend that they were acting in the capacity of medical practitioners who were providing proper medical care. Each of these

Petitioners held themselves out to be legitimate medical providers providing legitimate medical services and hid their fraudulent actions. However, each of these Defendants operated a pill mill operation under the guise of providing proper medical diagnosis, treatment, and care and concealed their "pill mill" activities, which activities were the proximate cause of Respondents' injuries. These facts have been substantiated by the West Virginia Board of Osteopathic Medicine and based upon those findings the licenses of Petitioners Blume and Mehta were either revoked or were suspended upon an emergency basis due to Mehta's danger to society due to the fact that the "medical services" he provided resulted in the death of at least five (5) patients.

The MPLA recognizes that certain injuries may be latent and provides that the statute of limitations may not start until "...when such person discovers, or with the exercise of due diligence, should have discovered..." the potential malpractice. W.Va. Code §55-7B-4(a).

In addition to the revocation/suspension of licenses, Petitioners Mehta, Blume, the Hope Clinic, 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 recently opined:

> "A five-step analysis should be applied to determine whether a cause of action is time-barred...Third, the discovery rule should be applied to determine when the statute of limitations began to run by determining whether the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action, as set forth in Syllabus Point 4 of *Gaither v. City Hosp. Inc.,* 199 W.Va. 706, 487 S.E.2d 901 (1997). Fourth, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action. Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled. *And fifth, the court or the jury should determine if the statute of limitations period was arrested by some other tolling doctrine.* Only the first step is purely a question of law; the resolution of steps two through five will generally involve questions of material fact that will need to be resolved by the trier of fact.
> Syl.Pt. 4 *State of West Virginia Ex Rel. West Virginia Regional Jail Authority v. Honorable Carrie Webster*, No. 19-0595 (2019) citing Syl pt. 5, *Dunn v. Rockwell*, 225 W.Va. 43, 689 S.E.2d 255 (2009)

It is uncontroverted that these Petitioners concealed facts that prevented the Respondents from discovering or pursuing the potential cause of action and thus the discovery rule applies to this case. Additionally, Respondents alleged in their Complaint that "at all times relevant hereto, the Defendants were in a joint venture and/or civil conspiracy to promote the distribution of highly addictive and potentially lethal drugs into the state of West Virginia, including but not limited to Wyoming County for profit and by turning a blind eye."

The Petitioners engaged in a conspiracy and acted in concert to addict Greg Shrewsbury to opioid medications. Per *State of West Virginia Ex Rel. West Virginia Regional Jail Authority v. Honorable Carrie Webster* the statute of limitations was appropriately tolled to co-conspirators. The court based their findings based upon steps three, four, and five outlined in

Dunn v. Rockwell. This Court stated that "given the high standard for the issuance of a writ of prohibition and the circumstances as presented in *Dunn*, WVRJA has failed to demonstrate that the circuit court's order was clearly erroneous in its decision to deny WVRAJ's motion to dismiss based solely on a statute of limitation argument." Included in the footnote this Court stated "Because it is not entirely clear whether the general rule in *Dunn* was intended to apply to statutory tolling provisions such as the MPLA, we cannot conclude that the circuit court clearly erred as a matter of law so as to warrant a writ of prohibition."

Likewise herein, the Petitioners have failed to demonstrate that the circuit court's order was clearly erroneous and their Writ of Prohibition must be denied.

As the West Virginia Supreme Court clearly outlined 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)."

Each of these Petitioners held themselves out as legitimate medical providers providing legitimate medical care and concealed their participation in the pill mill scheme. The Petitioners acted in concert to conceal their pill mill activities and pills for cash scheme. Instead of providing legitimate medical care, the Petitioners, on a continuous basis, merely prescribed and

then filled prescriptions for opioid medications. The Petitioners 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 Petitioners 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.

The destruction of the citizens of Wyoming County by pill mill operators is well known. Due to the Respondents' negligence, Mr. Shrewsbury lost many years of his life as he lived in the fog of addiction, barely conscious and unable to function either mentally or physically. Mr. Shrewsbury discovered the malpractice of these Defendants at such time that he had escaped the disease of addiction that these Respondents purposely caused through their negligent actions. Persons suffering from addiction do not have a clarity of mind or reason.

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.

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.

Mr. Shrewsbury followed the medical orders as he believed, due to the Petitioners pretense that they were practicing medicine legitimately, and that his pain was caused by the injuries he sustained in his car accident. Mr. Shrewsbury could in no way be aware that his pain was caused by the failure of each of the Respondents 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 until such time that he was no longer addicted to opioids. This condition is otherwise known as hyperalgesia, often medically diagnosed as opioid-induced hyperalgesia. "Opioid-induced hyperalgesia (OIH) is defined as a state of nociceptive sensitization caused by exposure to opioids. The condition is

characterized by a paradoxical response whereby a patient receiving opioids for the treatment of pain could actually become more sensitive to certain painful stimuli. The type of pain experienced might be the same as the underlying pain or might be different from the original and underlying pain. OIH appears to be a distinct, definable, and characteristic phenomenon that could explain loss of opioid efficacy in some patients." A comprehensive review of opioid-induced hyperalgesia, Pain Physician. 2011 Mar-Apr;14(2):145-61. The experts in this case have opined that Mr. Shrewsbury suffered from Opioid-induced hyperalgesia. **(App, 0311-0324).**

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).

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

Mr. Shrewsbury became aware of the Respondents' 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.

For these multiple reasons, the Petitioners' Writ of Prohibition must be Denied.

3. The Circuit Court Finding that the Statute of Limitations Is Stayed Until the Requirements of the MPLA are Met is Proper

Defendants have alleged that the Plaintiffs' Complaint is time barred by the Statute of Limitations. The requirements of the *MPLA* stay the statute of limitations until such time as those requirements have been met. According to §55-7B-6(i)(1)

"...any statute of limitations applicable to a cause of action against a health

> care provider upon whom notice was served for alleged medical professional liability shall be tolled from the date of mail of a notice of claim to 30 days following receipt of a response to the notice of claim, 30 days from the date a response to the notice of claim would be due...whichever occurs last.

Again, as this Court stated in *State of West Virginia Ex Rel. West Virginia Regional Jail Authority v. Honorable Carrie Webster,* No. 19-0595 (2019) "Because it is not entirely clear whether the general rule in *Dunn* was intended to apply to statutory tolling provisions such as the MPLA, we cannot conclude that the circuit court clearly erred as a matter of law so as to warrant a writ of prohibition." Accordingly, the Petitioners' Writ of Prohibition must be denied..

4. The Allegations Against Petitioners Rite Aid, Mehta, Blume, and Hope Clinic Fall Within the Applicable Statute of Limitations

The Petitioners assert that because Respondents list dates in their Complaint with respect to these Petitioners that fall outside of the statute of limitations that their claims must be dismissed. These Petitioners failed to state that the Respondents also stated in their Complaint that the Petitioners herein are co-conspirators, and that the Petitioners had agreements with each other to continue the addiction of Greg Shrewsbury to opioids. The Respondents have asserted that the Petitioners concealed their negligent behavior for years and that the discovery rule applies to this matter. Per the arguments and case law stated herein, the Petitioners arguments fail to substantiate their claims and their Writ of Prohibition must be denied.

D The Circuit Court Did Not Commit Clear Legal Error When it Denied DMS and Dr. Deschner's Motion to Dismiss And The Lower Court Had Personal Jurisdiction of Petitioners Deschner Medical Services, PLLC and Steven H. Deschner, M.D. And The Lower Court's Personal Jurisdiction is Proper Under the Federal Due Process Analysis

Petitioners 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).

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.

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)**

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).

Plaintiffs 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. Plaintiffs have established that this Court has jurisdiction over the Deschner Defendants and therefore the Deschner Defendants' Motion to Dismiss must be denied.

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).

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).

Per the facts of this case, these nonresident Defendants have sufficient contacts with the State of West Virginia to comply with federal due process.

to dismiss on the grounds of lack of subject-matter jurisdiction should be denied.

VI. CONCLUSION

One of the most important tenets of this country's system of justice is that all persons should have equal access to the court. The importance of this principle must not be undermined

by Petitioners in the filing a Writ of Prohibition because they filed to timely file an appeal. Respondents respectfully requests that Petitioners' Writ of Prohibition be denied. Petitioners have based their Writ on the fact that Respondents did not serve Certificates of Merit prior to the filing of the Complaint. Respondents were not required to do so as they filed this action pursuant to§55-7B-6(c) of the West Virginia Code. Therefore, Respondents complied with the provisions of the MPLA and the dismissal of their case is not warranted.

However, in the event this Court grants the writ of prohibition for lack of subject matter jurisdiction, these Respondents must be allowed to re-file their Complaint in that "When such a dismissal occurs, 'the medical malpractice action may be re-filed pursuant to W. Va.Code § 55–2–18 (2001) after compliance with the pre-suit notice of claim and screening certificate of merit provisions of W. Va.Code § 55–7B–6 (2003).'" ***State ex. Rel. PrimeCare Med. Of W.Va. Inc. v. Faircloth***, 835 S.E.2d 579 (W.Va. 2019) citing Syl. Pt. 3, in part, *Davis v. Mound View Health Care, Inc.*, 220 W. Va. 28, 529 S.E.2d 600 (2006). In *PrimeCare*, the Court also stated "We note, however, that our savings statute only authorizes "a party [to] refile the action if the initial pleading was timely filed[.]" W. Va. Code § 55-2-18(a) [2001]. This ability to re-file, when such re-filing is otherwise timely, is consistent with this Court's finding 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." Syl. Pt. 2, in part, *Hinchman*, 217 W. Va. 378, 618 S.E.2d 387 (2005). Respondents filed their complaint within the statute of limitations period.

Petitioners have failed to show entitlement to the extraordinary relief requested, and the lower court was correct in denying the Motion to Dismiss. Respondents have failed to prove the existence of any of the factors in *Hoover*. First, the Petitioners had another adequate means to obtain the desired relief, but having failed to timely filing an Appeal the Petitioners are improperly using a

Writ of Prohibition to gain the desired relief. Second, the Petitioners will not be damaged or prejudiced in any way if the Court fails to grant the writ as sought. Third, and most importantly, the circuit court's denial of the Petitioners' Motions to Dismiss do not constitute clear error. Finally, the circuit court's order does not raise new and important problems or issues of law of first impression. For these reasons, the Petitioners' Writ of Prohibition must be denied.

VII. Response to Motion for Stay of Proceedings

Respondents submit that the stay of the proceedings in the Circuit Court of Wyoming County does not promote judicial economy. Currently, there are not any pending motions before the Circuit Judge and thus no issues to be decided. In fact, Petitioners Devonna Miller-West and Westside Pharmacy have recently filed discovery requests, including Requests for Admissions. Respondents reject the Petitioners assertions that this Writ of Prohibition should be granted and therefore their Motion for Stay of Proceedings must be denied.

GREG A. SHREWSBURY and
PHYLLIS A. SHREWSBURY,
By Counsel

Joseph H. Spano Jr.
Pratt & Spano, PLLC
714 ½ Lee Street, E., Suite 204
Charleston, WV 25301
(304) 346-7748
WV State Bar ID No: 11373

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

HOPE CLINIC, PLLC,
JAMES H. BLUME, JR., D.O.,
SANJAY R. MEHTA, D.O.,
DESCHNER MEDICAL SERVICES, PLLC.,
d/b/a DEBOSS NEUROLOGY & PAIN CLINIC,
STEVEN H. DESCHNER, M.D.,
RHONDA'S PHARMACY, LLC,
RHONDA ROSE, R. Ph.,
EVAN D. BRUSH, R. Ph.,
BYPASS PHARMACY, INC.,
WESTSIDE PHARMACY, INC.,
DEVONNA L. MILLER-WEST, R. Ph.,
RITE AID OF WEST VIRGINIA, INC.,
WALGREEN CO,

Petitioners,

v.

THE HONORABLE WARREN R. MCGRAW,
JUDGE OF THE CIRCUIT COURT OF
WYOMING COUNTY, WEST VIRGINIA,

Respondent,

v.

GREG A. SHREWSBURY and
PHYLLIS A. SHREWSBURY,

Respondents.

VERIFICATION

I, Joseph H. Spano, Jr, of Pritt and Spano, counsel for Respondents, in accordance Rule 16(g) of the West Virginia Rules of Appellate Procedure, hereby verify that I am familiar with these proceedings, and that the Verified Response and Appendix hereto and submitted herewith constitute a fair and correct statement of the proceedings in the civil action identified in this Verified Response, based upon information and belief.

JOSEPH H. SPANO, JR.
Joseph H. Spano Jr.
Pritt & Spano, PLLC
714 ½ Lee Street, E., Suite 204
Charleston, WV 25301
(304) 346-7748
WV State Bar ID No: 11373

Taken subscribed and sworn to be before me this 23 day of July, 2020.

My commission expires: Aug. 26, 2021.

NOTARY PUBLIC OFFICIAL SEAL
JAMIE M. ABERNATHY
State of West Virginia
My Commission Expires
August 26, 2021
309 1st Ave South Charleston, WV 25303

Notary Public

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

HOPE CLINIC, PLLC,
JAMES H. BLUME, JR., D.O.,
SANJAY R. MEHTA, D.O.,
DESCHNER MEDICAL SERVICES, PLLC.,
d/b/a DEBOSS NEUROLOGY & PAIN CLINIC,
STEVEN H. DESCHNER, M.D.,
RHONDA'S PHARMACY, LLC,
RHONDA ROSE, R. Ph.,
EVAN D. BRUSH, R. Ph.,
BYPASS PHARMACY, INC.,
WESTSIDE PHARMACY, INC.,
DEVONNA L. MILLER-WEST, R. Ph.,
RITE AID OF WEST VIRGINIA, INC.,
WALGREEN CO,

Petitioners,

v.

THE HONORABLE WARREN R. MCGRAW,
JUDGE OF THE CIRCUIT COURT OF
WYOMING COUNTY, WEST VIRGINIA,

Respondent,

v.

GREG A. SHREWSBURY and
PHYLLIS A. SHREWSBURY,

Respondents.

CERTIFICATE OF SERVICE

I, Joseph H. Spano, Jr., hereby certify that service of the foregoing Respondents' Response in Opposition to Verified Petition for Writ of Prohibition has been made by mailing a true and correct

copy of the same ~~in the regular course in the United States Mail, postage prepaid~~, on this 23rd day of July, 2020, addressed as follows:

Judith A. Moses, Esq.
Cipriani & Werner, P.C.
650 Washington Road, Suite 700
Pittsburgh, PA 15228
Counsel for Rite Aid of West Virginia, Inc.

Robert L. McKinney, Esq.
Hawkins Parnell & Young
707 Virginia St., Suite 1601
Charleston, WV 25301
Counsel for Devonna L. Miller-West, R.Ph. and Westside Pharmacy, Inc.

Trevor Taylor, Esq.
Taylor Law Office
330 Scott Avenue, Suite 3
Morgantown, WV 26508
Counsel for Defendant, Bypass Pharmacy

Thomas P. McGinnis, Esq.
Jeanette H. Ho, Esq.
Samuel G. Dunlop, Esq.
Thomas, Thomas & Hafer
525 William Penn Place
37th Floor, Suite 3750
Pittsburgh, PA 15219
Counsel for Walgreen Co.

John D. Wooten, Esq.
Wooton, Davis, Hussell & Ellis, PLLC
P.O. Box 2600
Beckley, WV 25802-2600
Counsel for Defendants Rhonda Rose Evan D. Brush and Rhonda's Pharmacy, LLC

Tim J. Yianne, Esq.
Lewis Brisbois Bisgaard & Smith LLP
707 Virginia St. East
Suite 1400
Charleston, WV 25301
and
Thomas P. Mannion, Esq.
Lewis Brisbois Bisgaard & Smith, LLP
1375 E.9th Street, Suite 2250
Cleveland, OH 44114
Counsel for Defendants Deschner Medical Services, PLLC, d/b/a DeBoss Neurology and Pain Clinic And Stephen H. Deschner, M.D.

Robert M. Sellards, Esq.
John H. Zickefoose, Esq.
Bailes, Craig, Sellards & Yon PLLC
P.O. Box 1926
Huntington, WV 25720
Counsel for Hope Clinic, PLLC and James H. Blume, Jr., D.O.

PPPFD Alliance, LLC
213 Pinewood Drive
Shady Spring, WV 25918
c/o Mark Radcliffe
Shady Spring, WV 25918

Timothy R. Linkous, Esq.
Stephanie J. Shepherd, Esq.
Linkous Law, PLLC
179 Hanalei Drive, Suite 100
Morgantown, WV 26508
Counsel for Sanjay R. Mehta, M.D.

James R. Sheatsley, Esq.
Gorman, Sheatsley & Company
P.O. Box 5518
Beckley, WV 25801
Counsel for Beckley Pain Clinic

Ace Medical, Inc.
c/o David Lee Morgan, D.O.
2709 Summit Drive
Cheyenne, WY 82009-4570

David Lee Morgan, D.O.
2709 Summit Drive
Cheyenne, WV 82009-4570

Mark Radcliffe
213 Pinewood Drive
Shady Spring, WV 25918

PPPFD Alliance, LLC
P.O. Box 545
Beaver, WV 25813

Narciso A. Rodriquez-Cayro
c/o Maria Rodriquez-Cayro
185 Thomas Jefferson Drive
Oakvale, WV 24739

Siddarthan Ilangovan
104 S. Eisenhower Drive
Beckley, WV 25801

Beckley Pain Clinic, PLLC
302 Timber Ridge Drive
Beckley, WV 25801

Prakash Purankik
302 Timber Ridge Drive
Beckley, WV 25801

Joseph H. Spano Jr.
Pitt & Spano, PLLC
714 ½ Lee Street, E., Suite 204
Charleston, WV 25301
(304) 346-7748
WVState Bar ID No: 11373